

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A

IN RE: MARK A. SEXTON, Respondent
Arkansas Bar ID#98152
CPC Docket No. 2005-092

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Honorable J. Michael Fitzhugh in a Judicial Referral received March 3, 2005. The information related to the representation of Capitol One Bank by Respondent in 2004. On July 15, 2005, Respondent was served with a formal complaint, supported by the information from Judge Fitzhugh. A response was filed. The matter proceeded to ballot vote pursuant to the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law. (2002). Thereafter, a request for public hearing, de novo, was received. Following receipt of the request for de novo hearing, the Respondent, through counsel, and the Executive Director negotiated a discipline by consent proposal, which was submitted to this Panel.

The information before the Committee demonstrated that on October 21, 2004, Mark A Sexton, an attorney with a primary office in Little Rock, Arkansas, or someone on his behalf, forwarded to the Sebastian County Circuit Clerk's Office a complaint and summons in the case of Capital One Bank v. Timothy M. Hartzig. The Complaint was filed by the Clerk's office on November 8, 2004. On that same date, the Complaint and Summons were delivered to the Sheriff's Office for service of process on Mr. Hartzig, the defendant.

Deputy Sheriff Ron Morris received the Complaint and Summons for service. Deputy Morris was unable to perfect service and noted that fact on the return in the bottom left corner of the Summons. Deputy Morris' note was as follows: "unable to serve bad address." The return with the note written on it was given to the Clerk's Office for filing with a copy being mailed to Mr. Sexton on or about November 15, 2004. On that same date, the Sheriff's office reimbursed Hosto and Buchan \$30.00 of the \$50.00 service fee noting that it was returning the money because of non-service on Defendant Hartzig. The reimbursement check was negotiated by the law firm approximately nine (9) days later. The reimbursement check was marked as being a return of funds due to the non-service of the defendant, Timothy M. Hartzig.

A little over two (2) months later, on January 25, 2005, Mr. Sexton sent a letter to the Court with a proposed Default Judgment. In the letter, Mr. Sexton advised the Court that he had contacted the Clerk's office and that service had been made on the Defendant Hartzig. Mr. Sexton also enclosed a precedent for Default Judgment with a copy of a return of service. Before entering the Default Judgment, Judge Fitzhugh reviewed the Clerk's file. Judge Fitzhugh noticed that the return of service submitted by Mr. Sexton did not match the original return of service document in the court's file. The Sheriff's original return of service indicated that service on the defendant had been obtained, but also had hand-written on the bottom "unable to serve". The altered document had no indication of "unable to serve" on it.

After discovering the difference, Judge Fitzhugh set the matter for a hearing. Judge Fitzhugh directed that Mr. Sexton appear and bring anyone in his office who dealt with this case and the documents to explain the difference. On the date set for the hearing, Mr. Sexton appeared before Judge Fitzhugh. Mr. Sexton brought an affidavit of an employee. As such, Mr. Sexton failed to bring a live witness to the hearing despite Judge Fitzhugh's instruction that he do so. During the hearing, Judge Fitzhugh took the testimony of the Deputy Circuit Clerk, Deputy Sheriff and the Deputy Clerk from the Sheriff's Office. No one has been able to determine how or where the return came to be altered. During the hearing, Mr. Sexton supplied the copy of the Return of Service that was in his file – that being the altered document – which did not show any evidence of alteration.

At the conclusion of the testimony, Judge Fitzhugh advised Mr. Sexton that he was referring his conduct to the Committee on Professional Conduct. Judge Fitzhugh reserved further action on his part depending on what action the Committee might take with regard to Mr. Sexton's conduct. Judge Fitzhugh did, specifically, find that Mr. Sexton violated the directive of the Court by not bringing the employee who handled the matter with him to the hearing.

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

1. That Mr. Sexton's conduct violated Model Rule 3.4(c) because he was directed by Judge Fitzhugh, the presiding Judge in a tribunal where he had ongoing litigation pending, to bring with him to the hearing on February 24, 2005, any employees who were involved in the documents at issue in the hearing and he failed to do so. Model Rule 3.4(c) requires that a lawyer not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.
2. That Mr. Sexton's conduct violated Model Rule 8.4(d) because his failure to be diligent enough to be certain that service had been perfected on Timothy Hartzig created the need for additional hearing and proceedings before Judge Fitzhugh in the matter at issue in Sebastian County Circuit Court and because his conduct in providing the Court with an altered return of service in an effort to obtain a Default Judgment against Timothy Hartzig created the need for additional hearing and proceeding before Judge Fitzhugh. Such additional proceedings would not have been necessary but for the altered return of service. Model Rule 8.4(d) requires that a lawyer not engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that MARK A. SEXTON, Arkansas Bar ID# 98152, be, and hereby is, CAUTIONED for his conduct in this matter. In addition, pursuant to Section 18.A. of the Procedures, Mr. Sexton is assessed the costs of this proceeding in the amount of \$100. Further, pursuant to Section 18.B., Mr. Sexton is ordered to pay a fine in the amount of \$1500. The costs assessed and fine imposed herein, totaling \$1600, shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT - PANEL A

By: _____
Phil D. Hout, Chair, Panel A

Date: _____

(13.M, Rev.1-1-02)