

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL B

IN RE: HERBERT C. SOUTHERN, Respondent
 Arkansas Bar ID#99105
 CPC Docket No. 2005-122

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Ules E. Holder in an Affidavit dated September 12, 2005. The information related to the representation of Ules E. Holder by Respondent in 2004.

On September 28, 2005, Respondent was served with a formal complaint, supported by affidavits from Ules E. Holder, Missy Leflar and by Statements from the IOLTA Account of Herbert C. Southern. A response was filed. The Respondent and the Executive Director negotiated a discipline by consent proposal, which was submitted to this Panel.

The information before the Panel reflected that in 2004, Herbert C. Southern, an attorney with a primary law office in Fayetteville, Arkansas, filed a bankruptcy proceeding on behalf of Ules E. Holder. During the course of that representation, Mr. Holder experienced a problem with the Department of Finance and Administration (DFA) and requested that Mr. Southern assist him with the matter. Mr. Southern agreed to assist Mr. Holder with the problem he was experiencing. Mr. Holder needed to send a sales tax payment to DFA on a vehicle he had purchased because the check which he had initially written for the sales tax was returned for insufficient funds. As a result, Mr. Holder needed to have the money sent to DFA by an attorney. After Mr. Southern agreed to send the money for Mr. Holder, Mr. Holder delivered the funds to Mr. Southern in installments on November 11, 2004 and December 3, 2004.

When Mr. Holder initially contacted the Office of Professional Conduct, DFA had not received any funds from Mr. Southern on Mr. Holder's behalf. Mr. Holder reported that on more than one occasion, Mr. Southern advised that he had sent the money to DFA but there was no record of the money having been

received. Mr. Holder explained that after a period of time, Mr. Southern began to ignore his telephone calls and messages. With no other alternative, Mr. Holder hired another lawyer to help him recover the funds from Mr. Southern.

On January 27, 2005, Mr. Holder received a letter from DFA explaining that no funds had been received from Mr. Southern on Mr. Holder's behalf. Mr. Southern was written on January 28, 2005. In the letter, he was asked to return the funds to Mr. Holder. There was no response to the letter. As a result, a civil action was filed against Mr. Southern in an effort to recover the funds for Mr. Holder. The civil action was filed in Fayetteville District Court. After being served with a Summons, Mr. Southern contacted the attorney assisting Mr. Holder. Initially, Mr. Southern claimed to have repaid Mr. Holder. He could not establish that a check had been sent to Mr. Holder. The excuse being that the bank told him that the check to Mr. Holder had not cleared. Mr. Southern eventually sent two checks to the attorney who assisted Mr. Holder. One of the checks was repayment to Mr. Holder and the other was \$100 for costs in pursuing the matter against him.

The trust account documentation demonstrated that Mr. Holder's cash which was delivered to Mr. Southern on November 11, 2004, and December 3, 2004, was not deposited into Mr. Southern's IOLTA trust account. The funds were for a specific purpose and belonged to the client until such time as used for that purpose. Regardless of this fact, the cash was not deposited into the trust account. Mr. Southern advised that there was money in the trust account from his own funds which through reconciliation were credited to Mr. Holder. Further, he offered that he did, in fact, send a check to DFA for Mr. Holder but that it never cleared his bank.

Upon consideration of the formal complaint and attached exhibit materials, the response, the consent proposal, and other matters before it, and the Arkansas Model Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That Mr. Southern's conduct violated Model Rule 1.2(a) because Mr. Holder delivered funds to him in November and December 2004, specifically for payment to the Department of Finance and Administration. He failed to abide by Mr. Holder's objectives concerning this portion of his

representation of Mr. Holder, in that he failed to deliver the funds to the Department of Finance and Administration as he was to do for Mr. Holder. Model Rule 1.2(a) requires that a lawyer abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued.

2. That Mr. Southern's conduct violated Model Rule 1.3 because in the course of his representation of Mr. Holder, he failed to promptly remit the funds he received from him to the Department of Finance and Administration as he agreed to do for Mr. Holder. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.
3. That Mr. Southern's conduct violated Model Rule 1.4(a) when he failed to respond to Mr. Holder's requests for information about the funds Mr. Holder delivered to Mr. Southern for remittance to the Department of Finance and Administration and when he failed to respond to the agent for Mr. Holder for information about the funds Mr. Holder delivered to him for remittance to the Department of Finance and Administration. Model Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
4. That Mr. Southern's conduct violated Model Rule 1.15(a) because he failed to place and maintain the funds Mr. Holder delivered to him for payment to the Department of Finance and Administration in his IOLTA trust account even though the funds belonged to Mr. Holder until delivered to DFA. Model Rule 1.15(a) requires that all lawyers 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.
5. That Mr. Southern's conduct violated Model Rule 1.15(b) because upon receiving the funds from Mr. Holder to be delivered to the Department of Finance and Administration, he failed to promptly notify DFA, a third party whom he knew to have an interest in the funds and he failed to promptly deliver to DFA, the intended recipient of the funds, the funds that DFA was entitled

to receive from Mr. Holder. Model Rule 1.15(b) requires that upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person, and, except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive, and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that HERBERT C. SOUTHERN, Arkansas Bar ID# 99105, be, and hereby is, REPRIMANDED for his conduct in this matter. Further, pursuant to Section 18.A. of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law (2002), Mr. Southern is assessed the costs of this proceeding in the amount of \$75. 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 within 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: _____

J. Michael Cogbill, Chair, Panel B

Date: _____

(13.M, Rev.1-1-02)