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WAKE COUNTY

DISCIPLINARY HEARING COMMISSION

OF THE

NORTH CAROLINA

NORTH CAROLINA STATE BAR

02 DHC 3

THE NORTH CAROLINA STATE BAR  
PLAINTIFF

v.

DONALD J. MCFADYEN  
DEFENDANT

)  
)  
)  
) FINDINGS OF FACT  
) CONCLUSIONS OF LAW  
) AND ORDER OF DISCIPLINE  
)  
)

THIS MATTER came on to be heard and was heard on March 28, 2003 by a hearing committee of the Disciplinary Hearing Commission composed of Elizabeth Bunting, Chair; W. Steven Allen, Sr. and Marguerite P. Watts. The defendant, Donald J. McFadyen, did not appear in person or through counsel. Carolin Bakewell represented the N.C. State Bar. Based upon the evidence presented at trial and the pleadings herein, the hearing committee hereby enters the following:

FINDINGS OF FACT

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.
2. The Defendant, Donald McFadyen, was admitted to the North Carolina State Bar in 1975, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.
3. McFadyen was properly served with all process herein and the Disciplinary Hearing Commission has jurisdiction over McFadyen's person and the subject matter of this proceeding.

4. McFadyen was aware of the time, date and place of the show cause hearing herein.

5. On May 28, 2002, the Disciplinary Hearing Commission entered an order of discipline herein. The order suspended McFadyen's law license for one year and stayed the suspension for one year, based on various conditions. Pursuant to the order, McFadyen was required, inter alia, to:

- a. Make restitution to his former clients, Charles Murray, Macio Murray and Eldon McNeil, in the amount of \$2,710.75, \$2,710.75 and \$2,105.75, respectively, no later than June 23, 2002.
- b. Respond to all inquiries of the North Carolina State Bar by the deadline stated in the communication.
- c. Pay all due and owing mandatory State Bar dues.

6. McFadyen was properly served with and was aware of the terms of the May 28, 2002 disciplinary order.

7. On Jan. 13, 2003, counsel for the State Bar wrote to McFadyen and asked for evidence that he had made restitution as ordered by the DHC. McFadyen did not respond to this letter.

8. On Feb. 7, 2003, counsel for the State Bar again wrote to McFadyen and requested him to respond by Feb. 14, 2003. McFadyen did not respond to the Feb. 7, 2003 letter.

9. On Feb. 14, 2002, counsel for the State Bar sent a copy of the proposed motion to show cause to McFadyen by electronic mail and advised him that the motion would be filed on Monday, Feb. 17, 2003 unless he demonstrated that he had complied with the May 28, 2002 order of discipline.

10. McFadyen responded to bar counsel's Feb. 15, 2002 electronic message on Feb. 17. In his response, he advised bar counsel that he would provide copies of checks showing restitution had been made to the Murrays and McNeil within a few days, but he failed to do so.

11. McFadyen has not responded to the State Bar's motion to show cause, nor has he produced any evidence that he has made restitution to the Murrays or McNeil.

12. The balance in McFadyen's trust account was over \$11,000 as of April 25, 2003 and there was no evidence that McFadyen was unable to reimburse the Murrays or McNeil for any reason.

13. McFadyen has not paid any mandatory State Bar dues since Oct. 15, 1998.

14. McFadyen violated the May 28, 2002 order of discipline in the following respects:

a. McFadyen failed to make restitution to Charles and Masieo Murry and to Eldon McNeil.

b. McFadyen failed to respond to two inquiries of the North Carolina State Bar regarding the question of restitution to the Murrays and McNeil.

c. McFadyen failed to pay his overdue mandatory State Bar dues.

Based on the foregoing Findings of Fact, the Disciplinary Hearing Commission hereby enters the following:

#### CONCLUSIONS OF LAW

1. McFadyen's violation of this Commission's May 28, 2002 order was knowing and willful.

2. The one-year stayed suspension of McFadyen's law license should be activated, based upon his knowing and willful violation of this Commission's May 28, 2002 order.

In addition to the foregoing Findings of Fact and Conclusions of Law, based upon the evidence adduced at hearing, the Hearing Committee hereby also enters the following:

#### FINDINGS OF FACT RELEVANT TO DISCIPLINE

1. McFadyen's failure to comply with the terms and conditions of the order of discipline entered herein on May 28, 2002 undermines the State Bar's ability to regulate attorneys and undermines the privilege of lawyers in this state to remain self-regulating.

2. McFadyen's former clients, Charles and Masieo Murry and Eldon McNeil, suffered substantial actual harm as a result of McFadyen's failure to reimburse sums owed to them.

3. McFadyen became a patient of Dr. David B. Marcotte on June 27, 2002 and was thereafter diagnosed with major depressive disorder and obsessive compulsive disorder.

4. An order calling for discipline short of suspension of McFadyen's law license with appropriate conditions precedent for reinstatement would not sufficiently protect the public for the following reasons:

- a. McFadyen engaged in multiple violations of the Revised Rules of Professional Conduct beginning in at least 1995 and extending over a lengthy period of time, as opposed to an isolated act or mistake, and it therefore appears that his misconduct is the result of some problem or personality defect that is not readily changeable.
- b. McFadyen's actions resulted in multiple, substantial and actual harm to his clients.
- c. McFadyen failed to provide any assurances that he has addressed whatever problem or character flaw caused his misconduct and therefore there is a substantial risk that his misconduct would be repeated if he is permitted to continue to practice law.
- d. Entry of an order imposing lesser discipline would fail to acknowledge the seriousness of the offenses which McFadyen committed and his willful violation of this Commission's May 28, 2002 order, and would be inconsistent with orders of discipline entered by this body in similar cases and would send the wrong message to attorneys regarding the conduct expected of members of the Bar in this state.
- e. The protection of the public requires that McFadyen be forbidden to resume the practice of law until he demonstrates that he understands his ethical obligations to his clients, that he understands principles of trust account management, that he has made restitution to his former clients and that he is not suffering from any addiction or mental illness or condition that prevents him from practicing law competently.

Based upon the foregoing Findings of Fact, Conclusions of Law, Findings of Fact Relevant to Discipline and the consent of the parties hereto, the Hearing Committee hereby enters the following:

#### ORDER OF DISCIPLINE

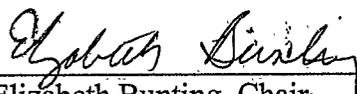
1. The stay of the suspension of the law license of the Defendant, Donald J. McFadyen, is hereby lifted and McFadyen's license to practice law is suspended for a period of one year, effective 30 days from service of the order of discipline upon him.

2. Prior to resuming the practice of law, McFadyen must file a petition demonstrating compliance with the following conditions:

- a. Not later than 45 days before filing a reinstatement petition, McFadyen shall provide to the Office of Counsel a written report from a psychiatrist approved by the N.C. State Bar Office of Counsel, certifying that McFadyen does not suffer from any addiction or physical or mental disability or condition that prevents him from competently practicing law. The report and evaluation shall be completed at McFadyen's expense.
- b. Not later than 45 days before filing a reinstatement petition, McFadyen shall execute a written waiver authorizing the Office of Counsel to contact the psychiatrist concerning McFadyen's evaluation and condition.
- c. McFadyen has complied with the recommended course of treatment of Dr. David B. Marcotte or such successor physician approved by the N.C. State Bar, for the one-year period next preceding the date on which McFadyen seeks reinstatement of his law license.
- d. McFadyen did not violate the laws of any state or of the United States during the suspension period.
- e. McFadyen paid the costs of this proceeding within 30 days after being served with written notice of the costs by the Secretary of the N.C. State Bar.
- f. McFadyen has successfully completed at least 6 hours of continuing legal education courses on the subject of trust account management by a provider approved by the N.C. State Bar.
- g. McFadyen has successfully completed a one-year course in law office management offered by Nancy Byerly Jones or another provider approved by the N.C. State Bar. The course shall be completed at McFadyen's expense.

Signed by the Chair with the consent of the other hearing committee members,

this the 9 day of May, 2003.

  
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Elizabeth Bunting, Chair  
Disciplinary Hearing Committee