

# Legal Malpractice: Taking a Mistake and Making It a Fiasco

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A fundamental of legal malpractice avoidance is that hiding your head in the sand is one of the worst reactions an attorney can have to a problem. Most problems facing attorneys can be fixed if they are addressed promptly. A failure to act often will cause a snowball effect where a relatively small or simple problem becomes a big problem. However, there is one reaction that is even worse than hiding your head in the sand, and that is lying to try and hide an error. As the Nixon era saying goes, “it’s not the crime, it’s the coverup.”

A recent opinion out the Eastern District of Pennsylvania, along with its companion disciplinary opinion exemplifies this issue in tragi-comic terms. The opinion in *FCS Capital v. Thomas*, No. CV 20-5580 (E.D. Pa. 2022) (J. Kenney) is a treatise on how not to practice law and on how not to respond to issues when they occur. The decision is interesting, and very unusual, because it involves a grant of a motion for summary judgment for the plaintiff in a legal malpractice action. The defendant, Joshua Thomas, was self represented in the legal malpractice action.

The legal malpractice action arose out of a defense by the legal malpractice plaintiffs

(FCS) of a claim under the Telephone Consumers Protection Act of 1991. FCS retained Thomas in the matter. The court in the legal malpractice action put together a procedural timeline based upon the underlying docket. This procedural timeline includes that a motion for summary judgment was filed against FCS in the underlying case.

The motion for summary judgment in the FCS matter was based solely on admitted facts because Thomas did not respond to discovery, including requests for admissions. Rather than timely responding to the motion for summary judgment, Thomas filed a motion to extend the time to respond, a week after the deadline to respond. That motion was granted. The court then struck the initial motion for summary judgment for failure to follow local rules and policies. An amended motion for summary judgment was filed, and Thomas again did not file a response within the required time, but filed another motion for extension, which was denied. The court noted the request was filed on the day that the motion was due and was consistent with Thomas’ inattentiveness to the litigation. Thomas did not file any response, and a month later the court entered an order granting the motion for

summary judgment. Judgment was entered against Thomas' client for \$54,000. Thomas did not timely file for reconsideration or appeal.

Thomas filed an untimely motion for reconsideration 47 days after the judgment was entered against his client. The motion was denied. The plaintiff then propounded post-judgment discovery. Thomas did not respond to post-judgment discovery. Following multiple motions regarding the discovery and unsuccessful appeals by Thomas of post-judgment rulings, the court issued sanctions of attorney fees of \$7,029.08, plus an additional \$554. After a hearing, the underlying judge found Thomas lied under oath about why he sought the extension of time to respond to the motion for summary judgment. Thomas' client paid the judgment and sanctions in full.

Largely as a result of his conduct in the FCS matter. Thomas and the Office of Disciplinary Counsel filed a joint petition for discipline on consent with the Disciplinary Board of the Supreme Court of Pennsylvania. Thomas, who was self represented in the disciplinary matter, consented to a two-year suspension. As part of the joint petition Thomas acknowledged there was no legitimate excuse for missing any of the deadlines in the FCS action.

Not surprisingly, FCS brought a legal malpractice action against Thomas. Thomas represented himself in the legal malpractice action. Shortly after the joint petition for discipline was filed, FCS filed a motion for summary judgment in the legal malpractice action. Rather than timely file a response to this motion for summary judgment, Thomas requested an extension of time to respond which the court granted. During the

extension, the Pennsylvania Supreme Court suspended Thomas. Thomas then filed his response to the motion for summary judgment, which included a number of statements that contradicted the joint petition for discipline.

The court authored an opinion granting the motion for summary judgment. The opinion includes a thorough discussion of Pennsylvania legal malpractice law. The opinion also includes a discussion of the uses and limits of judicial notice. The court noted that it could take judicial notice of the underlying docket, orders, and opinions as well as the public discipline by the Pennsylvania Supreme Court.

In granting the motion, the court found no expert was required, and the attempt by Thomas to blame his client for the missed deadlines in the underlying matter without evidence was insufficient to establish a genuine issue of material facts. The court utilized some striking language, stating:

"Of course, Mr. Thomas is self-represented. He did not have a carrier or coverage at the time and that became clear during the Rule 16 conference in this case when it was like pulling teeth to get him to reveal his coverage, which was eventually produced for periods of time that did not include the Shelton matter. A carrier would have cut its losses, paid this claim, and moved on without the façade of defenses as were presented here, which if presented by a carrier would subject it to a bad faith claim."

Ultimately, the court stated: "this court finds that taking the facts in the light most favorable to Mr. Thomas, no reasonable jury would be able to find that the FCS parties would have been unsuccessful in defending

themselves against the underlying summary judgment motion.” The court determined that damages were not speculative because the client was the defendant in the underlying action. The court granted the motion both on the professional negligence claim and a breach of contract claim because the court determined Thomas breached his contract by not providing a defense to his client. Presumably because Thomas was unrepresented, the opinion includes no analysis of a gist of the action doctrine defense to the breach of contract claim.

Finally, in a move that is very unusual in a legal malpractice case, the court found punitive damages were appropriate. The court wrote:

“Although this court’s determination of punitive damages rests solely on the appalling extent of Mr. Thomas’ actions constituting legal malpractice, it deems it pertinent to acknowledge that the current matter before the court is far from the first time Mr. Thomas has shown a complete disregard for the duties of the legal profession and blatant disrespect for the judicial system as a whole.”

The court ordered Thomas pay the entirety of the underlying judgment and sanctions as well as \$1 in punitive damages. Among the myriad of reasons the court determined punitive damages were appropriate, the court specifically noted that rather than telling his clients about the issues with their

case, Thomas “waged a cover-up campaign” to hide his mistakes. The court noted that the purpose in imposing the \$1 in punitive damages was to “serve as notice to everyone moving forward that they need to do due diligence when dealing with Mr. Thomas.”

As noted above, this case is a treatise, or at the very least a law school final exam question, on how not to practice law. If retained to provide a defense, then a defense should be provided. Respond to requests for admissions. Respond to dispositive motions. If a mistake is made, then address it, do not stick your head in the sand, or, worse yet, lie about what happened. The coverup can be worse than the act. Do not tell different stories to different tribunals. Maintain appropriate professional liability insurance. Finally, if your conduct causes a legal malpractice action against you or a disciplinary complaint, then retain counsel familiar with the defense of legal malpractice actions or practice before the Disciplinary Board.



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