

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

IN RE: **PHILLIP A. MOON**
Arkansas Bar ID # 84109
CPC Docket No. 2006-141

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee by C. Brian Meadors on August 9, 2005. The information related to the conduct of Respondent Phillip A. Moon, an attorney practicing primarily in Harrison, Boone County, Arkansas. On October 20, 2006, Respondent was served with a formal complaint, supported by affidavits from C. Brian Meadors, Dale Benedict, and Susie Pointer, Director of the Arkansas IOLTA Foundation.

Mr. Moon represented Wayne and Beverly Cotner in a legal matter involving Marti and Dale Benedict of Fayetteville, who were small business owners, in a 1990 transaction in which the Cotners were selling real property to the Benedicts, a transaction which required an escrow agent for \$40,000 deposited in escrow by the Benedicts, the buyers. Moon acted as that escrow agent, and thereby assumed fiduciary responsibilities to the Benedicts. Moon breached his duties to the Benedicts in 1991 by negligently releasing their funds to the Cotners when Moon should not have and after the Benedicts instructed him not to, informing Moon the contract at issue was in dispute. This act cost the Benedicts most of the \$40,000, when the Cotners later took bankruptcy after the Benedicts sued them and Moon. The balance of the escrowed funds has not been recovered. The Benedicts sued Moon in Washington Circuit Court No. CIV-94-851. The case was tried in 1999. An

Amended Judgment was filed on October 2, 2003, finding that Moon had committed gross negligence in his release of these escrow funds, and that Moon thereby breached his fiduciary duty to the Benedicts. Judgment for \$40,000, plus interest, totaling \$53,283.16 in all, was entered against Moon on October 2, 2003. That judgment was not appealed and became final. The judgment ordered Moon to comply with Arkansas Code Section 16-66-221 and file within forty-five (45) days a verified list of all his real and personal property, including bank accounts, and to specify which properties he claimed as exempt under law. Moon failed to comply with this court order. Thereafter, in 2005 Mr. Meadors garnished all banks in Harrison and only found one account of Moon's, a personal account, which contained \$227.44, and bore evidence of Moon's commingling of client and personal funds in that one account. Pursuant to his obligation as an attorney under Rule 8.3(a), Mr. Meadors reported this information to the Committee.

Each year every Arkansas licensed attorney is required to file an IOLTA statement with the Arkansas Supreme Court giving the status of the attorney's trust account. According to the Affidavit of Ms. Pointer, Director of the Arkansas IOLTA office, Moon has not reported maintaining an IOLTA account for client funds since July 19, 1999. Since Moon does receive client funds, he is required to maintain a trust account in some form. Ms. Pointer's Affidavit of March 11, 2005, confirms Moon has not reported to that office having an IOLTA trust account since his previous trust account was closed on July 19, 1999.

Mr. Moon responded that he had negligently released the escrowed funds to the Cotners. He admitted to having no trust account from 1999-2006, primarily out of fear that any funds in one would be subject to garnishment by the Benedicts on their judgment against him. He stated the two checks mentioned by Mr. Meador as evidencing client funds that should have been in a trust account

were either a refund of fees already earned or a return of fees due to a billing error as between two of his clients with the same last name. He also stated that he had not generated much net income from his law practice in the years after the judgment against him, and that he had no means for attempting to satisfy the Benedict judgment until a family member recently agreed to collateralize a bank loan for him for the \$60,000 he has tendered for restitution before the Committee.

Following Respondent Attorney's receipt of the formal complaint, and a ballot vote by another Panel, the attorney entered into discussion with the Executive Director which has resulted in an agreement to discipline by consent pursuant to Section 20.B of the Arkansas Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law (2002). Upon consideration of the formal complaint and attached exhibits, admissions made by the respondent attorney, the terms of the written consent, the approval of Panel B of the Committee on Professional Conduct, and the Arkansas Model Rules of Professional Conduct, the Committee on Professional Conduct finds:

A. Mr. Moon's conduct violated Model Rule 1.1 in that he engaged in conduct the trial court found to be "gross negligence" in 1990-1991 when he released the \$40,000 the Benedicts had placed in escrow with him as "earnest money" without authorization, contrary to the contract between the Benedicts and the Cotners, and contrary to the stipulation to which he was a party in court on September 14, 1990, in Washington County Chancery Court No. E-90-963. His actions in the matter demonstrate he did not exercise the legal knowledge, skill, thoroughness and preparation reasonably necessary to act as an escrow agent between the parties, one of which was his client, and as a fiduciary for the Benedicts. Model Rule 1.1 requires that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. Mr. Moon's conduct violated Model Rule 1.15(a) in that as the escrow agent for the Benedicts and the Cotners in 1990-1991 for the \$40,000 deposited with Moon as escrow agent by the Benedicts in their transaction, Moon was were required to maintain those funds in his possession and in an identifiable separate account. He violated the terms of the escrow agreement and of his fiduciary responsibility to the Benedicts by releasing the escrowed \$40,000 Moon held to his clients, the Cotners. Moon commingled client funds and personal funds in his account at Community First Bank, as shown by his check #1043 dated March 21, 2005, payable to what appears to be "Gene Luther and Sherri Roark" for \$450.00 for "refund of unearned fees," funds that were required to be maintained in a trust account until earned by Moon or refunded. Moon commingled client funds and personal funds in his account at Community First Bank, as shown by his check #1044 dated March 25, 2005, payable to Rodney Parker for \$161.90 for "refund for case DR-02-338-1," funds that were required to be maintained in a trust account until earned by Moon or refunded. 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. The lawyer or law firm may not deposit funds belonging to the lawyer or law firm in any account designated as the trust account, other than the amount necessary to cover bank charges, or comply with the minimum balance required for the waiver of bank charges. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

C. Mr. Moon's conduct violated Model Rule 3.4(c) in that he was, in essence, a party to the

stipulated agreement in court involving the escrowed \$40,000, by virtue of his position and role as the escrow agent for the parties, and Moon violated and disobeyed the court's order regarding the escrowed \$40,000, as memorialized in the in-court, on-the-record stipulation to which he was a party on December 6, 1990, in Washington County Chancery Court No. E-90-963. Model Rule 3.4(c) requires that a lawyer shall 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.

D. Mr. Moon's conduct violated Model Rule 4.4 in that he improperly released \$40,000 he held in escrow to his clients, the Cotners, in about 1990-1991, thereby burdening the other party, the Benedicts, who had placed the \$40,000 in escrow with Moon, in their efforts to obtain enforcement of their legal rights when the transaction between the Cotners and the Benedicts could not be consummated and finalized, the event which would have allowed Moon to release the \$40,000 in escrow to the Cotners. Model Rule 4.4 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.

E. Mr. Moon's conduct violated Model Rule 8.4(d) in that his grossly negligent conduct in 1990-1991 in improperly releasing the \$40,000 he held in escrow, caused the Benedicts to have to sue to recover these funds, and caused the trial court to have to devote years and much effort, including a trial, to resolving the additional dispute Moon caused by his gross negligence. 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 B, that **PHILLIP A. MOON**, Arkansas

Bar ID# 84109, be, and hereby is, **REPRIMANDED** for his conduct in this matter, and he is ordered to pay \$50.00 Committee case costs and restitution of \$60,000.00 for the benefit of Dale and Marti Benedict, through their attorney Hollie Greenway. The restitution is in the form of a trust account check from Mr. Moon's counsel, presently in the possession of the Office of Professional Conduct. Upon the filing of this Order, the check shall be delivered to counsel for the Benedicts. 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 B

By: _____
Henry Hodges, Chair, Panel B

Date: _____