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STATE OF WISCONSIN

IN SUPREME COURT

**OFFICE OF LAWYER
REGULATION**

In the Matter of Disciplinary Proceedings
Against Mark A. Phillips, Attorney at Law:

OFFICE OF LAWYER REGULATION,

Case No. 2011AP-2962-D

Complainant,

-v-

Case Code: 30912

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MARK A. PHILLIPS,

DEC 27 2011

Respondent.

CLERK OF SUPREME COURT
OF WISCONSIN

COMPLAINT

TO: THE HONORABLE JUSTICES OF THE
SUPREME COURT OF WISCONSIN:

Now comes the Office of Lawyer Regulation of the Supreme Court of Wisconsin (OLR),
by Retained Counsel, Attorney Gregg Herman, and alleges as follows:

1. OLR was established by the Supreme Court of Wisconsin and operates pursuant to Wisconsin Supreme Court Rules. This Complaint is filed pursuant to SCR 22.11.
2. Mark A. Phillips (Phillips) was admitted to the practice of law in Wisconsin on May 18, 1981. The most recent address furnished by Phillip to the State Bar of Wisconsin is 14525 Thomas Jefferson Ct., Elm Grove, WI 53122.
3. Phillips' disciplinary history consists of the following:
 - a. In 2006, Phillips received a one year suspension. *Disciplinary Proceedings Against Phillips*, 290 Wis.2d 87, 713 N.W.2d 629 (2006), 2006 WI 43.
 - b. In 2007, Phillips received a three year suspension. *Disciplinary Proceedings Against Phillips*, 301 Wis.2d 33, 732 N.W.2d 17 (2007), 2007 WI 63.
 - c. Phillips' Wisconsin law license remains suspended.

4. On or about October 28, 2002, Valeria Schmidt (Schmidt) consulted Phillips about a possible divorce.

5. On October 30, 2002, Schmidt's father, David Kupsak (Kupsak), gave Phillips a check for \$1500, which Phillips characterized on a December 16, 2002 statement he sent to Schmidt and Kupsak as a divorce retainer.

6. According to the December 16, 2002 statement, Phillips also received a payment of \$200 on November 22, 2002. The billing statement further indicates that Phillips billed at an hourly rate of \$150.

7. The December 16, 2002 statement shows that Phillips billed \$450 for three hours of time spent reviewing documents and obtaining and reviewing a title insurance company's report. The statement also indicates that a title insurance report cost \$200, for a total liability of \$650. After subtracting this amount from the \$1,700 in total payments received, Phillips' December 16, 2002 statement shows a credit balance of \$1,050.

8. Schmidt decided not to pursue her divorce, and Phillips did no further work on the matter.

9. Phillips sent additional statements in the matter on November 3, 2004 and February 9, 2005, each of which showed a credit balance of \$1,035. Neither explained the \$15 discrepancy between these statements and the December 16, 2002 statement.

10. For awhile Schmidt and her father did not object to Phillips' retention of the credit balance. Schmidt was still trying to decide if she wanted to file for a divorce.

11. Beginning in 2005, Schmidt tried to contact Phillips about a refund, but received no response. When Phillips was reached by phone on one occasion by Schmidt's father, Phillips

said he would send a check for the credit balance, but did not do so.

12. On July 25, 2006, Kupsak sent a note to Phillips on the November 3, 2004 statement, asking Phillips to refund the credit balance. Phillips did not respond.

13. Schmidt's father died in 2008.

14. In a June 28, 2009 written response to OLR, Phillips said that he has "systematically shredded all my old client files so as to protect their personal information" and that he, therefore, has no records or file for Schmidt's matter. Phillips submitted a copy of a fee agreement he used in 2002, which he says is like the one he would have had Schmidt sign. The agreement provides, in part:

This agreement becomes effective upon the Firm's receipt of a signed copy of this retainer agreement and of a retainer in the amount of \$1500.00. The retainer shall be applied towards my final bill. The retainer represents sums earned by the firm and are not to be held in an escrow account. Once the retainer is expended an additional retainer fee will be due and payable.

I will pay the Firm on an hourly basis for time spent in performing services connected with this matter at the following rates: \$150.00 per hour for services performed by Attorney Phillips...

15. Phillips stated that, based on the fee agreement he says he used in 2002, the \$1,500 was earned when received and that no refund is or was due to Kupsak or Schmidt.

16. Phillips also denied having received any correspondence or phone calls requesting a refund in the matter; argued that because it has been over six years since the balance on Schmidt's account was \$1,050, the statute of limitations on a civil claim has run; and referred to Schmidt and Kupsak as "these two miscreants."

17. On July 13, 2009, OLR sent Phillips a letter stating that current rules, which codified previous court rulings, prohibit billing against a retainer, which is defined as an amount

paid to secure the availability of a lawyer. OLR's July 13, 2009 letter pointed out that even in 2002, the rules of professional conduct and case law required that a "non-refundable retainer" be reasonable, and interpreted such a fee to be not a fee for specific services, but rather a fee to ensure the lawyer's availability or a fee that conferred an immediate benefit on the client.

18. OLR asked Phillips to explain why he billed against the \$1,500 retainer if it was earned upon receipt, and why he referred to the remaining balance on his billing statements as a "credit balance."

19. In a July 17, 2009 response to OLR, Phillips said his reference to a credit balance "was simply meant to indicate to the client that no further retainer amount was due at that time."

20. In April 2009, Schmidt's mother, Doris Kupsak, filed a claim against Phillips with the Wisconsin Lawyers' Fund for Client Protection (CP Fund). On August 18, 2009, the CP Fund approved Ms. Kupsak's claim in the amount of \$1,050.00.

COUNT ONE

21. By charging and keeping \$1,500 for three hours of work, billed at his hourly rate of \$150 an hour, in preparation for a possible divorce, **Phillips violated former SCR 20:1.5(a), effective prior to July 1, 2007.**¹

¹ Former SCR 20:1.5(a) applies to misconduct committed prior to July 1, 2007. It provided in pertinent part: "A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent."

COUNT TWO

22. By refusing to refund to the client the unearned \$1,050 credit balance shown on his December 16, 2002 billing statement, **Phillips violated former SCR 20:1.16(d), effective prior to July 1, 2007, and current SCR 20:1.16(d).²**

WHEREFORE, the Office of Lawyer Regulation respectfully requests that Attorney Mark A. Phillips be found in violation of the Supreme Court Rules as alleged in the two (2) counts of this Complaint and that the Court publicly reprimand Attorney Phillips, order him to make restitution of \$1,050 to the CP Fund, and order him to pay the costs of this proceeding.

Dated at Milwaukee, Wisconsin, this 23rd day of December, 2011.

OFFICE OF LAWYER REGULATION

By



Gregg Herman

Retained Counsel

State Bar No. 1017955

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² SCR 20:1.16(d) applies to misconduct committed prior to July 1, 2007. It provided in pertinent part: “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”