BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A

FILED
FEB 22 2010
LESLIE W. STEEN
CLERK

IN RE: F. MATTISON THOMAS, III, Respondent
Arkansas Bar ID#2002007
CPC Docket No. 2009-124

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Martha Wilson in an Affidavit dated October 15, 2009. The information related to the representation of Mrs. Wilson by Respondent beginning in June 2004.

On October 22, 2009, Respondent was served with a formal complaint, supported by affidavit from Mrs. Wilson and various pleadings, Orders and Opinions from both State and Federal Court. Respondent filed a timely Response which was submitted to Mrs. Wilson for rebuttal. Thereafter, the matter proceeded to ballot vote before Panel A of the Committee in accordance with the Arkansas Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law.

The information before the Panel reflected that during June 2004, John and Martha Wilson hired F. Mattison Thomas, III, an attorney practicing primarily in El Dorado, Arkansas, to represent them in a legal matter against a medical supply company. Mr. Thomas was referred by another lawyer.

Mr. Thomas filed a lawsuit on the Wilsons' behalf against Lincare in federal court. After the lawsuit was filed, Mr. Wilson died. Mrs. Wilson was appointed Personal Representative of her husband's estate on November 22, 2004. On November 29, 2004, an Order dismissing the case without prejudice (non-suit) was entered. Prior to dismissing the lawsuit, Mr. Thomas failed to

move to have Mrs. Wilson listed in place of her husband as plaintiff since he had died subsequent to the filing of the lawsuit but prior to the non-suit being taken. Mr. Thomas offered that at the time of taking the non-suit, Mr. Wilson had just died and an estate had not been opened yet. He explained that the actions were basically taken simultaneously but were both discussed with Mrs. Wilson. In addition, Mr. Thomas offered that the reason for the non-suit was that he had been unable to locate an expert witness on the issue of the pain pump.

Mr. Thomas re-filed the action against Lincare on November 28, 2005. He re-filed it just as it was previously filed. In essence he filed it as if Mr. Wilson was still living. Mr. Thomas explained in his response to the disciplinary complaint, that he was acting as he reasoned was proper when he re-filed the lawsuit.

The initial lawsuit was filed on April 15, 2004 against Lincare, Inc. and United Medical, Inc., in Columbia County Circuit Court. The matter was removed to United States District Court, Western Division on May 6, 2004. A Motion was filed by Mr. Thomas and the defendant's counsel on November 23, 2004, to dismiss the matter voluntarily. This was the day following entry of the Order appointing Mrs. Wilson as Personal Representative of her husband's estate. Mr. Thomas took no action to amend the lawsuit to name the proper plaintiff before filing the motion seeking the voluntary dismissal.

One year later, Mr. Thomas re-filed the action in Columbia County Circuit Court. After being served with the complaint, the Defendants' counsel sought removal to federal court. Mr. Thomas filed an Objection to Removal on December 19, 2005. The next pleading filed was a Withdrawal of Removal and Consent to Remand. After the matter was remanded back to Columbia County Circuit Court, Mr. Thomas made written request for trial to be set in early February 2007.

Unbeknownst to Mrs. Wilson, the defendants filed a Motion to Strike and to Dismiss. It

was with this pleading that Mr. Thomas' conduct in not naming the proper party first became an issue before a court. The defendants explained that Mr. Wilson died on October 22, 2004, that the non-suit was taken on November 29, 2004, and the matter was re-filed on November 29, 2005. Mr. Thomas did not make Mrs. Wilson aware of this pleading or of the issue and the problem that might be created and ultimately cause her to lose any opportunity to have her claims heard in court. By not advising Mrs. Wilson of this information, Mr. Thomas also denied Mrs. Wilson the opportunity to speak to other counsel about the issue in a timely manner. Mr. Thomas denied all of this and stated that Mrs. Wilson was kept informed thoroughly throughout the process.

Mr. Thomas filed a Response on October 16, 2006. Notice was given in December 2006, that a jury trial would be held on February 15, 2007. Mr. Thomas provided Mrs. Wilson with notice of this date. According to Mrs. Wilson, this is the only correspondence she received from Mr. Thomas during this time period. He did not communicate with her concerning the status of the lawsuit or actions being taken in it. He did call from time to time and on occasion went to her home to discuss things but most of those contacts were after the decision had already been made adverse to her and her claim. Mrs. Wilson was never advised why the jury trial was canceled.

Notice was given to Mr. Thomas on January 18, 2007 that the matter was reset for hearing on March 15, 2007, on the Motion to Strike and to Dismiss. Mr. Thomas did not give Mrs. Wilson notice of this hearing, which in turn deprived her of the opportunity to attend and hear the arguments being made. Judge Guthrie made his ruling in an Order filed April 24, 2007. Mr. Thomas filed a Notice of Appeal on May 15, 2007. Mrs. Wilson was advised of the adverse ruling and discussed the filing of a Notice of Appeal with Mr. Thomas. The Court of Appeals' decision was delivered October 29, 2008.

Mr. Thomas' failure to promptly and diligently act on Mrs. Wilson's behalf with regard to

naming the proper party in interest had the effect of causing her to not be able to present her claims in court as she hired Mr. Thomas to allow her to do. Further, his failure to advise her when the issue of his conduct and lack of proper action first came up caused her to not be able to pursue any claim with his malpractice carrier (if he has one) because the statute of limitations had expired while the appellate action was progressing. Mr. Thomas closed his response by explaining that there was nothing intentionally misleading in his dealings with Mrs. Wilson in this matter.

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

1. That Mr. Thomas' conduct violated Rule 1.1, because he was not thorough enough in his representation of Martha Wilson to be certain that he substituted Mrs. Wilson as Personal Representative of the Estate of Mr. Wilson as the Plaintiff prior to taking a non-suit in the action he filed in federal court on behalf of Mr. and Mrs. Wilson. Rule 1.1 requires that a lawyer provide competent representation to a client, including the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. That Mr. Thomas' conduct violated Rule 1.2(a), because despite the fact that his client wished to pursue a cause of action against Lincare and United Medical Supply, Mr. Thomas failed to comply with all the procedural rules to do so, in that he failed to move to substitute Mrs. Wilson, as personal representative of the estate of Mr. Wilson, as the Plaintiff prior to seeking and obtaining a non-suit of the original action, which error caused Mrs. Wilson to be denied opportunity to pursue an action against Lincare and United Medical Supply. Rule 1.2(a) requires that subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the

client as to the means by which they are to be pursued.

3. That Mr. Thomas' conduct violated Rule 8.4(d), because his failure to substitute the real party in interest before taking the non-suit in the Wilson lawsuit in 2004 resulted in his client being denied the opportunity to present her claims in court against the defendants Lincare and United Medical Supply. Rule 8.4(d) requires that a lawyer 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 A, that F. MATTISON THOMAS, III, Arkansas Bar ID# 2002007, be, and hereby is, CAUTIONED for his conduct in this matter. Pursuant to Section 18.A of the Procedures, Mr. Thomas is assessed the costs of this proceeding in the amount of FIFTY DOLLARS ($50). 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: _____
T. Benton Smith, Jr., Chair, Panel A

Date: January 28, 2010