

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

**IN RE: KATHY A. CRUZ
ARKANSAS BAR No. 87079
CPC DOCKET No. 2015-091**

FINDINGS AND ORDER

Kathy A. Cruz is an attorney from Hot Springs, Arkansas, licensed in 1987 to practice law in the State of Arkansas, and assigned Arkansas Bar Number 87079. The basis for the formal complaint arose from the representation of Jonathan Young in a bankruptcy matter in the United States Bankruptcy Court for the Western District of Arkansas and a referral from the Honorable Richard D. Taylor, United States Bankruptcy Court Judge for the Eastern and Western Districts of Arkansas.

Jonathan Young (“Young” herein) was a party to a divorce action, *Jonathan Young v. Kristalynn Young*, Garland County Circuit Court Case No. DR-2006-1150-IV. Kristalynn Young now goes by the name of Kristalynn Stephens (“Stephens” herein.) On November 1, 2007, the Garland County Circuit Court issued a Decree of Divorce. In the decree, Young was ordered to pay child support, restitution, alimony, and attorney’s fees and costs. On January 24, 2008, Attorney Michael Sanders filed a Chapter 7 Bankruptcy Petition for Young.

On May 6, 2008, Stephens filed a Motion for Relief from Stay in Young’s bankruptcy case on the restitution, alimony, and attorney’s fees ordered by the Garland County Circuit Court. Stephens sought relief from the stay in order to pursue her state court remedies stating that “The stay provision of 11 U.S.C. §362 of the Bankruptcy Code should be relaxed with regard to this Creditor with a valid claim or interest in and to the subject property and she should be released to pursue her usual [sic] lawful remedies against the Debtor.” Kathy Cruz (“Cruz”

herein) entered her appearance in the bankruptcy matter on behalf of Young on May 21, 2008. The next day, Ms. Cruz filed a Response to the Motion for Relief from Stay on behalf of Young, stating “11 USC 362(k) does not require the creditor to obtain relief from stay to file appropriate pleadings with the Arkansas Court of Appeals and to grant relief from stay to allow the creditor [Stephens] carte blanche court remedies is overly broad.” A hearing on the motion was set for June 18, 2008. Between the filing of the motion and the hearing date, Young filed a motion to convert his bankruptcy case from a Chapter 7 case to a Chapter 13 case.

At the June 18 hearing, Cruz advised the court that she agreed to a lifting of the stay and that Stephens’ attorney could draft a very specific type order allowing Stephens to pursue an appeal. The bankruptcy court stated that the parties were both in agreement as to limiting the lifting of the stay solely for the appeal and not a carte blanche type approach for all state remedies. The judge indicated that he would sign an order if both counsel signed off on it. The two counsel presented an order to the court which was signed by the judge and filed on June 25, 2008. The order was more consistent with the original Motion for Stay filed by Stephens. The order stated as follows:

“The parties announced that pending matters had been settled. Accordingly, it is hereby Ordered that the Motion for Relief from Stay is granted for the purpose of allowing the parties to file pleadings with Arkansas Court of Appeals or to seek state court remedies that are not inconsistent with any ruling issued by the Arkansas Court of Appeals in the underlying Circuit Court proceeding. This Order shall continue in effect should the Debtor convert his case to a Chapter 13 bankruptcy.”

Stephens then pursued her appeal to the Arkansas Court of Appeals.

Young’s bankruptcy case was converted from Chapter 7 to Chapter 13 on July 1, 2008. Young filed an initial Chapter 13 plan on July 17, 2008, which did not reference the restitution,

alimony, and attorney's fees ordered by the Garland County Circuit Court. Stephens and the Trustee both objected to the plan. Stephens objected as the plan did not address the issue of alimony, attorney's fees and costs, and restitution owed and that Young had not made alimony payments on an ongoing basis. The Trustee objected as Young had not provided proof all amounts ordered by Garland County Circuit Court had been paid by him.

The Arkansas Court of Appeals affirmed the trial court's decision on September 3, 2008. On October 6, 2008, Stephens sent Young a demand letter requesting assurance that she would receive payment on the alimony, attorney's fees, and restitution or she would file contempt charges against him.

On October 8, 2008, Cruz filed a Modification of Chapter 13 Plan. The plan addressed alimony, attorney's fees, and restitution as debts to be paid in full during the life of the plan through pro rata monthly payments. In the modification, Cruz characterized the alimony in the amount of \$9300 as "past due alimony" to be paid in full during the life of the plan and stated that Young would continue to pay his current monthly alimony of \$1,100 to Stephens direct. All but \$500 of the \$9300 alimony balance accrued post-petition. Cruz also amended Young's Schedules E, I, and J to include his monthly alimony expense of \$1100 as a §507(a)(1) unsecured priority claim. Young did not make alimony payments directly to Stephens at that point in time.

On October 22, 2008, Stephens withdrew her objection to confirmation in court and the court entered an order to withdraw the objection. On October 31, 2008, Stephens filed another Objection to Confirmation as Young's plan failed to address the issue of past due alimony. The Trustee also filed an Objection to Confirmation on December 1, 2008.

On November 12, 2008, Stephens filed in Garland County Circuit Court a Petition for

Order to Show Cause, for Renewed Alimony, for Contempt, Attorney's Fees and other Relief. A hearing was scheduled for December 11, 2008, on the matter. At the hearing, Stephens and her counsel appeared. Young appeared *pro se*. Following the hearing, the Garland County Circuit Court found Young to be in willful contempt of the court's previous orders concerning alimony and support but reserved the issue of restitution subject to the proposed plan pending before the bankruptcy court. The court stated that in the event Young failed to secure a stay from the bankruptcy court by March 1, 2009, he was to post a bond for past due alimony and attorney's fee or surrender to the Garland County Sheriff's Department. Young did not post a bond or surrender to the Garland County Sheriff's Department by March 1, 2009. A hearing was set for March 9, 2009.

Young appeared in Garland County Circuit Court at the March 9, 2009, hearing and again represented himself. Young made two arguments to the court: (1) that he was making all of his payments to the trustee and those funds were available to pay Stephens once she filed a proof of claim and (2) that, based on his conversations with Ms. Cruz, the June 25, 2008, stay of the bankruptcy court was still in effect and he should not have to go back to the bankruptcy court to confirm its continued existence. Following the hearing, the court announced its decision finding Young to again be in contempt and he was taken into custody to serve a thirty day sentence. In its order of March 27, 2009, the court stated that Young had not taken steps to purge himself of the previous contempt order and had not made any payments on attorney's fees or past due alimony despite representations by Young that such payments are current and being made through bankruptcy court. Young appealed the March 27, 2009, contempt order to the Arkansas Court of Appeals. Ms. Cruz represented Young on the appeal.

On March 17, 2010, the Arkansas Court of Appeals dismissed Young's appeal as moot.

In its opinion the Court of Appeals stated:

“In deciding that this case is moot, we note that [Stephens's] circuit court attorney introduced into evidence an order of the bankruptcy court that stated unequivocally that the automatic stay was lifted. It stated in pertinent part:

The Motion for Relief from Stay is granted for the purpose of allowing the parties to file pleadings with the Arkansas Court of Appeals or to seek state court remedies that are not inconsistent with any ruling issued by the Arkansas Court of Appeals in the underlying Circuit Court proceeding. This Order shall continue in effect should the Debtor convert his case to a Chapter 13 Bankruptcy.

We note that [the debtor's] appellate attorney, who is also his bankruptcy attorney, placed in the record certain bankruptcy-court documents as well as a transcript from the hearing wherein the relief-from-stay motion was presented. These documents were not presented to the circuit court, therefore, placing them in the abstract and addendum violates Arkansas Supreme Court Rule 4-2. While it may be true that these documents seem to cast doubt about whether the order lifting the stay accurately reflects the intention of the bankruptcy judge, we will not consider them in this appeal.”

On December 30, 2010, Cruz filed a Complaint on Young's behalf in bankruptcy court alleging willful violation of the automatic stay by Stephens when Stephens sought to collect pre-petition attorney's fees, restitution, and post-petition alimony which resulted in Young's incarceration in the Garland County Circuit Court case. Cruz also requested an injunction directing Stephens to cease collection efforts based on the June 2008 Stay Order. An Amended

Complaint was filed on January 5, 2011, wherein Cruz asserted that Stephens had not been paid because she continued to object to proposed plans and failed to file a proof of claim herself.

On March 22, 2011, Cruz filed a third modified plan and certified that Young was current in all domestic obligations due after the filings of the Chapter 13 Plan. The certification settled the Trustee's objections to the plan and the court then confirmed the plan.

A trial on the Complaint and Amended Complaint was held on April 22, 2013. On June 10, 2013, Judge Taylor issued a Memorandum Opinion wherein he found that Stephens willfully violated the automatic stay provided under the bankruptcy code. Young was awarded \$250 in nominal damages and \$500 in attorney's fees and costs. However, Judge Taylor also issued an Order to Appear and Show Cause on June 10, 2013, directing Cruz to appear and show cause as to why she should not be sanctioned as she may have signed and presented pleadings for improper purposes; asserted claims and other legal contentions not warranted by existing law or the appropriate extension, modification, or reversal of existing law; and may have alleged factual allegations in pleadings that did not have evidentiary support, were not likely to have evidentiary support and were made without reasonable inquiry. Cruz was directed to appear on July 24, 2013, in the United States Bankruptcy Court in Hot Springs. Cruz, along with her counsel, appeared before the court and trial was held. Judge Taylor issued an Order Imposing Sanctions on September 11, 2013. The court found that Cruz violated Rule 9011 and sanctions were appropriate based upon the findings and conclusions set forth in the Memorandum Opinion, the record in the case, and the record in the adversary proceeding. Further, the Court found that Cruz made misrepresentations to the court during her testimony at the July 24, 2013, hearing, and that sanctions were appropriate pursuant to 11 U.S.C. §105. As a result, Cruz was suspended from

practicing law in the United States Bankruptcy Courts for the Eastern and Western Districts of Arkansas for a period of six months commencing September 23, 2013, and ending March 23, 2014, reprimanded and fined \$1,000 payable on or before September 27, 2013, to Jean Rolfs, Clerk of the United States Bankruptcy Court. Prior to March 23, 2014, Cruz was required to provide the court with proof that she has attended twelve hours of continuing legal education in the area of Chapter 13 Bankruptcy. Cruz immediately filed a notice of appeal and requested a stay of sanctions pending appeal which was granted. During the pendency of Cruz's appeal, the court granted Young a discharge from bankruptcy following completion of the Chapter 13 plan.

On March 12, 2014, the United States Bankruptcy Appellate Panel for the Eighth Circuit issued a decision on Cruz's appeal. The court affirmed the findings that Cruz violated Federal Rule of Bankruptcy Procedure 9011 and the trial court's decision to suspend Cruz from bankruptcy court. The appellate panel reversed the court's sanctions on Cruz based on her testimony at the hearing on the Order to Show Cause and remanded the matter to the trial court. Cruz appealed the decision of the Bankruptcy Appellate Panel to the United States Court of Appeals for the Eighth Circuit. The Bankruptcy Appellate Panel granted a request to stay its mandate pending appeal. On June 17, 2015, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the Bankruptcy Appellate Panel.

Cruz stated in her response that she did not intentionally or unintentionally violate any Rules of Professional Conduct. Cruz stated that there was no issue as to client money, excessive fees, or failure to act. Cruz asserted that the bankruptcy court, while faulting part of her representation in the bankruptcy court, did grant her client a Chapter 13 discharge of all the debts, including the contested domestic support obligations and ruled in her client's favor in the

adversary proceeding wherein his ex-wife was found to be in violation of the bankruptcy code, which is the proceeding that gave rise to a review of the bankruptcy case on which the allegations in the disciplinary complaint are based. Cruz stated that she believes that she had a good faith basis under existing state and bankruptcy law for her actions in the Young case. Cruz stated that Judge Taylor seemed to believe that she knew her client had not been paying his post-petition alimony, that the amount of \$9,300 was previously reported as post-petition alimony, and that she did not disclose that when an agreed \$21,400 consent order was proposed. Cruz stated that she never denied that Young was in arrears in his post-petition domestic support obligations. Cruz stated that she requested continuances and refused to certify that her client was current on the domestic support obligations until she received proof that he was current. Cruz referred to the record which she stated was full of litigation concerning her client's lack of payment of domestic support obligations. Cruz pointed to her client's two appeals to the Arkansas appellate courts and his two incarcerations at the Garland County Jail for his failure to pay his domestic support obligations. Cruz stated there were volumes of pleadings filed in both circuit court and bankruptcy court which were available to everyone.

Cruz stated that the bankruptcy court focused on words she used in a 2008 modification plan, "the debtor will continue to pay his DSO directly" to find that she used those words in a way that was deceptive. Cruz took the position that the words were used in response to an objection that the ongoing alimony be paid in the bankruptcy plan. Cruz stated that the words were used to further explain that Young would not pay his ongoing post-petition domestic support obligations through the bankruptcy plan but when in the future he paid any ongoing domestic support obligations, those payments would be made directly to Stephens as he had been

doing with the child support and other domestic support obligations that had been paid directly to her. Cruz stated that the court alleged her use of the word “continue” was her being deceptive thereby misleading the court to believe that Young had been paying his ongoing and past due post-petition alimony when, in fact, she knew that Young had not been paying his alimony. Cruz stated that not only did she know her client had not been paying his ongoing alimony, the court, the trustee, the circuit court, the Garland County Jail, and the opposing party all knew that Young had not been paying his domestic support obligations.

Upon consideration of the formal complaint and attached exhibits, the response, and the Arkansas Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. Kathy A. Cruz violated Rule 1.1 of the Arkansas Rules of Professional Conduct when she filed documents with the bankruptcy court characterizing alimony which accrued after the filing of a bankruptcy case as a past-due pre-petition obligation rather than past-due post-petition obligation in order to avoid a dismissal of the bankruptcy proceeding. Rule 1.1 requires that a lawyer provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. Kathy A. Cruz violated Rule 3.1 of the Arkansas Rules of Professional Conduct when she had no basis in law or fact for characterizing the post-petition alimony as pre-petition, asserting Young would continue to make alimony payments, and certifying Young was current on his post-petition domestic support obligations. Rule 3.1 states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension,

modification or reversal of existing law.

3. Kathy A. Cruz violated Rule 3.3(a)(1) of the Arkansas Rules of Professional Conduct when she filed a modification of a Chapter 13 bankruptcy plan on October 8, 2008, which falsely characterized the post-petition accrued alimony as pre-petition alimony and which falsely stated that Young would continue to pay his current monthly alimony of \$1,100 to Stephens directly even though Young had not been and did not continue to making his post-petition alimony payments. Further, Cruz filed a modification of a Chapter 13 plan in March 2011 which falsely certified that Young was current on all domestic support obligations that were due after the filing date of his Chapter 13 plan even though Young had not paid post-petition alimony to Stephens directly or through the bankruptcy plan. Finally, Cruz filed an adversary proceeding complaint on January 5, 2011, and falsely alleged that Stephens had not been paid because she had failed to file a Proof of Claim and had continued to object to object to confirmation even though Stephens had no need to file a Proof of Claim and was not permitted by the bankruptcy code to file a proof of claim for ongoing post-petition alimony. Rule 3.3(a)(1) requires that a lawyer not knowingly make a false statement of fact or law to a tribunal.

4. Kathy A. Cruz violated Rule 3.3(a)(3) of the Arkansas Rules of Professional Conduct when, in March 2011, for the purpose of getting the plan confirmed Cruz filed a modification of a Chapter 13 plan which falsely certified that Young was current on all domestic support obligations that were due after the filing date of his Chapter 13 plan knowing that Young had not paid post-petition alimony to Stephens directly or through the plan. Rule 3.3(a)(3) states that a lawyer shall not knowingly offer evidence that the lawyer knows to be false.

5. Kathy A. Cruz violated Rule 8.4(c) of Arkansas Rules of Professional Conduct when

she filed a modification of a Chapter 13 plan on October 8, 2008, which characterized post-petition accrued alimony as pre-petition alimony which was a misrepresentation; when in the October 8, 2008, modification she stated that Young would continue to pay his current monthly alimony of \$1,100.00 to Stephens direct even though Young had not been and did not continue making his post-petition alimony payments which misrepresented the status of Young's alimony payments; when in March 2011, she filed a modification of a Chapter 13 plan which certified that Young was current on all domestic support obligations that were due after the filing date of his Chapter 13 plan which was untrue, as Young had not paid post-petition alimony to Stephens directly or through the plan; and her misrepresentations to the court resulted in an impermissible benefit for Young when the bankruptcy court confirmed Young's plan. Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that KATHY A. CRUZ, Arkansas Bar No. 87079, be, and hereby is, **REPRIMANDED** for her conduct in this matter. In determining the appropriate sanction, the Panel took into consideration Cruz's lack of any prior disciplinary record.

It is so ordered.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT - PANEL A

By: /s/ Michael W. Boyd, Chairperson

Date: December 18, 2015

Original filed with the Arkansas Supreme Court
Clerk on January 25, 2016.