

**BEFORE THE PRESIDING DISCIPLINARY JUDGE**

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

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

Respondent.

**No. PDJ-2016-9077**

**FINAL JUDGMENT AND  
ORDER**

[State Bar No. 16-0417]

**FILED FEBRUARY 13, 2017**

The Decision and Order, (“decision”), of the hearing panel was filed with the disciplinary clerk on January 18, 2017, suspending Ms. McCulloch effective February 17, 2017. On January 26, 2017, Ms. McCulloch filed a notice of appeal and motion for stay pursuant to Rule 59(c), Ariz. R. Sup. Ct. On February 8, 2017, Ms. McCulloch withdrew her notice of appeal, nullifying her conditions of stay.

Now Therefore,

**IT IS ORDERED** Respondent, **DIANA MCCULLOCH, Bar No. 009885** is suspended for sixty (60) days effective February 17, 2017.

**IT IS FURTHER ORDERED** Ms. McCulloch shall immediately comply with the requirements relating to notification of clients and others, and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. S. Ct.

**IT IS FURTHER ORDERED** upon reinstatement, Ms. McCulloch shall be placed on probation for two (2) years with the State Bar’s Law Office Management Assessment Program (LOMAP). Ms. McCulloch shall contact the State Bar

Compliance Monitor at (602) 340-7258, within ten (10) days from the date of this order to schedule a LOMAP assessment of her office procedures. Ms. McCulloch shall sign terms and conditions of participation, including reporting requirements, which shall be incorporated herein. Ms. McCulloch shall be responsible for any costs associated with LOMAP.

**IT IS FURTHER ORDERED** Ms. McCulloch shall pay all SBA costs and expenses ordered by the Presiding Disciplinary Judge. There are no costs or expenses incurred by the Office of the Presiding Disciplinary Judge in this proceeding.

**DATED** this 13<sup>th</sup> day of February, 2017.

*William J. O'Neil*

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

COPY of the foregoing e-mailed/mailed  
this 13<sup>th</sup> day of February, 2017 to:

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by: MSmith

**BEFORE THE PRESIDING DISCIPLINARY  
JUDGE**

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

**DIANA MCCULLOCH,  
Bar No. 009885**

Respondent.

**PDJ 2016-9077**

**DECISION AND ORDER IMPOSING  
SANCTIONS**

[State Bar No. 16-0417]

**FILED JANUARY 18, 2017**

On November 23, 2016, the Hearing Panel, composed of Scott I. Palumbo, attorney Member, and Thomas W. McAlpin, public Member, and the Presiding Disciplinary Judge, William J. O'Neil held an evidentiary hearing and considered the evidence and arguments offered. Nicole Kaseta appeared on behalf of the State Bar of Arizona. Ms. McCulloch appeared pro per. At the conclusion, the State Bar requested a sixty (60) day suspension and the payment of costs. On December 6, 2016, the State Bar filed its proposed findings. Ms. McCulloch filed her objection on December 19, 2016.

**I. SANCTION IMPOSED**

**SIXTY (60) DAY SUSPENSION, UPON REINSTATEMENT, TWO (2) YEARS OF PROBATION (LOMAP) AND COSTS OF THESE PROCEEDINGS.**

**II. FINDINGS OF FACT**

1. Ms. McCulloch is a lawyer licensed to practice law in Arizona having been first admitted to practice in Arizona on October 20, 1984. (Joint Pre-Hearing Statement at p. 2, ¶ 1).

2. Ms. McCulloch's law practice involves representing clients in juvenile court. (Stipulated Exhibit 19 at SBA159, 6:19-20; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:24:55-9:24:59).

3. Ms. McCulloch has handled approximately 20 juvenile court cases. (Stipulated Exhibit 19 at SBA159, 6:19-22; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:24:59-9:25:05).

4. Ms. McCulloch has handled dependency and severance cases before in juvenile court. (Stipulated Exhibit 19 at SBA159, 6:24-25 and at SBA160, 7:18-19; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:25:05-9:25:16).

5. Based on her work in juvenile court cases, Ms. McCulloch believes she understands the Arizona Juvenile Court Rules. (Stipulated Exhibit 19 at SBA161, 8:3-5; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:25:17-9:25:23).

6. The juvenile court rules apply to proceedings pending in juvenile court. (Stipulated Exhibit 19 at SBA161, 8:6-8; Juv.Ct.R.Proc. 1(a); and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:25:24-9:25:30).

7. According to Ms. McCulloch, "[t]here's a time limitation for everything" in juvenile court. (Stipulated Exhibit 19 at SBA180, 27:6-12).

8. Ms. McCulloch has previously engaged in discovery in severance cases and initially acknowledged that, to engage in discovery in juvenile court, she must either obtain the consent of the opposing party or the court's permission. (Stipulated Exhibit 19 at SBA162, 9:13-20, 9:13-20; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:27:05-9:29:12).

**COUNT ONE (FILE NO. 16-0417/Marshall)**

9. On May 16, 2012, Jessica G.'s (mother) and Gilbert S.'s (father) infant daughter (daughter) died. (Joint Pre-Hearing Statement at p. 2, ¶ 2). Father found daughter unresponsive on May 15, 2012 and "admitted that . . . he panicked, squeezed and shook her hard enough to cause injuries, and 'slammed' her down hard enough to hear a 'thump' sound as her head struck the carpet-covered cement floor." (Stipulated Exhibit 3 at SBA041-42, ¶¶ 4, 7). Father and mother denied knowing how daughter suffered her injuries. (*Id.* at ¶ 7).

10. In the same month, the Arizona Department of Economic Security (DES) petitioned the juvenile court to adjudicate mother and father's son dependent. (Joint Pre-Hearing Statement at p. 2, ¶ 3).

11. In August of 2012, the DES petitioned the juvenile court to sever mother and father's parental rights. (*Id.* at ¶ 4).

12. In September of 2012, an autopsy report "opined that [daughter] had died of blunt force head trauma in a manner of homicide." (Stipulated Exhibit 3 at SBA042, ¶9; and Stipulated Exhibit 19 at SBA170, 17:8-16).

13. In January and February of 2013, the juvenile court held consolidated dependency and severance hearings. (Joint Pre-Hearing Statement at p. 2, ¶ 5).

14. On April 12, 2013, the juvenile court issued an order finding that mother and father's son was dependent and severed their parental rights. (*Id.* at ¶ 6).

15. Ms. McCulloch acknowledges the juvenile court's April 12, 2013 severance order is a final judgment and order. (Stipulated Exhibit 19 at SBA 169, 16:15-18; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:32:08-9:32:17).

16. On July 10, 2013, Mother, represented by counsel, filed an appeal of the juvenile court's severance order with the Arizona Court of Appeals. (Joint Pre-Hearing Statement, at p. 2, ¶ 7; and Stipulated Exhibit 1).

17. The DES filed its answering brief in the Arizona Court of Appeals on August 26, 2013. (Stipulated Exhibit 2).

18. On January 2, 2014, the Arizona Court of Appeals affirmed the juvenile court's April 12, 2013 severance order. (Joint Pre-Hearing Statement at p. 2, ¶ 8; and Stipulated Exhibit 3).

19. Ms. McCulloch did not represent mother in the juvenile court or in her appeal to the Arizona Court of Appeals. (Stipulated Exhibit 19 at SBA168, 15:16-18, and at SBA 170, 17:17:-22; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:32:26-9:32:29).

20. In 2014, Ms. McCulloch commenced representation of Ms. McCulloch. (Joint Pre-Hearing Statement at p. 2, ¶ 9). Specifically, on January 9, 2014, Ms. McCulloch provided mother a "Hybrid Flat-Fee and Hourly Agreement" which defines the scope of representation as "Petition for Review" and "possible Motion for New Trial." (Stipulated Exhibit 4).

21. When Ms. McCulloch commenced representation of mother, the juvenile court had already severed mother's parental rights and there were no ongoing proceedings in the juvenile court. (Stipulated Exhibit 19 at SBA 168, 15:16-18 and at SBA169, 16:10-14; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:31:50-9:31:56).

22. On February 3, 2014, Ms. McCulloch filed a petition for review with the Arizona Supreme Court seeking review of the juvenile court's April 12, 2013 severance order. (Joint Pre-Hearing Statement at p. 3, ¶ 10; and Stipulated Exhibit 5).

23. The Arizona Supreme Court permitted and DES filed a response to the petition for review. (Stipulated Exhibit 19 at SBA174, 21:8-15; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:38:50-9:39:04).

24. On May 21, 2014, the Arizona Supreme Court denied mother's petition for review. (Joint Pre-Hearing Statement at p. 3, ¶ 11; and Stipulated Exhibit 7).

25. Ms. McCulloch received the Arizona Supreme Court's order denying the petition for review on May 21, 2014. (Stipulated Exhibit 19 at SBA174-75, 21:23-22:5; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:39:26-9:39:38). She emailed mother a copy of the order on the same date. (Stipulated Exhibit 7).

26. By May 21, 2014, mother exhausted all of her appeals of the juvenile court's April 12, 2013 severance order. (Stipulated Exhibit 19 at SBA174-75, 21:23-22:8; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:39:47-9:39:54).

27. Although the juvenile court entered a final judgment and order on April 12, 2013 and that mother's exhausted her appeals by May 21, 2014, Ms. McCulloch believed that she could still move to set aside the juvenile court's April 12, 2013 severance order. (Stipulated Exhibit 19 at SBA175, 22:9-13; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:39:55-9:40:05).

28. Ms. McCulloch believed she could, within six months of the order, move to set aside the juvenile court's severance order based on new evidence. We do not disagree. (Stipulated Exhibit 19 at SBA177-78, 24:14-25:3; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:40:08-9:40:12).

29. However, the new evidence, Ms. McCulloch relied upon, was her hunch “that there perhaps was a second autopsy of the baby”. (Stipulated Exhibit 8; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:40:12-9:40:20).

30. On December 8, 2014, Ms. McCulloch emailed father’s criminal attorney and wrote: “I understand that you may represent my client’s husband. My understanding is that there was perhaps a second autopsy of the baby and that you may have access to the same. Is there a time that we can set up to discuss after you have obtained permission form your client to speak to me.” (Stipulated Exhibit 8; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:40:40-9:41:26). Apparently, Ms. McCulloch believed, not later than December 8, 2014, there existed a second autopsy constituting new evidence. However the singular action she took to verify her belief was this email.

31. Father has not still not been charged with the daughter’s homicide. (Stipulated Exhibit 19 at SBA178, 25:9-15; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:41:26-9:41:34).

32. Ms. McCulloch believed the State may have conducted a second autopsy to enable the State could to charge father with the death of his daughter. (Stipulated Exhibit 19 at SBA185, 32:12-16; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:41:38-9:41:59).

33. Ms. McCulloch did not confirm with the Maricopa County Attorney’s Office (MCAO) that it had or was even considering having a second autopsy around the time that Ms. McCulloch sent her December 8, 2014 email to father’s criminal attorney. (Stipulated Exhibit 19 at SBA185, 32:20-23; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:42:00-9:42:14).

34. Nearly five months after Ms. McCulloch emailed to the father's attorney, mother emailed Ms. McCulloch and asked her "Have you decided yet what [is the] next step is on [the] case for my son since we were unable to get report of autopsy?" (Stipulated Exhibit 9). Ms. McCulloch replied to the April 29, 2015 email of her client, and blame shifted to her client: "I thought you were going to get a copy [of the second autopsy] from the criminal attorney and, if you could not, you would go to the prosecutor or have the criminal attorney ask the prosecutor? If you need us to do this, please let me know so we know whether we can file something on your behalf." (*Id.*; see also Stipulated Exhibit 19 at SBA182-83, 29:14-30:6). We note Ms. McCullough emailed father's attorney specifically asking for the autopsy if it existed. Ms. McCulloch testified she did not know the identity of the prosecutor, but did not try to determine who the prosecutor was. (Stipulated Exhibit 19 at SBA183, 30:7-11).

35. Within minutes, mother responded by email stating, she had spoken to the assistant of Ms. McCullough months earlier to inform her the father's attorney had heard nothing from the prosecutor. Mother stated she also informed this assistant to have Ms. McCullough inform her if there was anything else she could do to help. "I've been waiting to hear from you that's why I emailed today since I didn't." (Exhibit 9). On August 13, 2015, over eight months after Ms. McCulloch emailed the father's attorney, mother provided Ms. McCulloch the name and contact information of the prosecutor assigned to father's potential criminal case, Jeanine Sorrentino.<sup>1</sup> (Stipulated Exhibit 10; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:42:15-9:42:35).

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<sup>1</sup> Ms. Sorrentino is a prosecutor in the MCAO's family violence/sex crimes division. (Ms. Sorrentino's Testimony, 11/23/16 at 10:40:35-10:40:44)

36. Ms. McCulloch, however, did not contact Ms. Sorrentino when she obtained her contact information from mother. (Stipulated Exhibit 19 at SBA186, 33:12-14; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:42:36-9:42:45).

37. Instead, she waited four months to take any affirmative action. Rather than contact the prosecutor, on December 17, 2015, one year after emailing the father's attorney, Ms. McCulloch had the Maricopa County clerk issue a subpoena (subpoena) directed to Ms. Sorrentino of the MCAO. (Stipulated Exhibit 11; and Joint Pre-Hearing Statement at p. 3, ¶ 12).

38. Ms. McCulloch's paralegal drafted the subpoena but Ms. McCulloch reviewed it before she had it issued by the Maricopa County clerk. (Stipulated Exhibit 19 at SBA186-87, 33:20-34:1; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:43:00-9:43:18).

39. The subpoena identifies Ms. McCulloch as "[a]ttorneys for Mother." (Joint Pre-Hearing Statement at p. 3, ¶ 14; and Stipulated Exhibit 11).

40. The subpoena contains a return date of January 8, 2016. (Joint Pre-Hearing statement at p. 3, ¶ 16; and Stipulated Exhibit 11).

41. The subpoena references Arizona Rule of Civil Procedure 45. (Joint Pre-Hearing Statement at p. 3, ¶ 19; and Stipulated Exhibit 11).

42. Arizona Rule of Civil Procedure 45 requires that a subpoena shall state "the title of the action" and the "name of the court in which it is pending." Ariz.R.Civ.P. 45(a)(1)(B); Stipulated Exhibit 19 at SBA1094, 40:15-18; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:50:03-9:50:28). "Pending" is defined as "[r]emaining undecided or awaiting decision." Black's law Dictionary (10th ed. 2014).

43. The subpoena relates to the aforementioned dependency/severance case involving mother and father. (Joint Pre-Hearing Statement at p. 3, ¶ 17; and Stipulated Exhibit 11).

44. The subpoena contains a case number from the aforementioned dependency/severance case involving mother and father. (Joint Pre-Hearing statement at p. 3, ¶ 18; Stipulated Exhibit 11; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:49:38-9:49:58).

45. The subpoena seeks "[t]he entire file as it relates to [father], exculpatory evidence, medical reports, expert reports and so on." (Joint Pre-Hearing Statement at 3, ¶ 15; and Stipulated Exhibit 11).

46. The purpose of the subpoena was to obtain a copy of the alleged second autopsy. (Stipulated Exhibit 19 at SBA187, 34:2-3; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:43:20-9:43:42).

47. If Ms. McCulloch obtained the second autopsy, she intended to move to set aside the juvenile court's April 12, 2013 severance order based on new evidence. (Joint Pre-Hearing Statement at p. 3, ¶ 20; Stipulated Exhibit 19 at SBA187, 34:2-7; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:43:42-9:44:55).

48. A juvenile court rule governs motions to set aside. (Stipulated Exhibit 19 at SBA187, 34:8-13; Ms. McCulloch's Testimony, 11/23/16 Recording at 9:45:00-9:45:23; and Juv.Ct.R.Proc. 46). This juvenile court rule contains a time limitation for moving to set aside based on new evidence. (*Id.*). Specifically, Juvenile Court Rule 46(E) provides: "A motion to set aside a judgment rendered by the court shall conform to the requirements of Rule 60(c), Ariz. R. Civ. P., except that the motion shall be filed within six (6) months of the final judgment, order or proceeding unless

the moving party alleges grounds pursuant to Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within three (3) months of the final judgment.” Arizona Rule of Civil Procedure 60(c)(2) addresses “newly discovered evidence” and, therefore, Ms. McCulloch would have had to file her motion to set aside within three months of April 12, 2013 for it to be timely. See Ariz. R. Civ. P. 60(c)(2). Regardless, Ms. McCulloch’s inaction assured more than twelve months passed since she believed a second autopsy existed before she took an action she states was to lay the grounds for her filing her motion.

49. Ms. McCulloch admits she knew the time limitation for moving to set aside expired by the time she had the subpoena issued by the Maricopa County clerk. (Stipulated Exhibit 19 at SBA187, 34:11-20; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:45:23-9:45:30).<sup>2</sup>

50. Despite this, Ms. McCulloch delivered the subpoena to the Maricopa County clerk to be issued. (Stipulated Exhibit 19 at SBA188, 35:17-23; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:46:26-9:46:36).

51. Ms. McCulloch did not speak with the clerk when she had the subpoena issued. (Stipulated Exhibit 19 at SBA188, 35:22-25; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:46:36-9:46:51).

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<sup>2</sup> During the hearing, Ms. McCulloch changed her position on this issue. During her opening statement, Respondent alleged that she could file a motion to set aside because the son was adopted and that she could do so at any before the son became 18 years old. (Respondent’s Opening Statement, 11/23/16 Recording at 9:13:34-9:14:02). Respondent also testified to the same. (Respondent’s Testimony, 11/23/16 Recording at 11:14:41-11:15:27 and at 11:16:38-11:17:07). Respondent, however, did not even learn of the alleged adoption until less than a month of the hearing in this matter given that she testified during her deposition that she did not know if the son was adopted. (Stipulated Exhibit 19 at SBA204, 51:1-2).

52. Ms. McCulloch does not know whether the clerk checked the docket before issuing the subpoena. (Stipulated Exhibit 19 at SBA189, 36:5-13; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:46:51-9:47:11).

53. Ms. McCulloch did not discuss with Ms. Sorrentino or anyone from the MCAO the documents requested in the subpoena before the Maricopa County clerk issued the subpoena. (Stipulated Exhibit 19 at SBA190, 37:3-18 and at SBA191, 38:20-22; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:47:40-9:47:55).

54. When the Maricopa County clerk issued the subpoena, the juvenile court case was closed and was not pending given that the juvenile court issued its final judgment and order severing parental rights in 2013, there had been no ongoing litigation in the juvenile court since 2013, and mother exhausted all of her appeals. (Stipulated Exhibit 16 at SBA084 ["At this time, there is nothing happening in this case"]; Stipulated Exhibit 19 at SBA174-75, 21:23-22:8, at SBA194, 41:15-18, at SBA207-208, 54:24-55:12, and at SBA221, 68:14-20; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:31:56-9:32:08). Ms. McCulloch admits she knew that mother's rights were severed and that mother exhausted all her appeals when the Maricopa County clerk issued the subpoena. (Ms. McCulloch's Testimony, 11/23/16 Recording at 9:48:30-9:48:46). As discussed later she also alternatively argues she was aware an adoption of the child had been finalized.

55. Juvenile Court Rule 44(e) governs methods of discovery in juvenile court proceedings. See Juv.Ct.R.Proc. 44(e). It provides: "The parties may utilize methods of discovery as set forth in Rules 26-37, Ariz. R. Civ. P., upon the agreement of the parties. Absent such agreement, the party seeking to utilize such methods of discovery shall file a motion with the court requesting authorization to proceed and

shall set forth the reasons why such methods are necessary.” (*Id.*; and Joint Pre-Hearing Statement at p. 4, ¶ 21).

56. Arizona Rule of Civil Procedure 34(c), is applicable under Juvenile Court Rule 44(E), incorporates Arizona Rule of Civil Procedure 45. It states: “A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.” Ariz.R.Civ.P. 34(c).

57. Because Juvenile Court Rule 44(e) incorporates Arizona Rule of Civil Procedure 34(c) and Arizona Rule of Civil Procedure 34(c) incorporates Arizona Rule of Civil Procedure 45, Ms. McCulloch had to comply with Juvenile Court Rule 44(e) before issuing the subpoena. Juv.Ct.R.Proc. 44(e); and Ariz.R.Civ.P. 34(c).

58. In her response to the bar charge, Ms. McCulloch admits that Juvenile Court Rule 44(e) applies to the subpoenas. (Stipulated Exhibit 15 at SBA081). Ms. McCulloch wrote: “Third, Rule 44(E) of Juvenile Court Rules allows for any discovery (as set forth in the Civil Rules of Procedure), including subpoenas upon agreement of the parties. My client is the only party at this point so there is nobody with whom I could agree with.” (*Id.*; see also Stipulated Exhibit 16 at SBA084 [“With respect to your question if I made a Motion pursuant to Rule 44(e), the answer is no I did not as . . . there is no other ‘party’ actively involved in the case”]).

59. Ms. McCulloch did not comply with Juvenile Court Rule 44(E) before requesting that the Maricopa County clerk issue the subpoena. Ms. McCulloch did not obtain the agreement of the opposing party in the dependency/severance case, the DES, before requesting that the Maricopa County clerk issue the subpoena. (Joint Pre-Hearing Statement at p. 4, ¶ 22; and Ms. McCulloch’s Testimony, 11/23/16 Recording at 9:53:21-9:53:27). Ms. McCulloch also filed no motion with the juvenile

court or otherwise obtain the juvenile court's consent before requesting that the Maricopa County clerk issue the subpoena. (Joint Pre-Hearing Statement at p. 4, ¶ 23; see *a/so* Stipulated Exhibit 19 at SBA195, 42:12-16, 42:21-24; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:53:15-9:53:21).

60. Ms. McCulloch never informed DES of the subpoena. (Stipulated Exhibit 19 at SBA197, 44:12-14; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:53:28-9:53:38).

61. On December 23, 2015, Ms. McCulloch had the subpoena served on the MCAO. (Joint Pre-Hearing Statement at p. 3, ¶ 13; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:48:57-9:49:03).

62. Ms. McCulloch did not speak with anyone at the MCAO about the documents requested in the subpoena before serving the subpoena on the MCAO. (Ms. McCulloch's Testimony, 11/23/16 Recording at 9:49:03-9:49:22; Ms. Marshall's Testimony, 11/23/16 Recording at 10:08:35-10:08:50; and Ms. Sorrentino's Testimony, 11/23/16 Recording at 10:42:58-10:43:05, 10:43:12-10:43:24).

63. On December 24, 2015, the MCAO's custodian of records emailed Ms. McCulloch and informed her "[w]e need additional information to process this Subpoena." (Stipulated Exhibit 44 at SBA470).

64. On January 7, 2016, Ms. Sorrentino called Ms. McCulloch. (Stipulated Exhibit 19 at SBA197, 44:15-18; Ms. McCulloch's Testimony, 11/23/16 Recording at 9:56:55-9:57:05; and Ms. Sorrentino's Testimony, 11/23/16 Recording at 10:42:13-10:42:27). Ms. Sorrentino did not receive the subpoena until after the holidays and was concerned about timely complying with the subpoena. (Ms. Sorrentino's Testimony at 10:41:30-10:41:52, 10:42:06-10:42:13, and at 10:50:55-10:51:52).

At this time, Ms. Sorrentino did not know the status of the juvenile court proceedings or that the juvenile court was closed. (*Id.* at 10:41:55-10:42:06).

65. On the same date, Ms. Sorrentino emailed Ms. McCulloch and documented her conversation with Ms. McCulloch. (Stipulated Exhibit 12). Ms. Sorrentino informed Ms. McCulloch that the MCAO decided not to pursue criminal charges against father, that a second autopsy was never performed, that the file was returned to the investigating agency, and that the MCAO could not comply with the subpoena because it was not in possession of the requested file. (*Id.*; and Joint Pre-Hearing Statement at p. 4, ¶ 24).

66. The MCAO had never considered a second autopsy. (Ms. Sorrentino's Testimony, 11/23/16 Recording at 10:44:57-10:45:01).

67. On January 8, 2016, the MCAO's custodian of records objected to the subpoena. (Stipulated Exhibit 13). The MCAO custodian of records stated "we have some questions, including: . . . it appears to be related to a case that, according to the Attorney General's office, was closed over a year ago when the parental rights regarding the child in question were severed and the child was adopted." (*Id.*). Ms. McCulloch did not respond to this email. (Stipulated Exhibit 19 at SBA199-200, 46:17-47:9; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:59:05-9:59:40)

68. Ms. Sorrentino subsequently learned the juvenile court case used for the subpoena was a closed case and attempted to contact Ms. McCulloch. (Ms. Sorrentino's Testimony, 11/23/16 Recording at 10:45:45-10:46:28, 10:47:20-10:48:21). Ms. Sorrentino was angry and "extremely concerned" that Ms. McCulloch would serve a subpoena on her in a closed case. (*Id.* at 10:48:21-10:48:35). Ms. Sorrentino believes that she left Ms. McCulloch a voicemail message or talked to her

and criticized Ms. McCulloch's issuance of the subpoena. (*Id.* at 10:45:45-10:47:28 and at 10:52:25-10:52:36; and Stipulated Exhibit 14).

69. In an email dated January 19, 2016, Ms. Sorrentino wrote that she called Ms. McCulloch and that Ms. McCulloch "was not receptive to my constructive criticism regarding her misuse of the cited statute." (Stipulated Exhibit 14).

70. In contradiction of her response to the bar charge and despite Arizona Rule of Civil Procedure 34(c) addressing subpoenas, Ms. McCulloch now contends that Juvenile Court Rule 44(E) does not apply to subpoenas and testified to the same. (Stipulated Exhibit 19 at SBA2014, 51:6-7; Ms. McCulloch's Testimony, 11/23/16 Recording at 9:54:48-9:54:59; and Motion to Dismiss at pp. 2-3).<sup>3</sup>

71. Ms. McCulloch contends that Juvenile Court Rule 44(E) does not apply to subpoenas because the parties may utilize discovery methods in Arizona Rules of Civil Procedure 26-37 and, despite Arizona Rule of Civil Procedure 34, Ms. McCulloch does not believe that Arizona Rules of Civil Procedure 26-27 provide for subpoenas. (Stipulated Exhibit 19 at SBA204, 51:6-11; and Ms. McCulloch's Testimony, 11/23/16 Recording at 9:55:00-9:55:25).

72. Ms. McCulloch stated she is familiar with Arizona Rule of Civil Procedure 34(c) and admits that Rule 34(c) incorporates Arizona Rule of Civil Procedure 45. (Ms. McCulloch's Testimony, 11/23/16 Recording at 9:55:25-9:55:48). Ms. McCulloch argued, however, that Arizona Rule of Civil Procedure 34(c) only applies to discovery and a subpoena is not discovery. (*Id.* at 11:46:00-11:46:20, 11:48:20-11:48:49).

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<sup>3</sup> In her closing argument, Ms. McCulloch appeared to contradict this testimony by stating that she thought it would be more burdensome to ask the court's permission to proceed with the subpoena. (Respondent's Testimony, 11/23/16 Recording at 11:44:15-11:44:45).

Ms. McCulloch earlier stated, however, that Juvenile Court Rule 44(E) is the discovery rule and that a subpoena compels discovery. (*Id.* at 11:35:03-11:35:18).

73. The MCAO expended time and resources regarding the subpoena but ultimately produced no documents in response to the subpoena. Ms. McCulloch never moved to set aside the Juvenile Court's severance order because she obtained no new evidence. (Ms. McCulloch's Testimony, 11/23/16 Recording at 9:59:40-10:00:04; and Stipulated Exhibit 19 at SBA203, 50:20-25).

74. Despite testifying during her deposition that "[t]here's a time limitation for everything" in Juvenile Court, Ms. McCulloch also implied during her deposition she could always have a subpoena issued in a case notwithstanding the age or status of the case. (Stipulated Exhibit 19 at SBA213, 60:17-23 and at SBA209, 56:16-22). Ms. McCulloch testified at her deposition that cases are never closed "until they could not be modified. And a case can always be modified upon something such as the discovery of new evidence. . . ." (*Id.* at SBA209, 56:16-22).

75. At the hearing, however, Ms. McCulloch testified that she could not issue a subpoena in perpetuity and stated that she believed that the case was closed when the Arizona Supreme Court denied her petition for review. (Ms. McCulloch's Testimony, 11/23/16 Recording at 11:31:55-11:34:15).

76. In 2016, Barbara Marshall submitted a bar charge against Ms. McCulloch relating to the subpoena. (Ms. Marshall's Testimony, 11/23/16 Recording at 10:06:35-10:07:05).<sup>4</sup> Ms. Marshall was concerned about the subpoena because Ms.

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<sup>4</sup> Ms. Marshall is a prosecutor at the MCAO and chair of the ethics committee at the MCAO. (*Id.* at 10:05:25-10:06:02).

McCulloch issued it in a closed case and without complying with the Juvenile Court Rules. (*Id.* at 10:08:53-10:09:40).

77. The MCAO expended time to address the subpoena, including by contacting the Arizona Attorney General's Office, having their public records' section review the subpoena, and by attempting to communicate and communicating with Ms. McCulloch. (*Id.* at 10:09:05-10:10:16, 10:12:10-10:12:15).

78. During her closing statement, Ms. McCulloch contradicted the evidence and, therefore, the Presiding Disciplinary Judge amended the State Bar's complaint to include an ER 1.1 allegation. (11/23/16 Recording at 11:48:49-11:51:10).

### **III. CONCLUSIONS OF LAW**

Based upon the evidence and testimony presented, the Hearing Panel finds the State Bar has established by clear and convincing evidence the following ethical violations:

1. ER 1.1 provides that "a lawyer shall provide competent representation to a client and that "[c]ompetent representation requires the legal knowledge, skill thoroughness and preparation reasonable necessary for the representation." Ms. McCulloch failed to carry out the objectives of the representation chosen by her because she was not competent to do so. She failed to verify whether a second autopsy had been performed. She never informed her client of the deadline to pursue the motion to set aside and we are convinced she did not know of the deadline. Ms. McCulloch failed to comply with Juvenile Court Rule 44(E) in multiple ways. She never served a copy on the opposing party because she determined there could be no adverse party. She improperly issued a subpoena in a closed case, and asserted that

a subpoena was not discovery under Rule 44(E) despite stating that a subpoena's purpose is to compel discovery.

2. ER 3.4(c) provides "[a] lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. Ms. McCulloch knowingly violated Juvenile Court Rule 44(E). Ms. McCulloch testified that Rule 44(E) requires the approval of the opposing party or the court to engage in discovery in juvenile court, that the purpose of a subpoena is to compel discovery, and that she did not comply with Rule 44(E) before issuing the subpoena. Ms. McCulloch further admitted the juvenile court severed parental rights in April of 2013, that mother exhausted all of her appeals by May of 2014, and there was no ongoing proceedings in the juvenile court when she issued the subpoena in December of 2015. There was not a "pending" case from which to issue a subpoena pursuant to Arizona Rule of Civil Procedure 45.

3. ER 8.4(d) provides that "[i]t is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice. This panel recognizes to violate Rule 8.4(d), the "conduct must be improper, bear directly on judicial process, and "taint the judicial process in more than a *de minimis* way." *In re Carter*, 11 A.3d 1219 (D.C. 2011). We find the conduct of Ms. McCulloch tainted the judicial process and her inaction and actions carried potential for injury to multiple parties. We look beyond the fact that the foundation for the belief of Ms. McCulloch that there was a second autopsy was the hearsay upon hearsay statements to her from her client. We recognize her conduct involved actions and inactions after the conclusion of the severance and in an effort to reopen the case. However, Rule 8.4(d) can be violated "even if a legal proceeding has ended and even if the lawyer stops

somewhere short of spreading outright lies.” *In re Pyle*, 156 P.3d 1231 (Kan. 2007). A violation of ER 8.4(d) requires no mental state other than negligence. The motives of Ms. McCulloch are immaterial. *In re Alexander*, 300 P.3d 536 (Ariz. 2013). We find the inaction and actions of Ms. McCullough to be egregious and flagrantly violative of professional norms to an extent they held the potential to undermine the legitimacy of the judicial process.

#### **IV. ABA STANDARDS**

The American Bar Association’s *Standards for Imposing Lawyer Sanctions* are a “useful tool in determining the proper sanction.” *In Re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). In imposing a sanction, the following factors should be considered: (1) The duty violated; (2) the lawyer’s mental state; (3) the actual or potential injury caused by the lawyer’s misconduct; and (4) the existence of aggravating or mitigating factors. *Standard 3.0*.

#### **Duties violated:**

Ms. McCulloch violated her duty to her client by violating ER 1.1. Ms. McCulloch violated her duty to the legal system by violating ERs 3.4(c) and 8.4(d).

#### **Mental State and Injury:**

Ms. McCulloch violated her duty to her client which implicates *Standard 4.53*. *Standard 4.53* states: “Reprimand is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.” Here, Ms. McCulloch’s conduct caused potential injury to mother and others.

Ms. McCulloch violated her duty to the legal system which implicates *Standard* 6.0. *Standard* 6.22 states: "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 inference with a legal proceeding."

Ms. McCulloch knowingly failed to take reasonable steps to verify whether an alleged autopsy had even been performed and repeatedly delayed trying to meet the objectives of her client. Instead she served a subpoena in a closed juvenile court case without notice to the opposing parties or complying with Juvenile Court Rule 44(E). Ms. McCulloch testified that she was familiar with juvenile court proceedings and that Juvenile Court Rule 44(E) requires the consent of the opposing party or authorization from the court to engage in discovery but Ms. McCulloch obtained neither before issuing the subpoena. Ms. McCulloch knew that the juvenile court case was closed when she had the subpoena issued and served. She filed a petition for review to the Arizona Supreme Court in 2014 which the Arizona Supreme Court denied that year. Ms. McCulloch's conduct caused actual injury to the MCAO because it had to expend time in addressing the subpoena and potential injury to mother and others.

### **Aggravation and Mitigation**

The Hearing Panel finds the following aggravating factors are present:

- *Standard* 9.22(a) prior disciplinary offenses: (1) On April 8, 2014, Ms. McCulloch was suspended for thirty (30) days and placed on probation for one (1) year (CLE and restitution) in File No. 12-2894 for violating ERs 1.7, 3.1, and 3.4(c). (Stipulated Exhibits 39-42); (2) On February 12, 2013, Ms. McCulloch was reprimanded in File No. 12-0349 for violating ERs 3.4(c), 4.4(a), and 8.4(d), when Ms. McCulloch requested and obtained a subpoena seeking information from a non-

party that the court sealed without asking the court to unseal the document. (Stipulated Exhibits 36-38); (3) On August 17, 2011, Ms. McCulloch was reprimanded and placed on probation for six (6) months (fee arbitration) in File No. 10-1631 for violating ERs 1.5(b) and 1.16(d). (Stipulated Exhibits 33-35); (4) On April 15, 2003, Ms. McCulloch was ordered to pay restitution in File No. 02-0366 for violating ERs 1.5, 1.16(d), 8.1, and Rule 51(h) & (i), Ariz. R. Sup. Ct. (Stipulated Exhibit 26); (5) On November 10, 2003, Ms. McCulloch was informally reprimanded in File No. 03-1391 for violating ERs 1.5, 3.4(c), 8.1 and Rule 51(h) and (i), Ariz. R. Sup. Ct. (Stipulated Exhibit 27); (6) On May 1, 2002, Ms. McCulloch was suspended for six (6) months with probation (MAP, LOMAP, and TAEEP) in File No. 99-0044 for violating ERs 1.15, 8.1(b), Rules 43, 44, and 51(h) & (j), Ariz. R. Sup. Ct. (Stipulated Exhibits 22-25); (7) On October 27, 1998, Ms. McCulloch was informally reprimanded in File No. 98-0735 for violating ER 8.4(a). (Stipulated Exhibit 21); and (8) On August 19, 1996, Ms. McCulloch was informally reprimanded in File No. 96-0126 for violating ERs 8.4(c) and (d). (Stipulated Exhibit 20).

During the hearing, Ms. McCulloch admitted that she has been disciplined numerous times and her discipline includes two suspensions, two reprimands, and three informal reprimands. (Ms. McCulloch's Testimony, 11/23/16 at 10:00:21-10:00:43; and Stipulated Exhibits 20-43). At the hearing, Ms. McCulloch admitted that her most recent discipline included a violation of ER 3.4(c) and that she has been disciplined previously for improperly issuing a subpoena. (Ms. McCulloch's Testimony at 10:00:50-10:01:31).

- *Standard 9.32(c)*, a pattern of misconduct. Ms. McCulloch has been disciplined before for violating ER 3.4(c) and for improperly issuing a subpoena. (Stipulated Exhibits 27, 36-42).

- *Standard 9.22(f)*, submission of false evidence, false statements, or other deceptive practices during the disciplinary process. After the State Bar filed its complaint against Ms. McCulloch, Ms. McCulloch contradicted her prior position and now asserts that Juvenile Court Rule 44(E) does not apply to the subpoena. During the hearing, Ms. McCulloch implied that she could move to set aside the severance and the adoption because there is no time limit. However, Ms. McCulloch was not aware of the adoption when the State Bar deposed her on October 24, 2016.

- *Standard 9.22(g)*, refusal to acknowledge wrongful nature of conduct. As demonstrated by Ms. McCulloch's testimony and closing argument, Ms. McCulloch believes that it was proper for her to issue and serve a subpoena in a closed case without obtaining the juvenile court's approval to do so and without notifying the opposing party.

- *Standard 9.22(i)*, substantial experience in the practice of law. Ms. McCulloch was admitted to practice law in Arizona on October 20, 1984.

### **Mitigating Factors**

Ms. McCulloch produced no evidence of mitigation. (Ms. McCulloch's Testimony, 11/23/16 Recording at 10:00:05-10:00:21). Therefore, the Hearing Panel finds no mitigating factors.

## **V. CONCLUSION**

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In Re Peasley*, 208 Ariz. 27,

41, ¶ 64, 90 P.3d 764, 778 (2004). Upon consideration of the facts, application of the ABA *Standards*, including the aggravating factors and lack of mitigating factors, the Hearing Panel orders:

**IT IS ORDERED** Ms. McCulloch is suspended for sixty (60) days effective thirty (30) days from the date of this order.

**IT IS FURTHER ORDERED** upon reinstatement, Ms. McCulloch shall be placed on probation for two (2) years with the State Bar's Law Office Management Assessment Program (LOMAP). Ms. McCulloch shall contact the State Bar Compliance Monitor at (602) 340-7258, within ten (10) days from the date of this order to schedule a LOMAP assessment of her office procedures. Ms. McCulloch shall sign terms and conditions of participation, including reporting requirements, which shall be incorporated herein. Ms. McCulloch shall be responsible for any costs associated with LOMAP.

**IT IS FURTHER ORDERED** Ms. McCulloch shall pay all costs and expenses incurred by the SBA. There are no costs or expenses incurred by the Office of the Presiding Disciplinary Judge in this proceeding.

**DATED** this 18<sup>th</sup> day of January, 2017.

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

*Thomas W. McAlpin*  
**Thomas W. McAlpin, Volunteer Public Member**

*Scott I. Palumbo*  
**Scott I. Palumbo, Volunteer Attorney Member**

Copy of the foregoing e-mailed/mailed  
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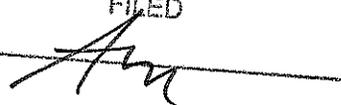
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Respondent

by: AMcQueen

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OFFICE OF THE  
PRESIDING DISCIPLINARY JUDGE  
SUPREME COURT OF ARIZONA

AUG 1 2016

FILED  
BY 

**BEFORE THE PRESIDING DISCIPLINARY  
JUDGE**

**IN THE MATTER OF A  
CURRENT MEMBER OF  
THE STATE BAR OF ARIZONA,**  
  
**DIANA MCCULLOCH,**  
**Bar No. 009885,**  
  
Respondent.

PDJ 2016-9077

**COMPLAINT**

[State Bar No. 16-0417]

Complaint is made against Respondent as follows:

**GENERAL ALLEGATIONS**

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 20, 1984.

**COUNT ONE (File no. 16-0417/Marshall)**

2. Respondent represented a mother ("mother") who had her parental rights severed in a dependency case.

3. On December 23, 2015, Respondent served a subpoena on the Maricopa County Attorney's Office ("MCAO").

4. The Maricopa County Clerk issued the subpoena on December 17, 2015.

5. The subpoena identifies Respondent as "[a]ttorneys for Mother."
6. The subpoena seeks "[t]he entire file as it relates to Gilbert Salazar, exculpatory evidence, medical reports, expert reports and so on."
7. Gilbert Salazar was the mother's husband.
8. The subpoena contains a return date of January 8, 2016.
9. The subpoena relates to the aforementioned dependency case in which the court severed the mother's parental rights after Mr. Salazar allegedly assaulted and caused the death of another of the mother's children.
10. The subpoena contains a case number from the aforementioned dependency case.
11. The dependency case had already been closed at the time Respondent requested the Maricopa County Clerk issue the subpoena.
12. Respondent did not comply with Juvenile Court Rule 44(e) before requesting that the Maricopa County Clerk issue the subpoena.
13. Juvenile Court Rule 44(e) provides: "The parties may utilize methods of discovery as set forth in Rules 26-37, Ariz. R. Civ. P., upon the agreement of the parties. Absent such agreement, the party seeking to utilize such methods of discovery shall file a motion with the court requesting authorization to proceed and shall set forth the reasons why such methods are necessary."
14. Respondent did not obtain the agreement of the opposing party in the dependency case before requesting that the Maricopa County Clerk issue the subpoena.

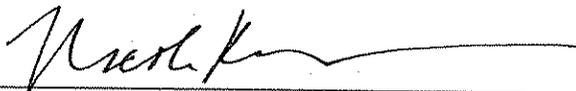
15. Respondent did not file a motion with the court requesting authorization to proceed before requesting that the Maricopa County Clerk issue the subpoena.

16. After receiving the subpoena, the MCAO informed Respondent that it decided not to pursue criminal charges against Mr. Salazar, that the file was returned to the investigating agency, and that the MCAO was unable to comply with the subpoena because it was not in possession of the requested file.

17. Respondent's conduct in this count violated Rule 42, Ariz. R. Sup. Ct., Ethical Rules 3.4(c) and 8.4(d).

**DATED** this 15<sup>th</sup> day of August, 2016.

**STATE BAR OF ARIZONA**



Nicole S. Kaseta  
Staff Bar Counsel

Original filed with the Disciplinary Clerk of  
the Office of the Presiding Disciplinary Judge  
of the Supreme Court of Arizona  
this 15<sup>th</sup> day of August, 2016.

by: Karen E. Caliza  
NSK:kec

BEFORE THE ATTORNEY DISCIPLINE  
PROBABLE CAUSE COMMITTEE  
OF THE SUPREME COURT OF ARIZONA

**FILED**  
JUL 22 2016  
BY *Hutchinson Lebr*

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

No. 16-0417

**DIANA MCCULLOCH**  
Bar No. 009885

**PROBABLE CAUSE ORDER**

Respondent.

The Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona ("Committee") reviewed this matter on July 8, 2016, pursuant to Rules 50 and 55, Ariz. R. Sup. Ct., for consideration of the State Bar's Report of Investigation and Recommendation.

By a vote of 9-0-0, the Committee finds probable cause exists to file a complaint against Respondent in File No. 16-0417.

**IT IS THEREFORE ORDERED** pursuant to Rules 55(c) and 58(a), Ariz. R. Sup. Ct., authorizing the State Bar Counsel to prepare and file a complaint with the Disciplinary Clerk.

Parties may not file motions for reconsideration of this Order.

**DATED** this 21 day of July 2016.

*Lawrence F. Winthrop*  
\_\_\_\_\_  
Judge Lawrence F. Winthrop, Chair  
Attorney Discipline Probable Cause Committee  
of the Supreme Court of Arizona

Original filed this 25<sup>th</sup> day  
of July, 2016 with:

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Respondent

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by: Karen E. Calogore