

SUPREME COURT OF NORTH DAKOTA

In the Matter of the Application for Disciplinary Action Against
William E. McKechnie

656 N.W.2d 661, 2003 ND 22 (N.D. 2003) · No. No. 20020194 · Decided February 19, 2003

SUMMARY

The Supreme Court of North Dakota reviewed disciplinary proceedings against attorney William E. McKechnie arising from his representation of a client pursuing a sexual-harassment and discrimination claim. The court found clear and convincing evidence that McKechnie violated North Dakota Rule of Professional Conduct 1.4(b) by failing to adequately explain the representation and statute of limitations, but found insufficient evidence of a separate Rule 1.1 competence violation. The court imposed a public reprimand and ordered McKechnie to pay \$5,375.59 in disciplinary proceeding costs.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Per Curiam; Gerald W. VandeWalle, C.J.; William A. Neumann, J.; Mary Muehlen Maring, J.; Carol Ronning Kapsner, J.; Dale V. Sandstrom, J.
JURISDICTION	North Dakota
DECIDED	February 19, 2003
DOCKET	No. 20020194
DISPOSITION	other
PROCEDURAL POSTURE	The Supreme Court of North Dakota reviewed objections filed by both disciplinary counsel and McKechnie to a hearing panel's report and order suspending McKechnie from practice for 30 days and imposing costs.
STANDARD OF REVIEW	Disciplinary proceedings are reviewed de novo on the record. The court gives due weight to the hearing panel's findings, conclusions, and recommendations but does not act as a mere rubber stamp. Disciplinary counsel must prove each alleged violation by clear and convincing evidence.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of North Dakota.

PARTIES

Disciplinary Board of the Supreme Court of the State of North Dakota
v. William E. McKechnie

TOPICS

employment law

administrative law

appellate procedure

standard of review

employment discrimination

PRACTICE AREAS

legal ethics

attorney discipline

professional responsibility

appellate procedure

QUESTIONS PRESENTED

1. Whether the hearing panel properly struck detailed allegations concerning McKechnie's prior private admonitions from the public disciplinary petition.
2. Whether the exclusion of a witness under N.D.R.E. 615 was properly preserved for review.
3. Whether the hearing panel properly excluded a letter offered for impeachment because disciplinary counsel failed to lay a foundation and show its criticality.
4. Whether expert testimony concerning the standard of care was required or admissible to establish a violation of the professional-conduct rules.
5. Whether an attorney-client relationship existed before the parties executed a written fee agreement.
6. Whether McKechnie's incorrect statute-of-limitations advice constituted a violation of N.D.R. Prof. Conduct 1.1.
7. Whether McKechnie's failure to explain the status of the representation and the applicable limitations period violated N.D.R. Prof. Conduct 1.4(b).
8. What sanction and costs should be imposed.

HOLDINGS

1. Detailed allegations concerning an attorney's prior nonpublic admonitions should not be included in a petition for public discipline; a general allegation that aggravating circumstances will be presented at a later sanction stage is sufficient.
2. Disciplinary counsel is not required to present expert testimony concerning the professional standard of care to prove a violation of the rules of professional conduct, and expert testimony interpreting those rules is not necessary to assist the trier of fact.
3. An attorney-client relationship may arise by implication from the parties' conduct and does not depend on an express contract, a written fee agreement, or payment of fees.
4. McKechnie's incorrect statute-of-limitations advice, standing alone, established only an isolated instance of ordinary negligence or error of judgment and did not constitute a violation of Rule 1.1 by clear and convincing evidence.

5. McKechnie violated Rule 1.4(b) because he failed to adequately explain the status of the representation and the applicable statute of limitations, and providing the client with a copy of the statute did not satisfy his explanatory duty when his specific advice was incorrect.

KEY QUOTATIONS

“We agree with McKechnie that the details of prior private discipline should not be alleged in a petition for public discipline.” (¶ 10)

“We conclude Disciplinary Counsel was not required to present expert testimony of the standard of care to support the charges in this case.” (¶ 17)

“We conclude an attorney-client relationship existed beginning in January 1996.” (¶ 20)

“We conclude there is clear and convincing evidence that McKechnie violated N.D.R. Prof. Conduct 1.4(b).” (¶ 29)

“We conclude McKechnie violated N.D.R. Prof. Conduct 1.4(b), and we order that he be publicly reprimanded and pay the costs of the disciplinary proceedings in the amount of \$5,375.59.” (¶ 34)

FACTUAL BACKGROUND

McKechnie was retained by Dennis Follman to investigate a possible discrimination or sexual-harassment claim against Follman's former employer. McKechnie repeatedly advised Follman that he had three years from his resignation to file suit, although the limitations period ran from the last discriminatory incident; Follman's later lawsuit was dismissed as untimely. McKechnie's communications were sporadic and confusing, including an unexplained \$500 retainer refund, and he did not adequately explain the status of the representation or the applicable limitations period.

PROCEDURAL HISTORY

A disciplinary petition was filed in June 2001. After a hearing, the hearing panel found violations of N.D.R. Prof. Conduct 1.1 and 1.4(b), recommended a 30-day suspension, and assessed costs. Both sides objected, and the Supreme Court conducted a de novo review on the record, ultimately finding only a violation of Rule 1.4(b), imposing a public reprimand, and assessing \$5,375.59 in costs.

DISPOSITION

other

CASES CITED

- Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, 609 N.W.2d 90
- In re Disciplinary Action Against Howe, 2001 ND 86, ¶ 6, 626 N.W.2d 650
- In re Disciplinary Action Against McDonald, 2000 ND 87, ¶ 13, 609 N.W.2d 418
- In re Disciplinary Action Against Seaworth, 1999 ND 229, ¶ 24, 603 N.W.2d 176
- Disciplinary Board v. Edwardson, 2002 ND 106, ¶ 9, 647 N.W.2d 126

- In re Disciplinary Action Against Boulger, 2001 ND 210, ¶ 16, 637 N.W.2d 710
- Matter of Disciplinary Action Against Garcia, 366 N.W.2d 482, 485 (N.D. 1985)
- State v. Saul, 434 N.W.2d 572, 575 (N.D. 1989)
- Matter of Disciplinary Action Against Hawkins, 2001 ND 55, ¶ 17, 623 N.W.2d 431
- In re Disciplinary Action Against McDonald, 2000 ND 87, ¶ 33, 609 N.W.2d 418
- Sather v. Bigger, 107 N.W.2d 38, 40-41 (N.D. 1961)
- In re Disciplinary Action Against Boulger, 2001 ND 210, ¶ 13, 637 N.W.2d 710
- Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927, 936 (Tex. Ct. App. 1999)
- In re Masters, 91 Ill. 2d 413, 63 Ill. Dec. 449, 438 N.E.2d 187, 192 (1982)
- Richmond v. Nodland, 501 N.W.2d 759, 761 (N.D. 1993)
- Olson v. Fraase, 421 N.W.2d 820, 828 (N.D. 1988)
- In re Disciplinary Action Against Jaynes, 267 N.W.2d 782, 784 (N.D. 1978)
- In re Conduct of Leonard, 308 Or. 560, 784 P.2d 95, 100 (1989)
- Moen v. Thomas, 2001 ND 110, ¶¶ 13, 15, 628 N.W.2d 325
- Stormon v. Weiss, 65 N.W.2d 475, 520 (N.D. 1954)
- Matter of Curtis, 184 Ariz. 256, 908 P.2d 472, 477-78 (1995)
- In re Myers, 164 Ariz. 558, 795 P.2d 201, 204 n.3 (1990)
- In re Mulhall, 159 Ariz. 528, 768 P.2d 1173, 1176 (1989)
- The Florida Bar v. Neale, 384 So. 2d 1264, 1265 (Fla. 1980)
- In re Complaint as to Conduct of Gygi, 273 Or. 443, 541 P.2d 1392, 1396 (1975)
- Committee on Legal Ethics v. Mullins, 159 W. Va. 647, 226 S.E.2d 427, 430 (1976)
- Committee on Legal Ethics v. Cometti, 189 W. Va. 262, 430 S.E.2d 320, 330 (1993)
- In re Disciplinary Action Against Nassif, 504 N.W.2d 311 (N.D. 1993)
- In re Disciplinary Action Against Orvik, 549 N.W.2d 671 (N.D. 1996)
- In re Disciplinary Action Against Howe, 2001 ND 7, ¶ 6, 621 N.W.2d 361

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