

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

IN RE: PAUL HERROD, Respondent

Arkansas Bar ID#84070

CPC Docket No. 2002-084

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by David M. Clark on February 15, 2002. The information related to the representation of Lance Burrows by Respondent in 2001.

On August 14, 2002, Respondent was served with a formal complaint, supported by affidavit(s) from David M. Clark, Deputy Prosecuting Attorney, Faulkner County, Arkansas. A response was filed. A ballot vote was taken by another Panel of the Committee on Professional Conduct. Thereafter, the Respondent, along with his counsel, Milas H. "Butch" Hale, III requested a *de novo* hearing before Panel A of the Committee. The *de novo* hearing was set to begin at 10:00 a.m. on Friday, May 16, 2003. Immediately, upon the commencement of the hearing, Mr. Herrod, through his counsel, Mr. Hale, made a plea offer to Panel A in an effort to conclude the matter.

The facts presented in the formal disciplinary complaint revealed the following:

Paul E. Herrod, an attorney practicing in North Little Rock, Pulaski County, Arkansas, represented an individual whom Mr. Clark was prosecuting and whom Mr. Clark believed to be Thomas Burrow. Only after conviction did Mr. Clark learn that the individual was actually Lance Burrow, brother to Thomas Burrow. Mr. Herrod represented Lance Burrow during the entire course of his criminal proceedings in Faulkner County Circuit Court. The proceeding had case number CR 2001-158.

The background information which led to Mr. Clark's complaint to the Office of Professional Conduct is as follows: On February 4, 2001, a drive by shooting occurred on the campus of the University of Central Arkansas. An arrest was made following the incident by members of the City of Mayflower Police Department. The individual taken into custody was identified as Thomas Burrow, the "defendant" in the proceedings prosecuted by Mr. Clark. Following the arrest, the defendant retained the services of Mr. Herrod. During the course of the criminal proceeding, Mr. Clark and Mr. Herrod engaged in plea negotiations regarding the defendant. A plea arrangement was able to be entered into whereby the defendant would plead to sixteen (16) years incarceration in the Arkansas Department of Corrections. On August 16, 2001, the defendant and Mr. Herrod appeared in Court and entered into the plea agreement before the Honorable Linda Collier. During the course of the proceedings, the defendant was placed under oath. While under oath, Mr. Herrod solicited various information from the defendant, his client, in order to establish a factual basis for the plea. One of the specific questions posed by Mr. Herrod was the defendant's name, to which the defendant responded "Thomas Burrow". Based upon the information presented, the Court accepted the guilty plea and a Guilty Plea Statement was signed by the defendant and Mr. Herrod on that date in Court. In addition, a Judgment and Commitment Order was executed and filed in Court on August 16, 2001.

A little over a month later, Mr. Clark received a telephone call from the probation department of Pulaski County. The individual with whom Mr. Clark spoke was Nashay Harris. Ms. Harris informed Mr. Clark that the individual he knew as Thomas Burrow was in fact Lance Burrow. Lance Burrow is Thomas Burrow' older brother and had used Thomas Burrow' name and date of birth at the time he was arrested and throughout his Court appearances, even at the guilty plea and sentencing stages. Ms. Harris had learned of this fact when she issued a warrant for probation revocation on Lance Burrow for failure to report to the Pulaski County probation office as directed. Ms. Harris contacted the mother of Lance Burrow and was advised of what had occurred in Faulkner County.

Following his conversation with Ms. Harris, Mr. Clark attempted to contact Mr. Herrod. Mr. Clark was not able to speak with him until approximately two (2) days later. Mr. Clark began the conversation by stating that he needed to talk with Mr. Herrod about Thomas Burrow. Mr. Herrod's initial response to Mr. Clark was "you mean Lance Burrow". Mr. Clark assumed that Mr. Herrod had also only recently learned that Mr. Burrow had been using his younger brother's name. Mr. Herrod volunteered to Mr. Clark that he had known the true identity but had been forbidden by his client from advising the prosecutor or probation officer.

Mr. Clark advised Mr. Herrod that he believed a fraud had been perpetrated on the Court and that it was his duty to report Mr. Herrod. Mr. Clark also advised Judge Collier of the information he obtained and she concurred in the opinion that Mr. Herrod should be reported and that Mr. Clark's contact with the Office should speak for her as well. Mr. Herrod admitted to being angry with Mr. Clark about the reporting of his conduct because he believed that he had used every means available to convince his client to be truthful and he truly believed that he was under a duty to maintain his client's confidence.

Since learning of the fraud upon the Court, Mr. Clark reviewed his file more thoroughly and came to the conclusion that Mr. Herrod knew of the falsehood from the beginning of his representation of Lance Burrow. Mr. Herrod used the name Lance Burrow instead of Thomas Burrow in at least one pleading he filed and also in a transmittal letter sent along with the pleading.

At no time during the plea negotiations or during the plea statement before the Court did Mr. Herrod advise that there was a fraud being perpetrated on the Court. Further, Mr. Herrod did not remove himself from the situation when he knew he was assisting his client with the fraud.

Because of the fraud that was committed, Mr. Clark was required to file a Petition for Writ of Error Coram Nobis. Judge Collier signed an Order based upon the information contained in the Petition. But for the fraud committed by Mr. Herrod's client and acquiesced in by Mr. Herrod, the filing of the Petition and the Order would not have been necessary. Through the deceit of the defendant, Mr. Clark was not aware of the material facts that Lance Burrow was on probation for the offense of possession of cocaine at the time of the offense at the University of Central Arkansas and was actually two (2) years older than reflected. The facts admitted reveal that Mr. Herrod knew that his client had given a false name to the police and was under a sentence of probation in Pulaski County. He advised that the information was communicated to him in confidence and he believed it was subject to the attorney-client privilege. Mr. Herrod also asserted that he explained the necessity of communicating the truth to the authorities to his client and believed that his client understood.

Mr. Herrod reported that when he filed the Motion for Discovery under his client's true identity, his client came to him and expressed his concern over this fact. Mr. Herrod believed that his client would tell the prosecutor the truth, if afforded the opportunity. Mr. Herrod stated that he attempted to set up an appointment with Mr. Clark, the deputy prosecutor, so that his client would have the opportunity to reveal the truth, but Mr. Clark was unable to find the time to have a meeting. Mr. Herrod went on to explain in his response that revealing this information would have been a waiver of the right against self-incrimination so he wanted his client to have the opportunity to do so for himself. During this time, Mr. Herrod appeared in Faulkner County Circuit Court for a hearing on a change of plea. Mr. Herrod stated that he wished, upon reflection, that he had taken the time to correct the plea statement and persuade Mr. Burrow to sign his true name.

Mr. Herrod asserted that his client assured him that under questioning he would tell the truth about his name. However, in a courtroom of people, he was unable to "muster the courage" to confess his true identity. According to Mr. Herrod when his client did not tell the truth, Mr. Herrod was a "befuddled" attorney standing in front of a judge whom he holds in high regard. Since he only had seconds to reach a decision on what to do, Mr. Herrod elected to keep his client's confidence. Further, Mr. Herrod said that if he had any indication that his client would lie about his name when questioned that he would have asked the Court to be relieved as counsel.

Mr. Herrod was aware from the onset that Mr. Burrow had used his brother's name when arrested. The grandmother had revealed this information to Mr. Herrod when she first approached him about representing Lance who was in jail under the name "Thomas Burrow".

Panel A of the Committee was made aware of the fact that Mr. Herrod entered into a self imposed suspension from the practice of law on or around March 21, 2003. Mr. Herrod made his clients aware of the fact that he would be in suspended status for a period of time and also made Courts in which he had matters pending aware of the impending suspension. Mr. Herrod accepted no new clients during this time period and appeared in Court only four (4) times to conclude pending matters. As such, Mr. Herrod has effectively served an eight (8) week suspension before the plea made to the Panel for consideration as a resolution to this matter. In addition, Mr. Herrod has written a letter of apology to Judge Collier and Mr. Clark, the complaining party. The letter was submitted to the Committee for review and is made a part of this Findings and Order by its attachment hereto.

Upon consideration of the formal complaint and attached exhibit materials, the plea made 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:

That Mr. Herrod's conduct violated Model Rule 1.16(b)(1) when he failed to withdraw from the representation of Lance Burrow after he knew that Mr. Burrow was continuing in a course of conduct which involved fraud on the Court. Model Rule 1.16(b)(1) provides that a lawyer may withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

That Mr. Herrod's conduct violated Model Rule 3.3(a)(2) when he failed to reveal to Judge Collier that Lance Burrow was not Thomas Burrow as he responded to Mr. Herrod's questions during his plea statement before Judge Collier on August 16, 2001. Model Rule 3.3(a)(1) requires that a lawyer not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

That Mr. Herrod's conduct violated Model Rule 3.4(b) because by his own questioning during Lance Burrow' appearance before Judge Collier on August 16, 2001, Mr. Herrod assisted Mr. Burrow in continuing to perpetrate his fraud by asking him to state his name which Mr. Burrow gave as Thomas Burrow. Model Rule 3.4(b) requires, in pertinent part, that a lawyer shall not assist a witness to testify falsely.

That Mr. Herrod's conduct violated Model Rule 3.4(c) because as an officer of the Court based upon his privilege to practice law, he is charged with the duty of truthfulness to the Judges he appears before, yet he allowed false statements to be made to Judge Collier concerning the identity of his client and thereby made falsehoods to her by his silence and acquiescence in the statements of his client. Model Rule 3.4(c) requires that a lawyer 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.

That Mr. Herrod's conduct violated Model Rule 4.1(b) because during the course of his representation of Lance Burrow, specifically during the plea negotiations with Deputy Prosecutor Clark, he failed to disclose that Lance Burrow gave his brother's name and date of birth at the time of arrest, even though he was aware of this fact. Model Rule 4.1(b) requires that in the course of representing a client, a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

That Mr. Herrod's conduct violated Model Rule 8.4(c) because although he had knowledge of his client's fraud on the Court, he failed to advise the Court or to withdraw from representation, thereby assisting his client in his dishonest conduct and allowing the misrepresentation and fraud to continue before Judge Linda Collier. Model Rule 8.4(c) requires that a lawyer not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

That Mr. Herrod's conduct violated Model Rule 8.4(d) because his failure to correct the false statements of his client to the Court about his identity or to advise the Court of the truth created the need for further proceedings in the criminal proceeding filed against his client, Lance Burrow. 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, through Panel A, that PAUL E. HERROD, Arkansas Bar ID #84070, be, and hereby is, SUSPENDED FOR A PERIOD OF THREE (3) MONTHS for his conduct in this matter. The suspension shall become effective May 16, 2003, upon the filing of this Findings and Order with the Clerk of the Arkansas Supreme Court. It is also the Order of this Panel of the Committee that Mr. Herrod be required prior to June 30, 2004, to obtain an additional two (2) hours of continuing legal education focusing on ethics in addition to the twelve (12) hours of continuing legal education that he must obtain this year. In addition to the suspension, Mr. Herrod is also fined in the amount of \$1,500 pursuant to Section 18.B. of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law (2002). Mr. Herrod is also ordered to pay costs in this matter in the amount of \$204.94 pursuant to Section 18.C. of the Procedures. The fine and costs have been presented to the Committee, Panel A, at the commencement of the hearing and will be delivered to the Clerk of the Arkansas Supreme Court upon the filing of this Order with the Clerk.

ARKANSAS SUPREME COURT COMMITTEE

ON PROFESSIONAL CONDUCT

By:

Gwendolyn Hodge, Chair, Panel A

Date:
