BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **HOLLY L. MARSHALL** **Bar No. 015897,** Respondent.	**PDJ 2021-9022** **DECISION AND ORDER OF DISMISSAL** [State Bar No. 20-0912] **FILED SEPTEMBER 21, 2021**

An evidentiary hearing was held on September 2, 2021 before a hearing panel comprised of Presiding Disciplinary Judge Margaret H. Downie, attorney member Ralph Wexler, and public member Mel O'Donnell. The State Bar of Arizona was represented by Craig D. Henley. Respondent Holly L. Marshall represented herself. Numerous exhibits were admitted into evidence, and the following individuals testified:

- Holly L. Marshall
- Casey Scatterday
- Matthew McGregor

In addition, the parties stipulated to the substance of testimony that would have been offered by Randy Ramsey – one of Ms. Marshall's listed witnesses. 119 exhibits were introduced into evidence – many of which were of marginal relevance.

FINDINGS OF FACT

1. Ms. Marshall was admitted to the State Bar of Arizona on December 20, 1994. She was previously admitted to practice law in New York in 1989.

2. Ms. Marshall represented Tyree Carter in post-decree paternity proceedings in Maricopa County Superior Court. The opposing party was Casey Scatterday, who represented herself. (*Casey Lee Scatterday v. Tyree Michael Carter,* FC 2015-051462). Ms. Scatterday's address was protected pursuant to Rule 7, Arizona Rules of Family Law Procedure ("ARFLP").

3. The State Bar alleges that Ms. Marshall failed to serve the following documents on Ms. Scatterday:

- Notice of Appearance (filed March 3, 2020)
- Garnishee's Answer (filed March 24, 2020)[1]
- Motion for Temporary Post-Decree Temporary Orders Without Notice (filed March 24, 2020)
- Petition for Modification of Legal Decision Making, Parenting Time and Child Support (filed March 24, 2020)

The State Bar further alleges that language Ms. Marshall used on the certificates of service was inaccurate.

4. In terms of the Notice of Appearance, the record reflects that Ms. Scatterday – who testified that she frequently reviewed the court's online docket -- emailed Ms. Marshall on March 18, 2020, stating:

> I saw your notice of appearance on the record, but I have not received a copy from you. Please be advised moving forward I accept electronic service by email to this address.

[1] Ms. Scatterday had obtained a judgment against Mr. Carter and sought to garnish any property or money belonging to him that Ms. Marshall had in her possession. In the Garnishee's Answer, Ms. Marshall advised that she had no such property or money.

Ms. Marshall immediately responded by email to Ms. Scatterday and attached a copy of the Notice of Appearance.

5. Ms. Marshall acknowledged that the certificate of service on the Notice of Appearance was inaccurate and testified that, at the time the document was filed, she had no contact information for Ms. Scatterday because her address was protected. Ms. Marshall agreed that the language she used on that certificate was "not good practice."

6. On March 24, 2020, Ms. Marshall filed a Motion for Post-Decree Temporary Orders Without Notice for Modification of Legal Decision Making, Parenting Time and Child Support. At the same time, she filed a Petition for Modification of Legal Decision Making, Parenting Time and Child Support. These two filings were not immediately served on Ms. Scatterday due to unusual circumstances occasioned by the COVID-19 pandemic. Ms. Marshall testified that petitions of that nature are served on opposing parties as soon as the assigned judicial officer takes some type of action, which may include issuing an order to appear or considering emergency relief. Such judicial action – at least in Maricopa County Superior Court -- typically occurs on the same day the petition is filed. Due to the pandemic, however, normal court operations were disrupted, and there was substantial delay in obtaining judicial review of the March 24, 2020 filings. In the meantime, Ms. Marshall testified, no rule or court order required her to serve the documents on Ms. Scatterday. Her testimony on this point was not refuted.

7. As with the certificate of service included on the Notice of Appearance, Ms. Marshall conceded that the language she used on the March 24, 2020 filings was

inaccurate because the documents had not been e-filed, and service was not effectuated on Ms. Scatterday until after the court took action on them.

8. After the March 24, 2020 petition and motion were filed, Ms. Scatterday corresponded with Ms. Marshall by email, stating she was aware of the filings, though they had not been served on her. On March 30, 2020, Ms. Marshall emailed Ms. Scatterday as follows:

> Hi Casey, I hope all is going well with you during these difficult days with the global pandemic.
>
> I received your email this morning. Things are a bit atypical at the moment given the restrictions and changes that have had to be worked out with the COVID-19 situation.
>
> The Motion was filed without notice. As a courtesy to you, I did want to call you to let you know when we were going in to address the Court as would normally be the case. That way, you would have had the chance to call in with your position. However, nothing went in the regular course of a typical filing. Although we filed the document with the Court, we did not see Judge Driggs, nor was the Petition considered. I was told that Judge Driggs would be in on Wednesday and some other things about the way the Court would be working. In any event, the Petition and order have not been handled as we would normally expect. I did hear that the Petition was considered by the Juvenile Court given the dual filings. I, however, was not present at that hearing and do not represent Ty up there in Coconino County. I suspect that the Order will be signed/or not, when the Juvenile Court transfers the case back to Family Court. If you will accept service, I will forward a waiver and acceptance of service to you. However, as I indicated, we do not have a signed order at this time. Therefore, we can wait until that happens or is declined. Currently, you could say the temp orders petition is in limbo. Let me know if you will accept service once we get the order back. If not, we will have to use a process server and increase the costs unnecessarily, I am sure you agree.

9. The issue of most concern to the hearing panel relates to language Ms. Marshall included in paragraph 6 of the March 24, 2020 *ex parte* motion. As originally filed, that paragraph read:

> Petitioner is pro per in this action and there is no current address on file for her where notice may be sent. *A telephone call was made to her prior to filing this action with the Court to inform her that this Motion was being filed and the telephone number of this Division of the Court was provided to her.* Alternative service of the Petition is requested so that providing any orders issued herein to the Clerk of the Court for service at her protected address, pursuant to Rule 7, ARFLP, is deemed sufficient service under the circumstances. (Emphasis added)

The italicized language is not accurate. Ms. Marshall did *not* call Ms. Scatterday before filing the *ex parte* motion. Ms. Scatterday brought this inaccuracy to Ms. Marshall's attention in a March 30, 2020 email.

10. On April 15, 2020, Ms. Marshall filed a "Notice of Amendment to Paragraph 6 of Respondent's Motion for Post-Decree Temporary Orders Without Notice for Modification of Legal Decision Making, Parenting Time and Child Support." She stated, in pertinent part:

> Respondent filed his Motion on March 24, 2020 and anticipated that the Motion would be handled in the regular course. Although the Motion was filed without notice, where no notice is required, as a courtesy to Petitioner, the undersigned intended to telephone her when the document was filed and being considered by the Court so she could provide her position. Under normal circumstances, the proceedings would have occurred immediately, and the undersigned would have called Petitioner as she walked into the Courtroom. In the present pandemic climate with the public health considerations, nothing is being handled normally. On March 24, 2020 the heightened security rules were just being instituted and counsel was not aware of the limits she would face when she got to Court. On that day, this matter was not handled in the regular course and undersigned was told to call the Court on Friday of that week and that Judge Driggs would be covering Wednesdays in the future under the system being put

in to place as a result of COVID-19. This matter is also a dual filing between Juvenile and Family Court and the matter remains before the Juvenile Court in Coconino County. The Coconino County Judge has reached out to Judge Driggs about issuing the orders requested in Respondent's Motion as the matter moves forward. As the Motion is now being handled in that manner and with the delays and the uncertainty from the COVID-19 precautions being put in to place, paragraph 6 is no longer accurate as it appears that there will not be a routine review of the emergency involving counsel of a nature where Petitioner would be called beforehand to express her position. Additionally, Petitioner is already aware of the Motion because she has participated in the Juvenile dependency action in Coconino County where the Motion has been repeatedly discussed, she has a copy of the Motion and she has emailed the undersigned and Respondent about it.

* * * * *

AMENDED PARAGRAPH 6

6. Alternative service of the Petition is requested so that providing any orders issued herein to the Clerk of the Court for service to her protected address, pursuant to Rule 7 ARFLP, is deemed sufficient service under the circumstances.

* * * * *

Respondent waited to file the amended paragraph until now in order to see what would occur and how things would be handled in this unique time in the Court's history and in this dual filed family/juvenile case before making changes. Petitioner has not been served as Respondent is awaiting an order on the Motion as it has not yet been granted or denied presumably pending the juvenile/family Court decisions.

Ms. Marshall confirmed the foregoing information when she testified at the disciplinary hearing. She stated that when she drafted the original wording of paragraph 6, she believed it *would* be accurate by the time a judicial officer actually considered her filing. She also testified that no rule or order required her to notify Ms. Scatterday of the emergency filing and that she intended to do so only as a courtesy upon confirmation that a judge would consider the matter.

11. The assigned judge did not take action on the March 24, 2020 filings until May 6, 2020, when he entered temporary orders in favor of Mr. Carter and issued an Order to Appear. Ms. Marshall provided the documents to the Clerk of the Court on May 8, 2020 for service on Ms. Scatterday pursuant to Rule 7, ARFLP. The record reflects that, although Ms. Marshall paid a $37 fee to have the documents served, the Clerk of the Court did not timely transmit them to Ms. Scatterday.

12. In terms of the Answer of Garnishee filed on March 24, 2020, Ms. Marshall acknowledges that it was not sent to Ms. Scatterday until March 30, 2020, after she specifically requested it. Ms. Marshall explained that she was "quite rattled by the events [of March 24, 2020] in the Courthouse and surrounding the pandemic."

13. The hearing panel found Ms. Marshall to be a credible witness. There is nothing to suggest – let alone clear and convincing evidence – that she intended to mislead Ms. Scatterday or the court or to obtain an unfair advantage for her client. Fortunately, Ms. Scatterday did not miss any deadlines or suffer any legal prejudice due to non-receipt of court filings. She testified that she regularly checked the court docket, and she responded to the *ex parte* motion and petition filed on March 24, 2020 before they were ever served on her.

CONCLUSIONS OF LAW

1. The State Bar did not prove by clear and convincing evidence that Ms. Marshall violated Rule 41(b)(7) (unprofessional conduct). Isolated and non-prejudicial violations of the Lawyer's Creed of Professionalism were established as to the failure to timely serve the Notice of Appearance and Answer of Garnishee. This, however, does

not rise to the level of "unprofessional conduct." *See* Rule 41(a) ("Unprofessional conduct" means "substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.").

2. The State Bar did not prove by clear and convincing evidence that Ms. Marshall violated ER 4.4(a) by using means that have no substantial purpose other than to embarrass, delay, or burden any other person.

3. *De minimis* violations of ER 8.4(d) were established by clear and convincing evidence, as that rule "does not require a mental state other than negligence." *In re Alexander*, 232 Ariz. 1, 11 (2013); *see also In re Martinez*, 248 Ariz. 458, 467 (2020) ("A lawyer's conduct violates ER 8.4(d) if it causes injury or potential injury.").

DISPOSITION

The hearing panel finds no ethical violations stemming from Ms. Marshall's decision not to serve the March 24, 2020 motion and petition on Ms. Scatterday until after the court acted on those filings. Once that occurred, she promptly took steps to have Ms. Scatterday served in accordance with Rule 7.

Although paragraph 6 of the *ex parte*, emergency motion proved to be inaccurate, Ms. Marshall corrected the misstatement before the court took action and credibly testified that, based on her years of experience in family court litigation, she believed the original language *would* be accurate by the time a judicial officer actually reviewed the filing.

We are left, then, with the poorly worded certificates of service on a handful of documents and the failure to send Ms. Scatterday two documents until she requested them -- the Notice of Appearance and the Answer of Garnishee.

The hearing panel recognizes that Ms. Marshall previously participated in diversion because she did not serve documents on a *pro se* litigant in a different family court matter. The record, though, is devoid of any evidence that Ms. Marshall has been sanctioned during her 32 years as a practicing lawyer or that her actions/inactions vis-à-vis *pro se* litigants have been a topic of concern by any judicial officer. Ms. Marshall testified that she has performed extensive *pro bono* professional work relating to access of justice and *pro se* litigants.

Intentional violation of court rules is obviously ethically problematic. *See, e.g.,* ER 3.4(c). But occasional oversights in a busy law practice should not necessarily brand a lawyer" unethical." This is especially true under the circumstances of this case, where Ms. Marshall was operating a solo family court practice during a pandemic and lost her only support staff member in April of 2020 -- presumably due to COVID-19.

Ms. Marshall testified that she has dealt with thousands of *pro se* litigants during her 32 years of practice, and she challenged the State Bar's assertion that she has a demonstrated pattern of not sending them documents simply because of lapses in two cases. She states: "If there is an error on a document due to oversight or unforeseen circumstances such as the COVID epidemic and [the court's] reaction thereto, the remedy is to correct it. It does not amount to an ethical violation." She further stated in one of her responses to the bar charge:

> March 2020 was an unprecedented period of developing crisis in Arizona and all over the world. None of us had ever lived through such an experience and nothing was normal . . . Those were the early days of the pandemic before much was known and they were terrifying. Virtually everything was shut down in March and not functioning very well, and I am no exception.

The Rules of Professional Conduct "are rules of reason." Rule 42, Preamble, *Scope*. "[T]he Rules presuppose that *whether or not discipline should be imposed for a violation*, and the severity of a sanction, depend on all the circumstances . . ." (emphasis added). *Id.* Our Supreme Court has, at times, declined to impose a sanction based on relatively minor violations of the ethical rules. *See, e.g., In re Neville*, 147 Ariz. 106, 115 (1985) (Noting the hesitancy to "minimize any violation of the Code," and finding improper conduct, but concluding it did not "rise to the level of a serious ethical violation" for purposes of determining a sanction).

"Lawyer discipline serves two main purposes: (1) to protect the public and the courts and (2) to deter the attorney and others from engaging in the same or similar misconduct." *In re Zawada*, 208 Ariz. 232, 236 (2004). The public and the courts do not need protection from Ms. Marshall. In terms of deterrence, the extensive proceedings emanating from this bar charge – including several detailed responses from Ms. Marshall, a deposition, and an evidentiary hearing – have presumably impressed upon her the importance of ensuring that opposing parties are properly served with documents to which they are entitled and of ensuring accuracy in court filings.

CONCLUSION

For the foregoing reasons,

IT IS ORDERED dismissing the first amended complaint filed on August 12, 2021.

DATED this 21st day of September 2021.

/s/signature on file
Margaret H. Downie, Presiding Disciplinary Judge

/s/ signature on file
Ralph Wexler, Attorney Member

/s/ signature on file
Mel O'Donnell, Public Member

COPY of the foregoing e-mailed
this 21st day of September 2021, to:

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