ORIGINAL

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO 09-1535

In Re:	:	
Complaint against	:	**Case No. 08-075**
John C. Kealy **Attorney Reg. No. 0031331**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Cleveland Metropolitan Bar Association	:	
Relator	:	

This matter was heard on May 28, 2009, in Cleveland, Ohio, before a panel consisting of Shirley J. Christian of Salem, Judge Joseph J. Vukovich of Youngstown and Jana E. Emerick, Chair, of Lima, Ohio. None of the panel members resides in the judicial district from which the complaint arose or served as a member of the probable cause panel that certified this matter to the Board.

Relator was represented by Attorneys R. Jeffrey Pollock and Ryan M. Fitzgerald. Respondent was present and was represented by Attorney Leonard A. Spremulli.

PROCEDURAL BACKGROUND

The complaint in this matter was filed on August 18, 2008. The complaint alleged three counts of misconduct.

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CLERK OF COURT
SUPREME COURT OF OHIO

Count 1 (the "Davis matter") alleged that respondent failed to carry out a contract of employment in the representation of a client named Ben Davis, and that respondent neglected several matters in his representation of Davis. Count 1 alleged that respondent's conduct in the Davis matter constituted a violation of the following:

DR 7-101(A)(2) – intentionally fail to carry out a contract of employment with a client for professional services;

DR 7-101(A)(3) – intentionally prejudice or damage a client during the course of a professional relationship;

DR 6-101(A)(1) – handle a legal matter that he is not competent to handle;

DR 6-101(A)(2) – handle a legal matter without adequate preparation in the circumstances;

DR 6-101(A)(3) – neglect a legal matter entrusted to him;

DR 1-102(A)(5) – conduct prejudicial to the administration of justice.

Count 2 alleged that respondent failed to cooperate in relator's investigation and that, in doing so, respondent knowingly misrepresented certain facts to relator. Count 2 alleged that respondent's conduct constituted a violation of the following:

Gov. Bar R. V(4)(G) – failing to assist in a disciplinary investigation;

Prof. Cond. R. 8.1(a) – knowingly making a false statement of material fact in connection with a disciplinary matter;

Prof. Cond. R. 8.4(h) – conduct adversely reflecting on the lawyer's fitness to practice law.

Count 3 (the "Krawulski matter") alleged that respondent improperly borrowed $20,000 from a client named John Krawulski while serving as power of attorney for Krawulski and that, after Krawulski's death, respondent failed to disclose the loan in the inventory respondent prepared for Krawulski's estate, of which respondent was initially the executor. Count 3 alleged that respondent's conduct constituted a violation of the following:

DR 5-104(A) – enter into a business transaction with a client when they have differing interests;

DR 1-102(A)(4) – conduct involving dishonesty, fraud, deceit, or misrepresentation;

DR 1-102(A)(5) – conduct prejudicial to the administration of justice.

In the answer filed by respondent, many of the factual allegations were admitted, although respondent denied that any disciplinary violations occurred. At the time of the hearing, the parties entered into a series of jointly stipulated facts, a copy of which are attached to this report. Those stipulations covered nearly all of the facts alleged in Counts 1 and 3 of the complaint, but left for the panel's determination the ultimate issue of whether any or all of the alleged professional misconduct had been proven.

At the hearing, relator presented the testimony of respondent and of Terrance Cawley, a member of the Cleveland Metropolitan Bar Association who investigated the Davis matter. Respondent testified on his own behalf, and also presented the testimony of several witnesses, who were primarily character witnesses.

FINDINGS OF FACT

Based upon respondent's answer to the complaint, the stipulations of the parties and the evidence presented at the hearing, the panel finds the following facts to have been proven by clear and convincing evidence.

Respondent was admitted to the practice of law in Ohio in May 1970, and engages in a general practice with a range of types of legal work, including criminal defense, domestic relations, probate, personal injury, and worker's compensation.

With regard to Count 1, on May 6, 2000, a vehicle being driven by Ben Davis was involved in an accident with a vehicle driven by Ilsa Kupczak. Davis was cited by the Cleveland Police Department for causing the accident and for failing to provide proof of insurance. On

May 2, 2002, Kupczak's insurer, United Services Auto Association (USAA) sued Davis on a subrogation claim, seeking to recover approximately $13,000 paid for damages to Kupczak's car. Respondent undertook the representation of Davis in that case. Respondent filed an answer and counterclaim on Davis' behalf. (Stip. ¶5) While the counterclaim alleged damages for injuries to Davis caused by Kupczak, respondent never filed any pleading or motion seeking to add Kupczak as a party to the lawsuit. USAA filed a set of requests for admissions to which respondent never responded. USAA filed a motion to dismiss the counterclaim, to which respondent never responded. On January 16, 2003, respondent (as well as Davis) did not appear for the final pretrial scheduled by the court. The court gave notice that future failure to appear would result in a default judgment being entered against Davis. On or about March 26, 2003, respondent received a written assignment notice from the court that a jury trial was set in the lawsuit for May 7, 2003 at 9:00 a.m. (Stip. ¶8) On April 8, 2003, USAA filed a motion for summary judgment, to which respondent failed to respond in any way. The motion for summary judgment was overruled by the court. Neither respondent nor his client appeared for trial on May 7, 2003, and a default judgment was entered against Davis for $13,609.08. (Stip. ¶11) As a result of the judgment, the Ohio Bureau of Motor Vehicles subsequently suspended Davis' driver's license.

With regard to Count 2, in October 2007, respondent was interviewed by relator's investigator, Terrance Cawley, after having been notified of the complaint made against respondent in the Davis matter. During that meeting, respondent told Cawley that respondent had never received notices of the pretrial or trial dates in the Davis case when, in fact, defendant had received written notices from the court. (Tr. 69-70)

With regard to Count 3, respondent began representing John Krawulski in early 2002. In November 2003, Krawulski developed serious medical problems. In late November 2003, Krawulski signed a power of attorney prepared by respondent in which Krawulski granted respondent a general power of attorney. (Stip. ¶13) In that same time period, Krawulski also executed a last will and testament prepared by respondent, which named respondent as executor of Krawulski's estate. Within the next few months, respondent began managing Krawulski's financial affairs by virtue of the power of attorney, including signing checks and paying expenses from Krawulski's bank accounts. (Stip. ¶14) On or about August 23, 2004, respondent and his wife borrowed $20,000 from Krawulski, evidenced by a promissory noted signed by respondent and his wife in which they agreed to repay the loan over a three-year term in the amount of $645 each month. (Stip ¶15) Respondent's wife, Carole, began making the monthly payments as set forth in the promissory note. In December 2004, respondent prepared another will for Krawulski, which was signed on December 20, 2004, and also named respondent as executor. On January 10, 2005, Krawulski died. On February 4, 2005, respondent filed an application for authority to administer Krawulski's estate in the Probate Court of Cuyahoga County. (Stip. ¶18) Respondent did not disclose the promissory note in the application. In the subsequent months, respondent's wife contacted Krawulski's heirs and suggested a negotiated lump-sum pay-off on the note. (Tr. 113) On July 26, 2005, Krawulski's heirs filed a motion to remove respondent as executor of the Krawulski estate. On July 27, 2005, respondent filed an inventory and appraisal with respect to the estate in the Probate Court of Cuyahoga County, but failed to disclose the promissory note in the inventory and appraisal. On August 11, 2005, the Krawulski heirs filed exceptions to the inventory and appraisal. On September 1, 2005, respondent resigned as executor. (Stip. ¶23) On February 15, 2006, the new administrator of the

Krawulski estate filed a complaint in probate court against respondent, alleging breach of fiduciary duty and seeking an accounting. On March 20, 2006, the new executor of the Krawulski estate filed suit against respondent in Cuyahoga County Court of Common Pleas, alleging breach of fiduciary duty and negligence. These formal complaints against respondent were ultimately settled for a total amount of $45,000. (Stip. ¶26)

CONCLUSIONS OF LAW

Based upon the stipulations of the parties and the evidence presented at the hearing, the panel unanimously finds by clear and convincing evidence that, as to Count 1, respondent violated DR 7-101(A)(2) [intentionally fail to carry out a contract of employment with a client for professional services]; DR 7-101(A)(3) [intentionally prejudice or damage a client during the course of a professional relationship]; DR 6-101(A)(3) [neglect a legal matter entrusted to him]; and DR 1-102(A)(5) [conduct prejudicial to the administration of justice]. As to Count 1, the panel unanimously finds that two of the allegations of rule violations were *not* proven by clear and convincing evidence, and the panel hereby dismisses the portion of the Count 1 that alleged violations of DR 6-101(A)(1) [handle a legal matter that he is not competent to handle] and DR 6-101(A)(2) [handle a legal matter without adequate preparation in the circumstances].

As to Count 2, the panel unanimously finds by clear and convincing evidence that respondent committed the violations alleged in Count 2, being violations of Gov. Bar R. V(4)(G) [failing to assist in a disciplinary investigation]; Prof. Cond. R. 8.1(a) [knowingly making a false statement of material fact in connection with a disciplinary matter]; and Prof. Cond. R. 8.4(h) [conduct adversely reflecting on the lawyer's fitness to practice law].

As to Count 3, the panel unanimously finds by clear and convincing evidence that respondent committed the violations alleged in Count 3, being violations of DR 5-104(A) [enter

into a business transaction with a client when they have differing interests]; DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and DR 1-102(A)(5) [conduct prejudicial to the administration of justice].

RECOMMENDATION

As to factors in mitigation, the panel finds that respondent was 64 years old at the time of the hearing, was admitted to the practice of law in 1970 and has not been subject to any prior disciplinary sanctions. Respondent engages in a general practice with a range of types of legal work, including criminal defense, domestic relations, probate, personal injury, and worker's compensation. Respondent has been active in his local legal aid society for 25 years and does a staggering amount of pro bono work. Respondent is also extremely active in his community, with a very long history of tireless volunteer work with his church, local charities, and other organizations.

As to applicable aggravating factors, the panel finds that respondent did engage in a pattern of misconduct. The panel also finds that respondent refused to completely acknowledge the wrongfulness of his conduct, although he readily admitted engaging in the actions that form the basis of the misconduct.

While respondent has had a nearly 40 year career of representing clients with integrity and while respondent has always dedicated himself to charitable causes and to helping others who are less fortunate, the fact that this case involved two separate clients is troubling to the panel, as of course is the fact that respondent was not initially forthcoming in the investigation of his ethical infractions. Moreover, an attorney who engages in conduct that violates DR 1-102(A)(4) will ordinarily be suspended from the practice of law. See, *e.g.*, *Disciplinary Counsel*

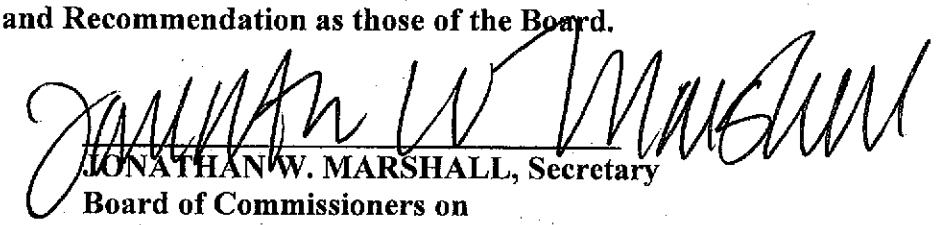
v. Fowerbaugh (1995), 74 Ohio St.3d 187, 190. Finally, respondent's actions did cause actual harm to his clients.

For all of the foregoing reasons, it is the recommendation of the panel that respondent be suspended from the practice of law for eighteen months, but that twelve months of the suspension be stayed.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 14, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, John C. Kealy, be suspended for eighteen months with six months stayed. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.



JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio