

FILED

May 12 2020

Disciplinary Board

Docket # 002

RECEIVED

MAY 11 2020

WSBA OFFICE OF DISCIPLINARY COUNSEL

BEFORE THE DISCIPLINARY BOARD

In re CYNTHIA ELLEN MCMULLEN, Lawyer (Bar No. 9027).

Proceeding No. 20#00029 ODC File No. 19-01220 STIPULATION TO REPRIMAND

Under Rule 9.1 of the Washington Supreme Court's Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Reprimand is entered into by the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association (Association) through disciplinary counsel Jonathan Burke and Respondent lawyer Cynthia Ellen McMullen.

Respondent understands that she is entitled under the ELC to a hearing, to present exhibits and witnesses on her behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that she is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less favorable to her. Respondent chooses to resolve this proceeding now by entering into the following stipulation to facts, misconduct and sanction to avoid the risk, time, expense, and publicity attendant to further proceedings.

1 **I. ADMISSION TO PRACTICE**

2 1. Respondent was admitted to practice law in the State of Washington on May 15, 1979.

3 **II. STIPULATED FACTS**

4 2. In February 2000, Respondent was hired to act as city attorney for the town of Wilbur
5 (Wilbur), Washington.

6 3. Respondent and her husband DM¹ operated a law practice in Spokane, Washington
7 for many years. DM sometimes provided legal services to Wilbur.

8 4. In or about September 17, 2017, Wilbur hired Respondent to deal with a nuisance
9 matter involving certain real property (Property) that was owned by Mark Hawley (Mark) and
10 Kathryn Hawley (Kathryn), hereafter collectively referred to as the Hawleys.

11 5. Mark Hawley died on January 15, 2011. Kathryn died on August 14, 2012. The
12 Hawleys' estates were not probated. EJ,² a friend of Kathryn's, lived on the Property for a while
13 after Kathryn died and paid taxes until he was convicted and sent to prison in or about September
14 2017.

15 6. After EJ's conviction, the Property was left abandoned and deteriorated. The structure
16 on the Property was unsafe and a nuisance.

17 7. On September 17, 2017, Sara McElyea (McElyea), then assistant clerk for Wilbur,
18 sent Respondent an email stating that the Hawleys had "no living relatives." McElyea did not
19 conduct an heir search and did no independent search to find the Hawleys's relatives. McElyea's
20 information about relatives was based on a casual conversation with a deputy sheriff.

21 8. In fact, Kathryn had at least three living siblings who resided outside of the State of
22

23 ¹ For purposes of this stipulation, DM's initials are used.

24 ² For purposes of this stipulation, EJ's initials are used.

1 Washington. The obituary for Kathryn in Wilbur's local newspaper on August 23, 2012 listed a
2 number of living relatives who lived out-of-state, including her parents and siblings.

3 9. Respondent was unaware that Kathryn has several living relatives because she did not
4 conduct an independent inquiry or search for heirs.

5 10. Respondent's efforts to deal with the nuisance resulted in Wilbur obtaining authority
6 to demolish and remove the structure on the Property and an order for Wilbur to secure the
7 Property. The estimated cost of demolishing the structure and cleaning up the Property was
8 approximately \$14,000.

9 11. Respondent recommended that Wilbur deal with the nuisance by commencing
10 probates for the Hawleys. Respondent drafted a memorandum (Memorandum), dated March 16,
11 2018, containing her proposal to the Wilbur City Council (City Council) and Mayor Gloria
12 Kuchenbuch (Kuchenbuch). The Memorandum stated that "there is some thought that there may
13 be a sibling in the area."

14 12. The Memorandum recommended that "Wilbur file a probate in Lincoln County
15 Superior Court and that Wilbur ask the Court to appoint an administrator, most likely an attorney
16 who does probate work in Lincoln County, to handle the estate and negotiate with Wilbur
17 regarding the abatement of the nuisance." Regarding the costs to Wilbur, the Memorandum stated
18 that Wilbur would need to pay \$250 to start the probate.

19 13. The Memorandum did not disclose or imply that Wilbur would purchase the Property
20 or that Wilbur would pay for administering the Hawleys' probate estates.

21 14. On June 21, 2018, Jeannie Olsen (Olsen), Wilbur's Clerk, sent an email to Respondent
22 stating that the City Council agreed with her proposal to initiate the probates of the Hawleys'
23 estates. Wilbur also authorized Respondent to spend the funds to obtain a title report for the

1 Property, which Respondent obtained.

2 15. Respondent and DM determined that the proposal approved by the City Council was
3 no longer feasible because the title report revealed a possible real estate contract interest in the
4 Property by the Walter Bremel Trust. The assessed value of the Property decreased to \$3,000.
5 DM and Respondent believed that no attorney in Lincoln County would be willing to administer
6 a badly insolvent estate because the estates would not be able to pay the administrative costs and
7 attorney fees.

8 16. Respondent and DM decided that they would handle the Hawleys' probates and bill
9 Wilbur for the fees and administrative expenses. They believed that this was the most cost
10 efficient way to deal with the nuisance. They also believed that it was likely that Wilbur would
11 ultimately purchase the Property.

12 17. The City Council did not approve this plan. There are conflicting accounts on whether
13 Respondent informed Kuchenbuch about the new plan. In any event, Wilbur did not approve of
14 the plan by Respondent and DM to pay for and administer the Hawleys' probates or for Wilbur
15 to purchase the Property.

16 18. On August 23, 2018, DM filed a petition for the probate of the Hawleys' estates in
17 Spokane County. The petition states that the petitioner is Wilbur acting through Wilbur's
18 attorney, Respondent. The petition states that "Petitioner believes that there are no heirs to either
19 estate."

20 19. The petition asked the court to appoint Respondent as the administrator in her capacity
21 as attorney for Wilbur. The court appointed Respondent as the Administrator of the Hawleys'
22 estates.

23 20. DM appeared in the Hawleys' probates as the Attorney for Administrator. Respondent

1 signed an Oath of Execution to “faithfully perform, according to law, the duties of my trust as
2 Administrator” of the Hawleys’ estates.

3 21. An administrator of an estate is a fiduciary and must therefore “exercise the utmost
4 good faith and diligence in administering the estate in the best interest of the heirs.” In re Estate
5 of Larson, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). Failing to abide by the notice statute,
6 including failing to notify heirs unknown but ascertainable through due diligence, is a denial of
7 procedural due process that amounts to a jurisdictional defect as to the heirs, rendering the decree
8 of distribution void. In re Estate of Little, 127 Wn. App 915, 921 113 P.3d 505 (2005).

9 22. Respondent failed to exercise due diligence in trying to ascertain, locate, and notify
10 the Hawleys’ heirs. Instead, Respondent relied solely on the September 17, 2017 email from
11 McElyea that there were no living heirs without making any independent inquiry regarding the
12 basis for McElyea’s statement.

13 23. None of the Hawleys’ relatives received notice of the Hawleys’ probate proceedings.

14 24. Respondent did not keep Wilbur reasonably informed about the Hawleys’ probates.
15 She did not send Wilbur any pleadings from the Hawleys’ probates.

16 25. Respondent never disclosed to Wilbur the potential conflict of interest by
17 simultaneously representing Wilbur while acting as the administrator of the Hawleys’ estates.

18 26. Respondent never obtained Wilbur’s informed consent to the potential conflict of
19 interest created by simultaneously representing Wilbur while acting as the administrator of the
20 Hawleys’ estates.

21 27. In December 2019, Respondent retired as Wilbur’s city attorney, but agreed to
22 continue to handle a few unfinished matters, including the nuisance issue regarding the Property.

23 28. In January 2020, Wilbur hired lawyer David Bingaman (Bingaman) as Wilbur’s City

1 Attorney.

2 29. On April 12, 2019, McElyea sent an email to Respondent inquiring about the status of
3 the nuisance Property.

4 30. On April 16, 2019, DM sent an email to McElyea attaching a letter he sent to Mr.
5 Bremel conveying that Wilbur intended to purchase the Property. This email asked McElyea to
6 share the information in the email with Kuchenbuch. This was the first time that written
7 information was provided to Kuchenbuch regarding the Hawleys' probate and the proposal for
8 Wilbur to purchase the Property.

9 31. On May 29, 2019, Respondent sent to McElyea a memorandum (Second
10 Memorandum) to be provided to Kuchenbuch and the City Council explaining the proposal for
11 Wilbur to purchase the Property. The Second Memorandum states that "our office then proceeded
12 to take steps to give notice to the creditors and to locate anyone with an interest in the property."

13 32. Attached to the Second Memorandum was a proposed Purchase and Sale Agreement
14 to be executed by Respondent on behalf of the Hawleys' estates and Kuchenbuch on behalf of
15 Wilbur. Under the terms of the Purchase and Sale Agreement, Wilbur would purchase the
16 Property in exchange for (1) satisfaction of the debt owed to Wilbur for utilities (approximately
17 \$300), (2) an unknown sum of administrative expenses incurred by Respondent and DM for
18 closing the sale, (3) payment of property taxes owed on the Property to Lincoln County
19 (approximately \$415), and (4) Wilbur's agreement to take financial responsibility for abating the
20 nuisance (previously estimated to be \$14,000) on the Property.

21 33. On June 10, 2019, McElyea sent an email informing Respondent that the City Council
22 did not approve the proposal.

23 34. On July 23, 2019, Bingaman sent an email to Respondent directing her and DM to

1 stop working on the Hawleys' probate matters.

2 35. On September 16, 2019, Respondent filed with the court a resignation as administrator
3 for the Hawleys' probates.

4 36. The Hawleys' probates did not go forward and Respondent's proposed sale of the
5 Property to Wilbur was not consummated.

6 III. STIPULATION TO MISCONDUCT

7 37. By failing to act with reasonable diligence in ascertaining the potential heirs of the
8 Hawleys' estates and providing notice to the potential heirs, Respondent violated RPC 1.3.

9 38. By failing to provide Wilbur with prompt and timely information regarding the
10 Hawleys' probates and the proposal to sell the Property to Wilbur, Respondent violated RPC
11 1.4(a) and RPC 1.4(b).

12 39. By simultaneously representing Wilbur and acting as the administrator of the
13 Hawleys' probate estates without obtaining informed consent from Wilbur, Respondent violated
14 RPC 1.7.

15 IV. PRIOR DISCIPLINE

16 40. In 1996, Respondent received a reprimand for violating RPC 1.7(b), RPC 1.8(a), and
17 RPC 5.1(c) for her knowledge and involvement in a number of unsecured loans that DM obtained
18 from a client.

19 V. APPLICATION OF ABA STANDARDS

20 41. The following American Bar Association Standards for Imposing Lawyer Sanctions
21 (1991 ed. & Feb. 1992 Supp.) apply to this case.

22 42. ABA Standard 4.4 applies to violations of RPC 1.3 and RPC 1.4, and provides as
23 follows:

1 **4.3 Failure to Avoid Conflicts of Interest**

2 4.31 Disbarment is generally appropriate when a lawyer, without the informed
3 consent of client(s):

- 4 (a) engages in representation of a client knowing that the lawyer's
5 interests are adverse to the client's with the intent to benefit the
6 lawyer or another, and causes serious or potentially serious injury to
7 the client; or
8 (b) simultaneously represents clients that the lawyer knows have adverse
9 interests with the intent to benefit the lawyer or another, and causes
10 serious or potentially serious injury to a client; or
11 (c) represents a client in a matter substantially related to a matter in
12 which the interests of a present or former client are materially
13 adverse, and knowingly uses information relating to the
14 representation of a client with the intent to benefit the lawyer or
15 another and causes serious or potentially serious injury to a client.

16 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of
17 interest and does not fully disclose to a client the possible effect of that
18 conflict, and causes injury or potential injury to a client.

19 4.33 **Reprimand is generally appropriate when a lawyer is negligent in
20 determining whether the representation of a client may be materially
21 affected by the lawyer's own interests, or whether the representation
22 will adversely affect another client, and causes injury or potential injury
23 to a client.**

24 4.34 Admonition is generally appropriate when a lawyer engages in an isolated
instance of negligence in determining whether the representation of a client
may be materially affected by the lawyer's own interests, or whether the
representation will adversely affect another client, and causes little or no
actual or potential injury to a client.

48. Respondent was negligent in determining whether her duties as administrator of the
Hawley's estates, especially with respect to the proposed agreement to sell the Property to Wilbur,
may have been materially affected by her own interest regarding future fees and the interests of
Wilbur. Respondent's conduct caused actual and potential injury to Wilbur by incurring attorney
fees and costs, and exposing Wilbur to liability if the sale of the Property consummated.

49. Reprimand is the presumptive sanction under ABA Standard 4.33.

50. Based on the analysis above, the presumptive sanction for Respondent's misconduct

1 is reprimand.

2 51. The following aggravating factors apply under ABA Standard 9.22:

3 (a) Prior disciplinary offenses [In 1996, Respondent received a reprimand for violating
4 RPC 1.7(b), RPC 1.8(a) and RPC 5.1(c) for her involvement in a number of
5 unsecured loans that DM obtained from a client during the 1980s without disclosing
6 his precarious financial circumstances to the client.];

7 (d) Multiple offenses [Respondent violated multiple RPCs]; and

8 (i) Substantial experience in the practice of law [Respondent was admitted to practice
9 law in 1979].

10 52. The following mitigating factor applies under ABA Standard 9.32:

11 (g) Character and reputation.

12 53. It is an additional mitigating factor that Respondent has agreed to resolve this matter
13 at an early stage of the proceedings.

14 54. On balance the aggravating and mitigating factors do not require a departure from the
15 presumptive sanction.

16 VI. STIPULATED DISCIPLINE

17 55. The parties stipulate that Respondent shall receive a reprimand for her conduct.

18 VII. RESTITUTION

19 56. Does not apply.

20 VIII. COSTS AND EXPENSES

21 57. In light of Respondent's willingness to resolve this matter by stipulation at an early
22 stage of the proceedings, Respondent shall pay attorney fees and administrative costs of \$894.17
23 in accordance with ELC 13.9(l). The Association will seek a money judgment under ELC 13.9(l)
24 if these costs are not paid within 30 days of approval of this stipulation.

1 **IX. VOLUNTARY AGREEMENT**

2 58. Respondent states that prior to entering into this Stipulation she has consulted with or
3 had an opportunity to consult with independent legal counsel regarding this Stipulation, that
4 Respondent is entering into this Stipulation voluntarily, and that no promises or threats have been
5 made by ODC, the Association, nor by any representative thereof, to induce the Respondent to
6 enter into this Stipulation except as provided herein.

7 59. Once fully executed, this stipulation is a contract governed by the legal principles
8 applicable to contracts, and may not be unilaterally revoked or modified by either party.

9 **X. LIMITATIONS**

10 60. This Stipulation is a compromise agreement intended to resolve this matter in
11 accordance with the purposes of lawyer discipline while avoiding further proceedings and the
12 expenditure of additional resources by the Respondent and ODC. Both the Respondent lawyer
13 and ODC acknowledge that the result after further proceedings in this matter might differ from
14 the result agreed to herein.

15 61. This Stipulation is not binding upon ODC or the respondent as a statement of all
16 existing facts relating to the professional conduct of the respondent lawyer, and any additional
17 existing facts may be proven in any subsequent disciplinary proceedings.

18 62. This Stipulation results from the consideration of various factors by both parties,
19 including the benefits to both by promptly resolving this matter without the time and expense of
20 hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As
21 such, approval of this Stipulation will not constitute precedent in determining the appropriate
22 sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in
23 subsequent proceedings against Respondent to the same extent as any other approved Stipulation.

1 63. Under ELC 3.1(b), all documents that form the record before the Chief Hearing
2 Officer for his review become public information on approval of the Stipulation by the Chief
3 Hearing Officer, unless disclosure is restricted by order or rule of law.

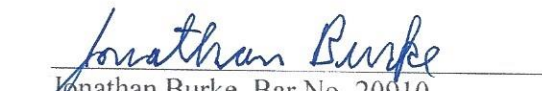
4 64. If this Stipulation is approved by the Chief Hearing Officer, it will be followed by the
5 disciplinary action agreed to in this Stipulation. All notices required in the Rules for Enforcement
6 of Lawyer Conduct will be made. Respondent represents that, in addition to Washington,
7 Respondent also is admitted to practice law in the following jurisdictions, whether current status
8 is active, inactive, or suspended: Federal District Court of the Eastern District of Washington.

9 65. If this Stipulation is not approved by the Chief Hearing Officer, this Stipulation will
10 have no force or effect, and neither it nor the fact of its execution will be admissible as evidence
11 in the pending disciplinary proceeding, in any subsequent disciplinary proceeding, or in any civil
12 or criminal action.

13 WHEREFORE the undersigned being fully advised, adopt and agree to this Stipulation to
14 Reprimand as set forth above.

15 
16 Cynthia Ellen McMullen, Bar No. 9027
17 Respondent

Dated: May 7, 2020

18 
19 Jonathan Burke, Bar No. 20910
20 Senior Disciplinary Counsel

Dated: May 11, 2020