

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

**PANEL B**

IN RE:           JOHNNY E. GROSS, Respondent  
                  Arkansas Bar ID#95156  
                  CPC Docket No. 2004-040

**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 Tom Keith on February 17, 2004. The conduct of Respondent was also reported to the Committee by the Arkansas Supreme Court in a Per Curiam delivered March 4, 2004. The information related to the representation of Terry Lee Kuelper by Respondent in 2002 and 2003.

On July 20, 2004, Respondent was personally served with a formal complaint, supported by the written information from Judge Keith and the Orders of the Arkansas Supreme Court. Respondent, Johnny E. Gross, an attorney residing in Bentonville, Arkansas, filed a timely response. The matter proceeded to ballot vote before Panel B of the Committee on Professional Conduct pursuant to the provisions of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law (2002).

The information presented to the Committee reflected that on January 26, 2004, a hearing was held before Judge Keith following a remand from the Arkansas Supreme Court. The first issue before Judge Keith was whether Mr. Gross and Daniel Hash, another attorney formerly practicing in Bentonville, Arkansas, had been relieved of counsel for Terry Lee Kuelper in the matter of *State of Arkansas v. Terry Lee Kuelper*, Case Number CR-2002-626-1. Judge Keith noted that Larry Froelich had entered his appearance for Mr. Kuelper during September 2003, as such it was interpreted that Mr. Gross had been relieved as attorney of record.

The second issue before Judge Keith was whether Mr. Kuelper had requested you to file a Notice of Appeal on his behalf following his conviction. During the hearing before Judge Keith, Mr. Kuelper testified that he asked Mr. Gross to pursue an appeal at the conclusion of his June 2003, trial. It was Mr. Kuelper's testimony that Mr. Gross advised that he would do so. There was further testimony that Mr. Kuelper attempted

to contact Mr. Gross after being incarcerated but that he was unable to do so.

Daniel Hash was the second witness who provided testimony before Judge Keith. Mr. Hash testified that his recollection was that Mr. Kuelper requested a Notice of Appeal be filed immediately upon his sentencing.

An Affidavit from Tracy M. Neal, a reporter for the *Benton County Daily Record*, was accepted into the record by Judge Keith as well. Attached to the Affidavit was an article penned by Mr. Neal and published on June 27, 2003. In the article, a statement is attributed to Mr. Gross affirming that Mr. Gross stated Mr. Kuelper's case would be appealed. Mr. Neal averred that Mr. Gross made the statement to him.

Following consideration of all of the evidence, Judge Keith ruled that Mr. Kuelper did want an appeal of his two convictions for rape. Judge Keith also found that Mr. Kuelper had requested Mr. Gross to file a Notice of Appeal but that none was timely filed. Based on these rulings, Judge Keith reported Mr. Gross' conduct to the Committee. On March 4, 2004, the Arkansas Supreme Court referred the same conduct to the Committee.

Mr. Gross acknowledged in his response to the Committee that an appeal was planned and discussed with Mr. Kuelper. He also admitted that Mr. Kuelper was advised that a Notice of Appeal would be filed as soon as the conviction order was entered. According to Mr. Gross, he made Mr. Hash aware that the files needed to be checked each week to determine when the Order of Conviction was filed. Mr. Gross advised that the Order of Conviction was not received from the Judge's Office and that it was on August 4, 2003 or later before he and Mr. Hash knew of the Order being filed on July 2, 2003. Mr. Gross admitted to the Committee that as one of the attorney's of record in Mr. Kuelper's matter, he had the responsibility to insure that the appeal was timely filed. It was not so filed and for that he accepted responsibility.

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 B of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That Mr. Gross' conduct violated Model Rule 1.1 when he failed to be thorough enough in his representation of Mr. Kuelper to make certain that an appeal was pursued as Mr. Kuelper desired and requested and when he failed to file a Notice of Appeal on Mr. Kuelper's behalf following his conviction on two counts of rape. Model Rule 1.1 requires that a lawyer provide competent representation to a client, including the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
2. That Mr. Gross' conduct violated Model Rule 1.2(a) because despite the fact that his client, Mr. Kuelper, wished to pursue an appeal of his criminal conviction of two counts of rape from Benton County Circuit Court, he failed to file a Notice of Appeal on Mr. Kuelper's behalf or take any other steps to perfect the appeal. Model Rule 1.2(a) requires that a lawyer abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and consult with the client as to the means by which they are to be pursued.
3. That Mr. Gross' conduct violated Model Rule 1.3 when he failed to file a Notice of Appeal on behalf of Mr. Kuelper despite having been requested to do so by Mr. Kuelper following his sentencing. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.
4. That Mr. Gross' conduct violated Model Rule 1.4(a) when he failed to advise Mr. Kuelper that he was not going to file a Notice of Appeal on Mr. Kuelper's behalf; when he failed to advise Mr. Kuelper that he had not filed a Notice of Appeal within the thirty (30) days he had to do so; and, when he failed to respond to Mr. Kuelper's requests for information about whether an appeal had been pursued on his behalf. Model Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
5. That Mr. Gross' conduct violated Model Rule 3.4(c) because he failed to file a Notice of Appeal on behalf of his client, Mr. Kuelper, despite the fact that an appeal had been requested and

despite the fact that Mr. Gross had not sought to be relieved from representing Mr. Kuelper prior to the time for filing a timely Notice of Appeal and because he violated Rule 16 of the Rules of Appellate Procedure - Criminal, which states that trial counsel, whether retained or court-appointed shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. 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.

6. That Mr. Gross' conduct violated Model Rule 8.4(c) when he falsely advised Mr. Kuelper that he would be pursuing an appeal of his criminal convictions on his behalf. Model Rule 8.4(c) requires that a lawyer not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
7. That Mr. Gross' conduct violated Model Rule 8.4(d) because his failure to file a timely Notice of Appeal on behalf of his client, Mr. Kuelper, created the necessity for proceedings before Judge Keith which would not have been necessary but for his failure; because his failure to file a timely Notice of Appeal and his failure to pursue Mr. Kuelper's appeal caused an unnecessary delay in his appellate proceedings; and, because his failure to file a timely Notice of Appeal for Mr. Kuelper created the need for additional proceedings before the Arkansas Supreme Court which would not have been necessary but for his failure. 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 B, that JOHNNY E. GROSS, Arkansas Bar ID# 95156, be, and hereby is, **SUSPENDED FOR THREE (3) MONTHS** for his conduct in this matter. In determining the appropriate sanction, Panel B of the Committee specifically utilized Section 19.L. and considered Mr. Gross' prior disciplinary record. The suspension shall become effective on the date this Findings and Order is filed of

record with the Clerk of the Arkansas Supreme Court. Further, pursuant to Section 18.A of the Procedures, Mr. Gross is assessed the costs of this proceeding in the amount of \$101.41. Mr. Gross is also ordered to pay a fine, pursuant to Section 18.B of the Procedures, in the amount of \$2,000. The costs assessed and the fine ordered 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 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 B

By: \_\_\_\_\_

J. Michael Cogbill, Chair, Panel B

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