

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL A

IN RE: S. GENE CAULEY, Respondent
Arkansas Bar ID#94012
CPC Docket No. 2003-157

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Jay Garrett, Deputy Bar Counsel, Office of Bar Counsel of the Kentucky Bar Association on March 27, 2003. The information related to the contact S. Gene Cauley, an attorney practicing in Little Rock, Arkansas, had with a Kentucky resident, Brian Cullinan, through an e-mail.

On December 8, 2003, Respondent was served with a formal complaint, supported by copies of documents relevant to the Complaint including the e-mail contact made with Mr. Cullinan. Thereafter, Respondent filed a timely response to the formal disciplinary complaint.

The information provided to the Committee from the investigation conducted by the Kentucky Bar Association began with Mr. Cauley's e-mail advertisement to Brian Cullinan on August 28, 2002. The e-mail advertised the fact that Mr. Cauley's law firm represented investors and consumers in class action and corporate government litigation. The main focus of the e-mail was Cryolife. Mr. Cullinan advised that his firm had never purchased or sold Cryolife for any of their clients. As such, the e-mail was determined to be a targeted spam solicitation.

When received by the Office of Bar Counsel of the Kentucky Bar Association, it was pursued under the rules regarding unauthorized practice of law in Kentucky because the e-mail contact did not contain the name of a licensed Kentucky attorney pursuant to the mandate of the Supreme Court Rules. On November 1, 2002, a letter was sent to Mr. Cauley by the Kentucky Bar Association setting forth that his e-mail advertisement to Mr. Cullinan may have constituted the unauthorized practice of law in Kentucky and may have been an unauthorized and unapproved attorney advertisement. Mr. Cauley denied all of the above and

offered that the communication was a notice required to be given concerning the pendency of a class action law suit as well as notice that any member of the reported class may move the Court to serve as lead plaintiff. The decision made with regard to that matter was that his e-mail had violated Kentucky Supreme Court Rule 3.130 because it failed to contain the name of a licensed Kentucky attorney. It was also determined that he violated Kentucky Supreme Court Rule 3.130 (7.05) in that he did not submit the e-mail advertisement for approval to the Kentucky Attorney's Advertising Commission before disseminating the advertisement. It was also specifically pointed out that Mr. Cauley's contact may have started out as a notice but went beyond that when he included the following statement: "Cauley-Geller is a national law firm that represents investors and consumers in class action and corporate governance litigation. We are one of the country's premiere firms in the area of securities fraud, with in-house finance and forensic accounting specialists and extensive trial experience. Since its founding, Cauley-Geller has recovered billions of dollars on behalf of aggrieved shareholders. The firm maintains offices in Boca Raton, Little Rock, and San Diego."

The information in that particular statement is advertising and causes the e-mail to become one of solicitation not notification. There is also no indication in the e-mail how Mr. Cauley or his law firm obtained Mr. Cullinan's name for sending the e-mail.

In responding to the formal disciplinary complaint, Mr. Cauley denied that his e-mail communication with Mr. Cullinan was an advertisement. He offered that it was a notice of the commencement of a federal securities class action lawsuit, which was authorized and required by the Private Litigation Securities Reform Act of 1995 and Rule 23 of the Federal Rules of Civil Procedure. According to Mr. Cauley, his law firm was the first in the nation to file a federal securities fraud lawsuit against CryoLife. It is his statement that federal law mandated publication in a "widely circulated national business-oriented publication or wire service" of a notice advising potential class members of (a) the pendency of a class action lawsuit, (b) the causes of action asserted in the lawsuit, (c) the relevant "class period", and (d) the ability of any member within the purported class to move to serve as Lead Plaintiff in the action. There is no provision in the statute provisions provided by Mr. Cauley for including the information he did about his law firm which caused the notice to become an

advertisement. Mr. Cauley says that the information was merely biographical not solicitation and that it is just the type of information others include when sending notices. Regardless of whether others do it, Mr. Cauley is subject to the Arkansas Model Rules of Professional Conduct based upon his privilege to practice law in the State of Arkansas. The content of the e-mail became one of advertising and solicitation when Mr. Cauley went beyond the requirements of the federally mandated notice.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, 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. Cauley's conduct violated Model Rule 7.3(b) when his e-mail advertisement to Brian Cullinan, which was a solicitation of professional employment, was sent through the internet rather than by regular mail; failed to plainly state in capital letters "ADVERTISEMENT" on each page of the communication; failed to begin with the statement that "If you have already retained a lawyer, please disregard this letter"; failed to include the following statement in capital letters: "ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT C/O CLERK, ARKANSAS SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK, ARKANSAS 72201"; and, failed to comply with the Kentucky Supreme Court's applicable rules governing lawyer advertising. Model Rule 7.3(b) permits a lawyer to solicit professional employment from a prospective client known to be in need of legal services in a particular matter by written communication. Such written communication shall: (1) include on the bottom left hand corner of the face of the envelope the word "Advertisement" in red ink, with type twice as large as that used for the name of the addressee; (2) only be sent by regular mail; (3) not have the appearance of legal pleadings or other official documents; (4) plainly state in capital letters "ADVERTISEMENT" on each page of the written communication; (5) begin with the statement "If you have already retained a

lawyer, please disregard this letter”; (6) include the following statement in capital letters: “ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT C/O CLERK, ARKANSAS SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK, ARKANSAS 72201”; and, (7) shall comply with all applicable rules governing lawyer advertising.

2. That Mr. Cauley’s conduct violated Model Rule 7.3(d) when he failed to include in his e-mail communication to Brian Cullinan a disclosure of how he obtained the information, which was incorrect, that his firm had significant holdings in CryoLife. Model Rule 7.3(d) requires that any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that S. GENE CAULEY, Arkansas Bar ID#94012, be, and hereby is, CAUTIONED 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 (2002), Mr. Cauley is assessed the costs of this matter in the amount of \$50. In addition, pursuant to Section 18.B. of the Procedures, Mr. Cauley is ordered to pay a fine in the amount of \$1000. The costs assessed and fine imposed herein, in the total amount of \$1050, 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: _____

Gwendolyn Hodge, Chair, Panel A

Date: _____