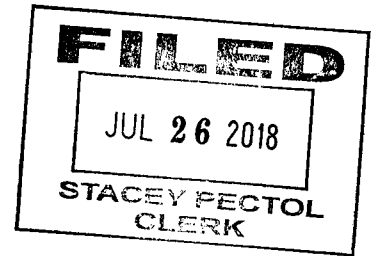


**BEFORE THE ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A**



IN RE: **KEN DAVID SWINDLE**, Respondent
Arkansas Bar ID #97234
CPC Docket No. 2016-119

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 June 19, 2013, in No. CV-12-1081, Ken Swindle v. Rogers Board of Education and Anita Turner. The information related to pro se litigation by Respondent Ken Swindle, an attorney practicing primarily in Rogers, Arkansas. On August 16, 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 19, 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 Anita Turner, David Matthews, Davia Swindle, Judge Xollie Duncan, and Ken Swindle.

The factual findings are:

1. Ken Swindle is the parent of a young son, hereafter "J.S.", who was five years old in March 2012, when the events relevant to this complaint occurred. The son was a kindergarten student at Northside Elementary School in Rogers at the time. The Swindles had another son

who was one grade ahead of J.S. and also a student at Northside. Anita Turner was the Northside Elementary school principal.

2. The facts are more fully set out in the pleadings and the opinion of the Arkansas Court of Appeals issued June 19, 2013. In Summary, J.S. used the "F-word" at school on three occasions, starting February 29, 2012. On the first occasion he was counseled at school. On the second occasion a note was sent home with J.S. Mr. Swindle signed the note and had it returned to the school. On the third occasion, on March 13, 2013, the school principal contacted the Respondent/father by telephone at 11:15 a.m. to come pick J.S. up, as he was being suspended for the remainder of the school day for another use of the "F-word." Mr. Swindle declined to do so, and informed Ms. Turner that if she suspended his son he would file a lawsuit.

3. Ms. Turner called and left a voice message on a telephone number she believed to be that of Mrs. Davia Swindle, wife of Respondent and also an employee in her husband's law firm, which was located within a three minute drive of the son's school.

4. Rather than come to school and pick up his son, or have him picked up by an authorized adult, after a brief 1:30 p.m. court appearance before Judge Duncan in Bentonville, a drive of 30-35 minutes at most from his law office, Respondent returned to his office, prepared his complaint against the Rogers Board of Education and Principal Turner in about 15 minutes, returned to Bentonville where he filed it at 2:51 p.m. that same day, and then personally took a copy to Ms. Turner at school in Rogers after the close of the school day. The son was gone from school by the time Respondent arrived with the Complaint.

5. Swindle's original complaint sought relief of his son being allowed to return to

school until a full school board hearing on the matter, that any record of the suspension be deleted from the son's record, and for a jury trial. It also states principal Turner left a voice message on March 13 for Davia Swindle, the mother of J.S. and wife of Ken, asking her to come pick up J.S. at school so he would not have to spend the afternoon in the school office.

6. Because neither parent came to school and picked up J.S., he served about 3.5 hours of in-school suspension on March 13 in Principal Turner's office doing school work until the end of the normal school day at 2:45 pm., at which time he was picked up by someone.

7. After other school administrative processes were used, on May 15, 2012, the Rogers School Board met and conducted a hearing on the J.S. suspension matter. Principal Turner, Respondent Swindle, and two witnesses for Mr. Swindle testified. David Matthews represented the school board. By a unanimous 6-0 vote, the Board affirmed the disciplinary action taken by school personnel toward J.S.

8. The Board and Turner employed attorney David Matthews and his law firm for defense of the civil lawsuit.

9. After the Rogers School Board hearing and decision on May 15, 2012, Swindle amended his complaint on May 29, 2012, adding a claim for breach of contract to the relief sought, claiming the school discipline policy constituted a contract between the school and the parents and student and that the district had violated its own policy by the action taken against J.S.

10. On May 29, 2012, Swindle filed an Amended Complaint and added a breach of contract claim. He alleged the school district discipline policy constituted a contract between the district and the parent and child student, and the Rogers School District had breached this

contract

11. On September 19, 2012, Judge Xollie Duncan conducted a hearing on motions. She ruled from the bench that there was no contractual obligation regarding the discipline, that Principal Turner acted appropriately on March 13, that the intervening cause for the son's suspension was the failure of the parents to pick up their child when offered the opportunity to do so, and gave Swindle ten days to amend his pleadings as to his remedy sought.

12. On September 19, 2012, Swindle filed a Second Amended Complaint, seeking reconsideration of the judge's decision at the hearing, an injunction, and a jury trial.

13. On October 23, 2012, Judge Duncan issued an Order generally denying Swindle relief and giving him ten days to amend his Complaint to seek an injunction.

14. On October 31, 2012, Judge Duncan entered another Order denying Swindle relief and granting summary judgment to the school district and Turner. The order contained comments about whose conduct caused J.S. to spend the afternoon at the principal's office, pointed at Mr. Swindle. Swindle's appeal followed.

15. The Court of Appeals affirmed the trial court, stating, in part, that Swindle's request for relief lacks foundation in any source of law.

16. Respondent's petition for rehearing was denied on July 24, 2013.

17. Respondent then filed for review by the Arkansas Supreme Court, which was denied on October 10, 2014, and the mandate issued.

18. The Rogers Board of Education, a public entity, was required to expend at least \$7,120.33 in legal fees and costs to defend this suit and the appeals.

19. Principal Turner testified by deposition, in part, as to the events in February-March

2012 related to the conduct of J.S., her telephone contacts with the parents, and school disciplinary policies.

20. Mr. Swindle testified, in part, that he filed his lawsuit hastily to try to avoid a defense of "mootness," and he pursued his suit to the extent and with the vigor he did because he wanted to compel the district to follow its own policy and not suspend five year olds without a parent or guardian being first given an opportunity to argue for the child against a suspension before one was imposed. He also testified that J.S. returned to school the next day and had no more disciplinary incidents or suspensions during his stay at Northside. He testified both Swindle youngsters stayed at Northside for two more school years after 2011-2012, where Turner remained as principal, and then both transferred to other schools not in the Rogers School District.

21. Mrs. Swindle testified by deposition, in part, that she did not recall picking J.S. up from school on March 13, did not know who did so, and if given a preference would have had the father pick J.S. up after Principal Turner called him and brought J.S. to the law office before the father went to court or prepared and filed the lawsuit.

22. Mr. Matthews testified by deposition, in part, about aspects of the school board hearing, the lawsuit, trial court rulings, and the appeals, and that he did not file a complaint against Swindle arising out of the lawsuit or the related matter. He also testified that he spoke with Mr. Swindle on the afternoon of March 13 after Swindle's filing of the lawsuit and informed Mr. Swindle that his son's suspension would be over at the end of that school day and the Rogers district school policy did not provide for any record of the disciplinary action to be on his son's record.

23. Judge Duncan testified, in part, that Mr. Swindle conducted himself properly in his case before her, she did not consider it to be a frivolous lawsuit, she ruled against him, and she did not file any complaint against Swindle arising out of the lawsuit or the related matter.

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, that the conduct of Ken D. Swindle violated Rule 3.1, in that the circuit court lawsuit Swindle filed against his son's school district was frivolous, and unnecessary, as the law of Arkansas was clearly against the positions he argued, and there would have been no in-school suspension of his son if either parent had heeded the school's timely requests to come to school and take the child home.

A2. By a vote of 6-1, with Boyd voting no, that the conduct of Ken D. Swindle violated Rule 3.1, in that the appeal Swindle filed and pursued was frivolous, and unnecessary, as the law of Arkansas was clearly against the position he argued.

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...

B1. By a vote of 6-1, with Boyd voting no, that the conduct of Ken D. Swindle violated Rule 4.4(a) in that the lawsuit Swindle filed for himself and presumably also for his five year old son against the Rogers Board of Education, a public entity, and school principal

Turner had no substantial purpose other than to embarrass and burden third persons, the school board and principal Turner, and the Board was required to expend at least \$7,120 for legal representation to defend Swindle's lawsuit through an appeal. Under the facts and circumstances, Swindle filed his lawsuit in haste and anger and without the professional judgment expected of an attorney, especially when it is clear that either Mr. or Mrs. Swindle could have picked up J.S. after being contacted in the late morning and J.S. would not have then had to spend approximately 3.5 hours in the principal's office studying or doing homework or whatever he did there.

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.

C1. By a unanimous vote, that the conduct of Ken D. Swindle violated Rule 8.4(d) in that the lawsuit and appeals filed and pursued by Swindle required the unnecessary expenditure of valuable trial court and appellate court time and resources.

C2. By a unanimous vote that the conduct of Ken D. Swindle did not violate Rule 8.4(d) in that by pursuing his claims regarding his son past the Board hearing stage, and into two levels of appellate effort on the facts and law involved, Swindle has held the legal profession up to unnecessary public ridicule and condemnation.

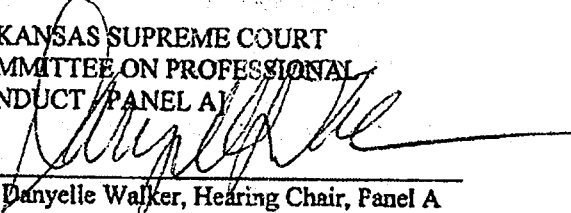
Arkansas Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

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, Reprimanded for his conduct in this matter, and ordered to pay \$7,120.00 restitution for the benefit of the Rogers School District. By a 6-1 vote (with Boyd voting no) Swindle is 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 2016-096, 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 2016-096.

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT / PANEL A

By:

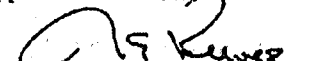

Danyelle Walker, Hearing Chair, Panel A

Date:

7-25-18

Order prepared by Stark Ligon, ABN 75077

Approved as to form:


James E. Keever, Respondent's counsel 7/25/18