

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

IN RE: **BENJAMIN C. LIPSCOMB**, Respondent
Arkansas Bar ID # 88131
CPC Docket No. 2015-105

CONSENT FINDINGS & ORDER

The formal charges of misconduct upon which this Consent Order is premised, involving respondent attorney Benjamin C. Lipscomb of Rogers, Benton County, Arkansas, arose from information brought to the attention of the Committee on Professional Conduct by news media articles in 2014. Following Respondent Attorney's receipt of the formal Complaint filed on October 14, 2015, the Respondent and his counsel entered into discussion with the Executive Director which has resulted in an agreement to discipline by consent pursuant to Section 20.B of the Arkansas Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law (2011).

The factual summary of relevant events shows:

1. Lipscomb received an Arkansas law license in 1988, with Bar No. 88131.
2. Lipscomb is a long-time resident of Benton County, Arkansas.
3. Lipscomb served as the elected City Attorney for the City of Rogers, AR, from October 1997, until he resigned around January 30, 2015.
4. On July 20, 2006, Lipscomb registered to vote in Precinct 64.04 in the City of Rogers, giving a residence address of 4302 Mockingbird Lane, Rogers, AR 72756.
5. As of November 11, 2014, Lipscomb had not registered to vote under any different address than 4302 Mockingbird Lane, Rogers, AR 72756.

6. Due to voter precinct redistricting in about 2011-2012 precinct 64.04 was renumbered as precinct 47.02, and 4302 Mockingbird Lane, Rogers, AR 72756 remained in the same geographical precinct as before, just now with a new number.

7. On August 5, 2010, Lipscomb filed as a candidate for election for a new four year term to the office of Rogers City Attorney, and executed a sworn Affidavit of Eligibility giving his address as 4302 Mockingbird Lane, Rogers, AR 72756. Lipscomb was elected in the November 2010 general election and commenced his new four year term on January 1, 2011.

8. On December 22, 2010, Lipscomb married Tita DeVore.

9. By early 2011, Lipscomb was occupying as his principal and full-time residence #6 Dearhurst Road, Rogers, AR, which was and is located outside the city limits of Rogers, Arkansas.

10. By May 2011, Lipscomb had leased/rented his house at 4302 W. Mockingbird Lane, Rogers, AR 72756 to a third party, Shonna Brown, who, with another person, occupied the residence full-time and had the city utilities registered in her name. Brown continues to reside there.

11. Since May 2011, Lipscomb has not resided at 4302 W. Mockingbird Lane, Rogers, Arkansas.

12. On July 19, 2011, Lipscomb executed a Homestead Tax Credit document, under criminal penalty for a false statement, claiming his principal place of residence was 6 Dearhurst Road, Rogers, AR, which location is outside the city limits of the City of Rogers, Arkansas.

13. The Rogers Code of Ordinances, Section No. 2-200, in effect since at least 2010, requires the city attorney to be a resident of the city.

14. In May 2011, when Lipscomb moved his primary residence outside the Rogers city limits, he became ineligible to hold the office of Rogers City Attorney.

15. On March 8, 2012, Brandon Bayer registered to vote in Benton County using an address of 4302 W. Mockingbird Lane, Rogers, AR.

16. On March 11, 2012, Shonna Brown registered to vote in Benton County using an address of 4302 W. Mockingbird Lane, Rogers, AR.

17. An Attorney General Opinion, No. 2012-122, issued December 4, 2012, to the Prosecuting Attorney of Benton County, Arkansas, opined, as in Opinion No. 2007-302, that an elected city attorney must, pursuant to Ark. Const. Art. 19, § 3, continue to reside within the city throughout his or her term of office.

18. Lipscomb continued to draw and accept his salary and benefits, approximately \$150,000 per year, as Rogers City Attorney after May 2011.

19. After May 2011, Lipscomb was ineligible to hold the elected office of City Attorney of Rogers, AR.

20. From May 2011 until the end of his elected term in December 2014, a period of over 3.5 years, Lipscomb accepted and received approximately \$500,000 in gross salary and benefits, which were public funds to which he was not legally entitled.

21. After May 2011, Lipscomb never resided at 4302 W. Mockingbird Lane, in Rogers, AR, nor did he establish any other primary residence within the city limits of Rogers, AR.

22. On February 14, 2014, Lipscomb executed a property settlement as part of a divorce from Tita DeVore in Case No. DR-13-179 in Benton County Circuit Court, in which he would receive the jointly-owned home at 6 Dearhurst Road, Rogers, AR, as well as the home at 4302

Mockingbird Lane, Rogers, AR, he owned prior to their marriage.

23. As a result of issues that arose between Lipscomb and other Rogers officials, a decision was made to redefine the duties and responsibilities of the Rogers City Attorney's Office. This resolution and agreement is reflected in city ordinances Nos. 14-46 and 14-47, which were supported at the time by both Mayor Hines and Lipscomb and were enacted by the city council on September 24, 2014. These ordinances did not reduce the salary and benefits of the elected city attorney.

24. On November 5, 2014, Lipscomb filed suit against the Mayor and Council members of the City of Rogers, as No. 14-cv-5338, in the United States District Court for the Western District of Arkansas. He alleged Rogers Ordinance 14-46 was unlawful, was a "Bill of Attainder" in violation of the United States Constitution, and an effort to unlawfully strip him of his full position as elected city office. He also sought a preliminary injunction. In his Complaint, Lipscomb alleged he took office on January 1, 2010, for a four year term.

25. On November 19, 2014, the City defendants filed their response to the motion for preliminary injunction, stating Lipscomb was a proponent of Ordinance 14-46 and advocated for its passage by the City Council on September 23, 2014, as a means to resolve issues with the operation of the city attorney office.

26. On November 26, 2014, the City defendants filed their Answer to the Complaint, alleging that Lipscomb was not a resident of the City of Rogers and not legally qualified to hold the office of City Attorney of Rogers.

27. During late 2014, Lipscomb had a Rogers city employee, Jan Brown, who worked full-time in his City Attorney office devote office time and resources to preparing documents in

Lipscomb's private matters, including pleadings in his federal case against the City of Rogers.

28. On or about December 3, 2014, on his own time after hours and from his office as City Attorney, and while represented by counsel, Lipscomb composed an FOIA request to the City of Rogers seeking information and communications directly related to his lawsuit against the City of Rogers.

29. On or about December 8, 2014, Lipscomb issued a memo/notice related to Rogers District Court announcing henceforth that criminal case plea bargaining basically would cease in that court.

30. As Rogers City Attorney, for years Lipscomb had been appointed a deputy prosecuting attorney for Benton County to prosecute state misdemeanors in Rogers. On or about December 16, 2014, Nathan Smith, the Benton County Prosecutor-Elect, released an announcement that when he took office on January 1, 2015, he would not commission Lipscomb as a deputy prosecuting attorney because of Lipscomb's stated new policy of no plea bargaining.

31. On December 29, 2014, Brian Ferguson and Ellen Turner filed a Complaint in Intervention seeking to enter into the Lipscomb v. City of Rogers federal lawsuit, claiming:

a. An illegal exaction by Lipscomb of his \$159,617 salary and benefits for 2015 as he was not a resident of the City of Rogers and not eligible to serve in the position of City Attorney, and

b. Seeking a declaratory judgment that Lipscomb's compensation represented an illegal exaction of public funds as he was not qualified to hold the city attorney office.

32. Attached to the Complaint in Intervention as Ex. A is the Affidavit of Chris Griffin, staff attorney for the City of Rogers, executed January 14, 2015, setting out the facts alleged

therein, and especially facts related to the extension of the term of office of the Rogers City Attorney in early 2014.

33. Attached to the Complaint in Intervention as Ex. B is the Affidavit of Jan Brown, secretary since 1991 in the office of the City Attorney for the City of Rogers, executed January 14, 2015, setting out the facts alleged therein, especially her being given Lipscomb's personal business matters to work on during regular work hours.

34. On January 16, 2015, an Amended Motion to Intervene, with accompanying Complaint in Intervention with the Griffin and Brown affidavits was filed.

35. On January 20, 2015, a hearing was conducted in Lipscomb v. Hines, at which both Lipscomb and Rogers Mayor Hines testified that significant conflict had developed between Lipscomb and one of his subordinate staff attorneys, and a reason for enacting Ordinance 14-46 was to remove the staff attorney from Lipscomb's supervision.

36. Mayor Hines also testified that prior to the enactment of Ordinance 14-46 the level of dysfunction in the office of City Attorney "was getting out of control" and the ordinance was a way of mitigating that dysfunction. An element of the dysfunction in the City Attorney's office was a unilateral interpretation by Lipscomb of the law, Ark. Code Ann. § 14-43-303 and ACA § 14-43-314, relating to the terms of offices of city officials and the effect on the City of Rogers, a first class mayor-council city, whose population had exceeded 50,000 in the most recent census.

37. While the general provision, in ACA § 14-43-303 may arguably have included the Rogers City Attorney's office in the two year term extension provision, the more specific law on city attorneys, ACA § 14-43-314 contains no provision for a term extension for the Rogers City Attorney in a city now at 50,000 or more population.

38. As City Attorney, and with a strong personal and financial interest in the outcome of the legal issue, Lipscomb personally opined that certain elected Rogers city officials now had a one-time two year extension of their four year terms to 2016. Lipscomb claimed this resulted from the increase in the population of Rogers placing it in the 50,000 or more population category in state law for elections in 2014, and he thought the office of Rogers City Attorney got a similar two year term extension through 2016.

39. Lipscomb was asked to get a second opinion from the legal department of the Arkansas Municipal League, being told that more research on the issue was needed. He then took the position that he got to make the decision.

40. On January 23, 2015, the District Court filed a Memorandum Order and Opinion (“Opinion”) denying Lipscomb’s Motion for Preliminary Injunction.

41. In the Opinion, the court found that every witness at the hearing, including Plaintiff Lipscomb, testified that Lipscomb advocated the enactment of the ordinance to city council members the night of its passage.

42. On January 23, 2015, the parties in Lipscomb v. Hines participated in a settlement conference conducted by U. S. Magistrate Judge Setser, which resulted in a settlement agreement which was approved by the Rogers City Council on January 27, 2015. An order dismissing the case with prejudice was entered January 29, 2015.

43. On January 29, 2015, the City of Rogers issued a check, net of taxes and benefits, for \$253,222.49 in full settlement with Lipscomb. The gross settlement of \$390,000 was calculated on and included Lipscomb’s salary and benefits as City Attorney through the end of 2016, almost two full years of salary and benefits for no work.

44. Lipscomb resigned from the office of City Attorney within a day or two of receiving his settlement check.

45. As part of the overall settlement, among other obligations and conditions, Lipscomb agreed to never seek elective office in the City of Rogers, or to seek employment with the City of Rogers.

46. As part of the overall settlement, among other obligations and conditions, Lipscomb agreed to not use the Arkansas Freedom of Information Act to harass the City of Rogers.

47. As part of the overall settlement, among other obligations and conditions, Lipscomb agreed that his spouse would dismiss her health records privacy lawsuit against the City.

48. Lipscomb's conduct during the past several years has lead to publicity that has been negative to the legal profession and his client the City of Rogers.

49. Lipscomb voted "early" in a Rogers special bond election, held on September 13, 2011, voting in city precinct 64.04 although he did not then reside in precinct 64.04. Lipscomb's vote in precinct 64.04 in the bond election of September 13, 2011, was a violation of the state election law and a criminal offense.

50. Lipscomb voted "early" in the preferential primary election held on May 22, 2012, voting in city precinct 47.02, formerly city precinct 64.04, although he did not then reside in either precinct 64.04 or 47.02. Lipscomb's vote in precinct 47.02 in the preferential primary election held on May 22, 2012, was a violation of the state election law and a criminal offense.

Upon consideration of the formal complaint and attached exhibits, admissions made by the respondent attorney, the terms of the written consent, the approval of Panel A of the Committee on Professional Conduct, and the Arkansas Model Rules of Professional Conduct, the

Committee on Professional Conduct finds:

B. The conduct of Benjamin Lipscomb violated Rule 1.7(a) in that as elected and long-time Rogers City Attorney, the City was Lipscomb's sole client. In November 2014, Lipscomb caused the City of Rogers to be sued in federal court, with him as the sole plaintiff, claiming an illegal or unlawful action by the City had harmed his status as a city official, thus placing his personal interest in direct conflict with the interest of his only client. Lipscomb continued to act as the legal representative of the City until he resigned on January 30, 2015. A concurrent conflict of interest existed between Lipscomb and his only client, the City of Rogers, as his representation of the City was materially limited by the personal interest of Lipscomb that was directly contrary to the interest of the City as set out in his litigation. The City of Rogers never consented to this conflict. Arkansas Rule 1.7(a) requires that, except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer, (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

C. The conduct of Benjamin Lipscomb violated Rule 1.8(b) in that as long-time City Attorney for the City of Rogers, Lipscomb used information related to the representation of his only client, the City, to the disadvantage of the client. The client, the City of Rogers, did not give informed consent, in a writing signed by the client, City of Rogers, when Lipscomb sued the City in November 2014, in federal court case No. 14-cv-5338. The basis of this lawsuit was that city ordinance No. 14-46, which Lipscomb supported before the city council when it was adopted in September 2014, (1) shows on its face that Lipscomb was one of the two “requestors” of the ordinance, and (2) was an illegal or improper Bill of Attainder designed to take away his duties as city attorney and to punish him. Arkansas Rule 1.8(b) requires that a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, in a writing signed by the client, except as permitted or required by these Rules.

D. The conduct of Benjamin Lipscomb violated Rule 8.4(a) in that as the plaintiff in litigation against his employer, City of Rogers, in federal court Case No. 14-cv-5338, after it was filed on November 5, 2014, Lipscomb violated the rules of professional conduct related to conflicts of interest by using or acting through a Rogers city employee, Jan Brown, who worked under his direct supervision, to prepare pleadings in his case against the City of Rogers as well as other documents for Lipscomb’s personal business matters. Arkansas Rule 8.4(a) provides that it is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.

E. The conduct of Benjamin Lipscomb violated Rule 8.4(b) in that by voting in a Rogers city voting precinct in which he did not then reside in the September 13, 2011, special bond election,

Lipscomb committed a criminal act under state law that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, and also makes him ineligible to hold any office or employment in any of the departments in this state, which would include any office in a city in Arkansas. By voting in a Rogers city precinct in which he did not then reside in the May 22, 2012, preferential primary election, Lipscomb committed a criminal act under state law that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, and also makes him ineligible to hold any office or employment in any of the departments in this state, which would include any office in a city in Arkansas. Arkansas Rule 8.4(b) provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

F. The conduct of Benjamin Lipscomb violated Rule 8.4(c) in that in November-December 2014, while a plaintiff in Case No. 14-cv-5338 against the City of Rogers, his sole client as Rogers City Attorney, Lipscomb improperly and possibly illegally used a city employee under his supervision, city property, city time and city resources for his personal legal and non-city employment matters. He directed the city employee, Jan Brown, to prepare an amended complaint for use in his federal lawsuit against the city and to prepare FOIA requests against the city for the benefit of him and his family member, conduct by Lipscomb involving dishonesty, fraud, deceit or misrepresentation to the City of Rogers. After moving his residence outside the Rogers city limits in May 2011, and thereby becoming ineligible to hold the elected office of Rogers City Attorney, Lipscomb continued in said office, drawing his full salary and benefits, until January 30, 2015, accepting approximately \$500,000 of city funds to which he was not

entitled, conduct by Lipscomb involving dishonesty, fraud, deceit or misrepresentation. Arkansas Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

WHEREFORE, in accordance with the consent to discipline presented by Mr. Lipscomb and the Executive Director, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct that Respondent **BENJAMIN C. LIPSCOMB**, Arkansas Bar No. 88131, be, and hereby is, **REPRIMANDED, fined \$4,000.00, and assessed \$100.00 case costs** for his conduct in this matter. The fine and costs assessed herein, totaling \$4,100.00, 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:/s/ Michael W. Boyd, Chairperson, Panel A

Date: May 20, 2016

Original filed with the Arkansas Supreme Court Clerk
on May 20, 2016.