

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL B

IN RE: JEAN M. MADDEN
ARKANSAS BAR ID NO. 84096
CPC DOCKET NO. 2009-114

FILED

APR 16 2010

**LESLIE W. STEEN
CLERK**

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information referred to the Committee by the Honorable Audrey R. Evans, Chief Judge of the United States Bankruptcy Court for Arkansas. The information related to the representation of Ethel T. West by Jean M. Madden, Attorney at Law, Little Rock, Arkansas, in the case of *In Re: Ethel T. West*, United States Bankruptcy Court for Arkansas Case No. 4:02-bk-23841.

On October 29, 2002, Jean Madden signed a Voluntary Petition for Relief under Chapter 13 of the United States Bankruptcy Code on behalf of her client, Ethel T. West. Ms. Madden also signed a Chapter 13 Statement of Plan ("the Plan") which proposed a method of payment to her creditors for the maximum period of time permitted by the Bankruptcy Code, sixty months. The Plan listed Ms. West's creditors, including Malco Motors ("Malco") and Regions Mortgage, Inc. ("Regions"). According to the filed documents, Ms. West had assets of \$54,519.00, which included her home valued at \$45,000, and liabilities of \$11,446.50. Ms. West was to continue to pay Regions outside of the Bankruptcy Court Plan. The Voluntary Petition for Relief was not filed until December 2, 2002.

On January 2, 2003, Malco filed an Objection to Confirmation of Plan. In its Objection, Malco stated that the Plan did not provide adequate protection to Malco. On February 18, 2003, the Court entered an agreed Order Withdrawing Objection to Confirmation Upon Condition. In the

Order, Malco agreed to withdraw its objection to the Plan if Ms. West modified her Plan within twenty days to provide that the secured value of the Ford Taurus would be listed at \$7,500 and Ms. West agreed to be placed on strict compliance for a period of nine months. The Order was signed by Malco's attorney and Ms. West's attorney, Jean Madden. The agreed amount was changed to \$7,500 and Ms. West was placed on "strict compliance." "Strict Compliance" means that if the debtor fails to make every plan payment during the designated time period, then the creditor may receive relief from the automatic stay as to the subject real or personal property after filing an Ex Parte Motion and submitting an Ex Parte Order. Strict compliance is rarely agreed to when a debtor has not missed a single plan payment to the Trustee.

On February 28, 2003, Regions filed a Proof of Claim asserting a secured claim of \$35,424.63 and an arrearage of \$1,183.31. A modified Plan was filed thereafter on March 3, 2003. After an Objection to the modified Plan was filed by the Trustee, an amended Plan was filed on May 9, 2003 and approved by Order dated June 16, 2003.

Later in 2003, Ms. West fell behind on her mortgage payments to Regions. On January 16, 2004, Regions filed a Motion for Relief from Automatic Stay. On March 18, 2004, an Agreed Order Settling Motion for Relief was entered wherein the parties agreed that Regions' motion would be withdrawn on the condition that the mortgage payments of \$426.34 per month would continue and the post-petition arrearage of \$3,894.26 would be cured within 36 months at the rate of \$109 per month. Regions was also awarded attorney's fees in the amount of \$500.00.

Pursuant to the Agreed Order, a Modification of Plan ("Modification") was filed with the Court on March 26, 2004. In the Modification, it was proposed that the regular monthly mortgage payments of \$426.34 be brought into the Plan and that the arrearage of \$3,894.26 be paid at \$109

per month inside the plan. The Modification proposed a monthly payment of \$800 per month by Ms. West. The Modification did not, however, provide for payment of the pre-petition arrearage. A second Modification of Plan was filed on April 20, 2004, reaffirming that Malco would be paid concurrently with the regular monthly payment to the Trustee inside the Plan. An Order confirming the modifications of the Plan was then entered on May 28, 2004.

On July 20, 2004, Regions filed an Amended Proof of Claim. In its Amended Proof of Claim, Regions again listed an arrearage of \$1,683.31. Regions stated it was owed a pre-petition arrearage of \$1,183.31 and \$500.00 attorney's fees that were entered by the Court on March 18, 2004.

On September 1, 2004, Ms. West filed a Modification of Plan requesting that the monthly payments to the Trustee be reduced to \$660.00 due to a change in her income. The September Modification was confirmed by Order dated October 1, 2004. Ms. West continued to make the reduced payments as directed by the Court.

In September, 2007, Ms. West's bankruptcy matter was nearing the end of its sixty month period. The Bankruptcy Trustee sent to Regions a request for information concerning the status of Ms. West's mortgage. Regions responded and provided information showing that Ms. West was in arrears to the amount of \$4,925.51. The report was made part of a letter dated September 6, 2007, which was then sent to Ms. West and copied to Ms. Madden.

On September 6, 2007, Regions filed a Second Amended Proof of Claim ("Second Claim"), listing an arrearage of \$5,577.57. On Exhibit A of the proof of claim, Regions stated it was owed a pre-petition arrearage of \$1,183.31, which represented two monthly mortgage payments from November and December, 2002, and interest as well as \$500.00 attorney's fees and post-petition

arrears of \$3,894.26 pursuant to the March 18, 2004, Agreed Order. The Bankruptcy Trustee issued a Summary Notice of Amended Claim ("Notice") on September 18, 2007. The Notice stated that Regions was amending its claim from \$1,683.31 to \$5,577.57. The Notice also stated that the claim would be deemed allowed unless the Debtor objects to the claim and obtains an order modifying or disallowing the claim as filed. No objection to the Second Claim was filed by Ms. Madden.

Ms. West filed with the Court a letter dated September 18, 2007. In her letter, Ms. West stated that she called her lawyer, John Jackson of the Madden Law Firm, on September 13, 2008, and asked him to reject the claim and find out why, since she had paid for five years on time, that Regions would say that she missed eleven payments and now owes \$4,511.80. Ms. West stated that Mr. Jackson told her he would look into the matter and call her back. Ms. West stated that she received a letter on September 19 which was addressed to her and Regions which led her to believe that she had agreed to pay the money Regions was seeking. The Court treated the letter as an objection to the allowance of claim filed by Regions. A hearing was then scheduled for November 14, 2007.

The November 14, 2007, hearing was continued to December 6, 2007. When the Court called the matter for hearing on December 6, Ms. West appeared and believed that no one from the Madden Law Firm was there to represent her. James Kubicek, Attorney at Law, announced to the Court that he was there for the Madden Law Firm. Ms. West did not know Mr. Kubicek. The Court informed Ms. West, Mr. Kubicek, and the Bankruptcy Trustee that the matter would be called following other matters scheduled for that day.

When the matter was recalled, the Trustee announced that a settlement had been reached

wherein Ms. West would be permitted a discharge. Ms. West's mortgage payments would, upon discharge, be increased by \$100 to cure the arrearage which was agreed to be \$3,667.47. Following the announcement of the Agreed Order, Ms. West was asked by the Court about the allegations contained in her September 18, 2007, letter wherein Ms. West stated that she wanted to file a complaint against Madden Law Firm and for the court to audit the way her case was handled. Ms. West went further and stated that she paid for a service and as far as she could tell the firm had not held up its part of the bargain.

Ms. West was placed under oath and testified about her experience with Madden Law Firm. Ms. West stated that every time she contacted Madden Law Firm to ask questions about her case, she would leave a message and nobody would call her back. The first time she experienced problems was when Malco Motors filed an objection to her bankruptcy plan because they stated that they were owed an additional \$2,000 for the vehicle. Ms. West informed John Jackson, an attorney with Madden Law Firm, that she would rather let Malco take possession of the vehicle than to pay an additional \$2,000 for the car. A few days after her conversation with Mr. Jackson, she received a letter in the mail stating that she agreed to pay the additional \$2,000.

Ms. West testified that Madden Law firm filed a claim for attorney's fees, listing a conference call with the attorney for Malco, Madden Law Firm, and Ms. West. Ms. West stated that there was no conference call. Ms. West stated that she would never have written the Court or the Trustee if someone from Madden Law Firm had taken the time to explain to her what happened. Ms. West met prior to the December 6, 2009, hearing with the attorney for Regions and the Bankruptcy Trustee. During the meeting they explained to her what happened. Nobody from Madden Law Firm offered her any information on what was going despite several calls to the office before the hearing.

Ms. West received a letter from Madden Law Firm a few days prior to the December 6 hearing which outlined an agreement for her to pay an additional \$100 per month after the bankruptcy matter was closed. The letter did not explain to her how there was an amount still owed on her Regions account. Ms. West then informed the court that she had never met the man who was present in court from Madden Law Firm. She stated she paid Madden Law Firm nearly \$2,500 for maybe five conversations and asked the court for a refund of at least half of the money because Madden Law Firm had not represented her. Ms. West stated she had more or less represented herself as far as writing letters to the Court, contacting the Trustee's office, and getting information about where the money went. It was her belief that she paid for a service she did not receive.

James Kubicek of the Madden Law Firm also testified that had no questions of Ms. West as he had never met her until that day. Mr. Kubicek was asked to appear in the case the day before by Ms. Madden who had a personal matter that she needed to attend. Ms. Madden apprised him of the basic essence of the negotiations that had taken place with the Trustee and the attorney for Regions. Mr. Kubicek stated that he had not read a letter Ms. West wrote to the court but had been advised by Ms. Madden that there was a letter to the Court complaining about the arrearage owed to Regions. Ms. West did not understand where an arrearage came from or how the arrearage was calculated.

Ms. West filed with the Court on December 19, 2007, a second letter to the Court concerning the actions of Madden Law Firm. On January 4, 2008, Judge Evans issued an Order to Show Cause and Notice of Hearing. The Order directed Ms. Madden to appear and address allegations made by Ms. West so that the court could determine whether sanctions and/or a disgorgement of fees was appropriate. A hearing was scheduled in the matter for January 29, 2008.

Ms. Madden appeared at the hearing with counsel. Ms. Madden testified that she had worked on this case throughout the four and a half or five years that the case had been open, with the exception of when Mr. Jackson assisted Ms. West on the telephone and then proceeded to work on the case. Ms. Madden prepared the bankruptcy pleadings and the plan, by which Ms. West was to pay \$280 per month to the Trustee through her employer. The plan was set up so that Ms. West would pay Regions outside the plan. Ms. Madden requested \$1200 in attorney's fee but the Court approved only \$1,053. Regions filed a motion for relief from stay because payments on the mortgage were in arrears. The motion listed the secured claim of \$35,424.63 and an arrearage of \$1,183.31. The matter was resolved by an Agreed Order which was entered on March 18, 2004, but it only applied to post-petition arrearage. Ms. Madden then prepared a modified plan to comply with the Agreed Order. The modified plan provided that the Regions mortgage would be brought into the bankruptcy plan and Ms. West's payments to the Trustee would be increased to \$800 per month.

Ms. Madden stated that up to July 2005, she was not aware of any complaints or problems raised by Ms. West or any other party. As a result of work required from the Regions motion, she filed an application for additional compensation requesting \$1,495.97. The Court entered an order granting the application but only in the amount of \$1,061.91

As Ms. West's bankruptcy case was nearing the end of the five-year period, the Trustee mailed a letter to Regions and copied Ms. West and Ms. Madden. In the letter, the Trustee requested confirmation from Regions that the mortgage was current. Regions replied to the request and stated that the mortgage was not current. Regions then filed a claim stating that the arrearage amount was now \$5,577.57, which included both pre- and post-petition arrearage. Ms. Madden instructed her staff to call find out why the arrearage had increased. Mr. Jackson sent an email to Regions' attorney

who responded that an order of the court granted the full amount but no amended proof of claim had been filed until September 6, 2007. Ms. Madden and Mr. Jackson searched for additional information as to how this arrearage could have occurred.

Ms. West called Madden Law Firm on September 19 directing the firm to object to the amended claim. From conversations with Regions' attorney, Ms. Madden believed the amended claim to be correct and that Ms. West did owe the amount stated on the amended claim. Ms. Madden worked out a plan for Ms. West to make up the arrearage. This plan, which was explained to Ms. West by a member of the Madden Law Firm, was for Ms. West to get a discharge from bankruptcy and enter an agreement with Regions to pay \$100 per month until the arrearage was paid. Ms. Madden stated that Ms. West agreed to the plan but she had nothing in writing confirming this agreement. As a hearing was scheduled soon, Ms. Madden sent a letter to Ms. West asking her to confirm whether this was acceptable. Ms. Madden stated that no response was received from Ms. West.

Ms. Madden did not appear at the December 6, 2007, hearing for two reasons. One, the hearing was concerning an objection to a claim in which she believed the parties had settled. Second, she had a friend who was ill from cancer and needed assistance attending a doctor's appointment. Ms. Madden provided her associate, Mr. Kubicek, with the file and explained the situation as she believed it to be. Ms. Madden believed she had a happy client despite Ms. West's allegations

Ms. West testified that she believed she had no more than three conversations with Ms. Madden during the five years in which she had been represented by Madden Law Firm. The most recent one was when she was asked to sign a letter that she was happy with the work of Madden Law

Firm. Ms. West felt that she was not represented because she could not get answers to questions about her case from the law firm, could not meet with a lawyer when she went to Madden Law Firm, and her calls were not returned

Ms. West stated that when she filed for bankruptcy she was already two months behind on her payments. She stated that she was paying her mortgage of \$426 per month outside the bankruptcy plan. In 2004, she received a modification plan that stated she owed \$3,894.26. The modification provided that she pay an additional \$109 inside the plan. It was her belief that this additional amount was going to pay for the \$3,894.26 arrearage as her Regions mortgage became part of the bankruptcy plan, and her bankruptcy plan payments doubled. Ms. West stated that she believed she was paying on the arrearage as she had not been told otherwise. Ms. West stated that her payments to the Trustee were made on time and according to the court's orders. When she received the letter from Regions stating that she owed more money, she called Madden Law Firm asking to know how this could have happened.

Ms. West stated she appeared in court when she was supposed to do so. When she arrived in court and was asked whether she was represented by Madden Law Firm, she stated she was not because she didn't see Ms. Madden or Mr. Jackson. Ms. West had never met Mr. Kubicek and had not received any message that he would be there instead of the attorneys with whom she was familiar. Ms. West believed Madden Law Firm did not need to let her know everything that was going on with her case but that she needed to be informed. Ms. West stated that during a break in court proceedings, she and Regions' attorney took ten minutes to sit down and go over what had happened. After the discussion, she understood what happened.

The Honorable Audrey Evans, on November 10, 2008, entered a Memorandum Opinion and

Order Disgorging Fees. In her Order, Judge Evans found that Ms. Madden failed to adequately represent her client, billed for services not rendered, and failed to communicate with her client. The Court found that Ms. Madden filed Ms. West's bankruptcy petition two months after the petition was signed, creating a situation where Ms. West became late on her mortgage payments while paying them outside her bankruptcy plan; failed to modify Ms. West's plan to pay Regions its pre-petition arrearage after Regions filed its original Proof of Claim; consented to the Malco settlement without Ms. West's permission in a way that negatively impacted Ms. West; failed to adequately counsel Ms. West on the consequences of reducing her plan payment after Regions failed to file a proof of claim for its post-petition arrearage, which resulted in an underfunded plan; billed for services not performed; forced Ms. West (through inaction) to represent herself by filing the Objection; failed to return Ms. West's phone calls; failed to explain to Ms. West why she owed Regions a \$4,511.80 arrearage; failed to explain a proposed settlement with Regions; and left Ms. West virtually unrepresented at the Objection Hearing. The Court further stated that Ms. Madden's legal advice (or lack thereof) prevented Ms. West from curing all of the arrearage owed to Regions by the end of her plan despite Ms. West fulfilling all of her obligations under her plan. The Court concluded that Ms. West was financially better off before she filed bankruptcy than she was five years later. Even though she discharged approximately \$5,000 in unsecured debts, she simultaneously amassed a post-petition arrearage on her home mortgage of \$3,667.47. The Court stated that Ms. West was not at risk of losing her home when she filed, but had she not intervened on her own at the end of the bankruptcy plan, her home would have been subject to foreclosure proceedings upon entry of her discharge from bankruptcy. The Court therefore granted Ms. West's Motion to Disgorge and Ms. Madden was directed to return to Ms. West \$2,114.91 in attorney's fees paid to her from the

bankruptcy plan. The Court then referred the matter to the Arkansas Supreme Court Committee on Professional Conduct.

In her response to the Complaint, Ms. Madden stated that there were two problem areas which led to the Formal Complaint: (1) a disputed amount owed on an automobile and (2) a change in a claim by Regions which resulted in an underfunded Plan prior to the scheduled close of the bankruptcy. As to the amount owed on the automobile, Ms. Madden stated that the decision to keep the vehicle was completely that of Ms. West and that she was advised it was not a logical decision. Because of the Ms. West's insistence on keeping the vehicle and refusing to come to court to challenge the objection from Malco, along with Ms. West's missing two previous car payments, Ms. West was placed in strict compliance. Ms. West was fully aware of possible consequences but agreed to the arrangement with Malco. As to the underfunded Plan, Ms. Madden stated that the amount owed to Regions was set by Regions in its claim and relied upon by everyone, including the Court. Ms. Madden found that Ms. West missed eleven payments on her mortgage up until Regions amended its claim, this was explained to Ms. West, and she understood the situation.

Following service of the formal complaint, Jean M. Madden, by and through her attorney, Bart F. Virden, entered into discussion with the Executive Director which 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 Rules of Professional Conduct, the Committee on Professional Conduct finds:

1. Jean M. Madden violated Rule 1.4(a)(2) when she failed to adequately counsel her client,

Ethel T. West, on the consequences of reducing her plan payment after Regions failed to file a proof of claim for its post-petition arrearage, which resulted in an underfunded plan; when she failed to explain to her client, Ethel T. West, why Ms. West owed \$4,511.80 in arrearage to Regions; and when she failed to explain to her client, Ethel T. West, the terms of a proposed settlement with Regions. Rule 1.4(a)(2) requires that a lawyer reasonably consult with the client about the means by which the client's objectives are to be accomplished.

2. Jean M. Madden violated Rule 1.4(a)(3) when she failed to return telephone calls from her client, Ethel T. West; when she failed to keep her client, Ethel T. West, informed about the status of the Amended Claim filed by Regions in September, 2007; and when she failed to explain to her client, Ethel T. West, the terms of the proposed settlement with Regions which was presented to the Court in December, 2007. Rule 1.4(a)(3) requires that a lawyer keep a client reasonably informed about the status of a matter.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that JEAN M. MADDEN, Arkansas Bar ID No. 84096, be, and hereby is, CAUTIONED and ordered to pay administrative costs in the amount of Fifty Dollars (\$50.00). 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.

IT IS SO ORDERED.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL B

By: Steve R. Crane
Steve R. Crane, Chair, Panel B

Date: 4-16-10