

**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

**DIANA McCULLOCH,**  
**Bar No. 009885**

Respondent.

**PDJ-2017-9028**

**DECISION AND ORDER OF  
DISMISSAL**

[State Bar No. 16-2950]

**FILED AUGUST 8, 2017**

On February 21, 2017, the Attorney Discipline Probable Cause Committee (ADPCC) issued a Probable Cause Order. The formal complaint was filed on March 7, 2017 alleging violations of ERs 1.1 (competence), 1.5(a) (fees), 3.1 (meritorious claims and contentions), 1.15(d) (safekeeping property), 1.16(d) (terminating representation), 8.4(d) conduct prejudicial to the administration of justice and Rule 54(d) (failure to furnish information).

Ms. McCulloch timely filed an answer on April 13, 2017. The Presiding Disciplinary Judge (PDJ), held an initial case management conference on April 20, 2017. Scheduling orders were issued and a firm hearing scheduled for July 7, 2017. A final case management conference was held on June 20, 2017. The parties filed their Joint Pre-Hearing Statement on June 27, 2017. Each party filed a prehearing memorandum.

On July 7, 2017, the hearing proceeded before the hearing panel, comprised of Paul D. Friedman, volunteer attorney member, Betty Jane Davies, volunteer public member, and the Presiding Disciplinary Judge (PDJ). Nicole S. Kaseta, Staff Bar Counsel, appeared on behalf of the State Bar of Arizona. Ms. McCulloch appeared with counsel, Ralph Adams, *Adams & Clark, PC*.

The hearing panel considered the testimony of Respondent, Diana McCulloch, and Christina Anchondo, (“complainant”), and the admitted exhibits. The charge resulting in the investigation against Ms. McCulloch was brought by complainant. The State Bar sent Ms. McCulloch a screening letter on September 9, 2016. Attached to the letter, was the original charge written by complainant which prompted the investigation.

At the hearing the State Bar ardently opposed the introduction of that attached handwritten charge written by complainant. The Index to the Exhibits listed Exhibit 1 as “Letter from Bar Counsel to Respondent enclosing bar charge.” Bar Counsel acknowledged that Exhibit 1 intentionally did not contain that attachment.

Respondent’s counsel objected stating he had not noticed in his review of the stipulated exhibits that the attachment was not part of the exhibit. During the testimony of complainant, Respondent sought to admit the letter after impeaching complainant with its contents. The letter was admitted, over objection, as Exhibit 1A.

At the conclusion of the State Bar's evidence, it rested. Because the hearing panel found there was not clear and convincing evidence to support the alleged violations, the complaint was dismissed with prejudice.

### **FINDINGS OF FACT**

Ms. McCulloch is a lawyer licensed to practice law in Arizona and was first admitted to practice law in Arizona on October 20, 1984. [Joint Prehearing Statement, ("JPS"), Fact 1.]

The single count complaint involves the efforts by Ms. McCulloch to regain from the paternal grandmother, custody or otherwise obtain visitation rights of the twin daughters of her client, Christina Anchondo, ("complainant"). Father was incarcerated in Texas.

The case involved the Uniform Child Custody Jurisdiction and Enforcement Act as the grandmother had obtained custody of the three children through a valid order issued in Texas District Court on May 21, 2013. That order established the children were living in Missouri at the time of the order, with grandmother. Under Texas law, grandmother was named "Sole Managing Conservator." Complainant and the father of the girls were named "parent possessory conservators." The order gave "no visitation" rights to complainant or father, "at this time." [JPS, Fact 2; Ex. 38.] The Order found the children's home state as Texas, now living in Missouri." [JPS, Fact 5.]

Complainant sought, in *pro per*, to establish paternity (of the father), custody, parenting time and, if successful, child support. She sought that relief by filing in the Arizona Superior Court in Maricopa County on July 3, 2014, a partially completed form pleading. She also moved “for a pre-decree temporary order without notice for a legal decision making and physical custody.” An Order to Appear was signed by the assigned Judge the same day and filed on July 7, 2014. [JPS, Fact 13; Exhibits 46-48.]

On August 26, 2014, the Court informed complainant that her case would be dismissed on October 24, 2014, if she did not take certain specified actions. [Ex. 54.] On September 3, 2014, the Court sent complainant a warning, telling her in bold capitalized print “THE COURT WILL DISMISS YOUR CASE,” any time after October 31, 2014, if she did not take specified action. [Ex. 53.] The Court issued an order setting a hearing for October 23, 2014. Complainant did not appear for the scheduled return hearing, and the court dismissed the cause, without prejudice, by formal order filed on December 10, 2014. [Ex. 56; JPS, Fact 24.]

Four months later, on April 7, 2015, complainant hired Ms. McCulloch. The parties entered into a signed formal fee agreement. [JPS, Facts 25, 28; Ex. 42.] The agreement stated Ms. McCulloch would “bill you on a monthly basis for services performed in the preceding month” and it also stated she would identify the balance of any advanced deposit. Ms. McCulloch failed to do so. [JPS, Fact 30.]

Complainant testified that Ms. McCulloch met with her and explained the difficulties in the case, which explanation included that Arizona no longer had apparent jurisdiction. But Complainant wanted her daughters back and because of the directives of complainant, Ms. McCulloch proceeded. [Testimony of complainant.] Ms. McCulloch warned complainant of “big hurdles” and that “there is a strong possibility that Texas will retain jurisdiction over your daughters.” In a letter to complainant dated April 21, 2015, she reviewed those concerns from their conference. [JPS, Fact 33.]

In the charge by complainant, she acknowledges that she agreed to pay \$500.00 per month in accord with the fee agreement. But then complains that for two years Ms. McCulloch couldn't find the grandmother to serve her. This was obviously untrue. [Ex. 1A.]

On April 22, 2015, Ms. McCulloch filed a notice of appearance and moved to reinstate the case that complainant had previously filed. The Court granted the motion and reinstated the case on April 28, 2015. She moved to join the father as an indispensable party on June 5, 2015. The Court granted the motion on June 12, 2015. [JPS, Facts 34, 36, 37, 39; Exhibits 57-60, and 64.]

Ms. McCulloch hired a registered process server who certified that service was accomplished on grandmother in Missouri on June 11, 2015. The process server

signed his certificate of service on July 1, 2015. It was filed with Court by Ms. McCulloch on the same day. [JPS, Fact 48; Ex. 65.]

Complainant also charged that Ms. McCulloch had caused her “lost time,” as the last time, “she put something in court was in 10-5-2015.” [Id.] This was also demonstrably untrue. The absence of additional filings were because the efforts of Ms. McCulloch were unsuccessful. The Court Order dismissing the amended petition issued on October 5, 2015. Complainant knew of the dismissal. Ms. McCulloch located a legal service in Texas and informed complainant of that fact. Complainant testified she had finally mailed the Texas pleadings for filing the day before the hearing commenced.

Ms. McCulloch told complainant she would have to file for relief in Texas, because Texas retained jurisdiction as stated in the dismissal order. Ms. McCulloch told complainant she did not know, nor could advise her, regarding the law in Texas as she was not licensed there. Ms. McCulloch told complainant she should seek someone in Texas to help her with that filing. [JPS Fact 59; Ex. 1A; testimony of Ms. McCulloch and complainant.]

However, complainant directed Ms. McCulloch to find someone in Texas to help her file for custody in Texas. Complainant made the conscious decision to continue to hire Ms. McCulloch to pursue custody or visitation alternatives of her children in Texas by searching for a legal document preparer in Texas.

As directed by complainant, Ms. McCulloch made multiple efforts to locate some legal service to assist complainant with filing for custody in Texas. [Exhibit 11; JPS, Fact 60.] The emails to Ms. McCulloch from complainant demonstrate their ongoing communications and that complainant was still asking for legal direction. Complainant asked her whether she was “still gonna have to go out the[re]?” (to Texas). Ms. McCulloch promptly replied, “No matter what, your children are there so yes, at some point, sooner than later.” [Ex. 12.]

The primary complaint of complainant about Ms. McCulloch, is there was never “good news.” This was also untrue. Complainant acknowledges in her charge that Ms. McCulloch ultimately located a legal service in Texas named “Legal Lady” to assist her. [Ex. 1A.] Ms. McCulloch sent for Legal Lady to review the documents pertinent to the case on April 1, 2016. [Ex 33.] On May 2, 2016, the Legal Lady sent a questionnaire to be filled out and a request for payment of \$350.00. Ms. McCulloch notified complainant within minutes to inform her Legal Lady would aid her with the Texas filing. Complainant replied, “Omg are u serious I’m so happy right now u made my day thaks u soooooo much god bless you ms. Diana and u partner!!!” [Ex. 98.]

It was argued by Ms. McCulloch that complainant was “unsophisticated,” made multiple errors in her application filed in *pro per*, and that paternity was never established for any of her children. [Respondent’s opening argument.] We disagree.

We completely recognize the statement, “unsophisticated” was not directed unkindly towards complainant and she was not present when it was said. The cross-examination of her was respectful. The term typically refers to lacking specialized knowledge. That is the context in which the panel received the statement.

However, the hearing panel found complainant confident, competent, and truthful when confronted with the multiple inconsistencies in the record, compared to her testimony. While she testified she had no legal training, her forms were substantially correctly filled out, despite her absence of specialized training. Under cross-examination, complainant was repeatedly impeached, due to her faulty memory. When documents refreshed her memory, she retreated willingly and substantively from her charges. Her shift substantially undermined the complaint.

Consistent with her charge to the State Bar, [Ex. 1A] complainant testified that when she expressed her concerns to the State Bar that she was told of the prior sanctions that had issued against Ms. McCulloch, and that Ms. McCulloch “stole” monies from clients. She testified she was mad she didn’t get a higher refund from Ms. McCulloch and hoped through the filing the complaint to get more money. [Testimony of complainant.] The hearing panel finds Ms. McCulloch followed the instructions of her client and properly communicated with her.

## CONCLUSIONS OF LAW

### **ER 1.1 (competence)**

The State Bar alleges ER 1.1 was violated because Ms. McCulloch failed to have her client verify the petition for modification. [JPS, State Bar Contested Issue of Law, 1.] ER 1.1, requires, that each lawyer who accepts representation of a client must minimally have “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Toy v. Katz*, 192 Ariz. 73, 85, 961 P.2d 1033, (App. 1997).

The State Bar failed to establish Ms. McCulloch lacked the requisite legal knowledge, skill, thoroughness and preparation necessary for the representation by failing to have complainant verify the amended petition. Nor was the hearing panel convinced the conduct of Ms. McCulloch was even malpractice. “Neither failure to achieve a successful result nor mere negligence in the handling of a case will necessarily constitute an ER 1.1 violation.” *In Matter of Curtis*, 184 Ariz. 256, 908 P.2d 472 (1995). Complainant requested Ms. McCulloch pursue the matter despite the warnings from her attorney.

Ms. McCulloch moved to reopen the original application of complainant. The court granted her motion. She requested the court hold a UCCJEA conference with the Texas court. The court granted the request. [JPS, Facts 49-50.] The Court attempted to set a conference. The Court left several messages with the Texas Court

and did not hear back for weeks. When the Texas Court finally responded, the Court recognized that the children had been out of Arizona for more than a year and then declined to hold a UCCJEA conference. [JPS, Fact 55.]

The State Bar asserts the absence of a verification caused the Court to decline relief. The Court ruled the basis for dismissal was that it had no jurisdiction. [JPS, Fact 58.]

### **ER 1.5 (fees)**

The State Bar alleges ER 1.5 was violated because Ms. McCulloch charged and collected an unreasonable fee. [JPS, p. 31.]

The Arizona courts have long characterized the attorney-client relationship as an agency relationship in which the lawyer acts as an agent for the client. *Cahn v. Fisher*, 167 Ariz. 219, 805 P.2d 1040 (App. 1990). While tactical decisions involved in the litigation of a matter are part of the attorney's apparent authority, the objectives are the client's. Complainant set the objectives. The client was informed of the risk and wanted the matter litigated in Arizona. The client directed that Ms. McCulloch find a legal service to aid her in filing a petition in Texas, to fill out forms and to communicate with the Legal Lady in Texas. There is not clear and convincing evidence of a violation of ER 1.5.

### **ER 3.1 (meritorious claims and contentions)**

The State Bar alleges ethical violations because Ms. McCulloch filed a petition for modification when Arizona did not have jurisdiction because the children of complainant had not resided in Arizona for over a year. [Id.]

ER 3.1 provides that a lawyer shall not bring or defend a proceeding unless there is a good faith basis for doing so. The rule must be balanced by the lawyer's duty to use the legal process to the fullest advantage of the client against the duty not to abuse the legal process or the justice system. The comment to the Rule explains that "the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken to the law's ambiguities and potential for change." Ms. McCulloch balanced these duties by moving to amend the initial petition. The failure of the client to know how to serve the grandmother resulted in the dismissal of her *pro per* petition. Under the circumstances, the panel does not find clear and convincing evidence the actions of Ms. McCulloch violated ER 3.1.

### **ERs 1.15(d) (safekeeping property) and 1.16(d) (terminating representation)**

The State Bar alleges ethical violations because Ms. McCulloch did not timely refund unearned fees. [JPS, p.32.] ER 1.16 prescribes the obligations of a lawyer upon "termination." The comment to Rule 1.15 states, "Lawyers often receive funds

from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represents fees owed." The evidence is that Ms. McCulloch discounted her bill substantively. There is no clear and convincing evidence of a violation under the evidence presented.

**ER 8.4(d) (conduct prejudicial to the administration of justice)**

The state Bar alleges ER 8.4(d) was violated because Ms. McCulloch failed to file a verified petition for modification when the Court did not have jurisdiction.

[Id.]

Because there is no clear and convincing evidence of a violation of either ER 1.1 or 3.1, the hearing panel finds no clear and convincing evidence of an ER 8.4(d) violation.

**Rule 54(d)**

The state Bar alleges Rule 54(d) was violated because Ms. McCulloch did not respond promptly to Bar Counsel's November 7, 2016 request for information. [Id.]

On October 26, 2016, Ms. McCulloch sent a seven page response to Bar Counsel's screening letter. The letter included, among others, requests to address: ER 1.2, that Ms. McCulloch had not abided by her client's decisions concerning the objectives of the representation; ER 1.3, that Ms. McCulloch did not act with reasonable diligence; ER 1.4, that Ms. McCulloch did not promptly inform complainant of the circumstances of the case and reasonably consult with her or

comply with requests for information from complainant; and ER 3.2, that Ms. McCulloch did not expedite the litigation. [Ex. 1, 3.]

On November 7, 2016, Bar Counsel wrote Ms. McCulloch requesting six separate categories of additional information. These include a complete copy of her client file. The concluding sentence of the request states, “Please produce the above information and documentation no later than November 28, 2016. [Ex. 4.] This request came in the midst of a prior disciplinary matter involving Ms. McCulloch that was tried on November 23, 2016. [Ex. 91.]

On December 12, 2016, Bar Counsel wrote Ms. McCulloch that “If I do not hear back from you today regarding the same (the November 7, 2016 request) I will assume that you do not intend to respond and will complete my investigation without your response.” [Ex. 25.] Exhibit 26, is what appeared to be a belated detailed response by Ms. McCulloch, written four days later on December 16, 2016.

We do not minimize the obligation of every lawyer to timely respond to such requests from Bar Counsel. However, Exhibit 25 left out the remainder of the email “string” regarding the communication between Bar Counsel and Ms. McCulloch. At the request of counsel for Ms. McCulloch, the complete conversation was introduced as Exhibit 25A.

Ms. McCulloch responded to Bar Counsel on the same day as the December 12, 2016, email. Ms. McCulloch stated, “I am so sorry Nicole. I do plan on

responding and will do so this week. I just returned minutes ago from Mohave County depositions. Will Friday be alright?" [Ex. 25A.] Ms. McCulloch submitted her response on Friday, December 16, 2016.

On the record before us we are disinclined to find the response a violation of ER 54(d).

### **CONCLUSION**

Under Rules 48d) and (e), Ariz. R. Sup. Ct., State Bar has the burden of proof to establish the allegations contained in the complaint by clear and convincing evidence. The State Bar having failed to meet its burden of proof, accordingly:

**IT IS ORDERED** dismissing the matter with prejudice.

DATED this August 7, 2017.

*William J. O'Neil*  
**William J. O'Neil, Presiding Disciplinary Judge**

*Paul D. Friedman*  
**Paul D. Friedan, Volunteer Attorney Member**

*Betty Jane Davies*  
**Betty Jane Davies, Volunteer Public Member**

COPY of the foregoing e-mailed/mailed  
on this August 8, 2017, to:

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