

STATE OF MINNESOTA
IN SUPREME COURT
A20-0473



In Re Petition for Disciplinary Action
against MICHELLE LOWNEY MACDONALD,
a Minnesota Attorney
Registration No. 0182370

ANSWER

Michelle Lowney MacDonald, through and by her undersigned counsel and in accordance with Rule 13, Rules on Lawyers Professional Responsibility, provides the following answer to the Director’s Petition for Disciplinary Action. She denies everything alleged in the Petition except for those matters she admits, qualifies, or explains in this answer.

1. Admits the admonition as alleged in the “DISCIPLINARY HISTORY” set forth in paragraph A, but denies the factual context alleged in paragraph B, and notes that the dispute concerned a shortfall of \$167.90, caused not personally by Ms. MacDonald.

2. Admits the substance of paragraph 1, to the extent it reflects the decision of this Court in In Re MacDonald, 906 N.W.2d 238 (Minn. 2018), cert. denied, 138 S.Ct. 2681 (2018).

3. Admits paragraph 2, which recounts her appearance on a WCCO radio

program and her statements reflected in the actual transcript of that interview.

4. Denies paragraphs 3 and 4. As a candidate for public office, she has a First Amendment privilege to offer her views and opinions on issues and cases she disputes. Republican Party v. White, 536 U.S. 765, 768 (2002). She is also permitted by that Amendment to voice her concerns as to how the judiciary functions. In addition to White, she relies on Garrison v. Louisiana, 379 U.S. 64 (1964), which reversed a prosecutor's conviction for uttering statements critical of his local judges, even if reckless. The statements in Garrison, far more pejorative than Ms. MacDonald's, were found to be First Amendment protected. Id. at 77-78. Ms. MacDonald, as a candidate, did not hinder the administration of justice.

5. As to paragraph 5, she admits that she was arrested, but further states that the charge was dismissed.

6. She admits paragraphs 6 and 7, though challenges the factual accuracy of the described website and Twitter account.

7. Concerning the defamation litigation, she admits the substance of paragraphs 8, 9 (save the description of "primary"), 10 (noting, though, the Defendants' Rule 11 Motion was dismissed in Dakota County and withdrawn in Ramsey County), and 11. She denies the substance of paragraphs 12 and 13, and admits 14, but persists that her underlying claims of defamation had merit, were

brought in good faith, and that she exercised her right under the Minnesota Constitution that affords residents of this state the remedy for damage to character. See Article I, Sec. 8 (“Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property, or character. . .”).

8. She denies paragraph 15, which alleges her lawsuit was frivolous. The case presented a question of first impression, namely whether defamation of implication was an actionable tort in Minnesota. This Court had ruled that a public official was constitutionally protected from a defamation claim, Diesen v. Hessburg, 455 N.W.2d 446, 452 (Minn. 1990), but had not yet decided whether the same rule applied to a public figure, Ms. MacDonald included. She and her lawyer sought to clarify an uncertain status of the law. The Complaint and resulting appeal were brought in a “good faith” effort for “an extension, modification, or reversal of existing law.” Rule 3.1, Minnesota Rules of Professional Conduct. In its published opinion, the Minnesota Court of Appeals made certain what was theretofore uncertain, though not in Ms. MacDonald’s favor. Her claim was reviewed de novo. MacDonald v. Brodkorb, ___ N.W.2d ___ (Slip Op. A19-0665, February 24, 2020).

Ms. MacDonald was represented by counsel, and she relied on that counsel

in litigating her District Court claims, and selecting the issues to be raised on appeal. Her decisions were rooted in that advice of counsel, insulating her from a finding of fault. Cf. State v. Jacobson, 697 N.W.2d 610, 616 (Minn. 2005)(holding that good faith reliance on the advice of counsel shields the defendant from criminal culpability). To the extent Ms. MacDonald, joined by her lawyer, were both mistaken in their good faith reading of the law, particularly the law of defamation by implication, they each have a complete defense. Id. at 615. There is no claim in this petition that Ms. MacDonald’s lawyer did not provide “competent representation” within the meaning of Rule 1.1. No disciplinary proceedings have been instituted against Ms. MacDonald’s lawyer for her conduct during the Brodkorb litigation. Moreover, Ms. MacDonald alleges that the Board, by seeking public discipline on this matter, is treating Ms. MacDonald inconsistently vis-a-vis the plethora of other lawyers who lose summary judgment motions, and have appeals of their respective cases affirmed. This Petition also violates her right of equal protection under the law.

9. She denies paragraph 16.

10. She admits paragraphs 17 and 18, and notes the time spent on this matter exceeded two hours.

11. She denies paragraph 19, and alleges the written fee agreement satisfied

the requirements of Rule 1.5 (b)(3), permitting non-refundable fees, and Rule 1.5(e), allowing for the division of labor and fees between lawyers who jointly represent the client. Had Mr. Potvin been concerned over the \$50.00 charge, described as an administrative fee in the retainer agreements, Ms. MacDonald would have taken “prompt action to resolve the dispute.” Rule 1.5(b)(3). Mr. Potvin’s request for a copy of his fee agreement was timely honored. Ms. MacDonald offered to appear for an interview with the Board to discuss this matter, an invitation not reciprocated.

12. She denies paragraphs 20, 21, 22, 23 and 24. The additional fees referenced were reasonable and appropriate. By its Petition, the Board requests what are scarce judicial resources to hear a claim involving \$50.00 increments. Ms. MacDonald alleges that the Board, by seeking public discipline on this matter, is treating her inconsistently compared to her co-counsel on the file.

13. This Answer is made subject to and without waiving affirmative defenses. Ms. MacDonald alleges that Board has failed to state a claim in the Petition upon which relief can be granted. She incorporates by reference all affirmative defenses required to be asserted under the Minnesota Rules of Civil Procedure.

WHEREFORE, Ms. MacDonald requests this Court appoint a Referee

pursuant to Rule 14(a), and that an in-person hearing be conducted, Rule 14 (b), when safe to do so, and where proof and authority will be submitted concerning a) her First Amendment and Minnesota Constitutional rights, as a candidate for judicial office, to criticize, in an opinion, a decision of a District Court; that her questioned complaint and appeal was litigated in good faith upon the advice of counsel, and concerned an open question in Minnesota jurisprudence; that the \$50.00 fee dispute is without merit and not worthy of discipline in any event.

And b) a consideration of her entire career. Ms. MacDonald, admitted to the Bar in 1987, served as a volunteer Referee and Arbiter for the Hennepin County Family and Civil Courts from 1992 to 2011, and has been an ADR Neutral since 1997. Ms. MacDonald received the Northstar Lawyers Pro Bono Award 2013, 2014, 2015, 2016, 2017, 2018 and 2019. Ms. MacDonald is the Founder, Volunteer President and Board Member of Family Innocence, a nonprofit dedicated to keeping families out of court: resolving conflicts and injustices peacefully (2011- present). She is also a founding member of Cooperative Private Divorce Project (Divorce without courts), with regular meetings since 2013 for family court reform to develop proposed legislation, Cooperative Private Divorce Bill HF 1348, which creates an administrative pathway to divorce. She is a founding member of Child Custody/ Parenting Time Dialogue Group, which was

established in 2013. Ms. MacDonald is a longtime member of the Minnesota State Bar Association, was Chairwoman of the Professionalism Committee, and currently serves on the Family Law, ADR and Children's Law sections. She is a member of the Amdahl Inn of Court.

Dated: April 13, 2020

Respectfully submitted,

/s/ Paul Engh

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