

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL B

IN RE: ALVIN DARRELL CLAY
Arkansas Bar ID # 96075
CPC Docket No. 2005-086

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by August Thomas on April 1, 2005. The information related to the representation in 2002 - 2004 of August Thomas and his minor son by Respondent Alvin D. Clay, an attorney practicing primarily in Little Rock, Arkansas. On June 22, 2005, Respondent was served with a formal complaint, supported by affidavits from August Thomas and Steven Jackson. Respondent filed a response to the complaint. Panel B heard the matter de novo on February 17, 2006. Stark Ligon represented the Office of Professional Conduct. Ronald L. Davis, Jr. represented Mr. Clay, who was the only witness to testify.

The factual matters before the Panel show August Thomas and his minor son Avery Thomas became Clay's clients in August 2002, on a personal injury matter involving Avery, when August Thomas paid Clay \$3,700.00, covering his flat fee for legal services of \$3,500.00 and \$200.00 for any filing fee and service costs. Despite the fact that Clay had never previously represented Thomas or his son, the basis or rate of Clay's fee for additional work for which he would charge Mr. Thomas was not explained to Thomas in writing or otherwise, according to Mr. Thomas. Suit was filed. In January 2004 Clay advised August Thomas that an accident reconstruction expert was needed and requested Thomas advance him \$1,000.00 for this expense, which Thomas did by his check dated January 20, 2003. Clay did not place these funds in his trust account, claiming they were paid to him in reimbursement of Clay's earlier personal check payment of this expense for the client. Neither Clay's \$1,000.00 check to Steve Jackson of Hot Springs nor Clay's bank records for his personal account were produced for review. On January 16, 2003, Clay engaged Jackson and at some date thereafter sent him Clay's personal check for \$1,000.00 to cover his services as the accident reconstruction expert. Jackson billed Clay on January 29, 2003, for \$823.75 for his services and report, which was not helpful to the client's case. Jackson also sent Clay his refund check for \$176.25, dated January 29, 2003, not knowing at the time that Clay's \$1,000.00 check to Jackson had been or would be refused payment by Clay's bank for insufficient funds. Despite his requests for payment from Clay, Clay did not pay Jackson the \$823.75 he owed him until April 21, 2005, when a payment of \$1,000.00 was sent to Jackson by Clay's attorney. August Thomas later gave Clay his check for an additional \$1,000.00 to cover Clay's expenses in taking depositions in the case. Clay claimed the check was for additional attorney fees. There is no evidence available to the Panel that Clay placed these funds in his trust account. One deposition costing \$180.60 was taken by Clay. Clay failed to account for or refund to August Thomas the balance of \$819.40 from this \$1,000.00 Thomas paid Clay for the specific purpose of taking depositions needed for the litigation.

The Thomas case was tried to a jury in October 2004 and resulted in a 10-2 defendant's verdict. Mr. Thomas later ran a very small "personal" notice in the state newspaper critical of Clay and Clay promptly sued him for defamation. Clay ultimately dismissed his complaint against Thomas. Thereafter the case was set for trial on Thomas's amended counterclaim against Clay. Prior to trial, Clay's deposition was taken. Several days before trial Clay settled the litigation by paying Mr. Thomas \$1,500.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, the testimony of Alvin Clay, the Arkansas Model Rules of Professional Conduct, and other matters before it at a public hearing on February 17, 2006, Panel B of the Arkansas Supreme Court Committee on Professional Conduct unanimously finds:

A. Mr. Clay's conduct violated Model Rule 1.5(b) in that though he had never previously represented August Thomas in any legal matter, he failed to provide Mr. Thomas an adequate basis or rate for the legal fee in the matter Clay was handling for him involving his son Avery Thomas. Clay charged Thomas a flat fee of \$3,500.00 to handle the personal injury matter through a jury trial, then claimed additional sums Thomas paid Clay as additional legal fees. Model Rule 1.5(b) requires that when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

B. Mr. Clay's conduct violated Model Rule 1.15(a) in that he failed to deposit into his trust account the \$1,000.00 advance payment of expenses he received from August Thomas for the accident reconstruction expert. Clay failed to deposit into his trust account the \$176.25 refund payment from Steve Jackson, the accident reconstruction expert he hired, which refund was for the benefit of August Thomas. Clay failed to deposit into his trust account the \$1,000.00 advance payment of expenses he received from August Thomas for depositions. Model Rule 1.15(a) requires that a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of a client shall be deposited and maintained in one or more identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

C. Mr. Clay's conduct violated Model Rule 1.16(d) in that upon termination of his representation of August Thomas and his son Avery Thomas, Clay failed to return to Thomas the unexpended balance of \$176.25 from the \$1,000.00 Thomas paid Clay to hire Steve Jackson, the accident reconstruction expert, whose bill was only \$823.75. Upon termination of Clay's representation of August Thomas and his son Avery Thomas, Clay failed to return to August Thomas the unexpended balance from the \$1,000.00 he paid Clay to take depositions in the case. The only deposition Clay took in the case was of Ms. Nelson at a cost of \$180.60, leaving an unexpended balance from this advance payment of expenses of \$819.40. Model Rule 1.16(d) requires that upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advanced payment of fee that has not been earned.

D. Mr. Clay's conduct violated Model Rule 8.4(c) in that Clay requested and accepted \$1,000.00 from his client August Thomas to obtain the services of an accident reconstruction expert. The expert Clay hired, Steve Jackson, billed Clay \$823.75 for his services, yet Clay failed to account for and deliver to August Thomas the \$176.25 refund check Jackson sent Clay from the \$1,000.00 Clay sent Jackson. Clay requested and accepted \$1,000.00 from his client August Thomas for the purpose of taking depositions in his legal matter. Clay took only one deposition in the matter, which was billed to him at \$180.60. Clay failed to account for and deliver to August Thomas the \$819.40 balance from the \$1,000.00 Thomas provided to Clay. After making an oral agreement with August Thomas to represent Avery Thomas and August Thomas in a claim against Beverly Nelson for a fee of \$3,500.00, Clay claimed additional funds for additional work from funds given to him by August Thomas to be used for other, specific purposes in the representation. In mid-January 2003, Clay gave Steve Jackson his personal check for \$1,000.00 to cover his fee and expense as an accident reconstruction expert. When Mr. Jackson presented Clay's check for payment,

payment was refused for "insufficient funds" in Clay's account, even though August Thomas had by then paid Clay \$1,000.00 for this expense. Clay knew that his check had not been paid by his bank. He did not pay Mr. Jackson until Clay's attorney sent Mr. Jackson the attorney's own check on April 21, 2005. Model Rule 8.4(c) requires that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

E. The charge of violating Rule 3.4(c) is not proven.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that ALVIN DARRELL CLAY, Arkansas Bar ID#96075, be, and hereby is, REPRIMANDED for his conduct in this matter. He is also ordered to pay a fine of \$3,500.00 and Committee costs of \$140.00, which includes the standard \$50.00 case cost and the court reporter's hearing charge of \$90.00. The fine and 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 B

By: _____

H. T. Moore, Chair, Panel B

Date: _____