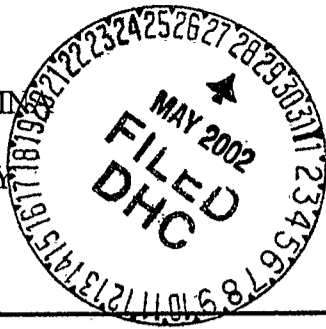


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NORTH CAROLINA  
WAKE COUNTY



BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
02 DHC 03

THE NORTH CAROLINA STATE BAR,  
Plaintiff

v.

DONALD J. McFADYEN, Attorney,  
Defendant

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

On May 10, 2002, this matter came on to be heard before a hearing committee of the Disciplinary Hearing Commission composed of Elizabeth Bunting, Chair; W. Steven Allen, Sr.; and Robert Hicks. A. Root Edmonson represented the North Carolina State Bar and the Defendant did not appear and was not represented by counsel. Based upon the admissions of the Defendant deemed from his default, the hearing committee makes 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 J. McFadyen (hereinafter "McFadyen"), was admitted to the North Carolina State Bar on August 24, 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 Revised Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the times relevant to this complaint, McFadyen actively engaged in the practice of law in the State of North Carolina and maintained a law office in the city of Fayetteville, Cumberland County, North Carolina.

4. McFadyen was properly served with the summons and the Complaint in this matter and was given notice of this hearing.

5. The hearing committee has jurisdiction over McFadyen and the subject matter of this hearing.

6. Brothers Charles and Masieo Murray were injured in an automobile accident on December 24, 1994. The Murray brothers subsequently retained McFadyen to represent them in personal injury claims.

7. In December 1997, McFadyen settled both Murray cases. Each brother received \$2,000.00 in med-pay and \$3,800.00 from liability coverage for a total settlement of \$5,800.00 each.

8. On December 30, 1997, the Murray brothers authorized disbursements from their settlements. As authorized, McFadyen disbursed \$2,089.25 to Charles Murray and \$2,164.32 to Masieo Murray. McFadyen also disbursed his fee of \$1,000.00 for each client.

9. Charles Murray directed McFadyen to disburse the remaining \$2,710.75 of his settlement to his medical providers.

10. Masieo Murray directed McFadyen to disburse the remaining \$2,635.68 of his settlement to his medical providers.

11. McFadyen failed to disburse Charles Murray's \$2,710.75 to his medical providers, even after being prompted to do so by Charles Murray's chiropractor and an investigator for the North Carolina State Bar.

12. McFadyen also failed to disburse Masieo Murray's \$2,635.68 to his medical providers, even after being prompted to do so by Charles Murray's chiropractor and an investigator for the North Carolina State Bar.

13. Jane Barton (hereinafter, "Barton") was injured in an automobile accident on June 25, 1995. Barton subsequently retained McFadyen to represent her in a personal injury claim.

14. On June 25, 1998, McFadyen filed a complaint on Barton's behalf against the negligent driver. However, McFadyen failed to serve a summons and the complaint on the negligent driver. McFadyen also failed to have the summons extended or have an alias and pluries summons issued.

15. As a result of McFadyen's failure to maintain and serve a summons on the negligent driver, the statute of limitations expired on Barton's claim.

16. After he became aware that the statute of limitations had run on Barton's claim, McFadyen failed to communicate this to Barton, even when Barton delivered more medical records to McFadyen's office.

17. On June 7, 2000, after being advised to do so by an investigator from the North Carolina State Bar, McFadyen advised Barton that he had missed the statute of limitations on her claim; offered to compensate her for his malpractice, and advised her to consult with an attorney.

18. Near the end of June 2000, Barton agreed to settle her malpractice claim with McFadyen for \$13,000.00. McFadyen was to pay Barton within three weeks.

19. McFadyen failed to pay Barton and failed to return her subsequent telephone calls.

20. Eldon McNeill (hereinafter, "McNeill") was injured in an automobile accident on August 3, 1995. McNeill subsequently retained McFadyen to represent him in a personal injury claim.

21. In January 1999, McFadyen received \$3,605.75 in settlement proceeds on McNeill's claim.

22. On January 25, 1999, McNeill authorized disbursements from his settlement funds. As authorized, McFadyen disbursed \$1,500.00 to McNeill.

23. McNeill directed McFadyen to disburse the remaining \$2,105.75 of his settlement proceeds to his medical providers.

24. McFadyen failed to disburse McNeill's \$2,105.75 to his medical providers, even after being prompted to do so by McNeill's chiropractor and an investigator for the North Carolina State Bar.

25. On February 28, 2001, the North Carolina State Bar issued a letter of notice to McFadyen by certified mail pursuant to 27 NCAC 1B, § .0112(c) seeking a response to the allegations mentioned above. The letter of notice was returned unclaimed.

26. On March 23, 2000, a Cumberland County Deputy Sheriff served McFadyen with a letter of notice seeking a response to the allegations mentioned above.

27. McFadyen failed to respond to the letter of notice.

28. On April 27, 2001, McFadyen was sent a follow-up letter seeking his response to the letter of notice.

29. McFadyen failed to respond.

30. The funds belonging to the Murray brothers and McNeil were still in McFadyen's trust account when the State Bar's investigator contacted McFadyen. There was no evidence of misappropriation.

BASED UPON the foregoing Findings of Fact, the hearing committee makes the following:

#### CONCLUSIONS OF LAW

1. All parties are properly before the hearing committee and the committee has jurisdiction over McFadyen and the subject matter.

2. McFadyen's conduct, as set out above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(a) & (b)(2) as follows:

- (a) By failing to promptly pay Charles Murray's \$2,710.75 to his medical providers as directed by Charles Murray, McFadyen failed to promptly pay or deliver funds to a third person as directed by his client in violation of Revised Rule 1.15-2(h) [for conduct occurring prior to the amendments to Revised Rule 1.15 on May 4, 2000] and in violation of amended Revised Rule 1.15-2(m) [for conduct continuing after May 4, 2000].
- (b) By failing to promptly pay Masieo Murray's \$2,710.75 to his medical providers as directed by Masieo Murray, McFadyen failed to promptly pay or deliver funds to a third person as directed by his client in violation of Revised Rule 1.15-2(h) [for conduct occurring prior to the amendments to Revised Rule 1.15 on May 4, 2000] and in violation of amended Revised Rule 1.15-2(m) [for conduct continuing after May 4, 2000].
- (c) By failing to preserve Barton's personal injury claim by failing to serve the summons and complaint on the negligent driver and failing to have the summons extended or have an alias and pluries summons issued prior to the statute of limitations expiring on Barton's claim, McFadyen failed to handle Barton's matter with preparation adequate under the circumstances in violation of Revised Rule 1.1(b) and failed to act with reasonable diligence and promptness in representing Barton in violation of Revised Rule 1.3.
- (d) By failing to promptly communicate to Barton that he had allowed the statute of limitations to expire on her claim after he became aware that he had done so, McFadyen failed to keep his client reasonably informed about the status of a matter in violation of Revised Rule 1.4(a) and failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation in violation of Revised Rule 1.4(b).
- (e) By failing to return Barton's calls after failing to timely pay her the agreed settlement amount, McFadyen failed to promptly comply with reasonable requests for information in violation of Revised Rule 1.4(a).
- (f) By failing to promptly pay McNeill's \$2,105.75 to his medical providers as directed by McNeill, McFadyen failed to promptly pay or deliver funds to a third person as directed by his client in violation of Revised Rule 1.15-2(h) [for conduct occurring prior to

the amendments to Revised Rule 1.15 on May 4, 2000] and in violation of amended Revised Rule 1.15-2(m) [for conduct continuing after May 4, 2000].

- (g) By failing to respond to the letter of notice or the follow-up letter, McFadyen failed to respond to a lawful demand for information from a disciplinary authority in violation of Revised Rule 8.1(b).

BASED UPON the foregoing Findings of Fact, the Conclusions of Law, the evidence presented at the hearing, the hearing committee hereby makes the following:

#### FINDINGS OF FACT REGARDING DISCIPLINE

1. On October 15, 1998, the Grievance Committee of the North Carolina State Bar imposed an Admonition against McFadyen in file number 97G1595(II) for his failure to finalize a settlement he had negotiated for his client, including having his client endorse the settlement check and sign the release, and for his failure to communicate with his client during that period.

2. McFadyen's law license was suspended for non-payment of State Bar dues on October 22, 1999, and apparently he has not practiced law since then.

3. McFadyen's misconduct is aggravated by the following factors:

- (a) A prior disciplinary offense; and
- (b) Substantial experience in the practice of law.

4. McFadyen's misconduct is mitigated by the following factors:

- (a) Absence of dishonest or selfish motive;
- (b) Personal or emotional problems;

BASED UPON the foregoing Findings of Fact Regarding Discipline and the arguments of counsel, the hearing committee hereby enters the following:

#### ORDER OF DISCIPLINE

1. The defendant, Donald J. McFadyen, is hereby suspended from the practice of law for one year.

2. McFadyen's one-year suspension is stayed for one year based upon the following conditions:

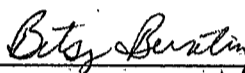
- (a) Within thirty (30) days after service of the disciplinary order upon him, McFadyen shall execute any and all medical and psychiatric authorization releases in favor of the North Carolina State Bar to permit McFadyen's

psychiatrist, selected under the terms of subparagraph (b) below, to release McFadyen's medical and psychiatric information to a designated representative of the Lawyer Assistance Program (hereinafter, "LAP") of the North Carolina State Bar.

- (b) Within sixty (60) days after service of the disciplinary order upon him, McFadyen shall make an appointment with a psychiatrist who is board certified by the American Board of Psychiatry and Neurology, and acceptable to the North Carolina State Bar, for an evaluation of McFadyen's mental and emotional health. The evaluation shall include a substance abuse assessment.
- (c) Within five (5) days of making the appointment with the psychiatrist, McFadyen shall notify the North Carolina State Bar of the name, address and telephone number of the psychiatrist he wishes to use. The North Carolina State Bar shall advise McFadyen as quickly as possible of its approval or disapproval of the psychiatrist.
- (d) If the psychiatrist recommends that McFadyen receive treatment for any mental or emotional problem, or receive treatment for any substance abuse problem, McFadyen shall follow the prescribed course of treatment for as long as the psychiatrist recommends.
- (e) McFadyen must instruct his psychiatrist, and the psychiatrist must agree, to notify the North Carolina State Bar of the date that McFadyen begins his treatment for mental, emotional or substance abuse problems and shall mail a representative designated by LAP quarterly reports of McFadyen's status.
- (f) In the event that McFadyen fails to comply with the psychiatrist's prescribed course of treatment, the psychiatrist shall notify the LAP representative as soon as is practical for the psychiatrist. In turn, the LAP representative shall notify the North Carolina State Bar.
- (g) At the conclusion of McFadyen's treatment, if any, the psychiatrist shall file a final report with the North Carolina State Bar concerning McFadyen's treatment.
- (h) The quarterly and final reports shall specifically include the psychiatrist's opinion about whether McFadyen suffers from any mental, emotional or substance abuse problem that interferes with his performing the obligations necessary to the practice of law.
- (h) Within thirty (30) days from service of the disciplinary order upon him, McFadyen shall make the disbursements to the clients as indicated in the findings of fact above.

- (i) McFadyen shall respond to all Letters of Notice and other requests for information from the North Carolina State Bar by the deadline stated in the communication.
- (j) McFadyen shall not violate any of the Revised Rules of Professional Conduct during the period of the stay.
- (k) McFadyen shall not violate any of the laws of the State of North Carolina or of the United States during the period of the stay.
- (l) McFadyen shall pay all of the costs of this proceeding as assessed by the Secretary within six (6) months of the date this disciplinary order is served upon him.
- (m) McFadyen shall pay all delinquent dues owed to the North Carolina State Bar.

Signed by the chair with the consent of the other hearing committee members, this the 23 day of May, 2002.

  
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Betsy Bunting, Chair  
Hearing Committee