

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL A

IN RE: DAVID C. MCMAHEN, Respondent
 Arkansas Bar ID#78111
 CPC Docket No. 2003-150

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by April Bradford on July 7, 2003. The information related to the representation of Mr. Bradford by Respondent, David C. McMahan, an attorney practicing in Camden, beginning in November 2002.

During October 2003, Respondent was served with a formal complaint, supported by affidavits from Ms. Bradford and Denise Parks, Deputy Clerk, Arkansas Supreme Court Clerk's Office. Mr. McMahan filed a timely response on November 19, 2003.

The information before the Committee reflected that during November 2002, Ms. Bradford hired Mr. McMahan to file a Chapter 7 bankruptcy on his behalf. At the time of their first meeting, Mr. McMahan explained to Ms. Bradford that the fee would be \$400 and the filing costs would be \$200. Their fee agreement was never placed in written form despite the fact that Mr. McMahan had never previously represented Ms. Bradford. Ms. Bradford paid Mr. McMahan \$300 at the time of their first meeting and an additional \$100 the following week. Mr. McMahan advised Ms. Bradford that he would begin the process of working on her matter and that when he reached the point of filing the actual petition he would need the \$200 filing fee from her. Mr. McMahan assured Ms. Bradford that the bankruptcy process would be started no later than December 31, 2002.

Ms. Bradford believed that everything was progressing as it should until she received a telephone call from an employee at a bank where she does business who questioned whether she was still seeking bankruptcy protection, because they had not received anything reflecting that. At that time, Ms. Bradford began to attempt

to reach Mr. McMahan to speak with him about the bankruptcy matter. Mr. McMahan did not return her telephone calls or respond to her letters. Finally, in January and February 2003, Ms. Bradford resorted to sending certified mailings to Mr. McMahan. Following those mailings, Ms. Bradford received one telephone call from Mr. McMahan. During the telephone call, Mr. McMahan told Ms. Bradford that he was going to take a class in Little Rock in order to be able to proceed with the bankruptcy online. According to the information provided to Ms. Bradford, the class was to take place the first part of February 2003. Mr. McMahan also wrote Ms. Bradford one letter wherein he addressed the need for her to pay the filing fee. Ms. Bradford's bankruptcy was still not filed when March 2003 arrived. Ms. Bradford again wrote to him and requested that he either file the bankruptcy or return her advance payment of fee. Mr. McMahan did neither. When Ms. Bradford contacted the prosecuting attorney's office about Mr. McMahan, she was advised to contact the Office of Professional Conduct about the matter.

Finally, Ms. Bradford hired new counsel. On March 27, 2003, Ms. Bradford wrote Mr. McMahan and terminated his services. She advised Mr. McMahan that she was now being represented by Michael Frey and wished for Mr. McMahan to return her documents and fee payment to Mr. Frey. He did neither. Mr. Frey contacted Mr. McMahan and was assured that he would deliver the documents to Mr. Frey but he did not do so. Mr. McMahan failed to comply with the requests for several months. Because Ms. Bradford had lost her records, she and Mr. Frey needed Mr. McMahan to provide the information in his files with regard to addresses and creditor lists.

At the time Ms. Bradford hired Mr. McMahan, she was unaware that he had been suspended from the practice of law for his failure to pay his annual license fees. The information provided by Denise Parks revealed that Mr. McMahan's license had been suspended on March 1, 2002, and was still in suspended status on the date of service of the formal complaint.

Mr. McMahan did not dispute all the allegations contained in the formal disciplinary complaint. Mr. McMahan offered as mitigation that in the past four years he had not been in the best of health. The impact of all of his health issues was that it wreaked havoc on his finances. Mr. McMahan stated that he simply

procrastinated in paying his license fee until it became delinquent. According to his response, he never intended to avoid any responsibility nor to show any disrespect to the profession.

Mr. McMahan disputes that Ms. Bradford provided all the required information to him. He explained that he provided Ms. Bradford with forms to complete about her assets and other details but she neglected to return those forms to him. Since the worksheets were never returned, Mr. McMahan never finished the petition beyond the initial entries. According to his information, Mr. McMahan had a hard disk failure during January 2003 and Ms. Bradford's preliminary information was lost.

Mr. McMahan offered to the Committee that in the future he will always place the fee agreement in written form. Mr. McMahan stated that he should have responded more clearly and more often to Ms. Bradford but he disputed that he made the assurances to her that she attributes to him. Mr. McMahan explained that he did contact Mr. Frey after being contacted by him and that he advised Mr. Frey about the hard disk failure and the inability to provide the initial information he received from Ms. Bradford to Mr. Frey. Mr. McMahan advised that he was taking the necessary steps to become reinstated to the Bar of Arkansas. In fact he did so prior to the ballot vote on this matter. He became reinstated by paying his annual fees and penalties on December 11, 2003.

Mr. McMahan included an Affidavit from Mr. Frey with his response to the complaint. In the Affidavit, Mr. Frey advised that he did have contact with Mr. McMahan and that Mr. McMahan explained to him that he had no documents or papers belonging to Ms. Bradford because he had lost the list of creditors. Further, Mr. Frey acknowledged that Mr. McMahan mentioned that he would consider refunding \$225 of the \$400 advance fee payment to Ms. Bradford.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, other matters before it, and the Arkansas Model Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That Mr. McMahan's conduct violated Model Rule 1.2(a) because although he

was hired by April K. Bradford to file a Chapter 7 bankruptcy proceeding on her behalf, he did not do so, nor was he in an appropriate licensure status to be able to do so at the time of hire. Model Rule 1.2(a) requires that a lawyer abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and consult with the client as to the means by which they are to be pursued.

2. That Mr. McMahan's conduct violated Model Rule 1.3 because since November 2002, when he received his attorney fees to represent Ms. Bradford in her bankruptcy matter, he undertook no efforts on her behalf and because at no time after being paid to pursue Ms. Bradford's bankruptcy petition did he file the petition or advise Ms. Bradford of the reason for not doing so other than advising her he needed the filing fee but he never took any steps to obtain the filing fee from her. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.

3. That Mr. McMahan's conduct violated Model Rule 1.4(a) when he failed to keep Ms. Bradford informed of the status of her bankruptcy proceeding or any efforts he was undertaking on her behalf in regard to that matter; when he failed to respond to the various requests for information made to him by his client, Ms. Bradford; and, when he failed to respond to the telephone messages left for him by Ms. Bradford concerning her file documents and the return of her legal fee. Model Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

4. That Mr. McMahan's conduct violated Model Rule 1.16(d) when he failed to return the unused portion of the advanced retainer to Ms. Bradford despite requests to do so and despite the fact that he did not take the action for Ms. Bradford which he was hired to pursue and when he failed to return to Ms. Bradford the papers and property to which she is entitled which were left with him when Ms. Bradford hired him to represent her in a bankruptcy proceeding which she wished to pursue. Model Rule 1.16(d) requires that upon termination of representation, a lawyer take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

5. That Mr. McMahan's conduct violated Model Rule 5.5(a) when he met with Ms.

Bradford and discussed pursuit of a bankruptcy proceeding at a time when his license to practice law was suspended in the State of Arkansas and when he accepted legal fees from Ms. Bradford for legal services with regard to a bankruptcy proceeding she wished to pursue at a time when his license to practice law was administratively suspended. Model Rule 5.5(a) requires that a lawyer not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

6. That Mr. McMahan's conduct violated Model Rule 8.4(d) because his failure to

undertake any efforts on Ms. Bradford's behalf or to explain to her that his license to practice law was suspended caused unnecessary delay in the pursuit of her bankruptcy proceeding. Model Rule 8.4(d) requires that a lawyer not engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that DAVID C. MCMAHEN, Arkansas Bar ID# 78111, be, and hereby is, **SUSPENDED FOR A PERIOD OF SIX MONTHS** for his conduct in this matter. The suspension shall become effective on the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court. Further, pursuant to Section 18.A. of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, Mr. McMahan is assessed the costs of these proceedings in the amount of \$50. Mr. McMahan is ordered to pay a fine in the amount of \$500 pursuant to Section 18.B. of the Procedures. In addition, pursuant to Section 18.C. of the Procedures, Mr. McMahan is ordered to pay restitution for the benefit of Ms. Bradford in the amount of \$400. The costs, fine and restitution assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL A

By: _____

Gwendolyn D. Hodge, Chair, Panel A

Date: _____