

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL A

IN RE: JOHN DOYLE NALLEY

ARKANSAS BAR NO. 86132

CPC DOCKET NO. 2004-165

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Shirley J. Ryan. The information related to the representation of Ms. Ryan by John Doyle Nalley, Attorney at Law, Benton, Arkansas, in 2003.

Shirley J. Ryan was injured while staying at the I-30 Travel Park in Benton, Arkansas. Ms. Ryan sought legal assistance from John Doyle Nalley, Attorney at Law. Mr. Nalley drafted an attorney-client retainer agreement wherein he agreed to represent Ms. Ryan in her legal matter in exchange for a fee of forty percent (40%) of the gross recovery. The agreement also stated that in the event Mr. Nalley determined that there was not a reasonable chance of making a recovery in the matter, he would inform Ms. Ryan of his determination in writing and the agreement would be null and void, with the parties having no further duties to each other.

On August 26, 2004, Mr. Nalley sent a letter to Ms. Ryan and informed her that, based on his investigation and her statements to Scottsdale Insurance Company, he would not be able to handle her legal matter. Mr. Nalley concluded his letter by stating, "I will take no further action on your behalf."

Scottsdale Insurance sent a letter to Ms. Ryan and informed her that it had \$5,000 in medical payment coverage and that if she wished for Scottsdale Insurance to consider the out-of-pocket medical expenses, she could send in medical expenses.

In October, 2003, Ms. Ryan's medical insurance carrier, Pacificare-Secure Horizons, acting through Primax Recoveries, notified Ms. Ryan that it was pursuing recovery from Scottsdale of medical costs that it incurred as a result of her slip-and-fall. On October 29, 2003, Mr. Nalley sent a letter to Ms. Ryan and informed her that he had received a check in the amount of \$5,000 from Scottsdale Insurance. Mr. Nalley asked

Ms. Ryan to authorize him to cash the check and send her two-thirds of the \$5,000, reserving one-third of the money as his fee. Ms. Ryan believed that he canceled the retainer agreement several months earlier.

Ms. Ryan, upon receipt of the letter from Mr. Nalley, wrote Mr. Nalley and informed him that, according to his letter dated August 26, 2003, he would take no further action on her behalf. Ms. Ryan inquired why the \$5,000 didn't belong to Pacificare-Secure Horizons as it was out the money for her care. Mr. Nalley responded to Ms. Ryan by writing on the bottom of her letter, "Do you want me to pay your portion of the \$5,000 to Pacificare-Secure Horizons?"

Ms. Ryan believed that she had no other choice and authorized Mr. Nalley to cash the check. One-third of the \$5,000 was sent to Primax Recoveries; one-third to Ms. Ryan; and one-third was kept by Mr. Nalley.

Mr. Nalley stated in his response that he did not charge Ms. Ryan a fee for representing her after declining representation on the liability issue, nor did he charge Ms. Ryan a fee from funds received through no efforts of his own. According to Mr. Nalley, Medicare, through Primax Recoveries, claimed a lien on the entire \$5,000 proceeds for Medicare subrogation. Mr. Nalley asserted that his efforts resulted in a negotiation with Medicare whereby Medicare, Ms. Ryan, and Mr. Nalley each received one-third of the proceeds. Mr. Nalley stated that Ms. Ryan knew of the settlement and did not object to the proposed settlement when it was explained to her. Mr. Nalley included in his response a copy of the written consent to the fee agreement and distribution of the proceeds. According to Mr. Nalley, it never occurred to him to execute a new retainer agreement with Ms. Ryan following conversations with her and her written directions regarding the distribution of the monies.

Mr. Nalley stated that he negotiated a settlement on Ms. Ryan's behalf with Medicare so that Ms. Ryan would have received money which she would not have received otherwise. Mr. Nalley asserted that the letters of October 29, 2003, and November 6, 2003, contained a mistake; he had forgotten that the \$5,000 check from Scottsdale Insurance was for no-fault medical payment coverage rather than liability. Despite his error, Mr. Nalley believed the letters to be of consequence as a letter he received on November 14, 2004, from Medicare showed that the money was for medical payments and that Primax Recoveries was asserting a Medicare lien.

Mr. Nalley denied that there was any attempt to deceive, misrepresent or defraud Ms. Ryan.

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:

1. That John Doyle Nalley violated Model Rule 1.5(a) when he charged Shirley Ryan, a former client, a fee for representation after he declined to represent her in the same legal matter by letter dated August 26, 2003, where he stated no further action would be taken by him in the legal matter and when he charged Shirley Ryan, a former client, a fee from medical payment funds received through no efforts of his own. Model Rule 1.5(a) requires a lawyer's fee to be reasonable. The factors to be considered in determining the reasonableness of a fee include the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; and the amount involved and the results obtained.

2. That John Doyle Nalley violated Model Rule 1.5(c) when, after declaring the existing fee agreement null and void on August 26, 2003, he charged a contingency fee in a matter for which there was no written fee agreement. Model Rule 1.5(c) states that a fee may be contingent on the outcome of the matter for which the service is rendered. A contingent fee agreement shall be in writing and state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer and other expenses to be deducted from the recovery, and whether such expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

3. That John Doyle Nalley violated Model Rule 1.9(c)(1) when, after informing Shirley Ryan that he was declining representation of her, he received a check in the amount of \$5,000 from Scottsdale Insurance and thereafter asserted an interest in the proceeds. Model Rule 1.9(c)(1) states that a lawyer who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client.

4. That John Doyle Nalley violated Model Rule 8.4(c) when, in a letter dated October 29, 2003, that he sent to Shirley Ryan, he implied that he had a fee agreement with Ms. Ryan for the recovery of medical

payments. Model Rule 8.4(c) requires that a lawyer not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that JOHN DOYLE NALLEY, Arkansas Bar No. 86132, be, and hereby is, CAUTIONED for his conduct in this matter and assessed costs in the amount of FIFTY DOLLARS (\$50.00). 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 A

By: _____

Bart Virden, Chair, Panel A

Date: _____