

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

IN RE: **JOHN SKYLAR “SKY” TAPP**
Arkansas Bar ID #76123
CPC Docket No. 2012-045

HEARING FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee by Nita Barga of Hot Springs on April 3, 2012. The information related to the representation of Ms. Barga in 2006 by Respondent John Skylar “Sky” Tapp, an attorney practicing primarily in Hot Springs, Garland County, Arkansas. On August 9, 2012, Respondent was served with a formal complaint, supported by an affidavit from Barga, to which Respondent filed an Answer. Rebuttal was filed. The case proceeded to ballot vote. The Panel B decision was communicated to Tapp, who requested a public hearing.

1. The hearing was conducted before Panel A on July 19, 2013, in Little Rock. The hearing panel consisted of Panel A members Danyelle Walker (Chair), Jerry Pinson, Steven Shults, Michael Boyd, Helen Herr, Panel B member Mark Limbird, and Panel D member Laura Partlow. Limbird and Partlow served in place of Panel A members Benton Smith and Elaine Dumas who were unavailable for the hearing. Stark Ligon represented the Office of Professional Conduct. Jeff Rosenzweig represented Sky Tapp.

2. The facts, as plead, in summary are that in 2002, Keanna Schmidt was born to Nita Barga in Kansas. Jason Schmidt is the father. Barga and Schmidt later lived together in Garland County until they separated in January 2006. Later that month, represented by attorney Tracy Turner, Barga filed suit as Garland Circuit 26DR-2006-101, seeking a

determination of paternity declaring Schmidt, to whom she has never been married, to be father of Keanna, and seeking support and other relief. Schmidt answered, by attorney Lance Garner, admitting paternity and seeking custody of Keanna.

3. On April 6, 2006, Bargaen, stating she was seeking more aggressive representation, consulted with Hot Springs attorney Sky Tapp, and revealed much of her confidential information related to Jason Schmidt to him, especially personal financial matters. Bargaen retained Tapp in the Schmidt case with a \$1,800 retainer fee payment. Shortly thereafter, Bargaen changed her mind, notified Tapp she would not be using him as her lawyer in the Schmidt case, asked for and on May 26, 2006, received a statement, a check from Tapp for a \$1,432.25 fee refund, and obtained her file.

4. Continuing with Turner as her lawyer, on March 13, 2007, an Agreed Order was entered establishing Schmidt's paternity of Keanna and setting a hearing for August 30, 2007, on all other issues. A hearing on October 29, 2007, resulted in the court requesting additional financial information from Schmidt and his businesses, to be filed by May 15, 2008. On June 17, 2008, an Agreed Order was entered fixing child support and finding there was no current arrearage.

5. On April 27, 2009, Schmidt substituted John Howard as his counsel, replacing Lance Garner. Bargaen then filed for contempt against Schmidt, alleging unpaid child support. That issue was dealt with in an Agreed Order filed September 10, 2010, finding Schmidt owed Bargaen \$2,476. In December 2010, through Howard, Schmidt filed an *ex parte* emergency petition seeking custody of Keanna. An Agreed Order was entered December 30, 2010, with Joe Churchwell now representing Bargaen, continuing the hearing set for that date, and asking for appointment of an attorney ad litem. Schmidt was again ordered to provide his

financial information by January 30, 2011.

6. On August 9, 2011, Churchwell filed a Motion for Body Attachment, alleging Schmidt had failed to deliver his 2010 tax returns and financial information, pursuant to an Order filed July 11, 2011. Howard was permitted to withdraw as Schmidt's counsel on March 9, 2012, and was replaced by Sky Tapp as Schmidt's new lawyer.

7. On March 20, 2012, Tapp filed a Motion for New Hearing and for other relief for Schmidt. On March 30, 2012, Churchwell filed a Motion to Disqualify Tapp as Schmidt's attorney in the Barga case, claiming Tapp had a conflict, under AR Rules of Professional Conduct 1.7 and 1.9, based his representation of Barga in 2006 in the same matter. Tapp disputed the motion to disqualify. Churchwell then obtained from Barga her copy of Tapp's office file on his contact with and employment by Barga in April-May 2006.

8. After a hearing on April 30, 2012, the trial court, Judge Marcia Hearnberger, granted the motion, stating there was a clear conflict as to Tapp, and entered its Order on May 17, 2012, disqualifying Tapp and any of his practice partners or associates from representing Schmidt in the Barga case.

9. In his Answer to the Committee Complaint, Tapp stated (1) he never signed or authorized the May 26, 2006, billing given to Barga; (2) the handwritten notes in the "Barga" file were not his handwriting; (3) he did not have any discussions in April-May 2006 with Barga about Jason Schmidt, paternity, or child support issues; (4) the issues he actually discussed with her and counseled her about had nothing to do with Jason Schmidt; and (5) his office file did not contain many of the "Barga" documents that appeared later, because, he claims, his long-time employee, Shirley Scott, took the Barga file with her when she left him and went to work for Churchwell, Barga's attorney who filed the 2012 motion

that led to Tapp's disqualification. Tapp also alleged that Churchwell and Tapp had a very acrimonious split-up in late 2007, after Churchwell had briefly worked in Tapp's law offices, and Churchwell had been making various ethical violation allegations against Tapp since their split. Bergen and Churchwell submitted rebuttals that disputed parts of Tapp's Answer.

10. At the Committee hearing the combined pleadings were admitted as Hearing Exhibit 1. Additional exhibits were received. Testimony was received from Sky Tapp, Nita Bergen, Shirley Scott, and Joe Churchwell.

11. Among other matters, Tapp testified that on April 6, 2006, when Bergen and he conferred, she presented to him information only about her personal relationship with another person, not Jason Schmidt, and claimed that Bergen and Tapp never discussed her pending legal matters, paternity and support, related to Schmidt. Tapp maintained he never received any confidential information from Bergen that would serve as a basis for his disqualification six years later in representing Schmidt in the same case against Bergen. Among other documents he disputed, Tapp denied a sheet of handwritten billing charges to Bergen in May 2006 was in his handwriting or that he had ever seen or authorized the May 26, 2006, billing statement to Bergen prepared in his office. Tapp offered that the disputed documents were created by others who were in his office. Tapp also questioned the motives of Churchwell, claiming he and two other young attorneys Tapp had brought into his office in September 2007, had abruptly left without notice to Tapp in November 2007. Tapp also stated Churchwell had a history of filing ethics complaints against Tapp.

12. Among other matters, Bergen testified that on April 6, 2006, she gave Tapp confidential information about financial dealings between and among her, Jason Schmidt, and members of Schmidt's family which were crucial, in her opinion, to her effort to try to obtain

appropriate child support from Schmidt. Barga testified that she decided not to continue with Tapp as her lawyer in May 2006 because of his belittling conduct toward her and because she could not afford his \$425 per hour fee rate.

13. Barga testified she went back to Tapp in Sept-Oct 2007 because she had heard he then had several additional lawyers in his firm and she might find aggressive representation from one of them. She testified the visit was also driven by the August 2007 purchase by Jason Schmidt of a well-known bar in Hot Springs, Smyley's Crab Shack, and his sudden apparent affluence while she was still having to pursue him in court for payment of modest child support. She stated Tapp introduced her to two young lawyers at his firm, including Churchwell, and briefed them on her matter. She was unable to afford their quoted \$250 per hour rate and declined to employ any of the Tapp attorneys. Tapp disputed that he had any such contact with Barga in 2007.

14. Among other matters, Scott testified that (1) she had worked for several Hot Springs lawyers over a period of more than thirty years; (2) she had worked for Tapp for six years without incident until she left voluntarily in late 2006, as a result of what she considered to be an untenable situation after Tapp brought his new wife in as office manager; (3) the billing and time notes on Barga were in Tapp's handwriting; (4) Tapp gave her the handwritten billing notes; (5) she prepared the May 26, 2006, billing statement to Barga; and (6) every entry on the refund check from Tapp to Barga was in Tapp's handwriting.

15. Among other matters, Churchwell testified as to his version of the practice arrangement he and two other young lawyers entered into with Tapp in August 2007, the problems that arose, and the circumstances of the collective departure of the three younger lawyers after less than two months in practice with Tapp.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, and other matters before it, and the Arkansas Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. The conduct of John Skylar Tapp violated Rule 1.7(a) in that In early 2006 Nita Bargaen consulted with Tapp, conveyed confidential information to him about her legal matter with Jason Schmidt, and retained Tapp with an \$1,800 retainer fee payment to represent her in a pending paternity case with Schmidt, Garland Circuit No. 26DR-2006-101. She discharged Tapp within weeks. In early 2012, Tapp appeared as counsel for Schmidt in the same case, contesting the same issues Bargaen had discussed with Tapp in 2006 when Bargaen employed him to represent her. The trial court disqualified Tapp from representing Schmidt, finding a clear conflict in Tapp doing so. Tapp's responsibility to Schmidt would have been materially limited by Tapp's responsibility to a former client, Bargaen, in the very same matter. 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 clients; 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. The vote was 6-1, with Herr, Limbird, Partlow, Shults, Pinson, and Walker voting this charge was proven, and Boyd voting no.

B. The conduct of John Skylar Tapp violated Rule 1.9(a) in that Tapp was employed by Nita Bargaen in April 2006, and paid a retainer fee of \$1,800 by her, to represent Bargaen in her dispute in ongoing litigation with Schmidt over financial issues arising from a paternity case in which they were the parents of a minor. In 2012, Tapp appeared as counsel for Schmidt,

and against Bargaen, in the same case, where the same issues were in dispute. Bargaen did not give her consent to Tapp's representation of Schmidt. In fact, her counsel filed a motion to disqualify Tapp, which the trial court granted. Arkansas Rule 1.9(a) requires that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. The vote was unanimous that this charge was proven.

C. The conduct of John Skylar Tapp violated Rule 8.4(a) in that Tapp violated Arkansas Rules 1.7(a) and 1.9(c), regarding "conflicts" when he represented Jason Schmidt in early 2012 in a case against Nita Bargaen, after Tapp had been briefly employed and paid a fee in early 2006 by Bargaen to represent her against Schmidt in the very same case. Arkansas Rule 8.4(a) provides that I
t 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. The vote was unanimous that this charge was proven.

D. The conduct of John Skylar Tapp violated Rule 8.4(c) in that he engaged in conduct that involved deceit or misrepresentation when he undertook to represent Jason Schmidt in Garland Circuit No. 26DR-2006-101 in early 2012, knowing Tapp had been employed, even if briefly, and paid a fee by opposing party Nita Bargaen to represent her in the same case against Schmidt in early 2006. The vote was 5-2, with Herr, Limbird, Partlow, Pinson, and Walker voting this charge was proven, and Shults and Boyd voting no. Arkansas Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

E. A charge that Mr. Tapp violated Rule 8.4(c) in the matter of charging Barga for time and services that were not actually provided was found not proven and dismissed by a vote of 6-1, with Shults, Boyd, Limbird, Partlow, Pinson, and Walker voting this charge was not proven, and Herr voting the charge proven.

F. The conduct of John Skylar Tapp violated Rule 8.4(d) in that Tapp's disregard of the clear conflict he had in representing Jason Schmidt against Nita Barga in early 2012 in Garland Circuit No. 26DR-2006-101, in spite of Tapp having been briefly employed by Barga to represent her in the same case in early 2006, caused the trial court to have to expend time and resources to hear and rule on Barga's motion to disqualify Tapp, a motion that was granted. This conduct by Tapp was prejudicial to the administration of justice. Arkansas Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. The vote was 6-1, with Boyd, Herr, Limbird, Partlow, Pinson, and Walker voting this charge was proven, and Shults voting no.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, unanimously voted that the Arkansas law license of **JOHN SKYLAR "SKY" TAPP**, Arkansas Bar ID# 76123, be, and hereby is, **SUSPENDED for NINETY (90) DAYS** for his conduct in this matter, he is ordered to pay a **\$10,000.00 FINE**, and assessed \$383.50 case costs and expenses plus the \$370.00 cost of the court reporter at the hearing. In assessing these sanctions, Respondent's prior disciplinary record was a factor considered by the panel. The \$10,753.50 in fine (\$10,000.00) and costs (\$753.50) 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.

After announcement of the sanction, Tapp moved for a stay of the sanction pending his appeal to the Arkansas Supreme Court. By a unanimous vote, the Panel granted his motion for stay pending appeal, conditioned upon his timely notice of appeal being filed after entry of this hearing order.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT - PANEL A

By: /s/ Danyelle Walker, Chair, Panel A

Date: August 13, 2013

Original filed with the Arkansas Supreme Court on
August 16, 2013.

Suspension Stayed pending Appeal

Order prepared by Stark Ligon, ABN 75077.