

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL A

IN RE: JAMES WARREN HYDEN

Arkansas Bar ID #72061

CPC Docket No. 2003-097

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information obtained by the Committee from the Arkansas Supreme Court Opinion and file in No. 02-1172, on June 12, 2003. The information related to the representation of Highcouch, Inc. and Donnieron, LLC by Respondent in 1998. On August 13, 2003, Respondent was served with a formal complaint and he filed a timely response.

Mr. Hyden was licensed to practice law in 1972, and had a graduate law degree in tax law. He was recognized as a tax law specialist by the Arkansas Supreme Court. His firm handles business transactions, orchestrating the buying and selling of businesses. He stated that even experienced business folks need his expertise. He stated he had performed over 500 closings of business transactions. In 1998 a relatively new associate attorney and Mr. Hyden from the law firm represented the clients, referred to as High and Couch, and were hired to oversee the sale of their business, for which offers of \$5,500,000 were received from each of two parties who shall be called Sitton and Hahn. In 1998, the associate had been actually practicing law two years and had joined Hyden's firm in August 1997, after becoming licensed in Arkansas. At the time of this transaction in September 1998, Mr. Hyden stated the associate had done only five or six closings and had never closed a deal where the owner financed the sale. Mr. Hyden had done legal work for the two principals in this transaction from the early 1990s on through this deal. He had known Mr. High since grade school days. He had done the estate planning for both High and Couch, knew them very well, and was aware the funds from this transaction were basically their retirement money.

In contemporaneous negotiations with the prospective purchasers, Hyden counseled his clients and wrote Hahn emphasizing the importance of a personal guaranty of the deal by the buyer as a condition of the transaction, noting his clients were entrusting their life savings to the deal. The principals for Hahn apparently agreed to give personal guaranties as part of the deal. Hyden did not insist on a personal guaranty from Sitton, expressing to his client the view that in light of Sitton's wealth, his unwillingness to make a personal guaranty was understandable. Hyden knew Sitton was going to use two new "shell" corporations with no assets in them as his vehicles for purchasing his clients' assets. Sitton was proposing to give Hyden's clients no security in the transaction other than the assets they were selling him, after Sitton first heavily mortgaged the assets to complete the sale. Presented with two *bona fide* offers of \$5,500,000 each for the assets, Hyden's clients chose to accept the Sitton offer, based at least in part upon Hyden's advice that the lack of a personal guaranty from Sitton, in fact Sitton's refusal to sign such a guaranty, was understandable. Sitton and Hyden agreed that Sitton would borrow against the assets of the business he was buying from Hyden's clients and use the proceeds to pay his clients the \$1,500,000 due at closing. Sitton then gave Hyden's clients two notes, totaling \$1,900,000, and filed a second mortgage against the assets being purchased to secure the notes. Hyden did not personally attend this closing, sending the associate in his place, as Hyden felt the associate had adequate experience to handle it. At closing, Sitton did not provide financing statements to allow Hyden's clients to perfect their financial interests, stating as the reason that their lawyers had not finished the paperwork. No financing statements were furnished. Sitton defaulted on the notes. Hyden's clients had to file suit against Sitton to enforce the notes, and they eventually decided to settle that litigation for \$1,400,000. The clients eventually recovered a total of \$4,085,000 from the buyers. Hyden's clients filed an attorney malpractice action against him stemming from this transaction.

At trial in March 2002, Hyden's now former clients testified they would not have sold their business to Sitton but for the assurances and representations Hyden made to them. The Supreme Court opinion and the record explained that Hyden conceded that he was negligent in representing his clients in this transaction but it was argued on his behalf after trial that they suffered no damages or, at most, \$15,000 in damages. A jury awarded Hyden's former clients a judgment for \$850,000 against him, the associate, and Hyden's law firm in a

general verdict, after being instructed on both negligence and breach of contract. This judgment was affirmed by the Arkansas Supreme Court on June 12, 2003.

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:

A. Mr. Hyden's conduct violated Model Rule 5.1(c)(2) in that , as a senior firm partner, lead counsel in the matter, and having direct supervisory authority over the associate who was assisting him in the client matter, Hyden was responsible for the associate's conduct in failing to obtain financing statements from the buyer at the closing, which left his clients substantially unprotected and unsecured in the transaction, a situation Hyden could have reasonably prevented by attending the closing, continuing the closing to a later date, or being more diligent about the work done for the client. Model Rule 5.1(c)(2) provides that a lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that **James Warren Hyden**, Arkansas Bar ID# 72061, be, and hereby is, **cautioned** for his conduct in this matter and assessed \$50.00 costs.

The costs 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 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 D. Hodges, Chair, Panel A

Date: _____