

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL B

IN RE: GARY JAMES MITCHUSSON, Respondent
 Arkansas Bar ID# 91267
 CPC Docket No. 2003-168

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 Eugene and Martha Caudle on July 30, 2003. The information related to the representation of the Caudles by Respondent beginning in 1997.

On November 25, 2003, Respondent was served with a formal complaint, supported by an affidavit from Mr. Caudle. A response was filed. The Respondent and the Executive Director negotiated a discipline by consent proposal, which was submitted to this Panel.

The facts giving rise to the formal complaint are that the Caudles were involved in an accident on August 20, 1997, when a Coca-Cola truck hit their vehicle. The Caudles hired Mr. Mitchusson to handle their claim. The Caudles met with Mr. Mitchusson on August 2, 2001, to discuss the possibility of an out-of-court settlement. The case settled for \$125,000 and Mr. Mitchusson received the settlement check on August 15, 2001. The Caudles had signed a fee agreement with Mr. Mitchusson agreeing to pay him one-third of the settlement. Medicare had paid for part of the medical bills and Mr. Mitchusson set aside \$41,789.17 for possible Medicare reimbursement. During the August 2nd meeting Mr. Mitchusson presented the Caudles with a Disbursement Agreement which would give the Caudles \$10,000 in lieu of the difference between the portion set aside for Medicare reimbursement and the actual amount Medicare would eventually claim (Mr. Mitchusson was anticipating that Medicare would waive a portion of the money owed to them). The Caudles questioned Mr. Mitchusson on why they should give up the additional money. They stated he did not answer their question and the Disbursement agreement was not thoroughly explained to them. They said that Mr. Mitchusson rushed them into signing the agreement, and that they did not get the opportunity to seek advice on

the matter. The Caudles said that during a subsequent meeting with Mr. Mitchusson, he told them they were not entitled to any remaining money left over from the Medicare funds. From the \$125,000 settlement the Caudles received \$50,557.68 (including the additional \$10,000), and Mr. Mitchusson paid himself an initial fee of \$32,653.15 (including \$986.49 for costs). Medicare had still not been reimbursed for medical bills as of September 8, 2003, and they had sent the Caudles several letters, including a letter stating they were going to refer the debt to the Department of Treasury for collection. Mr. Mitchusson had also failed to notify Medicare upon his receipt of the settlement check on August 15, 2001. The Caudles filed a grievance with the Office of Professional Conduct after receiving the many letters from Medicare about the reimbursement and after not being able to find out from Mr. Mitchusson the status of the funds. After being contacted by the Office of Professional Conduct about the matter, Mr. Mitchusson sent Medicare \$7,304.13 (the amount in Medicare's demand letter to the Caudles). Medicare ultimately only required reimbursement of \$3,000 and therefore they sent Mr. Mitchusson a check for \$4,304.13 which he sent to the Caudles. That left a balance of \$24,485.04 which Mr. Mitchusson had failed to keep in an IOLTA Trust account as required by the Model Rules. Mr. Mitchusson kept the balance of the funds set aside for Medicare reimbursement for himself.

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. Mitchusson's conduct violated Model Rule 1.4(a) when he failed to keep the Caudles informed about the status of the Medicare reimbursement funds. 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.
2. That Mr. Mitchusson's conduct violated Model Rule 1.4(b) when he failed to explain the whereabouts or status of the \$41,789.17 set aside for Medicare reimbursement. Model Rule 1.4(b) requires that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

3. That Mr. Mitchusson's conduct violated Model Rule 1.8(a) when he had the Caudles to sign the Disbursement Agreement without giving them the opportunity to seek the advice of independent counsel. Model Rule 1.8(a) provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be understood by the client; unless the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and unless the client consents in writing thereto.

4. That Mr. Mitchusson's conduct violated Model Rule 1.15(b) when he failed to notify Medicare upon his receipt of the settlement funds in August 2001, and when he failed to reimburse Medicare until September 2003. 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. 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 Gary James Mitchusson, Arkansas Bar ID# 91267, be, and hereby is, REPRIMANDED for his conduct in this matter, ordered to pay \$24,485.04 in RESTITUTION for the benefit of the Caudles, ordered to pay a \$2,500 FINE and \$50 in Costs. The fine, restitution, 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 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: _____