

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF PATRICK E.
MCDONALD, ESQ.

No. 38200

FILED

DEC 06 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *D. Richard*
CHIEF DEPUTY CLERK

ORDER OF STAYED SUSPENSION AND PUBLIC REPRIMAND

This is an automatic appeal from a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Patrick E. McDonald be suspended from the practice of law, that the suspension be stayed with respect to McDonald's court-appointed criminal defense work only, subject to several conditions, and that McDonald be publicly reprimanded.

In early 1999, a small business owner hired McDonald to represent him concerning citations that had been issued to his business by the Nevada Department of Business & Industry (DBI) for violations of the Nevada Occupational Safety and Health Act (NOSHA). In the first half of 1999, McDonald and the client met with a DBI representative and reached an agreement in principle to resolve the citations. Specifically, the business would admit to two violations and pay a fine of \$650. DBI sent a written stipulation to McDonald in August 1999. McDonald failed to respond to DBI, and in October 1999, the client received a letter from DBI asking about the stipulation. The client wrote to McDonald and asked that McDonald contact him to discuss the stipulation. The client also wrote to DBI and informed them that McDonald was his counsel, and that the stipulation had been sent to McDonald weeks earlier. McDonald failed to respond to the client's letter, and failed to respond to the client's repeated telephone calls from October 1999 through July 2000.

In July 2000, the client received notice from DBI of an "Application for Confirmation of Default Judgment." The documentation received by the client indicated that, when the written stipulation was not signed, DBI set a default hearing for June 14, 2000, notice of which was served on McDonald in May 2000. McDonald did not notify the client of

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the hearing, and did not appear on the client's behalf. The client sent a letter to McDonald by certified mail, return receipt requested, enclosing the application for default judgment and demanding action. McDonald failed to respond. The client also asked for the return of documentation demonstrating that the defects for which the business had been cited had been remedied, and McDonald failed to return the file. In September 2000, the client was notified that a default judgment for \$1,650 in penalties had been entered.

The client sent a letter to bar counsel complaining of McDonald's conduct. Consequently, bar counsel opened a grievance file, and sent a letter to McDonald, by certified mail, return receipt requested, asking for a response to the grievance. McDonald failed to respond to bar counsel's letter, and also failed to respond to a second certified letter.

A formal complaint was therefore filed against McDonald, charging violations of SCR 151 (competence), SCR 153 (diligence), SCR 154 (communication), SCR 166(4) (declining or terminating representation), and SCR 200(2) (failure to respond to disciplinary authority). McDonald was personally served with the complaint. McDonald failed to answer the complaint, and a notice of intent to take default was personally served on him. He still failed to respond, but was nonetheless personally served with notice of the formal hearing.

McDonald appeared at the formal hearing and admitted the material allegations in the complaint. He did not give any reason for failing to respond to the state bar, stating only that he found the situation "frustrating," apparently because he could not locate the client's file, and that he was too "embarrass[ed]" to retain counsel to represent him in the disciplinary proceeding. The record reflects ten instances in which McDonald failed to respond to bar counsel's inquiries.

McDonald testified as follows: he had never previously handled any NOSHA matters, and he agreed to represent the client as a favor. He did not enter into a fee agreement with the client, and received no fee. McDonald met the client on the morning of the hearing before DBI, after having reviewed some paperwork beforehand. He, the client, and a DBI representative engaged in negotiations, and then entered a stipulation on the record at the hearing. After the hearing, he told the client that the client would have to remedy any defects at the business. After he received the written stipulation, McDonald received a message

from the client's wife instructing him not to sign the stipulation. McDonald received no messages from the client, and did not fail to return phone calls or respond to requests for information. His understanding was that he appeared with the client at the hearing as a favor, and that his representation was limited to that appearance, but he did not communicate this limitation to the client adequately, and never in writing. We note that documentation in the record supports McDonald's statement that he was instructed not to sign the stipulation -- the client's letter to McDonald indicates that he did not agree with certain terms contained in the stipulation.

McDonald admitted his responsibility for his actions, and acknowledged that he should have cooperated with bar counsel. He stated that he was surprised bar counsel asked for a suspension, and asked the panel not to suspend him. According to McDonald, his practice consists mostly of appointed criminal work and some family cases. His wife practices with him part-time, and performs criminal work under a contract with the Eighth Judicial District Court; she also cares for their son. In addition, McDonald's eighty-four-year-old father-in-law came to live with them in September 2000, and is in poor health. McDonald stated that he has frequently covered his wife's hearings when she is caring for her father. He testified that a suspension would "probably destroy [him] financially."

The panel members concluded that the violations charged in the complaint had been shown by clear and convincing evidence. They further found aggravating factors in McDonald's prior disciplinary history, consisting of two private reprimands and a letter of caution, and concluded that his failure to respond to disciplinary authority violated a probationary condition contained in the plea agreement underlying McDonald's most recent private reprimand. It also appears that the panel found McDonald's personal circumstances and his sincere, although belated, acceptance of responsibility and remorse to be mitigating factors.

The transcript of the disciplinary hearing reflects that the panel recommended the following discipline: (1) that McDonald receive a public reprimand, (2) that he limit his practice to court-appointed criminal defense work for a period of two years, to end on July 1, 2003, but that he could conclude any civil, family or administrative matters pending at the time of the disciplinary hearing, (3) that he provide quarterly reports to

bar counsel of his compliance with these conditions, and (4) that if McDonald violated any of the conditions, then he would be suspended for six months and would be assessed the costs of the disciplinary proceeding.

The panel's written findings and recommendation differ from the transcript, however, in one key respect: the length of the suspension to be imposed in the event McDonald violates any of the probationary conditions. Although the transcript reflects a six-month recommendation, the written findings and recommendation set forth a five-year suspension. Only the panel chair signed the written findings and recommendation. It is not clear why the term of the suspension in the written recommendation is so different from that stated in the transcript.

Although the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise independent judgment.¹ Ethical violations must be proven by clear and convincing evidence, evidence which "need not possess such a degree of force as to be irresistible, but . . . must [include] evidence of tangible facts from which a legitimate inference . . . may be drawn."²

We conclude that clear and convincing evidence supports the violations found by the panel. We also conclude that the recommended discipline, as reflected in the hearing transcript, is consistent with previous discipline cases. Accordingly, McDonald is suspended for a period of six months, with the suspension to be stayed on the condition that he limit his practice to court-appointed criminal defense cases until July 1, 2003. McDonald may, however, conclude any matters pending at the time of the disciplinary hearing. McDonald must provide bar counsel with quarterly reports demonstrating his compliance. In addition, we hereby publicly reprimand McDonald for his violations of SCR 151 (competence), SCR 153 (diligence), SCR 154 (communication), SCR 166(4) (declining or terminating representation), and SCR 200(2) (failure to respond to disciplinary authority). McDonald shall pay the costs of this disciplinary proceeding. In the event that McDonald fails to abide by any

¹See In re Kenick, 100 Nev. 273, 680 P.2d 972 (1984).

²In re Stuhff, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992) (quoting Gruber v. Baker, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

of these conditions during the probationary period, then the hearing panel shall have continuing jurisdiction to recommend that we immediately suspend McDonald.

It is so ORDERED.³

Maupin, C.J.
Maupin

Young, J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Rose, J.
Rose

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Richard J. Pocker, Chair,
Southern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Perry Thompson, Admissions Office, U.S. Supreme Court
Patrick E. McDonald

³This is our final disposition of this matter. Any new proceedings concerning McDonald shall be docketed under a new docket number.