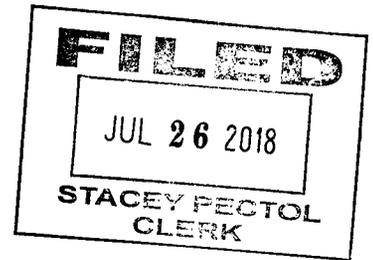


BEFORE THE ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A



IN RE: **KEN DAVID SWINDLE**, Respondent
Arkansas Bar ID # 97234
CPC Docket No. 2016-096

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee through an opinion of the Arkansas Court of Appeals issued March 12, 2014, in No. CV-13-753, Ken Swindle v. Southern Farm Bureau Casualty Insurance Co. The information related to pro se litigation by Respondent Ken Swindle, an attorney practicing primarily in Rogers, Arkansas. On June 22, 2016, Respondent was served by certified mail with a formal Complaint. After a ballot vote by Panel B, Respondent requested a public hearing.

The hearing was conducted July 18, 2018 in Little Rock before Panel A. Stark Ligon represented the Office of Professional Conduct. James E. Keever of Texarkana represented Mr. Swindle. The hearing Panel consisted of Hearing Chair Danyelle Walker and members Michael Boyd, Mark Martin, Lisa Ballard, Tanya Owen, and substitute members Carlton Saffa and Marshall Ney. The case was tried to a verdict by the Panel. Testimony was received from Sidney Davis, Jr., Joseph Paul Smith, and Ken Swindle.

The factual findings are:

1. Swindle represented clients Dornan and Perez on injury claims with a date of loss of July 1, 2011, against an insured of Southern Farm Bureau Casualty Insurance Company ("SFB"). Both claims were settled, SFB settlement checks on First Security Bank (FSB) were

issued, and releases executed in August 2012.

2. SFB delivered its checks dated August 22, 2012, to Swindle for \$13,500 payable to Dorman, Swindle, and Unruh Chiropractic Clinic, a health provider, and for \$11,000 payable to Perez, Swindle, and Unruh Chiropractic Clinic.

3. Swindle deposited both settlement checks twice in his IOLTA account at Arvest Bank, and twice in September each check was returned due to either improper or illegible endorsements according to the April 17, 2013, affidavit of long-time FSB officer Brenda Reynolds in the civil case. Swindle disputes this through the statement of then FSB employee Jason Lyles, as related by the 2013 affidavits of Davia Swindle and Mayra Palacios in the civil case.

4. On or about September 18, 2012, without knowledge of the second rejection of the SFB checks, Swindle had prepared and issued his firm's IOLTA trust account's settlement disbursement checks totaling about \$13,433 to the clients and a third party provider Unruh Chiro & Wellness, as well as his fee, all of which appear to have been negotiated in September 2012. The \$24,500 in Southern Farm Bureau settlement funds for the Dorman and Perez matters was not in Swindle's Arvest IOLTA trust account at the time these checks were issued and cleared his bank.

5. On September 28, 2012, a Friday, referencing Palacios' telephone communication with Blackburn the previous day, Swindle made demand on SFB's adjuster Blackburn by faxed letter for full payment of \$24,500 for both settlement checks by 5:00 p.m. that same day or he would file suit for breach of contract and seek attorney's fees.

6. The April 2013 affidavit of adjuster Blackburn in the civil case states that in a

telephone conversation on September 28, 2012, with Ms. Palacios he offered to issue replacement checks to Swindle. Swindle disputes this offer to reissue the checks was made on September 28, citing the April 26, 2013, affidavit of Bradley Mullins in the civil case that the check reissue offer was made to Mullins in a voice message left by Blackburn on September 12, 2012, and the reissue offer was not made in either of two telephonic contacts between Palacios and Blackburn on September 27 or 28, 2012.

7. The April 2013 affidavit of First Security Bank vice-president Brenda Reynolds gives her version of the facts of these events involving the checks in and around September 2012, concluding SFB always had adequate funds on deposit there to cover these two SFB settlement checks.

8. May 2013 affidavits submitted by Swindle Law Firm employees Davia Swindle and Mayra Palacios, used in the civil case and also with the Swindle response to the Complaint, relate that a then FSB employee in Rogers, Jason Lyles, informed them on September 28, 2012, that the endorsements on the settlement checks were good but there are no funds in this account for these checks. Swindle submitted no affidavit from Lyles, who left for extended military duty shortly thereafter.

9. On Monday, October 1, 2012, at 12:39 p.m., Swindle filed suit against SFB over the two settlement checks.

10. On October 19, 2012, SFB counsel Sidney Davis, Jr. ("Davis") mailed Swindle two replacement settlement checks by certified mail, restricted delivery.

11. Swindle or his office failed to sign for the Davis letter, and the mail item with the two replacement checks was eventually returned to Davis.

12. On October 24, 2012, Davis filed the SFB Answer, denying liability for non-payment of the original settlement checks.

13. On November 9, 2012, Davis emailed Swindle that he had sent replacement checks by certified mail and asked if Swindle had received the checks. Swindle responded that he had not received them.

14. On February 8, 2013, attorney Paul Smith, for Swindle, wrote Davis asking that SFB reissue the settlement checks and this time payable only to Swindle, as he had already paid the clients and third parties.

15. On February 18, 2013, Davis mailed Smith a second set of replacement settlement checks for Dornan and Perez, payable as requested, and asked Smith if that ended the matter.

16. On April 9, 2013, for Swindle, Smith filed a motion for judgment on the pleadings, stated Swindle had been paid, and the only issue remaining was an award of attorney's fees for Swindle, claiming he was the prevailing party in the lawsuit.

17. On April 19, 2013, Davis filed the SFB Response and Cross-Motion for Summary Judgment, with affidavits of Blackburn and Reynolds and other exhibits attached.

18. On May 3, 2013, Smith filed the Swindle response to the SFB Cross-Motion for Summary Judgment, with affidavits of Mullins and Palacios attached, stating their versions of events dealing with the original SFB checks and contacts with representatives of SFB, Arvest Bank, and First Security Bank. Some of these conversations had been recorded by Swindle's firm.

19. On June 20, 2013, the trial court filed its Order, making specific findings, granting SFB summary judgment, and ordering attorney's fees to be determined and awarded to SFB.

20. On July 11, 2013, an Order was entered granting summary judgment to SFB and awarding \$6,785.60 in attorney's fees against Swindle to SFB. Swindle's notice of appeal was filed July 31, 2013.

21. Swindle's Brief and Addendum was filed in No. CV-13-753 on October 7, 2013, sought reversal on two points - (1) entry of judgment to SFB was error, and (2) sanctions against Swindle for filing a "frivolous" lawsuit were not warranted in the case. SFB responded.

22. On March 12, 2014, the Court of Appeals issued its opinion in No. CV-13-753, affirming the trial court on both issues disputed by Swindle. The opinion recites that SFB did everything required of it regarding payment of the settlement funds.

23. The Court of Appeals opinion also states (a) that immediate payment of the settlement funds was not procured because of repeated mistakes by appellant (Swindle), and (b) that appellant (Swindle) appears to have filed suit out of anger rather than any need to do so.

24. On March 17, 2014, Swindle petitioned for rehearing, and for review by the Arkansas Supreme Court.

25. On April 9, 2014, the Court of Appeals denied rehearing.

26. On May 28, 2015, the Arkansas Supreme Court issued its opinion in No. CV-14-250, affirming in part, reversing in part, and vacating the Court of Appeals opinion.

27. All seven voting justices voted to affirm the trial court on its grant of summary judgment to SFB and to deny Swindle an award attorney's fees as the prevailing party.

28. In its opinion, the four justice majority did not address the issues raised previously

of whether Swindle filed his lawsuit against SFB because he neglected to secure necessary or legible endorsements on the settlement checks, rushed to file suit, and filed what amounted to a frivolous claim against SFB without proper and reasonable investigation.

29. A four vote majority of the Supreme Court reversed the trial court and Court of Appeals on the award of attorney's fees against Swindle, because SFB failed to file a separate motion for Rule 11 sanctions at the trial court level.

30. A three vote minority of the Supreme Court voted to affirm the award of attorney's fees against Swindle.

31. The minority noted that before she imposed Rule 11 sanctions, the trial judge found Swindle filed a frivolous lawsuit against SFB.

32. Of the total of eleven (11) judges who have ruled in this case at various stages, seven have found against Swindle on both issues, affirming the summary judgment and the award of attorney's fees to SFB. Four justices have found in favor of Swindle on the award of attorney's fees. All eleven (11) judges have found or agreed the grant of summary judgment to SFB was properly decided, affirming the trial judge's finding that Swindle filed an unnecessary and frivolous lawsuit on October 1, 2012 against SFB.

33. To defend Swindle's appeals of his frivolous lawsuit, Southern Farm Bureau was required to expend an additional \$5,752.62 in the appellate proceedings.

34. In a Per Curiam issued February 23, 2012, the Arkansas Supreme Court adopted revisions to the Arkansas Attorney Oath of Admission, (Ex. 33), which is applicable to all attorneys licensed or whose law license is renewed in Arkansas. This Oath is a rule of a tribunal under Rule of Professional Conduct 3.4(c).

35. At the hearing, Davis testified by deposition, in part, that his client SFB did everything it reasonably could to get good checks and funds to Swindle, and that he did likewise after litigation started and he got involved, even to the extent of having two sets of replacement checks issued for Swindle. He thought the litigation was resolved when he delivered the second set of replacement checks to Paul Smith on February 18, 2013.

36. At hearing, Paul Smith testified , in part, that he entered the Swindle lawsuit on December 18, 2012, communicated with Sid Davis by letter on February 8, and received Davis's letter of February 18, 2013, and the second set of replacement checks enclosed with it, at Davis's office. He testified his client Swindle thereafter made a choice to continue the litigation through the trial court and two appeals.

37. At hearing, Swindle testified he sought good funds from the settlement checks for a month before filing his lawsuit, described his efforts to obtain proper endorsements on the checks, rejection of the checks three times by banks, and his concern for his client trust account after he issued checks for \$24,500 from it when he did not have those funds on deposit in his trust account. He also believed SFB was engaging in tactics to delay actual payment of settlement funds and SFB needed to be called on as responsible for this, through his lawsuit. He claimed that once the trial court also awarded SFB attorneys fees and expenses of \$6,785.65 against him, he appealed to protect his business account.

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

A1. By a unanimous vote, the conduct of Ken D. Swindle did not violate Rule 1.15(a)(1) which alleged that if Swindle placed into his client trust account personal or office funds to pay the checks he issued from his client trust account in September 2012 to his clients Dorman and Perez and to third party provider Unruh, then Swindle improperly commingled client and non-client property in his client trust account.

Arkansas Rule 1.15(a)(1) requires that a lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

B1. By a unanimous vote, the conduct of Ken D. Swindle did not violate Rule 1.15(b)(3) which alleged that if Swindle maintained there or deposited into his client trust account funds in excess of \$500, and as much as about \$13,433 to fund payment of four settlement checks written from his client trust account in September 2012 to clients Dorman and Perez and third party provider Unruh Chiropractic, Swindle exceeded the limit of \$500 of such personal or law firm funds he was permitted to have and maintain in his client trust account.

Arkansas Rule 1.15(b)(3) requires that a lawyer may deposit funds belonging to the lawyer or the law firm in a client trust account for the sole purposes of paying bank services charges on that account, or to comply with the minimum balance required for the waiver of bank charges, but only in the amount necessary for those purposes, but not to exceed \$500.00 in any case. Such funds belonging to the lawyer or law firm shall be clearly identified as such in the account records.

C1. By a 5-2 vote, with Ney and Saffa in the minority, the conduct of Ken D. Swindle

did not violate Rule 3.1, which alleged that on October 1, 2012, Swindle filed a personal lawsuit against Southern Farm Bureau Casualty Insurance Company, arising out of the issues of the settlement checks for his clients Dornan and Perez, which was not necessary and three courts deemed to be frivolous.

Arkansas Rule 3.1 requires 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. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

D1. By a unanimous vote, that the conduct of Ken D. Swindle did not violate Rule 3.4(c) which alleged that the Arkansas Supreme Court's Arkansas Attorney Oath of Admission, revised by per curiam on February 23, 2012, at 2012 Ark. 82, and applicable to all Arkansas licensed attorneys, provides that "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but in all written and oral communications." Swindle violated this Court rule by filing an unnecessary and frivolous lawsuit against Southern Farm Bureau Casualty Insurance Company on Monday noon, October 1, 2012, after making a written demand for payment of two settlement checks on Friday, September 28, 2012, and when a proper investigation of the facts in the situation would have shown him that errors on his part regarding endorsements on the two checks were primarily responsible for the checks not being paid to that date.

Arkansas Rule 3.4(c) requires that a lawyer shall 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.

E1. By a 5-2 vote, with Ney and Saffa in the minority, the conduct of Ken D. Swindle did not violate Rule 4.4(a), which alleged that by hurriedly filing the lawsuit against Southern Farm Bureau Casualty Insurance Company at about noon on Monday, October 1, 2012, after making demand for payment on Friday, September 28, 2012, Swindle used means that had no substantial purpose other than to burden or delay a third person, Southern Farm Bureau Casualty Insurance Company. Swindle's actions regarding endorsements on the settlement checks originally provided to him by SFB were the cause for the checks to twice be returned uncollected. SFB's counsel provided replacement checks to Swindle by mail during October 2012, even though Swindle and his office failed to sign for the mail and did not actually receive the replacement checks then.

E2. By a 5-2 vote, with Ney and Saffa in the minority, the conduct of Ken D. Swindle did not violate Rule 4.4(a), which alleged that to defend Swindle's hastily filed lawsuit at the trial and appellate levels, Southern Farm Bureau was required to expend a total of \$12,538.22 for its attorneys, expenditures that would not have been necessary if Swindle had not acted in haste or even anger in filing his lawsuit.

Arkansas Rule 4.4(a) requires that, in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

F1. By a unanimous vote, that the conduct of Ken D. Swindle did not violate Rule 8.4(c) which alleged that if Swindle used funds of other clients in his Arvest client trust

account to fund payment of the checks written from his same client trust account to clients Dornan and Perez and to third party provider Unruh Chiropractic in September 2012, Swindle engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

F2. By a unanimous vote, that the conduct of Ken D. Swindle did not violate Rule 8.4(c) which alleged that if Swindle used personal or law office funds in or deposited such funds into his Arvest client trust account to fund payment of the checks written from his same client trust account to clients Dornan and Perez and to third party provided Unruh in September 2012, Swindle engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

Arkansas Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

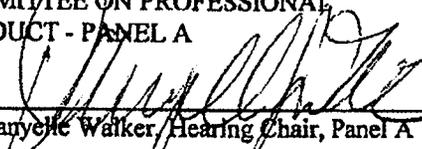
G1. By a unanimous vote, that the conduct of Ken D. Swindle violated Rule 8.4(d) in that by filing and pursuing a hasty and frivolous lawsuit against Southern Farm Bureau Casualty Insurance over the Dornan and Perez settlement checks through three courts, Swindle caused the unnecessary use of time and resources of multiple courts for no reasonable purpose, conduct by Swindle that is 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.

WHEREFORE, it is the unanimous decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that Respondent Ken David Swindle, Arkansas Bar ID# 97234, be, and hereby is, Cautioned for his conduct in this matter, and ordered to pay costs and expenses per Section 18 of the Procedures in the

amount of \$1,740.00 in this case. Under agreement of the parties reached on the morning of July 20 prior to the commencement of the hearing in CPC 2017-023 when Respondent withdrew his request for that hearing, and with the approval of Panel A, the cumulative restitution (\$7,120.00), fine (\$6,000.00), and costs (\$3,480.00) assessed in this case, No. CPC 2016-119, and No. CPC 2017-023, totaling \$16,600.00, shall be payable by cashier's checks or money orders payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct after the Findings and Order in the three cases are filed of record with the Clerk of the Arkansas Supreme Court as follows: not later than within 30 days of said filing \$4,000, within 60 days another \$4,000, within 90 days another \$4,000, and within 120 days the final \$4,600. As part of the post-hearing agreement of the parties, Respondent has waived his right to appeal the order and judgment to the Arkansas Supreme Court in this case and in No. CPC 2016-119.

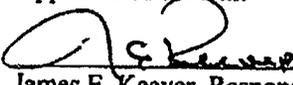
ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT - PANEL A

By: 
Daryelle Walker, Hearing Chair, Panel A

Date: 7-25-18

Order prepared by Stark Ligon, ABN 75077

Approved as to form:


James E. Keever, Respondent's counsel