

**BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A**

IN RE: JOHN L. KEARNEY, Respondent

Arkansas Bar ID# 74090

CPC Docket No. 2001-112

FINDINGS AND ORDER

The formal charges of misconduct upon which this Order is based arose out of

information provided to the Committee by Patricia Ann Davis on October 18, 2000. The information pertained to the representation of Patricia Ann Davis by Respondent from June 1996 through March 1999, in an employment discrimination case. The complaint was considered at a public hearing before Panel A on August 19, 2002. Respondent appeared and was represented by Darrell Brown. The Office of Professional Conduct was represented by Staff Attorney, Ann R. Dodson. The Respondent stipulated to all facts and rule violations and the only issues litigated were the sanction and penalty phase.

On October 30, 2001, Respondent was served with a formal complaint, supported by an affidavit from Patricia Ann Davis. Respondent filed a response to the complaint on December 28, 2001.

Ms. Davis hired John Kearney, an attorney primarily practicing law in Pine Bluff, to sue her former employer, Bancroft Cap Company. Ms. Davis paid John Kearney \$1,500. On July 1, 1996, John Kearney filed a complaint on behalf of Ms. Davis in United States District Court, Eastern District of Arkansas. John Kearney then advised Ms. Davis that he was assigning her case to Jeffery Kearney. John Kearney filed a motion for voluntary dismissal without prejudice on June 25, 1997 and the motion was granted on June 27, 1997. The District Court's order of dismissal stated that the case was dismissed on the condition that should the plaintiff commence another action based upon or including the same claims advanced therein, that the defendants be awarded its costs and attorney fees for any duplicated work.

On June 30, 1998, Jeffery Kearney refiled the action but this time it was filed in Circuit Court of Drew County. On July 29, 1998, Bancroft Cap filed a motion to dismiss or for summary judgment. The motion cited the dismissal order providing that defendant would be entitled to its costs and fees should a duplicate lawsuit be filed. Neither John nor Jeffery Kearney responded to this motion. On August 27, 1998, Jeffery Kearney filed a motion to be relieved as counsel. The defendant objected to the motion on the grounds that its pending motion to dismiss or for summary judgment included a request for costs and attorney's fees and Rule 11 sanctions. On September 16, 1998, Jeffery Kearney sent the court a letter asking that he be allowed to withdraw his motion to be relieved as counsel and that he would continue to represent Ms. Davis through the final disposition of the case. The court denied the defendant's motion to dismiss and for summary judgment in an order entered September 29, 1998.

On February 2, 1999, the defendant filed a motion for attorney's fees. On February 11, 1999, the defendant filed another motion for summary judgment on the grounds that the complaint filed in the circuit court was not timely pursuant to Ark. Code Ann. § 16-123-107(3). The court entered an order on February 18, 1999, setting the March 15, 1999, hearing and mailed copies of the order to Jeffery Kearney and John Ogles. On March 15, 1999, a hearing was held on the motion for summary judgment and the court dismissed the case with prejudice. Neither John Kearney nor Jeffery Kearney informed Ms. Davis of the March 15, 1999, hearing. Neither John Kearney nor Jeffery Kearney advised Ms. Davis of the statute of limitations regarding her case. Additionally, when John Kearney voluntarily dismissed the case in the District Court, the statute of limitations had already run for filing a state case yet Jeffery Kearney filed the state action. On March 19, 1999, the defendants filed a motion for Rule 11 sanctions arguing that plaintiff should have known about the statute of limitations and asking the court to assess a fine against both Ms. Davis and John and Jeffery Kearney. The circuit court never ruled on the motion for sanctions.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, and other matters before it, and the Arkansas Model Rules of Professional Conduct, Panel A, of the Arkansas Supreme Court Committee on Professional Conduct finds:

- That John Kearney's conduct violated Model Rule 1.1, when he voluntarily non-suited the federal action and filed an action in state court even though the statute of limitations had run prior to the voluntary non-suit in federal court. Additionally, he failed to respond to the motion for summary judgment and he never informed his client of the summary judgment hearing held on March 15, 1999. Model Rule 1.1 provides that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- That John Kearney's conduct violated Model Rule 1.3, when he voluntarily non-suited the federal action and filed a state action even though the statute of limitations had run, and he failed to respond to the motion for summary judgment filed on July 29, 1998. Model Rule 1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client.
- That John Kearney's conduct violated Model Rule 1.4(a), when he failed to

inform Ms. Davis about the statute of limitations for filing a state action and he failed to keep her informed about hearing dates. Model Rule 1.4(a) provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

- That John Kearney's conduct violated Model Rule 1.4(b), when he failed to

inform Ms. Davis about the statute of limitations. Model Rule 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

- That John Kearney's conduct violated Model Rule 1.5(c), when he accepted Ms.

Davis's case requesting *inter alia*, punitive damages and accepted a \$1,500 retainer, but did not reduce the contingency fee agreement to writing. Model Rule 1.5(c) provides, in pertinent part, that a contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

- That John Kearney's conduct violated Model Rule 8.4(d), when he filed a state

action advancing the same claims he previously voluntarily non-suited in federal court, and the statute of limitations had already run in the state action. This conduct was prejudicial to the administration of justice. Model Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

- Pursuant to Section 17.D(7) of the Procedures of the Arkansas Supreme Court

Regulating Professional Conduct (Rev. 2002), Mr. Kearney is placed on probation for a period of twelve (12) months, to begin at the conclusion of his probationary period in case number 2000-138. As a requirement of the terms of probation, Mr. Kearney shall provide the Office of Professional Conduct by the 5th day of each month during his period of probation a list of every criminal case for which he is attorney of record. On the list, Mr. Kearney shall state the status of the case, specifically, the next date the case is scheduled for hearing or trial; the date a notice of appeal is due, the date the record is due to be filed with the Arkansas Supreme Court Clerk; and the date appellate briefs are due. In addition, Mr. Kearney is to associate with Darrell Brown as his supervising attorney as required by Section 17.D(7) of the Procedures. Mr. Brown shall be required to make periodic reports to the Office of Professional Conduct concerning Mr. Kearney's progress. **The failure of Mr. Kearney to comply with the requirements of the terms of probation will terminate the probation and could subject him to further disciplinary action, to include imposition of a more severe sanction which could have been imposed originally.**

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that John Kearney, Arkansas Bar ID# 74090, be, and hereby is, REPRIMANDED for his conduct in this matter, and is placed on a one-year probation for the period January 3, 2003 through January 3, 2004. Mr. Kearney is also hereby ordered, pursuant to Section 18 of the Procedures Regulating Professional Conduct, to pay RESTITUTION of \$1,500 and costs of \$138.94 to the Office of Professional Conduct within thirty (30) days of the filing of this order.

ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT - PANEL A

By: _____

Ken Reeves, Acting Chair, Panel A

Date: _____