

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A

IN RE: **WILLIAM A. SIMS**

Arkansas Bar ID #71099

CPC Docket No. 2003-088

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Michael Minns in February and March 2003, at the direction of the United States Court of Appeals for the Ninth Circuit (“CA9”) in the case of Dixon et al. v. Commissioner of Internal Revenue, No. 00-70858, decided January 17, 2003, with an amended Opinion filed March 18, 2003. The information related to the representation of the Internal Revenue Service by Respondent, who is licensed only in Arkansas, as District Counsel, and another attorney, McWade, licensed in Oregon, as trial counsel, in related litigation that ran from about 1985 to 1989 before the United States Tax Court, in particular. On July 18, 2003, Respondent was served with a formal complaint.

Mr. Sims was District Counsel for the IRS in Hawaii and Mr. McWade was lead trial counsel for IRS in long-running (10+ years) of litigation in U. S. Tax Court and the federal courts, styled Dixon v. Commissioner of Internal Revenue, involving approximately 1,300 consolidated cases in which the IRS had disallowed tax deductions for investors (mainly airline pilots) in complex investment programs known as “Kersting” programs, named after their creator. The estimated tax liability of the 1,300 taxpayers was in the hundreds of millions of dollars. This was reputed to be one of the biggest tax cases ever tried, according to reports. The stakes were huge on each side. It was agreed that a few representative “test cases” would be selected, several by the IRS and several by the petitioners, and all parties agreed (by means of what are referred to as “piggyback” agreements) to be bound by the outcome of the test cases. The CA9 Opinion in early 2003 found Sims and McWade engaged in a pattern of conduct that amounted to fraud on the court and corrupted the

legitimacy of the truth-seeking process. The CA9 reversed and remanded the Tax Court, sending the case back to the Tax Court to fashion a remedy that granted the other petitioner taxpayers the same relief given secretly to a test case taxpayer party named Thompson, who had an undisclosed side agreement with McWade and Sims before the case went to trial before the Tax Court in the late 1980s. The CA9 instructed counsel (Minns) for some of the appellant taxpayers to file complaints against Sims and McWade wherever they were licensed, which he did. A complaint has also been filed with the ethics committee of the Tax Court. McWade is the subject of a pending complaint to the Oregon bar licensing authority.

In Dixon, three taxpayer cases, including those of Thompson and Cravens, were selected to be their test cases by the 1,300 or so petitioning taxpayers. No one but Thompson, Thompson's counsel, Cravens, a witness named Alexander, Sims and McWade apparently knew that McWade had made secret pre-trial settlement agreements with Thompson and Cravens that gave them a favorable result, regardless of the outcome of the trial. When they testified, no one else knew what had happened behind the scenes. The Tax Court ruled that the outcome of the case would not have been affected by the disclosure of the secret agreements. The Dixon taxpayers appealed. The CA9 called what happened at trial before the Tax Court deception, misrepresentation and fraud practiced by McWade with Sims' knowledge and acquiescence, if not approval. For his favorable trial testimony Thompson got at least a \$60,000 tax reduction or refund, which went directly to pay his attorney in the case. Another key IRS witness, Alexander, a former business associate of Kersting (who died before this trial), gave favorable testimony for the IRS in exchange for a secret agreement that he would receive favorable tax deficiency reductions. The conduct of McWade and Sims over the course of the long litigation, caused there to be at least one extra Tax Court trial and an extra federal court appeal, as information about their secret dealings became known. An in-house IRS investigation of the matter in 1992-93 found that Sims and McWade "agreed to special arrangements" with Thompson and Cravens, and that Thompson's arrangement was designed to pay his attorney's fees by abating taxes Thompson owed. After these events in the early 1990s, the case had to be tried again before the Tax Court and on appeal at least twice for another ten years, to get to the bottom of what McWade and Sims did in the trial before the Tax Court in 1989.

Shortly after the January 2003 CA9 opinion, the chief counsel for the IRS issued a public statement condemning the conduct of these two IRS lawyers in the Dixon case. He stated he concurred with the CA9's outrage over the fraud committed by the IRS lawyers who made secret deals with parties and witnesses and offered tainted testimony at trial, and stated he would apologize to the CA9 for the conduct of the IRS lawyers in the case.

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. Sims' conduct violated Model Rule 3.3(a)(2) in that co-counsel McWade and Sims failed to disclose a material fact to the court, that a secret agreement had been made with a key witness, Thompson, that his favorable trial testimony would result in a consideration to him of about \$60,000 by means of a reduction in his disallowed deductions, which Thompson could use for his attorney's fees in the case, thereby perpetrating a fraud on the court and the trial. Model Rule 3.3(a)(2) requires that a lawyer shall not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act.

B. Mr. Sims' conduct violated Model Rule 8.4(c) in that the Court of Appeals for the Ninth Circuit found the pattern of government misconduct, by Sims and co-counsel McWade, including the persistence and concealment of the misconduct, amounted to a fraud on the court. The misconduct involved Sims' and McWade's conduct toward and with key government witnesses Thompson, Cravens, and Alexander, and the use of secret, undisclosed settlements with each of them to elicit desired trial testimony. The Court found, "the factual findings of the Tax Court support the conclusion that a fraud, plainly designed to corrupt the legitimacy of the truth-seeking process, was perpetrated on the trial court by McWade and Sims The Tax Court believed it was hearing a legitimate adversarial dispute when, in fact, the proceeding was a charade fraught with concealed motives, hidden payments, and false testimony." The Court of Appeals notes, apparently with approval, that counsel for certain appellants has filed grievances against Sims and co-counsel with their respective Bars. Model Rule 8.4(c) requires that a lawyer shall not engage in conduct involving dishonesty,

fraud, deceit or misrepresentation.

C. Mr. Sims’ conduct violated Model Rule 8.4(d), in that his conduct caused the Circuit Court to find, “Here, it plainly would be unjust to remand for a new, third trial. The IRS had an opportunity to present its case fairly and properly. Instead its lawyers intentionally defrauded the Tax Court. The Tax Court had two opportunities to equitably resolve this situation and failed. Enormous amounts of time and judicial resources have been wasted The taxpayers should not be forced to endure another trial and the IRS should be sanctioned for this extreme misconduct.” The case has been remanded to the Tax Court for appropriate proceedings, after entering judgment for the appellant taxpayers. Model Rule 8.4(d) requires that a lawyer shall not engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that the Arkansas law license of William A. Sims, Arkansas Bar ID# 71099, be, and hereby is, **suspended for twelve (12) months** for his conduct in this matter, and he is ordered to pay costs of \$50.00. The suspension shall become effective on the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court. 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 with 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. Hodge, Chair, Panel A

Date: _____

