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## In The Supreme Court of Ohio

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APPEAL FROM THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE  
CASE NO. 08-075

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CLEVELAND METROPOLITAN BAR ASSOCIATION,  
*Relator,*

v.

JOHN C. KEALY,  
*Respondent.*

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### RELATOR CLEVELAND METROPOLITAN BAR ASSOCIATION'S ANSWER BRIEF TO OBJECTION OF RESPONDENT JOHN C. KEALY

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LEONARD A. SPREMULLI  
29325 Chagrin Blvd., Ste. 305  
Pepper Pike, Ohio 44122  
Phone: 216.831.4935  
Facsimile: 216.831.9526  
Email: [SpremulliL@aol.com](mailto:SpremulliL@aol.com)

*Attorney for Respondent*  
*John C. Kealy*

R. JEFFREY POLLOCK (0018707)  
(COUNSEL OF RECORD)  
ERIN K. WALSH (0078142)  
MCDONALD HOPKINS LLC  
600 Superior Ave., East, Suite 2100  
Cleveland, Ohio 44114  
Phone: 216.348.5400  
Facsimile: 216.348.5474  
Email: [jpollock@mcdonaldhopkins.com](mailto:jpollock@mcdonaldhopkins.com)  
[ewalsh@mcdonaldhopkins.com](mailto:ewalsh@mcdonaldhopkins.com)

*Attorneys for Relator*  
*Cleveland Metropolitan Bar Association*

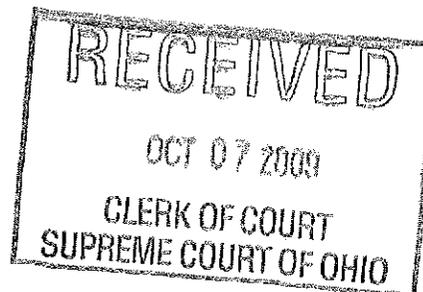
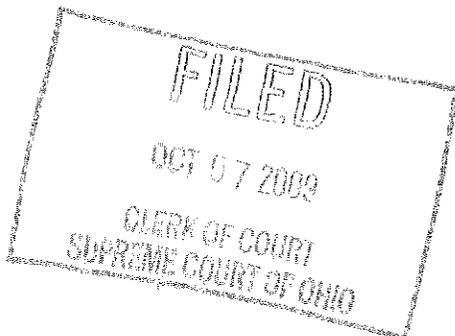


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## **I. INTRODUCTION**

Respondent John C. Kealy's ("Kealy") sole objection concerns the sanctions recommended by the Board of Commissioners on Grievances and Discipline (the "Board"). Kealy specifically does not object to any of the findings made by the Hearing Panel of the Board (the "Hearing Panel") or the Board with respect to multiple violations of Ohio Code of Professional Responsibility Disciplinary Rules ("DR"), the Ohio Rules of Professional Conduct ("Prof. Cond. Rules"), and the Supreme Court Rules for Governance of the Bar of Ohio ("Gov. Bar. R."). As discussed more fully below, the Board's recommended sanction of eighteen (18) months suspension with six (6) months stayed is appropriate and not unreasonable, taking into consideration all the facts and circumstances.

## **II. COUNTERSTATEMENT OF FACTS**

### **A. Count I - Kealy Representation of Ben Davis**

Kealy is a sole practitioner. He was licensed in 1971 and has practiced law full time from 1976 to the present. Since the late 1970s/early 1980s, Kealy has been a sole practitioner with a practice that is "courtroom oriented," i.e., primarily litigation and some probate administration (Transcript of Proceedings before the Board of Commissioners on Grievances and Discipline, May 28, 2009, hereafter "Tr.," p. 17-18).

Kealy represented an individual named Ben Davis ("Davis") as his attorney of record in a case captioned *United Services Auto Ass'n v. Ben Davis* in the Court of Common Pleas, Cuyahoga County, Ohio, Case No. CV-02-469766 (the "Davis Lawsuit"). (Stipulations entered into by the parties and submitted to the Hearing Panel, hereafter "Stip.," ¶ 3). On or about May 6, 2000, Davis was involved in an automobile accident (the "Accident") with an individual named Ilse Kupczak ("Kupczak"). Davis informed Kealy that he had sustained personal injury and claimed that Kupczak was negligent in colliding into the rear of his automobile. (Stip. ¶ 3,

Tr. 22). United Services Auto Association (“USAA”) filed a complaint against Davis as assignee and subrogee of Kupczak in the Davis Lawsuit on or about May 2, 2002, claiming that Davis was the negligent party in the Accident (Stip. ¶ 4).

Kealy filed an answer and counterclaim on behalf of Davis but never filed any pleading or motion with the Court to add Kupczak as a party in the Davis Lawsuit and never asserted or sought to assert any claims against Kupczak on behalf of Davis (Stip. ¶ 5). Kealy had knowledge when he filed the pleading that he had not filed a claim against Kupczak (Tr. 23). USAA filed its Requests for Admissions and a Motion to Dismiss Counterclaim in the Davis Lawsuit to which Kealy never responded (Stip. ¶ 6, 7). Kealy also failed to appear at two pre-trial conferences (Tr. 31-32).

Kealy admitted that he received notice from the Court by mail on or about March 26, 2003 that trial by jury was set in the Davis Lawsuit for May 7, 2003 at 9:00 a.m. (Tr. 32, Relator Ex. 1). Kealy informed Davis of the May 7, 2003 trial date some time after receiving notice from the Court (Stip. ¶ 9). At no time did Kealy take any actions to seek a continuance or postpone the trial date (Stip. ¶ 10). Shortly before the scheduled May 7, 2003 trial date, Kealy had a conversation with Daran Kiefer (“Kiefer”), attorney for USAA, in which Kealy told Kiefer that he was not going to appear for trial. Kiefer responded by stating that he was going to proceed to obtain a default judgment. Kealy understood the consequences of a default judgment but nonetheless, Kealy’s only response to Kiefer’s plan was that Kiefer should “go ahead and do what you have to do” (Tr. 33-34).

On May 7, 2003 the Davis Lawsuit was called for trial (the “Trial”) and Kealy did not appear. Plaintiff USAA obtained a default judgment against Davis in the amount of \$13,609 plus statutory interest (Stip. ¶ 11). On the actual day of Trial, Kealy again saw Kiefer in the

courthouse and learned that USAA had obtained a default judgment (Tr. 34). Kealy received written notice of the default hearing but never informed Davis (Relator Ex. 6, Request for Admissions No. 8, Tr. 38).

Kealy admitted at the hearing that he: (i) had actual knowledge of the Trial as early as March 2003; (ii) informed counsel for the Plaintiff shortly before Trial that he did not intend to appear; (iii) failed to appear for Trial; and (iv) understood the consequences that his failure to appear could result in a default judgment against Davis.

**B. Count II - Kealy Misrepresentations in the CMBA Investigation of the Davis Grievance**

Relator Cleveland Metropolitan Bar Association (“CMBA” or “Relator”) assigned attorney Terrence Cawley (“Cawley”) to conduct an investigation of the grievance filed by Davis. Cawley is Senior Claims Attorney for Progressive Insurance, responsible for issuing insurance policies to community banks and their officers and directors (Tr. 65). Kealy admitted at the hearing that he made material misrepresentations of fact regarding the Davis Lawsuit directly to Cawley and to the CMBA.

In a written response to the CMBA regarding the Davis grievance by letter dated July 17, 2007, Kealy stated as follows:

In reviewing the Court docket, I see that I did not appear on May 7 before Judge Burnside and a judgment was granted in favor of the plaintiff. I quite frankly have no copy of the notice for the hearing and Mr. Davis, to the best of my knowledge, ever (sic) gave me oral notice.

Relator Substitute Ex. 9, Tr. 28

The clear implication of the letter is that Kealy had never received notice of the 2003 Trial and that he only learned of the default upon reviewing the docket in July, 2007 in response to the grievance. Kealy even claimed in the letter that he “never had a professional relationship with Mr. Davis.” These were overt misrepresentations to the CMBA.

In addition, Kealy provided only sketchy and limited documents to the CMBA stating again in his letter of July 17, 2007 that he was “providing you with copies of all documentation which I have in my file regarding Ben Davis.” The entire set of documents produced by Kealy to the CMBA appears as Relator’s Substitute Exhibit 9 consisting of a few miscellaneous documents but no pleadings or court notices. Cawley arranged to meet at Kealy’s office during the investigation, at which time Kealy claimed that he could not locate the Davis litigation file (Tr. 71-72). Kealy claimed at the hearing that all documents relating to Davis had been misfiled under the name of a relative whose name he did not recall (Tr. 25-26). Yet during the investigation he told Cawley that the file had been under the name of Davis’ son (Tr. 27). At the hearing, Kealy admitted that he had made a copy of the entire file at the request of Davis but then could not locate the file a month or two later when responding to the CMBA (Tr. 31). This testimony strains credulity. If Kealy had produced his entire file, it most certainly would have contained the post card notice from the court in March 2003 scheduling Trial for May 7, 2003, thus revealing that he had prior notice of the trial.

Concerned about Kealy’s equivocation, Cawley took the deposition of Kealy under oath. Kealy admitted at the hearing that he was evasive and not truthful in his deposition to Cawley (Tr. 35) as follows:

1. Kealy admitted that he had received actual notice in March 2003 of the Trial, but testified to Cawley that he had received no notice regarding the trial before it occurred.

Q. And the entry just above that is dated March 26<sup>th</sup>, 2003.  
Trial by jury set for May 7, 2003. See that?

A. Correct.

Q. And you received that notice from the court.

A. Correct.

Q. And you received it in, or about, late March for trial set in May, correct?

A. Yes.

Q. And you did not show up for this trial, did you?

A. That's correct.

(Tr. 32)

\* \* \*

Q. But you do acknowledge that you were evasive in your deposition?

A. Yes.

Q: Do you also acknowledge that you were not being truthful in your deposition?

A. Yes.

Q. Did you state in your deposition to Mr. Cawley that you had received no notice in any way regarding the trial of May 7<sup>th</sup> before it occurred?

A. Yes.

(Tr. 35-36)

\* \* \*

Q. And you stated to Mr. Cawley in your deposition that you first learned of the trial when you checked the docket some two years later.

A. Yes, I probably said that in my deposition.

(Tr. 36)

2. Kealy admitted that he saw Kiefer the day of the Trial and if Kiefer had obtained his judgment. But then Kealy testified in his deposition that no such conversation had occurred:

Q. Now the attorney for the insurance company plaintiff was, is a man named Daran Kiefer, correct?

A. Correct.

Q. You recall his name.

A. Yes.

Q. You recall him.

A. Yes.

Q. And you spoke to him on at least two occasions just before trial, the day of the trial and possible the day before, correct?

A. I recall the day of the trial. I could have spoken to him the day before the trial. Correct.

Q. And on the day of the trial, knowing that the trial was that day, you saw him shortly thereafter and asked him if he got the judgment, correct?

A. I saw him that day. I don't know whether I said, Did you get the judgment; or he said, I got the judgment against your claim.

Q. And you had a second conversation with Kiefer, it might have been the day of the trial or the day before, in which you said to him your client was not cooperating. He said in essence he was going to go ahead and get a judgment. And your response was, "Go ahead and do what you got to do," correct?

A. Correct.

(Tr. 33-34)

\* \* \*

Q. Did you state in your deposition to Mr. Cawley that you had no conversation with Kiefer, opposing counsel, the day of the trial?

A. In my deposition?

Q. Yes.

A. I could have said that, yes.

(Tr. 36)

3. Kealy did not show for Trial and quite clearly intentionally made that decision not to show at the time. But under oath Kealy testified in his deposition that he first learned of the Trial some years later when he checked the docket, and that his failure to show came as a surprise to him:

Q. And you did not show up for this trial, did you?

A. That's correct.

Q. Mr. -- your testimony has been that Mr. Davis called you shortly before trial stating that he had a medical problem and couldn't be there, correct?

A. Correct.

Q. So he knew about the trial also because you told him.

A. Correct.

Q. And you made no motion to continue the trial, correct?

A. Right.

Q. You made no effort to communicate with the Court regarding the situation, correct?

A. I don't believe -- no. Correct.

Q. You understood the consequences of not showing and that could be a default judgment, correct?

A. Correct.

(Tr. 32-33)

\* \* \*

Q. And you stated to Mr. Cawley in your deposition that the fact that you had not shown for the trial came as a surprise to you.

A. Yes, I'm pretty certain.

Q. And you stated to Mr. Cawley in your deposition that you first learned of the trial when you checked the docket some two years later.

A. Yes, I probably said that in my deposition.

(Tr. 36)

4. Kealy received notice of the default judgment at the time of its entry in 2003, but testified in his deposition that he did not learn of it until the filing of the grievance:

Q. But you knew back in March 2003 some two or three months before that trial that the trial had been set and you didn't show up.

A. Yes.

Q. Am I correct also that you stated to Mr. Cawley in the deposition that you were not even aware of the default judgment prior to the time the grievance was filed in the summer of 2007?

A. I could have said that, yes.

Q. But, in fact, you received notice of the default judgment --

A. Yes.

Q. -- at the time, correct?

A. Correct.

(Tr. 37)

5. In his direct examination at the hearing, Kealy began to equivocate again, stating that he had not lied intentionally to Cawley under oath:

A. Yes. In fact in the first conversation Mr. Cawley said one of the mitigating factors is cooperation and you have that in your favor. He volunteered that.

Q. Did you intentionally lie to him --

A. No.

Q. -- under oath? When did you first meet Ben Kruwalski --  
John Kruwalski?

(Tr. 162)

During questioning from a member of the Hearing Panel, Kealy attempted to backtrack from his prior testimony on cross examination, stating falsely that he did not have notice of the Trial until reviewing the docket upon receiving notice of the grievance from the CMBA in 2007.

By Ms. Christian:

Q. Mr. Kealy, I'm not clear on your testimony with regard to when it was you realized that you had, in fact, gotten notice of hearing. Can you tell me when that was?

A. Notice of Mr. Davis' hearing?

Q. Right.

A. I'm not sure when.

Q. At the time of your deposition, at the time of your deposition (sic) did you testify that you had the notice or did you testify that you did not have the notice?

A. Testified at the deposition that I did not appear that I had notice.

Q. And sometime afterwards you realized that you did in fact have notice?

A. That's correct.

Q. How did you come to that realization?

A. Well, I looked at the docket. Once I had the letter from the Cleveland Bar Association, went down and made sure it was before I start writing letters about it. What the docket showed.

(Tr. 192-193)

On re-cross-examination, Kealy had to admit again that indeed he: (i) did have actual notice well in advance of the Trial; (ii) had the conversation with Kiefer the day of the trial that

he was not going to show; (iii) knew in the meeting with Cawley that he had not shown up for Trial even though he had notice of it.

Q. I want to try to get this issue of the notice of trial clarified and when you knew it. You testified on cross-examination this morning that you received notice from the court in March of 2003 of the upcoming trial in May, correct?

A. Correct.

Q. You testified that Ben Davis called you shortly before the trial?

A. Correct.

Q. So he had knowledge of it. And said he had a medical problem.

A. Right, correct. Called me the day before.

Q. And you've acknowledged now these conversations with Kiefer that you weren't going to show, correct?

A. At the date, yes, I acknowledge those conversations occurred.

Q. Okay. So then you meet with Cawley.

A. Right.

Q. In 2007.

A. In March, I think it was.

Q. I think he testified it was in the fall. I believe October?

A. All right, whatever the first meeting was. Yes.

Q. In 2007. Correct?

A. Correct.

Q. And you'd already responded to the Bar Association during this grievance.

A. Right.

Q. And you knew in that meeting with Cawley that you'd had notice of this trial, correct?

A. Yes.

Q. And you knew in that meeting with Cawley that you had not showed for the trial and even though you had knowledge of it.

A. I knew I didn't show for the trial. What was your second one?

Q. You knew when you met with Cawley that you had not shown up for the trial even though you had notice of it.

A. Well, that's true. Yes.

(Tr. 201-202)

6. At the hearing, Kealy stated in response to a question from a member of the Hearing Panel that he had advised Davis that a default judgment had been entered against him (Tr. 194). But he admitted in his responses to Requests for Admissions that he had not informed Davis of the default judgment (Relator Ex. 6, Request for Admission No. 8). In summary, Kealy made material misrepresentations during the investigation in a deposition under oath, admitted such misrepresentations at the hearing, and then had the temerity to equivocate again at the hearing despite the admissions he had just made.

**C. Count III - Kealy's Management of the Affairs and Estate of John Krawulski**

Kealy began representing John Krawulski ("Krawulski") in approximately March 2002 (Stip. ¶ 12). On or about November 26, 2003, Kealy arranged for Krawulski to sign a document titled "Durable Power of Attorney" in which Krawulski named Kealy his attorney in-fact. During this same period of time, Kealy also prepared a last will and testament for Krawulski in which Kealy was appointed executor, and Krawulski executed such last will and testament shortly thereafter (Stip. ¶ 13, Relator Ex. 11). Starting no later than mid-2004, Kealy began

managing the financial affairs of Krawulski by virtue of his power of attorney by, among other things, signing checks and paying expenses from Krawulski's banking accounts (Stip. ¶ 14).

On or about August 23, 2004, Kealy and his wife Carole Kealy ("Carole") borrowed \$20,000 from Krawulski evidenced by a cognovit promissory note under which Kealy and Carole are jointly and severally liable (the "Note"). The terms of the Note required payments in thirty-six (36) equal monthly installments, each in the amount of \$645 beginning September 1, 2004 (Stip. ¶ 15, Relator Ex. 14).

In December 2004, Kealy prepared a second last will and testament of Krawulski in which Kealy was again appointed executor without the requirement of a bond (the "Will"). The Will is signed and dated December 20, 2004 (Stip. ¶ 16, Relator Ex. 17). Krawulski died on January 10, 2005 (Stip. ¶ 17). The Will contained standard provisions granting Kealy as executor the power to compromise and settle all debts due to the estate (the "Estate") (Relator Ex. 17, Item VIII).

Kealy acknowledged at the hearing that by personally borrowing money from the Estate and then also serving as executor, he had created a direct conflict (Tr. 45). His personal interest was to compromise the amount due under the Note but his fiduciary duty as executor was to pay the Note in full. Kealy attempted to resolve such conflict by a strategy of unethical actions that in the end were exposed.

On February 4, 2005 he filed an Application for Authority to Administer Estate with the Probate Court of Cuyahoga County. Kealy did not disclose the Note in the application (Relator Ex. 18, Tr. 46). Kealy was aware that as executor he had a duty to disclose any conflicts but failed to make such disclosure (Tr. 46).

Starting in the Spring 2005, Kealy sent correspondence to the beneficiaries of Krawulski (the "Beneficiaries") in which Kealy: (i) portrayed Carole as the sole borrower under the Note; (ii) offered the Beneficiaries the option of either continuing to receive monthly payments or compromising the outstanding balance due under the Note; and (iii) conveyed that he would remain uninvolved in the decisions regarding the Note, with Carole making all the decisions (Reclator Ex. 19, 20, Tr. 46-47, 49).

In such correspondence, Kealy did not propose the obvious solution which would have been payment of the Note's outstanding balance in full. Instead, Kealy failed to acknowledge that both he and Carole were borrowers and then feigned neutrality while attempting to stage a settlement. These letters stated in pertinent part as follows:

“ . . . my wife and John Krawulski signed a Cognovit Promissory Note underlying a \$20,000 loan on August 23, 2004. . . . she is required to make monthly payments of \$645.00 beginning September 1, 2004 for a period of 36 months . . . she can then decide whether she wishes to pay off the loan in a lump sum judgment. I will in no way interfere with these negotiations either as Executor of the Estate or husband of Carole Kealy.”  
(emphasis added)

Exhibit 19, Tr. 47

“My wife, Carole Kealy, is the debtor and as I understand it, has made several payments toward satisfaction of the Note. The four residual beneficiaries . . . should agree on how they want to negotiate settlement of the account . . . you may continue receiving the monthly payments . . . in the alternative, you could negotiate with Carole Kealy . . . in an effort to obtain a lump sum settlement of the account. I am advising you of this situation solely as Executor of the Estate. I would not be involved in any negotiation of the debt because Carole Kealy is my wife.” (emphasis added)

Exhibit 20, Tr. 50

Kealy admitted at the hearing that these letters were “not exactly correct” (Tr. 47), given the fact that both he and Carole were co-borrowers on the Note. Kealy claimed at the hearing

that he was aware of the conflict and wanted to remove himself from the process (Tr. 49). Neither Kealy nor Carole made monthly payments from August through October 2005, ostensibly while Kealy was attempting to reach a resolution (Tr. 58). But all the while the Beneficiaries were indirectly pressured to settle and compromise the Note by the withholding of the monthly payments by Kealy. Kealy professed at the hearing under oath that Carole made all the decisions regarding payment, and that he had no involvement whatsoever with respect to payments under or resolution of the Note.

Q. All right. And your wife was making payments on the note, correct?

A. Correct.

Q. And you were representing to the heirs that you had no involvement whatsoever in the payment of the note or any discussions regarding resolution of it, correct?

A. That's correct.

Q. It was supposed to be exclusively with your wife?

A. Correct.

Q. You had no discussions with your wife regarding this subject?

A. I told her that I, as the executor, wanted to liquidate that note. But I in no way told her what to do. I just told her that I wanted to liquidate it. That's the only comments I had.

Q. So is it your testimony that you had no conversations with your wife about not paying the monthly payments on this loan from August '05 until November of '05?

A. That's correct.

(Tr. 59)

But Carole testified more truthfully that indeed she had discussed with Kealy the subject of not making the monthly payments and that he had instructed her to stop making the payments.

Q. And I see you made payments in February, April, May, June, and July of '05. Those payments were made to the estate?

A. Yes, sir.

Q. Were you advised by your husband to stop making payments?

A. Yes. We were hoping that we would get an answer from them.

(Tr.114)

Q. And I believe you testified that you discussed that subject with your husband John about not making those payments, correct?

A. Correct.

Q. And your own preference was to just pay off the entire note?

A. I would have just -- both of us wanted to resolve the matter.

Q. And your own preference would have just been to pay the whole thing off?

A. Yes.

(Tr. 117)

If the entire Note had been paid off in full -- as Carole desired and as the Note required -- there would of course have been no conflict of interest and no necessity of disclosure in the inventory. Kealy obviously did not want to pay off the entire balance of the Note. Kealy attempted to put the Beneficiaries into a position of settling and compromising the Note, and portrayed himself as a neutral party while instructing his wife to withhold the monthly payments.

But time ran out for Kealy. On July 26, 2005, the Beneficiaries filed a Motion to Remove Executor, seeking to remove Kealy as executor of the Krawulski Estate (Stip. ¶ 20, Relator Ex. 22). Kealy learned of such motion and knew that he could no longer delay filing the inventory and appraisal. The next day, July 27, Kealy filed an inventory and appraisal for the Krawulski Estate with the Probate Court of Cuyahoga County (Stip. ¶ 21, Relator Ex. 21). Kealy did not disclose the Note in the inventory and appraisal (Stip. ¶ 21). Kealy was aware when he filed the inventory that the Note was outstanding, that he had a conflict, and that he had not disclosed the Note (Tr. 55).

The entire affair then began to unravel. On August 11, 2005, the Beneficiaries filed Exceptions to Inventory and Appraisal in the Probate Court of Cuyahoga County (Stip. ¶ 22, Relator Ex. 24). On or about September 1, 2005, Kealy resigned as Executor of the Krawulski Estate (Stip. ¶ 23). On or about February 15, 2006, the Administrator of the Krawulski Estate filed a Complaint against Kealy in the Probate Court of Cuyahoga, Ohio alleging breach of fiduciary duty by Kealy and seeking an accounting (Stip. ¶ 24, Relator Ex. 26). On or about March 30, 2006, the Executor of the Krawulski Estate filed a Complaint against Kealy in the Court of Common Pleas, Cuyahoga, Ohio alleging breach of fiduciary duty and negligence (Stip. ¶ 25, Relator Ex. 25).

Although the evidence at the hearing established that Kealy eventually paid the outstanding balance of the Note after being sued, the entire affair could easily have been avoided if Kealy had simply followed the advice of Carole. Instead Kealy engaged in a course of action which he hoped would never see the light of day. He then compounded these errors by again not being truthful in his testimony at the hearing. Unfortunately, Carole had to set the record straight.

### III. LAW AND ARGUMENT

Kealy's misconduct, which included six (6) DR violations, two (2) Prof. Cond. Rule violations, and one (1) Gov. Bar. R. violation, justified the Board's sanction of an eighteen-month suspension from the practice of law with a six-month stay.<sup>1</sup> The Board found clear and convincing evidence that Kealy's misconduct occurred from three separate instances including: (i) the Davis Lawsuit; (ii) the CMBA Investigation; and (iii) the representation of the Krawulski Estate.

When determining an appropriate sanction for attorney misconduct, the Ohio Supreme Court considers "the duties violated, the actual or potential injury caused, the attorney's mental state, and sanctions imposed in similar cases." *Disciplinary Counsel v. Broeren* (2007), 115 Ohio St.3d 473, 477 citing *Stark Cty. Bar Ass'n v. Buttacavoli* (2002), 96 Ohio St.3d 424. The Court must weigh both aggravating and mitigating factors to ascertain whether a greater, or lesser, sanction is warranted. BCGD Proc. Reg. 10(B)(1); *Cleveland Bar Ass'n v. Jimerson* (2007), 113 Ohio St.3d 452. In this case, both case law and the cumulative aggravating factors militate in favor of the Board's recommended sanction.

#### **A. Kealy's Neglect of the Davis Lawsuit and Dishonesty in the CMBA Investigation Warrant the Board's Sanction.**

The Board found by clear and convincing evidence that Kealy committed the following violations in the Davis Lawsuit: (i) failure to carry out a contract of employment (DR 7-101(A)(2)); (ii) prejudice or damage to a client (DR 7-101(A)(3)); (iii) neglect of a matter entrusted to attorney (DR 6-101(A)(3)); and (iv) conduct prejudicial to the administration of justice (DR 1-102(A)(5)). In addition, the Board found clear and convincing evidence that Kealy

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<sup>1</sup> Some events under the CMBA's charges took place after February 1, 2007 (the effective date of the Ohio Rules of Professional Conduct), which superseded the Disciplinary Rules of the Ohio Code of Professional Responsibility.

failed to assist the CMBA in its disciplinary investigation of the Davis Lawsuit in violation of Gov. Bar Rule V(4)(G). The Board found that Kealy made a false statement of material fact in connection with the disciplinary matter and performed conduct that adversely affected his fitness to practice law, in violation of Prof. Cond. R. 8.1(a) and Prof. Cond. R. 8.4(h).

This Court has held consistently that “[n]eglect of legal matters and a failure to cooperate in the ensuing disciplinary investigation generally warrant an indefinite suspension from the practice of law in Ohio.” *Akron Bar Ass’n v. Snyder* (1999), 87 Ohio St.3d 211, 212; *Cleveland Bar Ass’n v. Judge* (2002), 94 Ohio St.3d 331 ; *Cleveland Bar Ass’n v. Davis* (2009), 121 Ohio St.3d 337; *Cleveland Bar Ass’n v. Kodish* (2006), 110 Ohio St.3d 162 (holding that unless mitigating circumstances dictate a lesser sanction, neglect of legal matters and the failure to cooperate in an ensuing disciplinary investigation warrant an indefinite suspension from the practice of law). Further, a lawyer's failure to cooperate in a disciplinary investigation alone may warrant an actual suspension from the practice of law. *Butler Cty. Bar Ass'n v. Williamson* (2008), 117 Ohio St.3d 399; *Disciplinary Counsel v. Broeren* (2007), 115 Ohio St.3d 473 (six-month suspension warranted where attorney neglected legal matter and was deceitful in disciplinary investigation).

The instant case contains facts akin to those in *Cleveland Bar Ass’n v. Jimerson* (2007), 113 Ohio St.3d 452, whereby this Court issued a two-year suspension with a six-month conditional stay as an appropriate sanction. In *Jimerson*, the attorney violated: (i) disciplinary rules governing client representation; and (ii) governing bar rules on disciplinary investigations. The attorney abandoned her client’s personal injury lawsuit by failing to file pleadings and responding to client inquiries. The attorney also failed to respond to the relator's investigative inquiries after a grievance was filed. When the attorney finally did meet with the relator, she

omitted material facts regarding her client's case. *Id.* at 454. After considering the mitigating factors, including a discipline-free past, and the aggravating circumstances, the Court issued a two-year suspension with a six-month conditional stay.

Just as in *Jimerson*, Kealy abandoned the Davis Lawsuit. Despite receiving notice from the Court of the Trial date in the Davis Lawsuit, Kealy never attended the Trial. He likewise never bothered to notify his client of the default judgment. Like *Jimerson*, Kealy failed to cooperate with the subsequent disciplinary investigation and made material misrepresentations in the CMBA Investigation. Specifically, Kealy misrepresented to the CMBA that he never received Court notification of the Trial. Kealy again misrepresented the date upon which he learned of the default judgment against Davis. Kealy did not produce the entire Davis Lawsuit file to the CMBA; the produced file contained neither pleadings nor court notifications. Kealy's misconduct during the CMBA Investigation, including overt misrepresentations, is no less egregious than the attorney's actions in *Jimerson, supra*. Thus, the Board's recommendation of an eighteen-month suspension with a six-month stay was more than reasonable and appropriate just based on Kealy's misconduct in the Davis Lawsuit and ensuing CMBA Investigation.

**B. The Board's Sanction is Warranted Due to Kealy's Misconduct in the Representation of the Krawulski Estate.**

While Kealy's neglect of the Davis Lawsuit and his misrepresentations in the CMBA Investigation alone warrant the Board's sanction, Kealy also committed additional and separate violations during his representation of the Krawulski Estate. The Board found clear and convincing evidence that Kealy: (i) entered into a business transaction with a client when the attorney and client have differing interests (DR 5-104(A)); (ii) committed conduct that involved dishonesty, fraud, deceit or misrepresentation (DR 1-102(A)(4)); and (iii) committed conduct

prejudicial to the administration of justice (DR 1-102(A)(5)) during his representation of the Krawulski Estate.

This Court has held that an attorney that “engages in a course of conduct [that violates DR 1-102(A)(4)] will be actually suspended from the practice of law for an appropriate period of time.” *Disciplinary Counsel v. Fowerbaugh* (1995), 74 Ohio St.3d 187, 190. An indefinite suspension was ordered in the case of *Office of Disciplinary Counsel v. Dillon* (1986), 28 Ohio St.3d 114, which contains several factual similarities to the instant matter.

In *Dillon*, the attorney was suspended indefinitely because he failed to disclose his own indebtedness and the indebtedness of an acquaintance to an estate that he was handling, thereby violating DR 1-102(A)(4). The Court also found the attorney violated DR-5-104(A). This Court recognized that although the deceit was subsequently corrected by the attorney, such corrective action was taken only *after* opposing counsel had made an appearance on behalf of the heirs. *Id.* at 118.

In this case, Kealy and Carole personally borrowed \$20,000 from Krawulski; Kealy and Carole executed the Note in connection with such \$20,000 loan. Kealy then served as the executor of the Krawulski Estate. Krawulski communicated to the Beneficiaries that Carole was the sole borrower of \$20,000 as well as the sole obligor of the Note, but never once disclosed his own liability under the Note. Kealy then instructed Carole to stop the monthly payments under the Note in an attempt to leverage a favorable settlement with the Beneficiaries and compromise the outstanding balance. Such a settlement would have undoubtedly benefited Kealy while harming the Beneficiaries. Like the *Dillon* case, Kealy's deceit was only corrected *after* opposing counsel had made an appearance on behalf of the Beneficiaries. Thus, based on

Kealy's dishonest actions, and pursuant to Court authority that mandates a suspension for such an offense, the Board's sanction is both reasonable and warranted.

**C. Aggravating Factors Militate in Favor of the Board's Sanction.**

Because each disciplinary case involves unique facts and circumstances, BCGD Proc. Reg. 10 must be reviewed as a part of any discipline consideration. Several aggravating factors exist surrounding Kealy's misconduct and militate in favor of the Board's sanction. First, Kealy committed multiple offenses. *See* BCGP Proc. Reg. 10(B)(1)(d). The Board found by clear and convincing evidence that Kealy's misconduct amounted to nine ethical violations. Such violations occurred during three unique situations: (i) the Davis Lawsuit, (ii) the subsequent CMBA Investigation; and (iii) the representation in the Krawulski Estate, and thus involve "multiple offenses."

Second, Kealy submitted false statements during the CMBA Investigation. BCGP Proc. Reg. 10(B)(1)(e) and (f). Kealy even admitted that he was untruthful and evasive during his CMBA Investigation deposition. Tr. 35-36. For example, while under oath during the CMBA Investigation deposition, Kealy testified that he first learned of the Davis Lawsuit Trial date some years later when he checked the Davis Lawsuit docket upon receiving the grievance. Kealy's testimony was not true. Kealy subsequently admitted that he *had* received actual notice in March 2003 of the Trial date.

Also, during the CMBA Investigation, Kealy denied even having a professional relationship with Davis. This denial was false. Kealy then misrepresented his knowledge of the default judgment in the Davis Lawsuit to the CMBA investigator. Kealy stated that he did not learn of the default judgment until 2007; however, Kealy later admitted that he received actual notices of default and that he spoke with Kiefer immediately after Trial whereby it was confirmed that default judgment had been entered. For each of these reasons, Kealy submitted

false statements during the CMBA Investigation. Certainly, such dishonest acts support the Board's sanction.

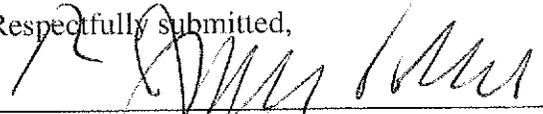
Third, Kealy acted with a dishonest and selfish motive in his dealings with, and representation of, the Krawulski Estate. *See* BCGD Proc. Reg. 10(B)(1)(b). Kealy admitted that he and his wife, Carole, personally borrowed \$20,000 from Krawulski, as evidenced by their execution of the Note. After Krawulski died, Kealy became the executor of the Krawulski Estate. As executor, Kealy had the power to settle and compromise debts due to the Krawulski Estate. Kealy utilized his role as executor to attempt to compromise the amount due under the Note, even though his fiduciary role required him to pay the Note in full to the Krawulski Estate and even though, because of the missed monthly payments under the Note, the outstanding balance of the Note was payable by Kealy immediately.

Kealy attempted to compromise the amount due on the Note by portraying Carole as the sole borrower and portraying himself as a neutral party not involved in the transaction while actually advising Carole to stop monthly payments under the Note. By withholding the monthly payments, Kealy exerted pressure to settle and compromise the Note. Kealy's plan was fueled by a dishonest and selfish motive, and such motive is an aggravating factor the Court may consider in determining appropriate sanctions.

#### **IV. CONCLUSION**

For the foregoing reasons, Relator CMBA urges this Court to adopt the recommendations of the Board regarding the sanction against John Kealy. Although the CMBA recommended at the hearing a lesser sanction of an eighteen-month suspension with twelve months stayed, the recommendation of the Board of an eighteen-month suspension with six months stayed is certainly appropriate and reasonable, given all the facts and circumstances discussed above.

Respectfully submitted,



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R. Jeffrey Pollock (0018707)  
Erin K. Walsh (0078142)  
McDonald Hopkins LLC  
600 Superior Ave., East, Suite 2100  
Cleveland, Ohio 44114  
Phone: 216.348.5400  
Facsimile: 216.348.5474  
Email: [jpollock@mcdonaldhopkins.com](mailto:jpollock@mcdonaldhopkins.com)  
[cwalsh@mcdonaldhopkins.com](mailto:cwalsh@mcdonaldhopkins.com)

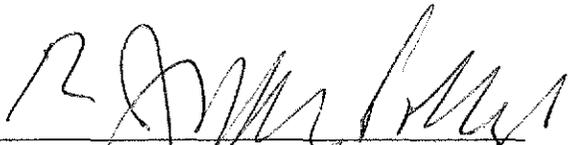
*Attorneys for Relator  
Cleveland Metropolitan Bar Association*

**CERTIFICATE OF SERVICE**

A copy of the foregoing Relator Cleveland Metropolitan Bar Association's Answer Brief To Objection of Respondent John C. Kealy was served via regular mail this 6<sup>th</sup> day of October 2009 upon the following:

LEONARD A. SPREMULLI  
29325 Chagrin Blvd., Ste. 305  
Pepper Pike, Ohio 44122  
Phone: 216.831.4935  
Facsimile: 216.831.9526  
Email: [SpremulliL@aol.com](mailto:SpremulliL@aol.com)

*Attorney for Respondent  
John C. Kealy*



R. Jeffrey Pollock (0018707)  
Erin K. Walsh (0078142)  
McDonald Hopkins LLC  
600 Superior Ave., East, Suite 2100  
Cleveland, Ohio 44114  
Phone: 216.348.5400  
Facsimile: 216.348.5474  
Email: [jpollock@mcdonaldhopkins.com](mailto:jpollock@mcdonaldhopkins.com)  
[cwalsh@mcdonaldhopkins.com](mailto:cwalsh@mcdonaldhopkins.com)

*Attorneys for Relator  
Cleveland Metropolitan Bar Association*