IN DISCIPLINARY DISTRICT IV OF THE BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE

IN RE: JOHN W. PRICE, III, BPR #8016, an attorney licensed to practice law in the State of Tennessee (Rutherford County)))) **Docket No. 2010-1903-4-KH**

JUDGMENT OF THE HEARING COMMITTEE

I. INTRODUCTORY STATEMENT

The Hearing Committee sustains the Board's allegation of a technical violation of RPC 1.9(a), which **unconditionally** prohibits an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, **"unless the former client consents in writing after consultation."** As described in greater detail below in the Committee's Conclusions of Law, the Committee unanimously acknowledges that it is troubling that the facts discussed below, considered against traditional legal principles, could support the conclusion that the Complainant engaged in conduct which would constitute a waiver of any conflict of interest[1] and, further, that the Complainant Tom Butler engaged in conduct which certainly appears to the Committee to be suspect and highly questionable. If the Committee were to engage in a balancing of the equities in evaluating the conduct of Mr. Price and the conduct of Mr. Tom Butler, a different result might occur. However, careful deliberation by the Committee leads to one inescapable conclusion: The technical rule cited above, by which the Committee must gauge Mr. Price's decision to accept a suit against his former client, Tom Butler, is clear, unconditional, and unambiguous: **a**

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[1] A different result might occur under the Rules in effect prior to the 2003 adoption of the Rules of Professional Conduct.

"written" waiver by the former client is mandatory. A document, which had relevance in the recent litigation only in the context of its origin in the initial litigation, removes any doubt in the minds of the Committee regarding whether the cases are "substantially" connected. The Committee further preliminarily observes that it is virtually certain that any attorney representing Henry Butler in the present litigation against his brother, Tom Butler, would have accessed and utilized the sensitive information to which Tom Butler objects, and there is probably a minimal nexus, if any, between John Price's previous representation of Tom Butler and the exploitation of the discovery materials gained from the first suit. Those materials were known to Henry Butler, and it must be assumed that any attorney representing him would have zealously and properly exploited the documents in the pending litigation between the Butler brothers. For that reason, the Committee is concerned about the appropriateness of a public censure as the required sanction, but is restricted, by the applicable rules, from any other course of action.

Both counsel for Mr. Price and the Board have submitted excellent, thoroughly-researched proposed Findings of Fact and Conclusions of Law. The Committee has generally adopted the submissions submitted by the Board, with some significant editing, particularly with regard to implementing the preliminary comments outlined above.

II. FINDINGS OF FACT

1. On July 21, 2005, the Board received a letter by Tom and Denise Butler regarding alleged ethical misconduct by Respondent.

2. On August 8, 2005, the Respondent sent a reply to the complaint, thus commencing a lengthy series of correspondence between Respondent, Tom Butler, and the Board.

3. Respondent represented Tom Butler from 1986 to 1992 in a suit filed by Federal Land Bank ("Farm Credit Services").

4. Farm Credit Services sued Tom Butler, Leonard Butler (his father), and Dan Butler (his brother) in an action to collect an unpaid debt.

5. As part of that representation of Tom Butler, Respondent filed an answer and counter complaint, a motion for production of documents, and a motion to compel discovery.

6. The parties eventually reached a settlement and on February 19, 1992, the Farm Credit Services suit was dismissed.

7. On January 29, 1992, William Reese, opposing counsel in the case, acknowledged receipt of an executed settlement agreement and check provided by Respondent on behalf of his clients.

8. Respondent signed the proposed Order of Dismissal which was entered on February 19, 1992.

9. In order to reach settlement in the Farm Credit Services suit, Tom Butler and the other defendants were required to provide financial statements to the bank.

10. As part of the defense strategy, Respondent advised Mr. Butler and other members of his family to transfer real estate.

11. In 1986, Respondent prepared a warranty deed transferring property from Mr. Butler to his fiancé, Denise Erwin.

12. In August 1989, Respondent prepared a Quitclaim Deed transferring the same property from Denise Erwin to Oleda Butler (Mr. Butler's mother).

13. Also in August 1989, Respondent prepared a Quitclaim Deed transferring other property from Denise Erwin to Butler & Butler.

14. According to Respondent, the deed to Butler & Butler was improper because there was no such entity. However, he admits that he is responsible for preparation of that deed.

15. These property transfers occurred while the Farm Credit Services case was pending.

16. Respondent advised Mr. Butler that their strategy for defending the Farm Credit Services case was intended to drag out the litigation as long as possible.

17. In total, Respondent represented Mr. Butler for a little over five (5) years in the Farm Credit Services case.

18. In addition to the Farm Credit Services case, Respondent represented Mr. Butler in two (2) other cases.

19. Respondent also represented Mr. Butler in 1992 on an assault charge.

20. Respondent represented Mr. Butler in 1991 to 1994 in a suit filed by Mr. Butler and his ex-wife on behalf of their son against Ford Motor Company.

21. On May 13, 2004, Mr. Butler filed a lawsuit against his brother, Henry Butler, to dissolve a business partnership and to recover income and property that may have been improperly distributed to Henry Butler. Mr. Butler alleged that he was a partner in "Butler & Butler" and that Henry Butler improperly converted assets of the partnership for his personal use and benefit.

22. The Respondent began representing the defendant, Henry Butler, on or about May 2004 in the Butler v. Butler case (hereinafter "partnership case").[2]

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[2] Notably, after the Tennessee Supreme Court adopted the TRPC, effective March 1, 2003.

23. Respondent has admitted that he did not seek a written waiver of conflict of interest from Mr. Butler, his former client.

24. In February 2005, Respondent specifically used information regarding the Farm Credit Services settlement to discredit Mr. Butler in a deposition.

25. Specifically, Respondent interrogated Mr. Butler about whether or not he included income from the partnership on the financial statement provided to Farm Credit Services.

26. Respondent used the compromise and release from the Farm Credit Services case to initiate the questions about Mr. Butler's income and assets.

27. The purpose of Respondent's questions was to show that Mr. Butler made inconsistent statements to Farm Credit Services thus demonstrating that he had been dishonest about his interest in the partnership.

28. Further, Respondent questioned Mr. Butler about the purpose of real estate transfers knowing that the transfers were made in order to protect them from Farm Credit Services.

29. Respondent's questions to Mr. Butler demonstrate a thorough understanding of the Farm Credit Services case.

30. Respondent's questions to Mr. Butler demonstrate that he knew Mr. Butler was vulnerable on the subject of his income, assets, and disability payments.

31. Further, after the deposition, Respondent contacted Mr. Butler's insurer, Hartford Life Insurance, and reported information about Mr. Butler to Hartford that resulted in a termination of his benefits.

32. Respondent ceased representation of Henry Butler on or around February 6, 2007, almost two (2) years following the disciplinary complaint.

33. Respondent has a prior disciplinary history including a public censure issued in 1988, four (4) private informal admonitions issued in 1995, 1996 (2), and 2000, and a private reprimand issued in 2008.

34. Respondent has been practicing law since 1973.

CONCLUSIONS OF LAW

35. After considering the evidence and testimony in this matter, this Panel finds by a preponderance of the evidence that Respondent has violated Rules of Professional Conduct ("RPCs") 1.6(a), 1.8(b), 1.9(a)(c), and 8.4(a).

36. Accordingly, the appropriate discipline must be based upon application of the *ABA Standards for Imposing Lawyer Sanctions*, ("ABA Standards") pursuant to Section 8.4, Rule 9 of the Rules of the Supreme Court.

Violations of Confidentiality

37. Respondent violated RPC 1.6(a) by revealing information regarding the Farm Credit Services case in the February 2005 deposition of Mr. Butler.

38. Specifically, Respondent presented a copy of Mr. Butler's compromise and release in the deposition, entered it into evidence, and proceeded to question his former client about a financial statement that was referenced in the compromise and release form.

39. Respondent admits that his sole purpose in using this information was to discredit his former client by showing that Tom did not report income or assets from the partnership when he provided financial information to Farm Credit Services.

40. Although Respondent claims that he has never seen Tom's financial statement, Respondent clearly asked leading questions in the deposition which belies his claim.

41. Respondent was Mr. Butler's attorney throughout the Farm Credit Services case. Respondent met with opposing counsel to discuss settlement and other matters related to the case. Respondent received the executed compromise and release from opposing counsel. Respondent signed the Order dismissing the case.

42. According to the letter sent by opposing counsel and the language of the release itself, it is clear that the parties did execute financial statements to the bank in order to finalize the Farm Credit Services settlement.

43. Further, on page 63 of Mr. Butler's deposition of February 11, 2005, Respondent asks the following: "Back here on the Farm Credit Services financial statement you didn't list any trust property that your brother was holding for you, did you?"

44. RPC 1.6(a) states: "Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation."

45. The principle of attorney-client confidentiality is fundamental to the attorney-client relationship. Maintaining the confidentiality of "information relating to the representation of a client" encourages the client to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

46. Confidentiality, as defined in RPC 1.6, extends well beyond the concept of "attorney-client privilege" recognized in related bodies of law. Comment 5 to Rule of Professional Conduct 1.6 states:

> The principle of lawyer-client confidentiality is given effect by related bodies of law, including the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in

> professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. **The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.** A lawyer may not disclose such information except as authorized or as required by the Rules of Professional Conduct or other law. (emphasis added)

47. The ethical duty placed on lawyers by RPC 1.6 is broad, forbidding the disclosure of "information relating to the representation of a client." The range of information protected by RPC 1.6 covers information received from the client or any other source, even public sources, and even information that is not itself protected but may lead to the discovery of protected information by a third party. See *RPC 1.6, cmt. 4.*

48. There is no exception to a lawyer's duty under RPC 1.6 for information previously disclosed or publicly available. See *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995)(lawyer violated Rule 1.6 by disclosing information relating to representation of client, even though information "was readily available from public sources and not confidential in nature"); see also *In re Bryan*, 61 P.3d 641 (Kan. 2003)(lawyer violate Rule 1.6 by disclosing, in court documents, existence of defamation suit against former client); see also *State ex rel. Olka Bar Ass'n v. Chappell*, 93 P.3d 25 (Okla. 2004)(lawyer in fee dispute with former employer violated Rule 1.6 by filing motion referring to criminal charges that had been filed and later dismissed against former client); *Lawyer Disciplinary Bd. V. McGraw*, 461 S.E.2d 850 (W.Va. 1995)("[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it").

49. Respondent owed a duty to maintain confidential information regarding to the Farm Credit Services case whether or not other people knew about it.

50. Attorneys are not relieved of their duty of loyalty to former clients simply because other people could also know or discover the information. If the Panel adopted this logic, then no obligation to maintain confidentiality would ever attach to any client or case. It is precisely for this reason that RPC 1.6 is so broad. Any information related to the representation, however innocuous it may seem, should be protected by the attorney.

Violations of Conflict of Interest

51. The Respondent admits that he committed a technical violation of RPC 1.9(a) and (c).

52. RPC 1.9(a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, *unless the former client consents in writing after consultation.*" (emphasis added)

53. Several elements contained within RPC 1.9 are undisputed. It is undisputed that Respondent did not consult with Mr. Butler, or his attorneys, in order to obtain Mr. Butler's consent through a written waiver.

54. Respondent now argues that Mr. Butler waived the conflict by not raising the issue until after the Respondent reported him to Hartford. There is absolutely no authority in RPC 1.9 that permits an attorney to assume that his former client has waived the conflict simply because the client has failed to raise the issue. Respondent fails to grasp that it is his duty to consult with the former client. It is his duty to obtain a written waiver.

55. Traditional legal principles would probably support the Respondent's position that Tom Butler waived his right to object to any conflict of interest. It is troubling to the Committee that Mr. Butler knew when the litigation was commenced and Henry Butler retained the services of Mr. Price, that Mr. Price had previously represented him in the earlier litigation. It must be further presumed that Mr. Tom Butler had at least some basic understanding of the factual and legal issues in the earlier case. Possessing that information, and being represented by an attorney for a period of several months, Tom Butler elected to voice no objections to the involvement of Mr. Price in representing Henry Butler in the recent litigation. Instead, after the sensitive information was exploited in a manner in which Tom Butler felt violated, he belatedly elected to object to Mr. Price's representation of Henry Butler in what appears to be a retaliatory, rather than substantive, complaint of "conflict of interest." That observation does not alter the technical mandate of RPC 1.9. Respondent cites *Lazy Seven Coal Sales v. Stone & Hinds*, P.C. 813 S.W.2d 400 (June 1991) to support his argument that Mr. Butler waived his right to object to a conflict of interest. The *Lazy Seven* case is a civil malpractice action which focused on standard of care. It is distinguishable from Respondent's disciplinary matter. First, the Tennessee Supreme Court's analysis is focused on whether or not the former client had an actionable malpractice claim, not whether or not there was a disciplinary violation. The Court held that the client's failure to move for disqualification operated as a waiver of potential tort claims against the attorney based upon conflict of interest. *Id.* at 410. The Tennessee Supreme Court clearly states that "[C]onduct that violates the Code may not breach a duty to the client and therefore will not constitute actionable malpractice." *Id.* at 404. The Court cites cases from other jurisdictions holding that the remedy for violations of disciplinary rules is the imposition of disciplinary sanctions. *Id.* at 404-405. Second, the "Code" referenced in that opinion

is the Code of Professional Responsibility, which was the controlling body of disciplinary rules at the time of the *Lazy Seven* case. The affected rule was Disciplinary Rule 5-105(c), which governed simultaneous representation of multiple clients. Even if this case was analogous to the Respondent's adversarial relationship to a former client, DR 5-105(c) does not require a written waiver, unlike the current RPC 1.9.

56. Respondent admits that he had no mechanism for conducting a conflict check in 2004. However, this is where Respondent's testimony becomes confusing. Respondent maintains that he did not believe that the partnership case was substantially related to the Farm Credit Services case; however, he has also stated that he did not remember his representation of Tom in that case even when Henry Butler provided the compromise and release for use in the deposition. Respondent could not have made an assessment as to whether or not a conflict existed if he did not remember the representation.

57. Regardless, it was improper for Respondent to use any information relating to Farm Credit Services to cross-examine Tom before ascertaining whether or not a conflict of interest existed.

58. RPC 1.9, Comment 3 states, in part: "The current matter is substantially related to the former matter if the current matter involves the work the lawyer performed for the former client or there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known."

59. Respondent admits that the information provided by Mr. Butler in the Farm Credit Services case is not "generally known."

60. The Respondent had a potential conflict of interest from the beginning of the partnership case. The entire purpose of the partnership case was to determine what, if any, income and assets were owed to Mr. Butler by the partnership. For Henry Butler, determining whether Tom had any stake in the partnership was a threshold issue. It was entirely foreseeable that any attorney representing Henry Butler would be interested in discovering Tom's sources of income, assets, tax returns, and any other discoverable financial information. Comment 6 of RPC 1.9 states that "[S]ubstantial risk exists where one could reasonably conclude that it would materially advance the client's position in the subsequent matter to use confidential information obtained in the prior representation."

61. Respondent had an actual conflict of interest in February 2005 when it became apparent that he needed to use "information acquired in the course of representing the former client" to discredit Mr. Butler. See *RPC 1.9, cmt. 3*

62. RPC 1.9(c)(1) states that unless the client has consented after consultation, the attorney may not "use information relating to the representation to the disadvantage of the former client except as these Rules otherwise permit or require with respect to a client, or when the information has become generally known." RPC 1.9(c)(2) states that an attorney may not "reveal information relating to the representation of the former client except as these Rules otherwise permit or require with respect to a client. Application of the mandatory effect of that rule, which contains no technical exceptions or conditions, is not removed or minimized by the fact that Henry Butler probably possessed exactly the same information, and would have related it to any attorney whom he had hired for the litigation against his brother, Tom Butler.

63. Respondent cannot point to any exception provided by the rules which excuses his failure to consult with Mr. Butler prior to the representation or prior to the use of information related

to the Farm Credit Services case. Further, he cannot point to any exception to the written waiver requirement of RPC 1.9.

64. RPC 1.0(c) defines "consult" as denoting "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

65. Respondent relied upon Mr. Butler to raise the issue of conflict of interest. Tom Butler did not raise the issue until Respondent's action directly affected his disability benefits.

66. Both RPC 1.9(c) and 1.8(b) contain the same prohibition against an attorney using information relating to the representation of a client to the disadvantage of that client. While the Board concedes that 1.8 applies to situations involving current clients, the language and purpose of prohibiting the use of "information relating to the representation to the disadvantage of the former client" is identical. Furthermore, all of the rules regarding conflicts are grounded in the fundamental loyalty all attorneys owe to clients, both current and former.

67. By his actions, Respondent has also violated RPC 8.4(a) and (d), as set forth below:

It is professional misconduct for a lawyer to:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

68. That violation cannot be defended by asserting Tom Butler's comparative culpability.

Application of the ABA Standards

69. The Supreme Court has adopted for use by its Hearing Panels the ABA Center for Professional Responsibility Standards for Imposing Lawyer Sanctions (ABA Standards). The Panel should find, in light of the violations set forth above, the following ABA Standards are applicable:

4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

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

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

70. Pursuant to ABA Standard 9.22, a number of aggravating factors are present in this case which justify an increase in the level of discipline.

71. Respondent has six (6) prior disciplinary sanctions. On July 28, 1988, Respondent received a public censure for conduct prejudicial to the administration of justice, neglect, and failure to communicate. On June 6, 1995, Respondent received a private informal admonition for neglect and failure to communicate. On March 22, 1996, Respondent received a private informal admonition for neglect and failure to communicate. On April 25, 1996, Respondent received a private informal admonition for failing to withhold settlement funds for payment of medical bills and failure to communicate. On January 31, 2000, Respondent received a private informal admonition for violating a standing rule of a tribunal. On May 8, 2008, Respondent received a private reprimand for lack of diligence.

72. Finally, Respondent has substantial experience in the practice of law.

CONCLUSION

Based on the findings of facts, conclusions of law, and existing aggravating factors, the Hearing Panel finds that Respondent has violated the Rules of Professional Conduct and imposes a public censure.

ENTERED this the 5th day of MAY, 2011.

Wm. Kennerly Burger, BPR#3731
Hearing Panel Chair

R. Steven Waldron, Panel Member

Frank Lynch, Panel Member

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