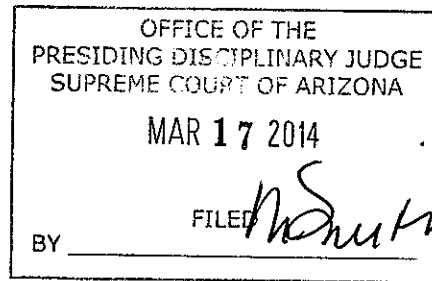


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Respondent

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER OF THE
STATE BAR OF ARIZONA,

**DIANA MCCULLOCH,
Bar No. 009885,**

Respondent.

PDJ-2013-9105

[State Bar File No. 12-2894]

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent Diana McCulloch, who has chosen not to seek the assistance of counsel, hereby submit their Tender of Admissions and Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. A Probable Cause Order was entered on October 18, 2013, and a formal complaint has been filed in this matter. Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

The complainants were notified on February 21, 2014, of this agreement and informed that they could file a written objection within five (5) business days of the notice. Rule 53(b)(3), Ariz.R.Sup.Ct.

Respondent conditionally admits that her conduct, as set forth below, violated Rule 42, ERs 1.7(a), 3.1, and 3.4(c). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: 30-day suspension commencing June 22, 2014, one-year probation. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit "A."

FACTS

GENERAL ALLEGATIONS

1. Respondent was admitted to practice on October 20, 1984, and was an active member during the events described below.

COUNT ONE (State Bar File No. 12-2894)

2. Denise Mary Phelan-Propst (Ms. Phelan-Propst), was the petitioner in an action to terminate parental rights and subsequent adoption (JS-506522)("severance/adoption matter"). Ms. Phelan-Propst is the paternal great aunt of the child and had been the caregiver for the child since the child's infancy.
3. Ms. Phelan-Propst was also the court appointed guardian for the minor child in JG-501399 ("guardianship matter"), before the biological parents Antonio

¹ Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

- (Tony) and Candice Meza² (Candice), withdrew their consent to the guardianship.
4. Respondent represented both parents in the guardianship matter, arguing for the dismissal of Ms. Phelan-Propst as the guardian.
 5. The guardianship was terminated but not before the court granted Ms. Phelan-Propst temporary custody of the child so the child could be protected while Ms. Phelan-Propst pursued the severance/adoption matter.
 6. On June 2, 2009, Ms. Phelan-Propst's attorney Timothy W. Durkin (Mr. Durkin) filed the severance/adoption matter.
 7. On August 3, 2009, Respondent filed a notice of appearance on behalf of parents Tony and Candice in the severance/adoption matter. On August 6, 2009, Respondent filed an amended notice of appearance indicating that she was only representing Candice.
 8. On August 27, 2009, Respondent filed a notice of appearance, and a "Petition re: Intent to Adopt Trevor Riley Meza with Consent" (petition to adopt) on behalf of Stephanie and Christopher Chandler (the Chandlers) in the severance/adoption matter.
 9. The Chandlers were relatives of biological mother Candice.
 10. In the petition to adopt filed by Respondent on behalf of the Chandlers, Respondent stated that both parents had executed consents to voluntary termination of their parental rights.
 11. Respondent was representing biological mother Candice and the prospective adoptive parents in the severance/adoption matter.

² Aka Candice Davis.

12. On September 9, 2009, Mr. Durkin filed an objection to the notice of appearance filed by Respondent and an objection to Respondent's petition to adopt.
13. In the objection, Mr. Durkin outlined the numerous ethical conflicts presented by Respondent representing the biological parents and prospective adoptive parents at the same time. Respondent agrees that Mr. Durkin outlined numerous ethical conflicts, but disagrees that the allegations were accurate or correct in many respects.
14. Mr. Durkin also filed a motion for an award of attorneys' fees and costs in connection with Respondent's improper pleadings.
15. On September 11, 2009, Mr. Durkin, the best interest attorney for the minor child Hollie Owsley, and Respondent, appeared at a status conference and met in Judge Udall's chambers to address the above referenced pleadings, motions, and objections.
16. The Court's minute entry states in part that "Respondent shall respond to Mr. Durkin's motion regarding sanctions by 9-18-09." Respondent failed to file a response by the Court's deadline. Respondent says that she did not receive the email until after the response date had passed. However, after Respondent received the minute entry, she did not file a response for another two weeks.
17. On September 28, 2009, Mr. Durkin filed a China Doll affidavit for the Court's consideration. He also filed a motion for ruling on petitioner's request for sanctions and attorney's fees.
18. On October 2, 2009, the Court awarded Ms. Phelan-Propst \$2,660.80, in attorney's fees and costs incurred as a result of Respondent's misconduct.

19. On November 17, 2009, Mr. Durkin wrote to Respondent and demanded payment of the \$2,660.80. Ms. Phelan-Propst had already paid Mr. Durkin's fees, so the money was to reimburse Ms. Phelan-Propst.
20. Respondent did not pay the sanction. In 2011, Respondent filed bankruptcy, and in 2013 the amount she owed Mr. Phelan-Propst was discharged.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent conditionally admits that her conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.7(a), 3.1, and 3.4(c).

CONDITIONAL DISMISSALS

The State Bar has conditionally agreed to dismiss ER 8.4(d) and Rule 54(c), Ariz.R.Sup.Ct.

SANCTION

Respondent and the State Bar of Arizona agree to the following sanction:

Respondent will be suspended for 30-days and will comply with the provisions of Rule 72, Ariz.R.Sup.Ct. Respondent will be on probation for one year or until the following terms are satisfied.

1. Respondent shall contact the State Bar publications at 602-340-7318 to either obtain and listen to the CD or obtain and view the DVD entitled "The Ten Deadly Sins of Conflict" within ninety (90) days of the date of service of this Order. Respondent may alternatively go to the State Bar website (www.myazbar.org) and complete the self-study online version. Respondent shall provide Bar

Counsel with evidence of completion of the program by providing copies of handwritten notes. Respondent shall be responsible for the cost of the CD, DVD or online self-study.

2. Respondent shall pay Ms. Phelan-Propst \$2,660.80.

Respondent may request early termination of probation once these terms have been met. If Respondent fails to comply with any of the probation terms, and information is received by the State Bar of Arizona, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard 3.0*.

The parties agree that *Standard 4.33* (ER 1.7) is an appropriate *Standard* for the facts and circumstances of this matter. Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Standard 6.22 (ERs 3.1, and 3.4(c)) is an appropriate *Standard* for the facts and circumstances of this matter. Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding. Respondent knowingly filed pleadings in the severance/adoption matter on behalf of the Chandlers who were not parties in that action. She also knowingly failed to pay the sanction levied against her for two years before discharging it in bankruptcy. Respondent's filings caused Ms. Phelan-Propst harm by expanding expensive litigation.

The duty violated

As described above, Respondent's conduct violated her duty to the profession, the legal system, and the public.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently violated ER 1.7 and knowingly violated ERs 3.1 and 3.4(c).

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was actual harm to Mr. Phelan-Propst and potential harm to the profession, and the legal system.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is suspension. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

Standard 9.22: Factors that may be considered in aggravation.

- (a) prior disciplinary offenses;
 - August 19, 1996 – Informal Reprimand [now an admonition] in file no. 96-0126 for violation of ERs 8.4(c) & (d).
 - October 27, 1998 – Informal Reprimand [now an admonition] in file no. 98-0735 for violations of ER 8.4(a).
 - May 1, 2002 – 6 months suspension / 2 years probation MAP, LOMAP and TAEEP in file no. 99-0044, for violation of ERs 1.15, 8.1(b) and Rules 43, 44 and 51(h) & (i), Ariz. R. Sup. Ct.
 - April 15, 2003 – Restitution in file no. 02-0366 for violation of ERs 1.5, 1.16(d), 8.1 and Rule 53(h) & (j), Ariz. R. Sup. Ct.
 - November 10, 2003 – Informal Reprimand [now admonition] in file no. 03-1391 for violations of ERs 1.5, 3.4(c), 8.1 and Rule 53(h) & (i), Ariz. R. Sup. Ct.
 - June 26, 2008 – Reinstated.
 - August 17, 2011 – Reprimand in file no. 10-1631 for violation of 1.5(b) and 1.16(d); Probation for 6 months Fee Arb.
 - February 12, 2013 – Reprimand in file no. 12-0349 for violation of ERs 3.4(c), 4.4(a), and 8.4(d).
- (c) a pattern of misconduct;

Respondent has been sanctioned before for similar violations.
- (g) refusal to acknowledge wrongful nature of conduct;
- (i) substantial experience in the practice of law;

Standard 9.32: Factors that may be considered in mitigation.

- (m) remoteness of some of the prior offenses.
- (j) delay in disciplinary proceedings. This matter was not brought to the State Bar's attention until October 2012, but the conduct actually occurred in 2009.

Discussion

The parties have conditionally agreed that a greater or lesser sanction would not be appropriate under the facts and circumstances of this matter. This agreement was based on the following: Respondent now understands the conflict of interest, but did not think at the time that the Chandlers' interests were different from Tony and Candice because Tony and Candice were not seeking to regain rights to their son Trevor. All four agreed that the goal was to have the Chandlers adopt Trevor. Respondent also recognizes that she filed frivolous pleadings and she should have moved to intervene instead of filing the Notice of Filing Consent to Terminate Parental Rights and Consent for Adoption and the Petition, re: Intent to Adopt Trevor Riley Meza with Consent. Respondent failed to file a timely response to Ms. Phelan-Propst's motion for fees and sanctions as directed by the Court.

Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.


CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent

believe that the objectives of discipline will be met by the imposition of the proposed sanction of a thirty-day suspension with one-year probation, subject to early termination upon completion of the probation terms, and payment of the costs and expenses of these proceedings. ~~A proposed form order is attached hereto as Exhibit B.~~^{do}

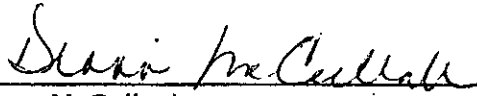
DATED this 17th day of March, 2014.

STATE BAR OF ARIZONA


Shauna R. Miller
Senior Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation. [I acknowledge my duty under the Rules of the Supreme Court with respect to discipline and reinstatement. I understand these duties may include notification of clients, return of property and other rules pertaining to suspension.]

DATED this _____ day of March, 2014.


Diana McCulloch
Respondent

Approved as to form and content


Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this 17 day of March, 2014.

Copies of the foregoing mailed/emailed
this 17 day of March, 2014, to:

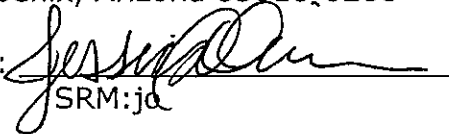
Diana McCulloch
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Respondent

Copy of the foregoing emailed
this 17 day of March, 2014, to:

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
Email: officepdj@courts.az.gov
lhopkins@courts.az.gov

Copy of the foregoing hand-delivered
this 17 day of March, 2014, to:

Lawyer Regulation Records Manager
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266

By: 
SRM:jd

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

IN THE MATTER OF A MEMBER OF THE
STATE BAR OF ARIZONA,

DIANA MCCULLOCH,
Bar No. 009885

Respondent.

PDJ 2013-9105

**AMENDED
FINAL JUDGMENT AND ORDER**

[State Bar File No. 12-2894]

FILED APRIL 11, 2014

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent ("Agreement") filed on March 17, 2014, pursuant to Rule 57(a), Ariz. R. Sup. Ct., and the State Bar's Notice of Errata filed on April 9, 2014, hereby accepts the Agreement. Accordingly:

IT IS HEREBY ORDERED that **Diana McCulloch, Bar No. 009885**, is hereby suspended for thirty (30) days for her conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents, effective **June 22, 2014**.

IT IS FURTHER ORDERED that Ms. McCulloch shall immediately comply with Rule 72, Ariz.Sup.Ct., including notice to clients and others.

IT IS FURTHER ORDERED that upon reinstatement, Ms. McCulloch will be on probation for one (1) year or until the following terms are satisfied.

Terms of Probation

1. Ms. McCulloch shall contact the State Bar publications at 602-340-7318, to either obtain and listen to the CD or obtain and view the DVD entitled "The Ten Deadly Sins of Conflict" within ninety (90) days of the date of service of this Order. Respondent may alternatively go to the State Bar website (www.myazbar.org) and complete the self-study online version. Ms. McCulloch shall provide Bar Counsel with evidence of completion of the program by providing copies of handwritten notes. Ms. McCulloch shall be responsible for the cost of the CD, DVD or online self-study.
2. Ms. McCulloch shall pay Ms. Phelan-Propst \$2,660.80, prior to her reinstatement.

Ms. McCulloch may request early termination of probation once these terms have been met.

IT IS FURTHER ORDERED that Ms. McCulloch shall pay the costs and expenses of the State Bar of Arizona in the amount of \$1,200.00 prior to her reinstatement. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 11th day of April 2014.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
this 11th day of April, 2014.

Copies of the foregoing mailed/mailed
11th day of April, 2014.

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by: MSmith