

IN RE: JAMES A. McDONALD

Order (public reprimand) entered by the Board on November 18, 2002.

BOARD MEMORANDUM<sup>1</sup>

Bar Counsel filed a petition for discipline against the respondents, James A. McDonald ("McDonald") and William H. Shaughnessy ("Shaughnessy"), charging them with, in the main, neglecting a client's personal injury case, allowing her claims to be dismissed, failing to make timely efforts to preserve or revive her claims, and misrepresenting the status of the case to the client. In addition, the petition charged Shaughnessy with making misrepresentations to the court, to McDonald, to successor counsel and to Bar Counsel; with failing to timely return the client's file; and with attempting to exonerate himself or limit his liability for malpractice.

Shaughnessy and Bar Counsel appeal from a report of a hearing committee which recommended an admonition for McDonald and a six month suspension for Shaughnessy. The committee's recommendations were based upon its findings that McDonald had engaged in neglect of a matter he ultimately entrusted to Shaughnessy and that Shaughnessy had neglected a client's personal injury case, allowing her claims to be dismissed, and misrepresented the status of the case to McDonald and the client.

McDonald has not appealed and contends imposition of an admonition is appropriate.

Shaughnessy makes a series of contentions: (1) that he was denied due process by (a) being deprived the opportunity to take discovery prior to hearing and (b) the introduction of aggravating evidence (prior discipline) before the committee prior to its finding a violation had been committed; (2) that newly discovered evidence mandates a new trial before a new committee; and (3) that the committee's findings are erroneous in that he did not neglect the matter.

Bar Counsel appeals the findings and recommendation of the committee as to both Respondents.

On April 8, 2002, oral Argument was held before the Board pursuant to Rule 3.50 of the Rules of the Board of Bar Overseers. We allow Bar Counsel's appeal as to McDonald's sanction and order a public reprimand. As to Shaughnessy, we deny both cross appeals and adopt the committee's suggestion to recommend a six month suspension.

**FACTUAL BACKGROUND**

For the reasons discussed below, we adopt and incorporate by reference the hearing committee's findings of fact. The allegations all emanate from the respondents' representation of Julie Furtado, who on February 27, 1989, was injured in a fall on a sidewalk in the vicinity of the Massachusetts Bay Transportation Authority Haymarket bus station and the Government Center Garage. Furtado engaged McDonald to represent her in this matter. He ultimately filed suit against the City of Boston and the MBTA. Between October 3, 1990 and April 2, 1991, McDonald received Motions for Summary Judgment filed by both the City and the MBTA, based upon their respective positions that the property was not owned by either the City or the

MBTA, but had been conveyed to a private entity prior to Furtado's fall. McDonald failed to respond to either motion, even though McDonald knew (1) that the defendants' motions left open the issue of whether the defendants exercised control or oversight over the premises, and (2) that the statute of limitations on causes of action against other defendants arising out of the client's fall was three years.

Sometime prior to April 9, 1991, McDonald consulted Shaughnessy and asked him to come into the case and represent Furtado. McDonald transferred Furtado's file to Shaughnessy, but did not withdraw from or terminate the representation, and, in fact, continued to represent Furtado in this matter, along with Shaughnessy.

Although Shaughnessy entered an appearance before judgment had entered on either defendant's motion for summary judgment, he did not file any opposition to either motion or a written request for a hearing on either of them. He did apparently file an assented to Motion for Extension of Time for Hearing the summary judgment motions, which was allowed by the court, but, because Shaughnessy had not complied with Superior Court Rule 9A with respect to the Motions for Summary Judgment, his motion had no substantive effect on those pending motions. The committee found it would have been unreasonable for him to think otherwise. On April 29, 1991, and July 9, 1991, the court allowed both defendants' Motions for Summary Judgment and dismissed the plaintiffs claims.

Shaughnessy filed a notice of appeal from the judgment in the case against the MBTA. Although he received notice that the record had been assembled and he entered the case in the Appeals Court, neither he nor McDonald took any further steps to prosecute the appeal and the appeal was dismissed.

Neither McDonald nor Shaughnessy notified the client of these events. They also took no action to file suit against the garage owners, thus allowing the statute of limitations on the claim against the owners to run on February 27, 1992.

Shaughnessy testified that sometime before the end of 1991 he filed a motion to amend the complaint by adding the garage owners as a party. There is no dispute that no such motion or amended complaint was served on the parties or docketed with the court. Shaughnessy was not able to produce such a motion or amended complaint at the hearing. Nonetheless, the committee credited Shaughnessy's testimony that he filed this motion in the motion session.

During 1991 and 1992, Furtado called McDonald several times inquiring as to the status of her case. McDonald did not always reply, but when he did he informed her that the suit was proceeding, in reliance upon Shaughnessy's representations to that effect..

In November 1992, Shaughnessy and McDonald met together with Furtado for the first time. Shaughnessy then represented to Furtado that the case was proceeding to trial and would be reached in about one year. McDonald did not correct Shaughnessy or disclose to the client the true history of the case. Shaughnessy repeated this representation to the client at a meeting in 1993.

Throughout 1993 and 1994, McDonald and Shaughnessy communicated with each other concerning the status of Furtado's case. Shaughnessy represented to McDonald that he was taking or had taken steps to restore the case. McDonald made no effort to verify these representations. Between spring 1993 and July 1994, Furtado repeatedly inquired of McDonald as to the status of the case. As before, McDonald did not always reply, but when he did he represented that the suit was proceeding, although he knew the case had been dismissed.

Shaughnessy testified that in 1994, the same date on which he met with Furtado, he again filed a motion to amend the complaint because the court had lost the previous motion. He produced no evidence to corroborate this allegation. Whether it was filed or even allowed, Shaughnessy never took the further steps necessary to add the garage owners.

It was not until July 22, 1994, that Shaughnessy told Furtado that, in essence, she had no case, although he still did not reveal the truth about the case's procedural history.

Sometime on or before September 1, 1994, Furtado consulted successor counsel, who contacted Shaughnessy concerning the status of the case. Although Shaughnessy acknowledged that the case against the original defendants had been dismissed, he did not reveal on what basis, and he again represented that he was bringing or trying to bring the garage owners into the lawsuit.

Furtado's new counsel served a demand pursuant to G.L. c. 93A for compensation for the loss of Furtado's claims. Shaughnessy's reply denied any error and asserted a counter demand under chapter 93A, to wit: if counsel proceeded with a chapter 93A claim against him or McDonald, Shaughnessy would pursue one against Furtado's new counsel. Believing this placed him in a position of conflict, Furtado's new counsel ceased pursuing the claim.

The foregoing summary is based upon the hearing committee's findings of fact, which we adopt and incorporate by reference.

### **COMMITTEE'S CONCLUSIONS OF LAW**

We also adopt the hearing committee's conclusions of law, which are summarized below.

#### **McDonald**

The committee found that McDonald continued to act as attorney for Furtado even after he brought Shaughnessy into the case. McDonald never withdrew from the representation, and in fact continued to meet and communicate with Furtado. McDonald neglected the matter by failing to ascertain the status of Furtado's case, in placing too much trust in his friend and colleague, and in relying upon his representations as to the progress of the case. When served with notices from the court in this matter, McDonald failed to contact Shaughnessy to ascertain how he intended to handle the case.

By remaining in the case and failing to take the steps necessary to ensure that Furtado's interests were being actively pursued and protected, the committee found McDonald neglected a legal matter entrusted to him in violation of Canon Six, DR 6 101(A)(3). Failing to accurately inform Furtado as to the status of her case (particularly about the allowance of the motions for summary judgment) and relying too heavily on Shaughnessy to handle the case and communicate adequately with the client also constituted neglect by McDonald in violation of Canon Six, DR 6 101(A)(2).

The committee did not find that McDonald was intentionally deceitful or dishonest or that his conduct rose to the level of a violation of Canon One, DR 1 102(A)(4) or (6) (conduct involving deceit, dishonesty, misrepresentation or fraud; conduct adversely reflecting on fitness to practice). Because the committee did not find that McDonald's actions were intentional, it found no violation of Canon Seven, DR 7 101(A)(1) (3) (intentional acts resulting in failure to represent client zealously and resulting in damage or prejudice).

#### **Shaughnessy**

The committee found that, by failing to review and comply with the requirements of Rule 9A, file timely objections to the defendants' motions for summary judgment, file requests for hearings on those motions, file motions to vacate the dismissals, take proper steps to add the garage owners as defendants or sue them separately, or take other timely and effective action to pursue or protect Furtado's claims, Shaughnessy handled a legal matter without preparation adequate in the circumstances in violation of Canon Six, DR 6 101(A)(2); neglected a legal matter entrusted to him in violation of Canon Six, DR 6 101(A)(3); and intentionally failed to seek the lawful objectives of his client through reasonably available means in violation of

Canon Seven, DR 7 101(A)(1). Even if the client had not been harmed by these actions as Shaughnessy contended, lack of injury is not a defense to allegations of neglect under the disciplinary rules. See, e.g., *Matter of Garabedian*, 416 Mass. 20, 21, 23 (1993); *Matter of Gustus*, 8 Mass. Att'y Disc. R. 89 (1992). In any event, the committee found that Furtado was harmed by Shaughnessy's failure to properly represent her. Had Shaughnessy really concluded that Furtado could not recover under any circumstances, he would have been obligated to withdraw from representation and give prompt notice to her and McDonald so that they could make an informed decision about proceeding. In the absence of full disclosure and withdrawal, Shaughnessy had a duty to prosecute the case regardless of its perceived infirmities. See *Matter of Aronson*, 14 Mass. Att'y Disc. R. 12 (1998) (finding neglect and abandonment of estate claim despite absence of evidence that client could have recovered). Therefore the committee concluded that he violated Canon Seven, DR 7 101(A)(3) (prejudice to client in the course of the professional relationship).

The committee rejected Bar Counsel's charge that Shaughnessy intentionally deceived the Court, McDonald, successor counsel or Bar Counsel. However, the committee found that Shaughnessy misled Furtado into believing that her case was proceeding on to trial and misled McDonald into believing that he was taking action to add the garage owners as defendants. Shaughnessy failed to make full and timely disclosure to Furtado as to the status of the case, particularly by failing to notify her of the summary judgment motions and judgments of dismissal. The committee concluded that Shaughnessy actively misrepresented matters to Furtado, continually telling her that her case was on track when in fact it had been derailed, and never candidly discussing the problems with the case. By intentionally concealing the true status of the case from Furtado and McDonald and by intentionally making misleading representations to her, Shaughnessy violated Canon One, DR 1 102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (A)(6) (conduct that adversely reflects on fitness to practice law).

The committee proposed an admonition for McDonald and a six month suspension for Shaughnessy. Shaughnessy appealed as to the sanction recommended in his case, and Bar Counsel appealed as to the sanctions recommended for both Respondents.

#### **RESPONDENT SHAUGHNESSY'S GROUNDS FOR APPEAL**

Shaughnessy claims that newly discovered evidence, presented by way of an affidavit of McDonald's attorney, mandates a new hearing. The Board finds that even if it credits Shaughnessy's new evidence—that an "A" marked on a motion in the Superior Court means the motion has been "Allowed"—given the committee's findings of fact and conclusions of law, which we adopt, this new evidence has no effect on the findings of the hearing committee or on the disposition of this appeal. Even if, as the committee found, a Motion to Amend the Complaint was filed, and, even if, as this new evidence purports to show, it was allowed as Shaughnessy testified, he took no steps to follow through on the amendment. He did not file an amended complaint; he did not serve any papers to that effect on the garage owners or on the City or MBTA. Furthermore, when the motion was filed there was no case in superior court; the matter was then on appeal from the summary judgments that had entered. The request for a new hearing based upon this evidence is denied.

Shaughnessy raises two due process issues: (1) that evidence concerning prior discipline was heard before the hearing committee made a finding of a disciplinary violation; and (2) that he was precluded from obtaining pre hearing discovery. Neither argument has merit. Although evidence of a respondent's prior discipline is not relevant to whether he or she committed another disciplinary violation, it is relevant on the issue of the appropriate sanction. *Matter of Dawkins*, 412 Mass. 90, 96 (1992). The committee took the evidence after the close of Bar Counsel's case, and upon the clear understanding it would be considered only for purposes of the appropriate sanction if a disciplinary violation were found. The process followed by the committee in this case was approved in *Matter of Saab*, 406 Mass. 315, 324 325 (1989).

Shaughnessy's second due process ground, that he was not allowed to take prehearing depositions, fares no better. The Court has ruled that pre hearing depositions might be required in a bar discipline case if refusal would prejudice a party such that due process could not be afforded without them. *Matter of Tobin*, 417 Mass. 81, 87 (1994). The respondent made no showing of any prejudice from the inability to take pre trial depositions. There is no showing that he was unfairly surprised by the evidence.

Contrary to his contention, the hearing committee's findings that Shaughnessy neglected the client's case are amply supported by the evidence. He avers that he took steps to protect and further the client's interest. However, the committee found, and we agree, that the steps taken were not appropriate or timely, and he did not follow through to complete or perfect them. Further, any belief Shaughnessy had that the steps taken would protect the client's interest was unreasonable.

## THE APPROPRIATE SANCTIONS

### McDonald

Bar Counsel maintains that an admonition is inadequate and instead seeks a public reprimand. We agree. McDonald neglected the Furtado matter in a variety of ways, and over many years. The fact that he turned the case over to Shaughnessy does not relieve him of his obligations to represent the client, for he did not withdraw from the representation or inform Furtado that he was no longer acting as her counsel. In fact, he continually dealt with the client as if he was her counsel -sometimes as if he were her only counsel. He took no steps to keep the case from being dismissed, or to bring in new defendants. He relied on his friend Shaughnessy's repeated assurances to him that Shaughnessy was taking action on the case, rather than taking independent steps to assure himself that Shaughnessy was properly protecting the client's interests. He was present when Shaughnessy made misrepresentations to the client concerning the status of the case and neither made an effort to correct him nor called upon him to be truthful with the client.

In mitigation, the respondent was truthful with the committee and appeared to be remorseful about any adverse impact his conduct had upon Furtado.

If *Matter of Kane*, 13 Mass. Atty. Disc. R. 321 (1997), governed here, such misconduct would warrant suspension, but the acts predated Kane, which is to be applied prospectively. Precedent prevailing at the time the acts were committed requires a public reprimand. See *Matter of Keefe*, 7 Mass. Att'y Disc. R. 138 (1991); *Matter of Buckley*, 8 Mass. Atty. Disc. R. 38 (1992); *Matter of Anderson*, 416 Mass. Atty. Disc. R. 6 (1993).

### Shaughnessy

Shaughnessy engaged in a pattern of misconduct. He neglected a matter entrusted to him. He failed to prevent summary judgment from entering against his client, allowing the case to be dismissed, failed to make timely efforts to preserve or revive the client's claims, and made affirmative misrepresentations to the client and co counsel concerning the status and procedural history of the case.

In aggravation, Shaughnessy has a history of discipline. He received an admonition in 1994 for neglect, inadequate preparation, withholding information, and failing to provide zealous representation in three tort cases between 1992 and 1994. AD No. 94 73, 10 Mass Att'y Disc. R. 458 (1994). Prior discipline must always be considered in establishing the sanction. *Matter of Anderson*, 416 Mass 521 (1993); *Matter of Dawkins*, 412 Mass. 91 (1992). See also ABA Standards for Imposing Lawyer Sanctions, ("ABA Standards") § 9.22(i).

In further aggravation, Shaughnessy committed multiple disciplinary offenses, and he exhibited a lack of insight into the wrongful nature and implications of his misconduct. See

ABA Standards, § 9.22.

Shaughnessy also threatened to file an apparently baseless counterclaim under chapter 93A against Furtado's successor counsel in an effort to discourage that attorney's continued representation of Furtado, and prevent himself from being sued for malpractice. This action was inappropriate and we consider it a matter in aggravation.

In mitigation, there was an extensive fire in Shaughnessy's office in December 1991, undoubtedly causing disruption to his law practice. In addition, Shaughnessy lost his wife to cancer in 1985, and he has been solely responsible for raising and supporting his five sons who were approximately 14, 13, 12, 10, and 8 years old when he first officially appeared in the Furtado matter. These two events obviously caused him a great deal of personal stress and must have affected the conduct of his legal practice.

Even under pre Kane precedent, a six month suspension may be warranted for neglect of a single matter. See *Matter of Garabedian*, 416 Mass. 20, 9 Mass. Att'y Disc. R. 132 (1993); *Matter of Chambers*, 421 Mass. 256, 11 Mass. Att'y Disc. R. 31 (1995). This is particularly true in light of Shaughnessy's prior discipline, which must be considered. *Matter of Anderson*, 416 Mass. 521 (1993). Shaughnessy's misconduct also included misrepresentation, which militates toward suspension. See, e.g., *Matter of Ryan*, 7 Mass. Atty. Disc. R. 257 (1991).

### Conclusion

For all of the foregoing reasons, we adopt and incorporate by reference the hearing committee's findings of fact and conclusions of law. We deny the motions to dismiss and for a new hearing. We deny both respondents' appeals. We deny Bar Counsel's cross appeal as to Shaughnessy and allow his cross appeal as to McDonald. An order shall enter publicly reprimanding James A. McDonald, and an Information shall be filed with the Supreme Judicial Court recommending that William H. Shaughnessy be suspended from the practice of law for six months.

Respectfully submitted,  
THE BOARD OF BAR OVERSEERS

By:  
Elizabeth N. Mulvey  
Secretary

Approved: August 12, 2002

<sup>1</sup> Compiled by the Board of Bar Overseers based on the record of proceedings before the Board.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).  
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