

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

IN RE: JANIE M. EVINS, Respondent
Arkansas Bar ID#92068
CPC Docket No. 2007-079

FILED
OCT 24 2007
LESLIE V. STEEN
CLERK

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by Crystal McKinney in an Affidavit dated July 10, 2007. The information related to the representation of Clint Asher by Respondent beginning in 2004.

On July 19, 2007, Respondent was served with a formal complaint, supported by affidavit from Crystal McKinney. Respondent filed a timely response pursuant to the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law. The matter then proceeded to ballot vote before Panel A of the Committee.

The information before the Panel reflected that on April 28, 2004, Ms. McKinney caused to be filed an Ex Parte motion against Clint Asher, the father of her son, because Mr. Asher and his wife refused to give the minor child his allergy and asthma medicine. Also filed on that same date was a motion, which among other things, requested permission to relocate with her son, daughter and husband to Colorado Springs, Colorado, where her husband was stationed as a member of the United States Air Force. This action by Ms. McKinney reopened the case involving Mr. Asher and her which had been closed for two (2) years. Judge Shirron signed the Ex Parte Order which stopped Mr. Asher's visitation with the child, Cade, until a hearing on the matter could be held. The hearing was scheduled for May 12, 2004. Janie Evins, an attorney

practicing primarily in Hot Springs, Arkansas, represented Mr. Asher at the hearing and she filed responses, on May 12, 2004, to both Motions. Ms. Evins also filed a Petition for Custody, For Child Support and For Modification of Visitation on that same date. A Response was filed on May 21, 2004.

During the hearing, Ms. Evins and her client stated that Mr. Asher did not have access to medical records pertaining to Cade's asthmatic and allergic condition. Both even went on to state that they had never seen any documentation referring to Cade having a medical problem at all. Ms. Evins developed through questioning of her client that Cade had never shown signs or symptoms of any type of illness while in the care of Mr. Asher and his wife, and that they had never had to take him to the doctor. In addition, an explanation was provided that the only reason Mr. Asher had not given Cade his medication was because he and his wife believed that the medicine sent was out of date and unsafe to administer.

Ms. Evins stated to Judge Shirron that the only reason Ms. McKinney filed an Ex Parte Motion was in retaliation for statements made that Mr. Asher planned to file a Petition for Change of Custody. After the testimony, Judge Shirron believed that Ms. McKinney had tried to deceive him, as Ms. Evins suggested, and went on to state that she had fabricated the medical neglect claim.

Judge Shirron dismissed the Ex Parte case, reinstated Mr. Asher's visitation, and ordered Ms. McKinney to sign a medical release form allowing Mr. Asher to obtain any medical records pertaining to Cade. Judge Shirron explained that he felt this was important because of the complaints made about Cade's doctor's office refusing to give either Mr. Asher or Ms. Evins access to any type of medical records. Judge Shirron also ordered make-up visitation which was

to commence that afternoon. Ms. Evins prepared the Order Following Hearing.

In the cover sheet attached to the Order Following Hearing, Ms. Evins stated “once your client has signed the appropriate medical release form at the pediatrician’s office, please let me know so that Mr. Asher can make plans to pick up the medical records.” In paragraph four of the Order, Ms. Evins included language that Ms. McKinney should “within ten (10) days of the entry of this Order, provide an appropriate medical release form to the medical providers for Cade Asher to allow the Plaintiff to have access to all medical information regarding the minor child.” One would believe that Mr. Asher had never had access to Cade’s medical records. This was not true.

Mr. Asher’s visitation with Cade commenced on May 12, 2004, for a week. When Cade returned home, Ms. McKinney realized that Mr. Asher had not given Cade his necessary medication. She called Mr. Asher and his wife to discuss the problem with not administering the medication. She had a tape recorder and taped the whole conversation. Mr. Asher and his wife did admit that they did not give Cade his medication because they felt he did not need it and that they did not think he had a problem with asthma.

After speaking with Mr. Asher, Ms. McKinney contacted her attorney and the decision was made to file a Second Ex Parte Petition. Attached to it was evidence that had been received when Ms. McKinney went to sign a medical release form for Mr. Asher. While asking to fill out a second HIPPA compliant form, the doctor’s office informed Ms. McKinney that she had already signed a release form in September 2003 and that Mr. Asher did have access to Cade’s medical records. In addition, Ms. McKinney learned that Mr. Asher had recently been in the doctor’s office requesting one medical record for Cade. The staff at the doctor’s office

photocopied an authorization form that Mr. Asher signed to obtain a copy of one of Cade's medical records. Mr. Asher signed the form and obtained the medical record he asked for on May 11, 2004, the day before the Ex Parte hearing.

Mr. Jackson filed Ms. McKinney's Second Ex Parte Petition on May 21, 2004, and attached a copy of the authorization form that Mr. Asher signed to obtain the medical record one day prior to the first hearing. He also attached a copy of the HIPPA compliant medical release form that demonstrated that Mr. Asher did have access to Cade's medical records.

Ms. McKinney did not know until Ms. Evins filed a response to the Second Verified Petition for Ex Parte Relief that she knew anything about Mr. Asher obtaining a medical record. In paragraph five of the response, Ms. Evins included the following statements "the Plaintiff affirmatively states that, only because he secured counsel to assist in securing medical records, did he have access to any medical records of the minor child, and affirmatively states that those records were received by the Plaintiff one day prior to the most recent hearing. The Plaintiff did not have access to these records during the April period complained of by the Defendant in her first Ex Parte petition... The Plaintiff, until this date, had no direct information from any physician that the minor child had been previously diagnosed with asthma." Mr. Asher's ability to obtain medical records was never even mentioned until the Ex Parte Hearing, when Ms. Evins and Mr. Asher both complained that they tried to obtain medical records and that the doctor's office would not acknowledge them, give them any type of medical records, or even call them back when asked. Secondly, Ms. Evins and Mr. Asher both had in their possession, prior to the May 12, 2004, Ex Parte hearing, a medical record on Cade. Mr. Asher admitted, under oath, at a later hearing, that he did give this medical record to his attorney on the same day he received it

and the reason why Ms. Evins instructed him to obtain only one medical record.

In June 2004, Ms. Evins sent Mr. Jackson Interrogatories for Ms. McKinney to answer. They were answered and personally delivered to Ms. Evins on July 2, 2004. In addition, Interrogatories were delivered to Ms. Evins for Mr. Asher to answer.

On July 15, 2004, Mr. Asher and Ms. McKinney met again in court in regard to the relocation to Colorado. Ms. Evins represented her client by asking questions about extended family life here in Arkansas. Judge Shirron delivered a letter opinion on August 3, 2004. He granted temporary custody to Mr. Asher. He ruled against Ms. McKinney taking her three year old son with her to Colorado.

Once Mr. Jackson received the letter ruling, he quickly filed a Motion for Clarification and /or Reconsideration on August 6, 2004, at 10:16 a.m. On that same date, Ms. Evins completed the Order awarding custody of Cade to Mr. Asher. The reconsideration hearing was held on August 25, 2004. During the hearing, Judge Shirron heard testimony regarding the earlier false testimony of Ms. Evins' client.

During testimony, Mr. Jackson offered the taped telephone conversation where Mr. Asher and his wife admitted that they had not given Cade his medication. Ms. Evins objected to the tape because she had not known one existed. She was overruled. Mr. Jackson also introduced evidence demonstrating that Mr. Asher had obtained a medical record on May 11, 2004, as evidence that Mr. Asher had received medical documentation prior to the first hearing. During Mr. Asher's testimony, Mr. Jackson asked him what he had done with the medical record he had obtained. Mr. Asher stated, under oath, that he had given it to his attorney that day. Mr. Asher went on to respond that yes, he assumed Ms. Evins brought the medical record with her to court.

When Mr. Jackson asked Mr. Asher why he and his attorney had concealed the document from the Court, Mr. Asher said he did not know, he was sorry and that he had made a mistake. When asked why he obtained only one medical record instead of the whole file, Mr. Asher stated that he and his attorney thought they could prove Ms. McKinney had over-medicated Cade with Albuterol. Judge Shirron even asked Mr. Asher why he had not mentioned the medical record and went so far as to ask him did he just forget he had it. Mr. Asher replied no, that he did not forget, but he just made a mistake and he was sorry and that he was just not thinking clearly.

After all testimony had been completed, Judge Shirron went to his chambers. When he came back to the Courtroom, Mr. Jackson addressed him and explained that he had requested Ms. Evins and her client to respond to Interrogatories on July 2, 2004, and that he had still not received them as of August 25, 2004. Ms. Evins responded that the Interrogatories had already been answered and that he should have received them that day or by the latest, the next day. This was well over the amount of time allowed for timely responses. Mr. Jackson never received those responses, and neither did Ms. McKinney's new counsel, Meredith Wineland. Ms. Wineland left several messages concerning the responses after she was hired but she received no return call about them.

On August 31, 2004, Judge Shirron rendered a letter ruling and stated "After considering the proof from the August 25, 2004, hearing the Court concludes it should set aside its August 3, 2004, letter order. To do otherwise would allow a decision to remain in effect that is now known to have been based on a record of tainted facts." At the conclusion of his ruling, Judge Shirron notified all parties that he was recusing and requesting a Special Judge be appointed. Ms. Evins set out her belief, in her response to the formal disciplinary complaint, that Judge Shirron was

speaking about the administering of the medication, not the testimony about the medical records and whether Mr. Asher had access to them.

The aftermath of all the deceit, which was known by Ms. Evins, caused tremendous hardship for Ms. McKinney. She was left in limbo until a Special Judge was appointed in the Spring of 2005.

A full day trial was scheduled for July 11, 2005, before Honorable Robin Mays. On March 19, 2005, Ms. Wineland sent out a second round of Interrogatories to Ms. Evins for Mr. Asher to answer. They were not answered, so Ms. Wineland sent a letter to Ms. Evins asking when they would be answered. Ms. Evins never answered the letter. On May 16, 2005, Ms. Wineland filed a Motion to Compel. An Order to Compel was entered. On June 15, 2005, the Interrogatories were finally answered. A Motion for Continuance was filed by Ms. Evins but the Court denied it. Judge Mays, after trial, granted custody to Ms. McKinney and she was allowed to move her family to Colorado.

In responding to the formal disciplinary complaint, Ms. Evins denied that she offered into evidence testimony that she knew to be false. She stated that Mr. Asher had only been able to obtain one medical record and not all of them, as he had wished to have. Ms. Evins asserted that she made reasonably diligent effort to comply with the discovery requests. She also explained that she did not allow her client to provide false testimony. Ms. Evins denied that any of her conduct with regard to the representation of Mr. Asher were unethical or a violation of the Rules of Professional Conduct.

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 Ms. Evins' conduct violated Model Rule 3.3(a)(2), because on May 12, 2004, when her client, Mr. Asher, testified that he did not have access to his son's medical records, she did not disclose the material fact to Judge Shirron that Mr. Asher did have access to at least one medical record and had provided the same to her prior to the May 12, 2004, hearing. Model Rule 3.3(a)(2) requires that a lawyer not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by the client.

2. That Ms. Evins' conduct violated Model Rule 3.3(a)(4), when she offered evidence through her client, Mr. Asher, that he had not been able to obtain any medical records with regard to his minor child, which evidence was not factually accurate. Ms. Evins took no remedial measures to make certain that the true facts were given the Court in testimony on May 12, 2004. Model Rule 3.3(a)(4) requires that a lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

3. That Ms. Evins' conduct violated Model Rule 3.4(c), when she failed to comply with the Arkansas Rules of Civil Procedure, in that she failed to file timely responses to discovery on behalf of her client in the custody proceeding involving the minor child of Mr. Asher and Mrs. McKinney. Ms. Evins' failure in doing so required a Motion to Compel to be necessary in the matter. Model Rule 3.4(c) requires that a lawyer not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

4. That Ms. Evins' conduct violated Model Rule 3.4(d), because during the course of the proceeding addressing the issue of custody of Mr. Asher's minor child, she failed to be diligent in

responding to legally proper discovery requests made by Mrs. McKinney's counsel thereby requiring a Motion to Compel to be filed and addressed by the Court. Model Rule 3.4(d) requires that, in pretrial procedure, a lawyer not fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing counsel.

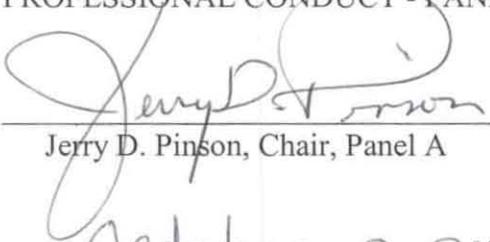
5. That Ms. Evins' conduct violated Model Rule 4.4, because during the course of her representation of Mr. Asher, she allowed him to provide false testimony in a hearing on May 12, 2004. Her conduct in doing so served no other purpose other than to delay and / or burden Mrs. McKinney in her desire to relocate with her entire family to Colorado where her husband was stationed in the Armed Forces, and because during her representation of Mr. Asher, Ms. Evins failed to provide timely responses to discovery with no valid excuse for having done so. Model Rule 4.4 requires that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person.

6. That Ms. Evins' conduct violated Model Rule 8.4(d), because her conduct in allowing her client, Mr. Asher, to testify falsely in the hearing on May 12, 2004, with regard to access to his son's medical records, created the need for additional pleadings and hearings before the Court to address the issue and present the accurate facts and because her conduct in allowing her client, Mr. Asher, to testify falsely in the hearing on May 12, 2004, with regard to access to his son's medical records led the Court to rule on issues based on false testimony. Model 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 JANIE M. EVINS, Arkansas Bar ID#92068, be, and hereby is, CAUTIONED for her conduct in this matter. In addition,

pursuant to Section 18.A of the Procedures, Ms. Evins is assessed the costs of this proceeding in the amount of \$398.50. Ms. Evins is also ordered to pay a fine in this matter in the amount of \$500.00, pursuant to Section 18.B. of the Procedures. The costs and fine assessed herein, totaling \$898.50, 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: 
Jerry D. Pinson, Chair, Panel A

Date: October 2, 2007