

SUPREME COURT OF RHODE ISLAND

In re McKenna

76 A.3d 144 (R.I. 2013) · Decided October 17, 2013

SUMMARY

The Rhode Island Supreme Court suspended attorney David I. McKenna from practicing law for at least three months based on neglect of an estate-planning matter, failure to communicate with a client, failure to respond to disciplinary counsel, and misrepresentations concerning filings with the Division of Taxation. The suspension required an application for reinstatement and imposed procedures for concluding or transferring client matters.

CASE DETAILS

COURT	Supreme Court of Rhode Island
WRITING FOR THE COURT	Flaherty; Goldberg; Indeglia; Robinson; Suttell
JURISDICTION	Rhode Island
DECIDED	October 17, 2013
DISPOSITION	other
PROCEDURAL POSTURE	Attorney disciplinary matter submitted by the Rhode Island Supreme Court disciplinary board for review and entry of an appropriate order.
STANDARD OF REVIEW	The Supreme Court reviewed the disciplinary record and entered the appropriate disciplinary order under Article III, Rule 6(d) of the Supreme Court Rules of Disciplinary Procedure.
PRECEDENTIAL VALUE	published opinion
PARTIES	Disciplinary Counsel v. David I. McKenna

TOPICS

estate planning probate trusts

PRACTICE AREAS

legal ethics and professional responsibility attorney discipline estate planning

QUESTIONS PRESENTED

1. Whether McKenna's neglect of the estate-planning representation, failure to communicate with the client, and failure to respond to disciplinary counsel violated the Rhode Island Rules of Professional Conduct.
2. Whether suspension from the practice of law for at least three months, with an application for reinstatement, was appropriate in light of McKenna's misconduct and prior disciplinary history.

HOLDINGS

1. An attorney who fails to diligently complete a client representation, fails to communicate with the client and provide documents for which the client paid, and knowingly fails to respond to lawful disciplinary demands is subject to discipline under the applicable Rules of Professional Conduct.
2. Suspension for at least three months, together with a requirement that the respondent apply for reinstatement, was appropriate for the misconduct and demonstrated history of neglect.

KEY QUOTATIONS

"Accordingly, the respondent, David I. McKenna, is suspended from the practice of law for at least three months, commencing thirty days from the date of this order." (at 146)

FACTUAL BACKGROUND

In May 2012, John D'Errico retained McKenna to prepare estate-planning documents and paid him \$1,642 after reviewing draft documents. McKenna agreed to revise and provide the completed documents but did not do so, failed to return D'Errico's calls, and did not respond to disciplinary counsel's written requests. McKenna later claimed that his failure was partly attributable to pending documentation with the Rhode Island Division of Taxation, but the Division's records showed that he submitted an incorrect filing, failed to respond to the Division's notice, and had no further contact with it. The disciplinary board found that McKenna lied about those claimed difficulties.

PROCEDURAL HISTORY

Disciplinary Counsel filed a petition alleging that McKenna neglected an estate-planning representation, failed to communicate with the client, failed to provide paid-for documents, failed to respond to disciplinary inquiries, and made false representations concerning the Division of Taxation. The disciplinary board held hearings, reopened the record to receive additional evidence, found that McKenna had lied about his claimed difficulties with the Division of Taxation, and recommended suspension for at least three months with an application for reinstatement. The Supreme Court directed McKenna to show cause and, after hearing from the parties and reviewing the record, imposed the recommended discipline.

DISPOSITION

other

CASES CITED

- In re McKenna, No. 2006-287-M.P. (R.I., filed Oct. 16, 2006)

- In re McKenna, 973 A.2d 620 (R.I. 2009)
- In re Fishbein, 8 A.3d 1038, 1039 (R.I. 2010)

OPINION

PER CURIAM.

ORDER This attorney disciplinary matter came before the Court at its conference on September 12, 2013. On August 16, 2013, this Court's disciplinary board (board) forwarded to the Court a decision and recommendation that the respondent, David I. McKenna (the respondent), be suspended from the practice of law for at least three months and that he be required to apply for reinstatement.

Article III, Rule 6(d) of the Supreme Court Rules of Disciplinary Procedure provides in pertinent part: "If the Board determines that a proceeding should be * * * concluded by public censure, suspension or disbarment, it shall submit its findings and recommendations, together with the entire record, to this court. This court shall review the record and enter an appropriate order." We directed the respondent to show cause, if any, why we should not impose the discipline recommended by the board.

Having heard the representations of the respondent, who appeared pro se, and this Court's Disciplinary Counsel, and having reviewed the record, we deem that an order suspending the respondent from the practice of law is appropriate.

The facts giving rise to this disciplinary proceeding are as follows. In May 2012, John D'Errico (D'Errico), retained the respondent to prepare estate planning documents on his behalf. The respondent prepared draft documents and met with D'Errico to review those drafts on June 7, 2012.

After discussion, the respondent agreed to make changes to the drafts and provide the completed documents to D'Errico for execution. At that time D'Errico paid the respondent a fee of \$1,642.00. The respondent did not forward the completed documents to D'Errico. D'Errico made telephone calls to the respondent seeking those documents, but those calls were not returned.

On September 13, 2012, D'Errico filed a complaint with this Court's Disciplinary Counsel regarding the respondent's failure to communicate with him or provide the documents for which he had paid. The respondent did not reply to two written requests from Disciplinary Counsel that he file a response to D'Errico's complaint.

On November 8, 2012, the respondent met with Disciplinary Counsel to discuss this complaint. At that meeting he presented copies of the documents he had completed for D'Errico, advised Disciplinary Counsel that he would forward the documents to D'Errico, and would also file his

written response to D'Errico's complaint. He failed to follow through on either of those representations.

Disciplinary Counsel filed a petition for disciplinary action on January 18, 2013, alleging the above facts and asserting that the respondent had violated Article V, *145Rules 1.31, 1.42, and 8.13 of the Supreme Court Rules of Professional Conduct.

The board conducted a hearing on the petition on April 3, 2013, during which the respondent admitted most of the allegations contained in the petition, but claimed for the first time that he had submitted necessary documentation to the State of Rhode Island, Division of Taxation, and had not received a response from that agency. He offered this explanation as a partial excuse for why he had not provided D'Errico all of his requested documents.

The board concluded the hearing on that day. Disciplinary Counsel contacted the Division of Taxation to verify the information provided by the respondent at the hearing. According to the records of the division, the respondent had submitted an incorrect filing with the division on November 9, 2012.

On November 14, 2012, the division sent notice to the respondent that he had not submitted the correct documentation and forwarded to him the proper forms to complete and return to the division. The respondent had no further contact with the division. Upon receiving this information, Disciplinary Counsel filed a motion to reopen the record in accordance with the provisions of Rule 3.41 of the Rules of Procedure of the Disciplinary Board of the Supreme Court.⁴ The respondent did not object to the motion, and the board reconvened on June 3, 2013 to receive evidence relating to the representations made by the respondent at the hearing held on April 3, 2013.

The board concluded that the respondent lied regarding his claimed difficulties with the Division of Taxation. The board has recommended that we suspend the respondent for at least three months and that he be required to apply for reinstatement, should he choose to do so, at the conclusion of that period.

We believe that the board's recommendation is appropriate. We note that the respondent was suspended by this Court on October 16, 2006 for neglecting client cases and failing to adequately communicate with those clients.

In re McKenna, No.2006-287-M.P. (R.I., filed Oct. 16, 2006). He was reinstated on June 18, 2009. In re McKenna, 973 A.2d 620 (R.I.2009). We previously have suspended attorneys with a demonstrated history of neglect with a requirement that they must apply to this court for reinstatement. See In re Fishbein, 8 A.3d 1038, 1039 (R.I.2010).

Accordingly, the respondent, David I. McKenna, is suspended from the practice *146of law for at least three months, commencing thirty days from the date of this order. During this thirty-day

period, he shall conclude those pending client matters that can be resolved and arrange for the orderly transfer of his remaining client matters to new counsel of the client's choice.

He shall not take on any new matters. Within ten days of the commencement of his suspension, he shall comply with the mandates of Article III, Rule 15 of the Supreme Court Rules of Disciplinary Procedure. He may apply to this Court for reinstatement after three months from the date of his suspension.. Article V, Rule 1.3 of the Supreme Court Rules of Professional Conduct, entitled "Diligence," provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

Article V, Rule 1.4 of the Supreme Court Rules of Professional Conduct, entitled "Communication," provides, in pertinent part: "(a) A lawyer shall: "(2) * * * reasonably consult with the client about the means by which the client's objectives are to be accomplished; "(3) keep the client reasonably informed about the status of the matter; "(4) promptly comply with the reasonable requests for information * * *.

Article V, Rule 8.1 of the Supreme Court Rules of Professional Conduct, entitled "Bar admission and disciplinary matters" provides, in pertinent part: "a lawyer in connection with * * * a disciplinary matter * * * shall not * * * (b) * * * knowingly fail to respond to a lawful demand for information from * * * disciplinary * * * authority * * *.". Rule 3.41 of the Rules of Procedure of the Disciplinary Board of the Supreme Court, provides, in pertinent part: "(a) Petition to reopen.

At any time after the conclusion of a hearing in a proceeding, any participant in the proceeding may file with the Board a petition to reopen the proceeding for the purpose of taking additional evidence."