

# BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

## PANEL A

IN RE: R.S MCCULLOUGH, Respondent  
Arkansas Bar ID#85102  
CPC Docket No. 2003-079

### FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information revealed in the Arkansas Supreme Court Opinion delivered in the matter of Joyce Whaley and Keith Whaley v. Kroger Company, Case Number 02-874. Appellants were represented by Respondent, R.S. McCullough, in the appeal before the Arkansas Supreme Court.

On August 26, 2003, Respondent was served with a formal complaint, supported by the Supreme Court Opinion delivered on February 23, 2003. Respondent filed a timely response following an extension of time in which to do so.

The Opinion of the Arkansas Supreme Court contained sanctions which were imposed upon Respondent based upon a Motion for Sanctions filed against Respondent by counsel for the appellee. The factual background leading to the Opinion reveals that the underlying case was a personal injury case arising out of an alleged electrical shock at a Kroger store in DeWitt, Arkansas in August 1997. After trial was concluded in the lawsuit brought by Respondent, a unanimous defense verdict was delivered. This verdict was delivered on January 22, 2002. In the subsequent appeal to the Arkansas Supreme Court, Respondent did not challenge anything about the trial, evidence, rulings of the trial court, the jury verdict, or the sufficiency of the evidence. Respondent's sole point on appeal was whether the trial court committed reversible error in failing to disqualify appellee Kroger's counsel. The basis for the disqualification request was a September 19, 2001, letter written to Respondent concerning settlement negotiations. In the letter, appellee's counsel expressed a desire to continue negotiating but said that would only occur if Respondent's clients withdrew a motion for

sanctions which was based upon an Order compelling discovery which appellee's counsel argued was never received. A hearing was held on September 25, 2001, concerning the disqualification request but no ruling was made at the time. The Motion to Disqualify was renewed by Respondent on the morning of trial. At that time, the trial court denied the Motion.

Respondent argued that during attempts to settle the case before trial, appellee's counsel took the position that settlement could not be made unless the motion for sanctions was withdrawn by appellants. Respondent expressed his belief to the trial court and the appellate court that the difficulty in the case was based upon the fact that a motion to disqualify was filed after appellee's counsel personally interjected himself into the litigation by taking certain matters personally. Respondent contended that the conduct of appellee's counsel went beyond zealous representation and became personal conduct. Respondent also asserted his belief that appellee's counsel should be disqualified because his conduct appeared to violate the Model Rules of Professional Conduct in that he was placing his personal interest into his client's matter.

Respondent argued to the Supreme Court that an Order should be entered reversing the trial court, directing that appellee's counsel be disqualified, and restoring the matter to the trial court's calendar. To do otherwise, Respondent argued would cause appellee and appellee's counsel to perceive that the Model Rules of Professional Conduct have no "teeth" or remedy and that any violations that occur will not and cannot be otherwise addressed. The Supreme Court disagreed with Respondent and affirmed the trial court.

The record before the Supreme Court reflected that Respondent did not provide the Court with any factual basis or legal authority for the proposition that appellee's counsel be disqualified. The only evidence presented was the September 19, 2001, letter from appellee's counsel to Respondent. The Court also explained that Respondent failed to demonstrate how appellee's counsel placed his personal interests over the interests of his client.

In his response to the formal disciplinary complaint, Respondent explained that he did not believe that the letter of appellee's counsel was proper. He stated that he thought it to be an impropriety and prejudicial to the administration of justice, which was the basis for filing the motion for disqualification. Respondent asserted

that there is no law or prohibition against the type of appeal he pursued. He believed that the case law he set out did apply in a “legal, logically” fashion to the issue raised. Respondent admitted that there were no cases directly on point but argued that the lack of the same should not give rise to sanctions by the court or by the Committee, because to do so would have an effect of creating a position where the status quo could never be questioned.

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:

1. That Mr. McCullough’s conduct violated Model Rule 3.1 when he brought an appeal to the Arkansas Supreme Court in the matter of Whaley v. Kroger which appeal was found to be frivolous and not based in fact or law. Model Rule 3.1 requires that a lawyer not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
2. That Mr. McCullough’s conduct violated Model Rule 3.4(c) because his conduct, in filing the appeal of the trial court’s decision not to disqualify Kroger’s counsel, was found to be in violation of Rule 11 - Rules of Appellate Procedure - Civil. 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.
3. That Mr. McCullough’s conduct violated Model Rule 8.4(d), because the filing of the frivolous appeal in the Whaley matter created the need for the Court to entertain review of a matter that had no basis in fact or law and therefore created a delay in the appellate court docket of other matters and required the Supreme Court to expend additional time and effort which would not have been necessary otherwise. 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 R.S. MCCULLOUGH, Arkansas Bar ID# 85102, be, and hereby is, REPRIMANDED for his conduct in this matter.

Further, pursuant to Section 18.A. of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, Mr. McCullough is ordered to pay the costs of this matter in the amount of \$50. Mr. McCullough is also ordered to pay a fine in the amount of \$500 pursuant to Section 18.B. of the Procedures. The costs and fine assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct with 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: \_\_\_\_\_

Gwendolyn Hodge, Chair, Panel A

Date: \_\_\_\_\_