

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

**PANEL B**

**IN RE: JAMES A. PENIX, JR.**

Arkansas Bar ID #73092

CPC Docket No. 2003-011

**FINDINGS AND ORDER**

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by James Paul Smith on July 8, 2002, and by Margaret Mitchell on October 4, 2002. The information related to the representation of Ms. Mitchell by Respondent in 2000-2001.

On February 5, 2003, Respondent was served with an original formal complaint, supported by affidavits from Margaret Mitchell and James Paul Smith. Respondent filed a timely response, and Ms. Mitchell and Mr. Smith filed rebuttals, all of which provided additional information that led to the filing of a First Amended Complaint on July 7, 2003. Respondent filed a timely response to the First Amended Complaint.

Margaret Mitchell, who was seventy-two years of age by early 2003, was injured in a "slip and fall" at a bank. She engaged Springdale attorney James A. Penix, Jr. to represent her on a contingent fee basis of one-third of any recovery, but she was not provided a written fee agreement. In late June 2001 Mr. Penix negotiated a mediation settlement of \$97,500.00 and received the funds. Ms. Mitchell was given a very general accounting on August 3, 2001, showing \$35,593.42 was withheld by Mr. Penix for "NW Medical Center" and \$5,963.89 was withheld for "QualChoice." According to Ms. Mitchell, Mr. Penix told her at the time he would attempt to "negotiate" reductions with these providers and would split the reductions "50/50" with Ms. Mitchell.

Ms. Mitchell later retained other attorneys, including James Paul Smith, to help her understand what had happened in her settlement and with the funds withheld by Mr. Penix for these medical bills. Mr. Smith met with Mr. Penix and was told the situation was just a "misunderstanding." Mr. Smith then wrote Mr. Penix

on May 21, 2002, asking for a detailed explanation of the settlement funds and setting out his belief that Mr. Penix owed Ms. Mitchell \$13,827.80 on the settlement. When Mr. Penix did not respond, Ms. Mitchell filed a criminal complaint with the Washington County Prosecutor. Mr. Penix paid \$13,827.80, the amount demanded in Mr. Smith's May 21, 2002, letter, through the Prosecutor's Office in September 2002, and the Prosecutor declined to file charges.

In his response to the original complaint, Mr. Penix stated a written fee agreement was provided to Ms. Mitchell but he could not locate a copy. He claimed the \$13,827.80 he retained represented his earned attorney's fees for collection and payment by him of the medical lien of Northwest Medical Center (NWMC) and the subrogation claim of QualChoice. He stated these two providers would not reduce their claims, that he explained this to Ms. Mitchell, and that she consented to his representing these claimants and taking these fees. He further explained that NWMC had retained the services of Medical Reimbursement of America, LLC, (MRA) on its claim, and MRA then retained Mr. Penix to collect the lien of NWMC. Mr. Penix claimed he earned a one-third fee from the amount owed to NWMC and also on the subrogation amount due QualChoice, totaling the \$13,827.80 at issue.

At a public hearing on October 15, 2004, Stark Ligon represented the Office of Professional Conduct and Stephen Taylor represented Mr. Penix. Mr. Penix was the only live witness at the hearing. He offered testimony essentially the same as that provided in his written submission to the Committee. Upon consideration of the First Amended Complaint and attached exhibit materials, the responses, rebuttal materials, the testimony of Mr. Penix, other matters before it, and the Arkansas Model Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct found, by a unanimous vote:

A. That Mr. Penix's conduct violated Model Rule 1.4(a) in that after his settlement and partial distribution of settlement funds in her case, he failed to respond to requests for information about the proper distribution of these funds from his client Margaret Mitchell and her new attorneys. Model Rule 1.4(a) requires that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

B. That Mr. Penix's conduct violated Model Rule 1.5(c) in that he failed to provide his client Margaret Mitchell with a written fee agreement for the contingent fee matter he was handling for her.

Upon the settlement conclusion of her contingent matter fee, he failed to provide his client with a complete written statement stating the outcome of the matter and showing the remittance to the client and the method of its determination. Model Rule 1.5(c) provides that a fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

C. That Mr. Penix's conduct violated Model Rule 1.7(b) in that he withheld from his client's part of her settlement \$13,827.80, while he was supposedly negotiating with her medical providers for reductions in their claims against her, from which reductions he would keep one-half for his services, thereby placing himself in a position in which his obligation to his client's best interest was materially limited by his own interests. There was no factual basis on which he could reasonably believe that charging his client one-half of the amount at issue after settlement was not adversely affecting her recovery, when he already charged her one-third on the total recovery in the underlying tort action. Model Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

D. That Mr. Penix's conduct violated Model Rule 1.15(b) in that he failed to promptly and fully account to his client for the \$97,500.00 in settlement funds he received in her case in July 2001,

and when he failed to promptly deliver to his client all the funds to which she was entitled from her settlement. 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.

E. That Mr. Penix's conduct violated Model Rule 1.2(a) in that on August 3, 2001, when Ms. Mitchell signed the settlement disbursement sheet he prepared, his client's objective was for her medical bills to be paid as outlined, in full. He did not abide by her decision in this matter, failing to pay her Northwest Medical Center hospital and QualChoice bills then, even though he had funds in his possession to pay both bills in full immediately and ultimately paid both bills in amounts less funds he retained for his additional legal fees. His client only found out about this unauthorized action by him when she was later contacted by representatives of these two creditors seeking payment of her unpaid bills. Model Rule 1.2 (a) requires that a lawyer shall abide by a client's decisions concerning the objectives of representation, ..., and shall consult with the client as to the means by which they are to be pursued.

F. That Mr. Penix's conduct violated Model Rule 1.4(b) in that on and after August 3, 2001, he failed to explain to Ms. Mitchell that he was not going to pay her two medical bills promptly and in full from the settlement funds he retained, and that he was going to seek additional attorney's fees from these two creditors for, in effect, representing their interests in collecting funds from her that he already held for the purpose of paying her bills in full, thereby not giving his client reasonable information and opportunity to make an informed decision about this aspect of his representation of her. 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.

G. That Mr. Penix's conduct violated Model Rule 1.5(a) in that he agreed to charge his client Margaret Mitchell a contingent fee of one-third if her personal injury claim was settled. He settled the claim for \$97,500 and took a fee of \$32,400, which represents approximately one-third. He then claimed and took an additional fee of \$13,827.80 from the settlement for some effort to settle or pay or collect two medical provider liens against her settlement, raising his total claimed fee to \$46,227.80, or 47.41%, which is not a reasonable fee under his original fee contract with his client, Ms. Mitchell, and was an excessive fee under the contract and circumstances. Mr. Penix assumed no additional risk on the matter of the \$13,827.80 such as to warrant any additional fees, and in fact he knew the lienholders were entitled to be paid in full from the settlement funds he held. Model Rule 1.5(a) provides, in pertinent part, that a lawyer's fee shall be reasonable (e.g. not excessive).

H. That Mr. Penix's conduct violated Model Rule 1.7(a) in that from the settlement he obtained for his client Margaret Mitchell, he claimed legal fees totaling an additional \$13,828.80, above his contracted fee of one-third with his client, from two medical providers who had claims against her settlement, while claiming to represent these providers. He had the funds from the settlement to pay in full the claims of these two providers, Northwest Medical Center (\$35,593.42) and QualChoice (\$5,963.89), and in fact withheld such sums from the final settlement with his client. By claiming to be representing one or both of these providers to collect their lien amounts against Ms. Mitchell's settlement, he acted adversely to her without her consent after consultation. Model Rule 1.7(a) provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

WHEREFORE, it is the unanimous decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that James A. Penix, Jr., Arkansas Bar ID# 73092, be, and hereby is, **reprimanded** for his conduct in this matter and **assessed costs of \$100.00** (which includes a \$50.00 court reporter appearance fee). By a vote of 5-2, with members Cogbill, Hatfield, Moore, Orton and Rush approving, Mr. Penix is also **fined \$5,000.00** pursuant to Section 18.B of the Supreme Court's

Procedures Regulating the Professional Conduct of Attorneys at Law. The fine 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 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: \_\_\_\_\_

J. Michael Cogbill, Chair, Panel B

Date: \_\_\_\_\_