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

BOARD OF PROFESSIONAL  
RESPONSIBILITY  
*Rew* EXEC. SEC.

IN RE: PAUL DONALD RUSH  
BPR NO. 23865, Respondent  
An Attorney Licensed to  
Practice Law in Tennessee  
(McMinn County)

DOCKET NO.: 2012-2136-3-RW

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JUDGMENT OF THE HEARING PANEL

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This matter came before the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee on September 9, 2013. The Respondent is Paul Donald Rush, who became licensed to practice law in Tennessee in late 2004. He graduated from law school in May 2004. He has since practiced as an Assistant District Attorney in the 10<sup>th</sup> Judicial District (Bradley, McMinn, Monroe and Polk counties). The present Petition for Discipline arises from the capital murder trial of Michael Younger, who was the last of three defendants tried for the murder of three people in Bradley County in 1999. The trial occurred in May, 2010 and ended in a mistrial. All charges against Mr. Younger were later dismissed. Mr. Rush's actions during, after and immediately before that trial are at issue in the present disciplinary proceeding.

The Board of Professional Responsibility filed a Petition for Discipline against Mr. Rush on July 6, 2012. Citing various rules, the Petition makes basically three complaints against Mr. Rush. First, it alleges that Mr. Rush failed to make timely disclosure to Mr. Younger's defense counsel of information that bore on the credibility of one of the State's witnesses, Anita Wilson, who all agree was an important witness in the case. Second, the Board asserts that Mr. Rush on

redirect examination of a witness solicited information about whether Mr. Younger was a drug dealer. These questions, the Board asserts, violated a court order and Tennessee Rule of Evidence 404(b). Finally, the Board asserts that Mr. Rush failed to report these incidents to the Board of Professional Responsibility, even though he had been ordered to do so by the trial judge in the case.

Before addressing these issues, the Hearing Panel notes that Mr. Rush had been practicing law for only five and a half years at the time of the Younger trial. Although he had participated in many jury trials, the Younger trial was his first capital murder case. He was the second chair to an experienced attorney. And he was brought into the case as a part of the trial team only a few months before trial. Mr. Rush's experience and the circumstances surrounding his involvement in the case were important to the Hearing Panel's consideration of whether or not Mr. Rush had an intent to violate the rules.

At the hearing, the Hearing Panel heard testimony from three witnesses—Mr. Paul Rush, Ms. Kim Parton and Mr. John C. Cavett. Mr. Cavett and Ms. Parton represented Mr. Younger in the capital murder case. The Panel also received 17 exhibits, which included, among other documents, transcripts from a number of hearings that took place as part of the Younger case. The Panel read and considered all of the exhibits.

Although the three alleged ethical violations are connected, these findings of fact and conclusions of law address them in the order they were discussed in the Petition.

#### Brady Allegations

1. On August 19, 2010 Mr. John C. Cavett, Jr. sent a letter to the Board of Professional Responsibility making a complaint against Assistant District Attorney General Paul Rush. Mr. Cavett claimed that Mr. Rush failed to timely turn over to the defense information

concerning Anita Wilson, who was a witness for the prosecution. Mr. Cavett asserted that Mr. Rush had failed to comply with Rule 3.8(d) of the Tennessee Rules of Professional Conduct ("RPC") which requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense ..."

2. RPC 3.8(d) incorporates into the Rules of Professional Conduct a prosecuting attorney's duties pursuant to Brady v. United States, 397 U.S. 742 (1970). Information given to the defense as a result of this requirement is usually called "Brady Material" and a failure to comply is referred to as a "Brady Violation." In Tennessee the Brady Duty applies not only to evidence directly bearing on the guilt or innocence of the defendant, but also information relating to the credibility of the State's witnesses. See e.g. Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001).

3. Anita Wilson was an important State witness because she was expected to testify that Mr. Younger made statements to her that linked him to the murders. The State had no physical evidence or eye witness testimony linking Younger to the murders. Prior to Mr. Younger's trial in May, 2010, Ms. Wilson had a long history of criminal convictions which cast substantial doubt on her credibility. Excluding the stolen checks investigation described in Paragraph 4, there is no assertion or proof that Mr. Rush failed to timely disclose Brady Material, including shoplifting charges that were pending against Ms. Wilson at the time of trial.

4. Unfortunately, in the three months prior to the Younger trial, Ms. Wilson's criminal history continued to evolve. The Brady Material relevant to the present petition concerned an investigation that targeted Ms. Wilson for fraudulently endorsing and passing checks she allegedly stole from her employer. Apparently, in February 2010, Ms. Wilson's

former employer fired her and reported to the Sweetwater police that Ms. Wilson and possibly others had stolen checks. In March, 2010, a Detective Illingworth of the Sweetwater police department informed Mr. Rush about the stolen check investigation against Ms. Wilson. Detective Illingworth informed Mr. Rush that Ms. Wilson's former employer had fired her and filed charges against her for stealing checks and cashing them at various banks in and around Sweetwater, Tennessee. Detective Illingworth informed Mr. Rush that he did not at that time have sufficient evidence to charge Ms. Wilson with a crime because he had not yet obtained and viewed videos from the banks where the checks were cashed that could link Ms. Wilson to the crime. In addition, he informed Mr. Rush that other employees from Ms. Wilson's former employer, Mexi-Wings Restaurant, were also under investigation. Mr. Rush asked Mr. Illingworth to keep him informed of the status of the investigation because he would have to turn the information over to the defense in the Younger trial. Prior to an evidentiary hearing that occurred two days before the Younger trial, Mr. Rush had not received from Detective Illingworth or anyone else additional information about the Wilson investigation. Detective Illingworth initially told Mr. Rush about the investigation while Mr. Rush was on duty during a busy Sessions Court hearing day. We find on this record that Mr. Rush told Detective Illingworth to get back to him. Detective Illingworth did not get back to him.

5. At a hearing two days prior to jury selection, Mr. Rush disclosed to defense counsel all he then knew about the Wilson check theft investigation.

6. There is no evidence that Mr. Rush knew anything more than what he told to the Court and defense counsel on May 2, 2010.

7. After hearing Mr. Rush's disclosure, defense counsel Cavett and Parton revealed to the Court that the Wilson investigation had moved further than what Mr. Rush disclosed. Mr.

Cavett later played to the Court a tape recording of a conversation that a defense investigator had with Detective Illingworth. In that conversation, Mr. Illingworth said among other things that Bank tapes had in fact linked Ms. Wilson to the check crimes, that she had admitted her involvement, and that the detective was using Ms. Wilson to link others to the crime. Critically, according to Detective Illingworth in the tape recording<sup>1</sup>, another Assistant District Attorney from the 10<sup>th</sup> Judicial District had asked Detective Illingworth to slow walk the investigation until after the Younger trial. (See, Ex. 2, pp. 42-55). The Hearing Panel finds that Mr. Rush did not know these facts prior to the May 2, 2010 hearing. We also find that Mr. Rush disclosed what he knew about the investigation before Mr. Cavett alleged later that more should have been disclosed by the State.

8. Arguably, Mr. Rush should have followed up on the Wilson investigation. But RPC 3.8(d) only requires “timely disclosure to the defense of all evidence or information **known to the Prosecutor.**” In this situation, “Known or knowing denotes actual awareness of the fact in question.” RPC 10(f). Mr. Rush did not know more about the Wilson investigation than what he revealed.

9. Whether or not the information Mr. Rush disclosed on May 2, 2010 was Brady Material,<sup>2</sup> Mr. Rush disclosed all he knew prior to trial, and his actions or inactions did not rise to the level of a RPC 3.8 violation.

10. This ruling as to what Mr. Rush knew and when he knew it is substantially based on the Hearing Panel’s listening to and observing Mr. Rush’s testimony at the disciplinary

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<sup>1</sup> Illingworth later denied in court that he had been asked to slow walk the investigation. (Ex. 2, pp. 35-36).

<sup>2</sup> It is unclear whether the information known by Mr. Rush—without the information later revealed by Mr. Cavett—was Brady Material that should have been disclosed. See, e.g., Tankleff v. Senkowski, 135 F.3d 235, 251 (2<sup>nd</sup> Cir. 1998) (Failure to disclose Cumulative Immaterial Impeachment Evidence after a witness’ credibility has been called into question generally will not support a Brady claim.)

hearing and assessing his credibility. And there was no countervailing proof. On this record, we cannot rule that Mr. Rush's disclosure was untimely.

11. The Hearing Panel finds that Mr. Rush did not violate RPC 3.8(d) of the Tennessee Rules of Professional Conduct.

#### Improper Solicitation of Evidence

12. On April 19, 2010, the Criminal Court of Bradley County in the Younger case held an evidentiary hearing to determine the admissibility at trial of certain evidence that the State intended to introduce pursuant to Rule 404 of the Tennessee Rules of Evidence.

13. Pursuant to Rule 404(b), in order for evidence of other crimes, wrongs or acts to be admissible, the court upon request must hold a hearing outside the jury's presence. Then, the court must find proof of the other crime to be clear and convincing and that it is material to an issue other than a character trait. Finally, the court must find that the probative value of the evidence outweighs the danger of unfair prejudice. Tenn. R. Evid. 404(b)(2), (3) and (4).

14. The State filed a Rule 404 Motion in the Younger case. (Ex. 3) On May 3, 2010, after a hearing that occurred on April 19, the Court ruled on the admissibility of certain evidence. (Ex. 4).

15. At the April 19 Rule 404(b) hearing, the State attempted to introduce evidence that witnesses Amy Lonas, Anita Wilson, and Vivian Denise Carter had each purchased drugs from defendant Michael Younger. The Court clearly denied the State's motion and ruled that this evidence was not admissible.

16. At the Rule 404 hearing, the State also presented proof from Ms. Pamela Upton. This proof related to Mr. Younger's actions at a party that occurred a few days before the murders. Ms. Upton gave testimony the State would use to show that Mr. Younger had shown hostility toward a murder victim prior to the murders. The Court ruled that this evidence was

admissible. However, the State did not attempt at the Rule 404 hearing to offer evidence through Ms. Upton that Mr. Younger was a drug dealer.

17. Ms. Upton testified at the Michael Younger trial. In direct examination by Mr. Rush, Ms. Upton did not testify about whether or not Mr. Younger sold drugs or was a drug dealer.

18. However, during cross examination, Mr. Cavett asked whether two State witnesses and two of the murder victims were drug dealers. Specifically, he asked on page 21 of Exhibit 5:

Q. Desmond Bennett you said was a drug dealer. Was Carrie Rogers a drug dealer?

A. I don't know Carrie that well, so I don't know.

Q. Was O. J. Blair a drug dealer?

A. Not that I know of.

Q. Ok. Thank you. What about Tart Blair, do you know if she was a drug dealer?

A. Not that I know of, sir.

Ex. 5, p. 21.

19. Then, upon redirect examination, without approaching the bench or making a motion, or in any way preparing the Court for what he was about to ask, Mr. Rush asked Ms. Upton:

Q. Did you know Maurice Johnson?

A. Yes, sir.

Q. Do you know what he did for a living?

A. Yes, sir.

Q. Was he a drug dealer?

A. Yes, sir.

Q. Do you know Mr. Younger?

A. Yes, sir.

Q. Was he a drug dealer?

A. Yes, sir.

Ex. 5, pp. 21-22.

20. We find that Mr. Rush's questions were in direct violation of a court order.<sup>3</sup>

21. We find that Mr. Rush's questions violated Rule 404(b) of the Tennessee Rules of Evidence.

22. We find credible Mr. Rush's testimony that he believed Mr. Cavett had "opened the door" for his questions.<sup>4</sup>

23. Nevertheless, the requirements of Rule 404 are clear and the Court's order was clear. Mr. Rush knew what the Rule 404 order said and understood the requirements of Rule 404.

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<sup>3</sup> Mr. Rush has admitted that his questions violated the trial Court's Order. See, e.g., Exhibit 10 (transcript of December 17, 2010 hearing before Judge Kerry Blackwood on the State's Motion to *Nolle Prosequi* the Younger case):

THE COURT: Okay. All right. And a result of that 404 hearing, you were ordered that you would not be able to ask your witnesses any questions about whether or not drug dealing may have been a motive.

GENERAL RUSH: That's correct.

THE COURT: In this event, that was the order of the Court.

GENERAL RUSH: Absolutely.

Exhibit 10, P. 15, LL. 4 – 11.

THE COURT: Okay. No – all right. Then are you saying that on redirect – you're saying that on redirect, then you asked the question that you had been prohibited from asking.

GENERAL RUSH: Yes.

Exhibit 10, P. 18, LL. 9 – 13.

<sup>4</sup> As noted by the trial Judge, defense counsel on cross-examination elicited testimony from the State's witness that "Desmond Benton was a drug dealer." While the trial Judge concluded that the defense's line of questioning was "not relevant" and was "improper," the State asserted no objection at trial. Had Mr. Rush objected to the defense's questioning, "the Court would have sustained an objection, but the objection did not come." Exhibit 5, P. 53, LL. 19 – 25.



24. Mr. Rush's actions interfered with a legal proceeding by causing a mistrial. (Ex. 7).<sup>5</sup>

25. In a later order the Court noted, "On 5/8/10 a mistrial was declared due to the State of Tennessee violating a court order and intentionally soliciting statements from a state's witness that violated the order relative to 404 evidence." (Ex. 8)

26. This conduct violates Rule 3.4(c) of the Tennessee Rules of Professional Conduct, which states that a lawyer shall not "knowingly disobey an obligation of the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." In addition, the conduct violates RPC 8.4(d) because Mr. Rush engaged in conduct that is prejudicial to the administration of justice.

27. We note that the solicitation of improper statements from a witness was alleged only in passing in Paragraph 30 of the Board's Petition for Discipline.

28. Mr. Cavett's August 19, 2010 letter (Ex. 14) to the Board of Professional Responsibility did not raise in the letter itself an issue about Mr. Rush's improper questions.

29. Mr. Rush's response to Mr. Cavett's letter (Ex. 13) did not address the improper questioning because this issue was not raised in Mr. Cavett's letter. Nor was the Rule 404(b) issue raised in the Board of Professional Responsibility's August 23, 2010 letter to Mr. Rush that required him to respond to Mr. Cavett's letter. (Ex. 12) In other words, this allegation was never the thrust and focus of the Board's complaint against Mr. Rush.

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<sup>5</sup> Mr. Rush does not contend that his question -- which violated Rule 404(b) and the Court's order - was accidental or inadvertent. On the contrary, he admits his question was intentional, but he denies that the question was asked for the purpose of causing a mistrial. See Ex. 10, P. 22, LL. 1 - 3 ("There was no question that I intended to ask that question. I did it. I did it intentionally, but it was to get out motive, not to cause a mistrial.")

30. However, this issue was raised at the September 9, 2013 hearing and addressed by Mr. Rush's counsel and counsel for the Board.

Failure to Report Conduct to the Board of Professional Responsibility

31. On the record, during the hearing at which the Court granted a mistrial, Judge Reedy, the trial court judge, stated:

I do have the power to either report unethical conduct or questionable unethical conduct. I am not finding here that General Rush or General Stutts intentionally committed unethical conduct. That is not what this hearing is about, but I do think I have the inherent power to order that they self-report, and, General Rush, I am ordering that you and General Stutts do a self-report as to this situation. That is what all lawyers do in a proud manner on a regular basis. This is something that you have a duty to report to the Board of Professional Responsibility and let them decide, and I am ordering that you do so. And I am ordering that you do with a transcript of these proceedings.

Ex. 2, pp. 72-73. The Court also ordered that defense attorneys Parton and Cavett report the "situation" to the Board. Id.

32. Mr. Rush did not report this situation to the Board of Professional Responsibility. Mr. Rush's first contact with the Board about this situation was his response to Mr. Cavett's letter (Ex. 13 – Letter from Paul Rush to Preston Sharp (Disciplinary Counsel) (Sept. 8, 2010)).

33. Mr. Rush admitted that he did not self-report this situation. He stated "I did not self-report because I behaved well within the ethical guidelines of Rule 3.8(d) and Brady as reviewed by the Tennessee Court of Appeals in McKay v. State, 2010 Tenn. Crim. App. LEXIS 49." Id.

34. By failing to self-report as ordered by Judge Reedy, Mr. Rush violated RPC 8.4(d) by engaging in conduct that is prejudicial to the administration of justice.

35. We further find that Mr. Rush failed to self-report because he had a good faith belief that he did not commit an ethical violation. But Mr. Rush's good faith belief that he did

not commit an ethical violation – however sincerely that belief is held - is not a defense to, or a justification for, his admitted failure to comply with Judge Reedy's Order. Nothing prevented Mr. Rush from complying with Judge Reedy's Order. Mr. Rush could and should have self-reported (and he could certainly have included his contentions, research, argument, explanation, and conclusions in the self-report). His subjective conclusion that he committed no ethical violation does not relieve him of his duty to comply with Judge Reedy's Order, nor does it relieve him of the consequences for failing to do so.

36. We do not find that Mr. Rush's age and experience were an aggravating circumstance.

37. We further find that Mr. Rush's failure to report did not cause injury or potential injury to a client or party, nor did it interfere with a legal proceeding.

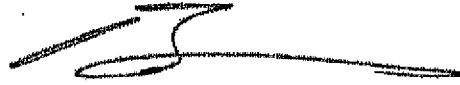
It is therefore ordered by the hearing panel as follows:

1. That the Respondent receive a public censure for intentionally soliciting evidence during a trial that was prohibited by a court order and for failing to follow the procedure required by Rule 404(b) of the Tennessee Rules of Evidence before presenting to the jury in a capital murder case evidence of other crimes, wrongs or acts causing a mistrial.

2. In addition, the public censure shall note that Mr. Rush failed to self-report possible ethical violations despite being ordered by a court to do so.

3. All other allegations and claims against the Respondent set forth in the Petition for Discipline are dismissed with prejudice and on the merits. Respondent shall pay one-half of the costs.

The Findings of Fact, Conclusions of Law and Judgments in the case In Re Paul Donald  
Rush, Doc. No. 2012-2136-3-RW are entered this 20<sup>th</sup> day of September, 2013.



BARRY L. GOLD, ESQ.

Panel Chairperson



CHESTER CREWS TOWNSEND, ESQ.

Panel Member



SCOTT M. SHAW, ESQ.

Panel Member

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

BOARD OF PROFESSIONAL  
RESPONSIBILITY

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EXEC. SEC.

IN RE: PAUL DONALD RUSH  
BPR NO. 23865, Respondent  
An Attorney Licensed to  
Practice Law in Tennessee  
(McMinn County)

DOCKET NO.: 2012-2136-3-RW

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AMENDED JUDGMENT OF THE HEARING PANEL

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This matter came before the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee on September 9, 2013. The Respondent is Paul Donald Rush, who became licensed to practice law in Tennessee in late 2004. He graduated from law school in May 2004. He has since practiced as an Assistant District Attorney in the 10<sup>th</sup> Judicial District (Bradley, McMinn, Monroe and Polk counties). The present Petition for Discipline arises from the capital murder trial of Michael Younger, who was the last of three defendants tried for the murder of three people in Bradley County in 1999. The trial occurred in May, 2010 and ended in a mistrial. All charges against Mr. Younger were later dismissed. Mr. Rush's actions during, after and immediately before that trial are at issue in the present disciplinary proceeding.

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redirect examination of a witness solicited information about whether Mr. Younger was a drug dealer. These questions, the Board asserts, violated a court order and Tennessee Rule of Evidence 404(b). Finally, the Board asserts that Mr. Rush failed to report these incidents to the Board of Professional Responsibility, even though he had been ordered to do so by the trial judge in the case.

Before addressing these issues, the Hearing Panel notes that Mr. Rush had been practicing law for only five and a half years at the time of the Younger trial. Although he had participated in many jury trials, the Younger trial was his first capital murder case. He was the second chair to an experienced attorney. And he was brought into the case as a part of the trial team only a few months before trial. Mr. Rush's experience and the circumstances surrounding his involvement in the case were important to the Hearing Panel's consideration of whether or not Mr. Rush had an intent to violate the rules.

At the hearing, the Hearing Panel heard testimony from three witnesses—Mr. Paul Rush, Ms. Kim Parton and Mr. John C. Cavett. Mr. Cavett and Ms. Parton represented Mr. Younger in the capital murder case. The Panel also received 17 exhibits, which included, among other documents, transcripts from a number of hearings that took place as part of the Younger case. The Panel read and considered all of the exhibits.

Although the three alleged ethical violations are connected, these findings of fact and conclusions of law address them in the order they were discussed in the Petition.

#### Brady Allegations

1. On August 19, 2010 Mr. John C. Cavett, Jr. sent a letter to the Board of Professional Responsibility making a complaint against Assistant District Attorney General Paul Rush. Mr. Cavett claimed that Mr. Rush failed to timely turn over to the defense information

concerning Anita Wilson, who was a witness for the prosecution. Mr. Cavett asserted that Mr. Rush had failed to comply with Rule 3.8(d) of the Tennessee Rules of Professional Conduct ("RPC") which requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense ..."

2. RPC 3.8(d) incorporates into the Rules of Professional Conduct a prosecuting attorney's duties pursuant to Brady v. United States, 397 U.S. 742 (1970). Information given to the defense as a result of this requirement is usually called "Brady Material" and a failure to comply is referred to as a "Brady Violation." In Tennessee the Brady Duty applies not only to evidence directly bearing on the guilt or innocence of the defendant, but also information relating to the credibility of the State's witnesses. See e.g. Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001).

3. Anita Wilson was an important State witness because she was expected to testify that Mr. Younger made statements to her that linked him to the murders. The State had no physical evidence or eye witness testimony linking Younger to the murders. Prior to Mr. Younger's trial in May, 2010, Ms. Wilson had a long history of criminal convictions which cast substantial doubt on her credibility. Excluding the stolen checks investigation described in Paragraph 4, there is no assertion or proof that Mr. Rush failed to timely disclose Brady Material, including shoplifting charges that were pending against Ms. Wilson at the time of trial.

4. Unfortunately, in the three months prior to the Younger trial, Ms. Wilson's criminal history continued to evolve. The Brady Material relevant to the present petition concerned an investigation that targeted Ms. Wilson for fraudulently endorsing and passing checks she allegedly stole from her employer. Apparently, in February 2010, Ms. Wilson's

former employer fired her and reported to the Sweetwater police that Ms. Wilson and possibly others had stolen checks. In March, 2010, a Detective Illingworth of the Sweetwater police department informed Mr. Rush about the stolen check investigation against Ms. Wilson. Detective Illingworth informed Mr. Rush that Ms. Wilson's former employer had fired her and filed charges against her for stealing checks and cashing them at various banks in and around Sweetwater, Tennessee. Detective Illingworth informed Mr. Rush that he did not at that time have sufficient evidence to charge Ms. Wilson with a crime because he had not yet obtained and viewed videos from the banks where the checks were cashed that could link Ms. Wilson to the crime. In addition, he informed Mr. Rush that other employees from Ms. Wilson's former employer, Mexi-Wings Restaurant, were also under investigation. Mr. Rush asked Mr. Illingworth to keep him informed of the status of the investigation because he would have to turn the information over to the defense in the Younger trial. Prior to an evidentiary hearing that occurred two days before the Younger trial, Mr. Rush had not received from Detective Illingworth or anyone else additional information about the Wilson investigation. Detective Illingworth initially told Mr. Rush about the investigation while Mr. Rush was on duty during a busy Sessions Court hearing day. We find on this record that Mr. Rush told Detective Illingworth to get back to him. Detective Illingworth did not get back to him.

5. At a hearing two days prior to jury selection, Mr. Rush disclosed to defense counsel all he then knew about the Wilson check theft investigation.

6. There is no evidence that Mr. Rush knew anything more than what he told to the Court and defense counsel on May 2, 2010.

7. After hearing Mr. Rush's disclosure, defense counsel Cavett and Parton revealed to the Court that the Wilson investigation had moved further than what Mr. Rush disclosed. Mr.



Cavett later played to the Court a tape recording of a conversation that a defense investigator had with Detective Illingworth. In that conversation, Mr. Illingworth said among other things that Bank tapes had in fact linked Ms. Wilson to the check crimes, that she had admitted her involvement, and that the detective was using Ms. Wilson to link others to the crime. Critically, according to Detective Illingworth in the tape recording<sup>1</sup>, another Assistant District Attorney from the 10<sup>th</sup> Judicial District had asked Detective Illingworth to slow walk the investigation until after the Younger trial. (See, Ex. 2, pp. 42-55). The Hearing Panel finds that Mr. Rush did not know these facts prior to the May 2, 2010 hearing. We also find that Mr. Rush disclosed what he knew about the investigation before Mr. Cavett alleged later that more should have been disclosed by the State.

8. Arguably, Mr. Rush should have followed up on the Wilson investigation. But RPC 3.8(d) only requires “timely disclosure to the defense of all evidence or information **known to the Prosecutor.**” In this situation, “Known or knowing denotes actual awareness of the fact in question.” RPC 10(f). Mr. Rush did not know more about the Wilson investigation than what he revealed.

9. Whether or not the information Mr. Rush disclosed on May 2, 2010 was Brady Material,<sup>2</sup> Mr. Rush disclosed all he knew prior to trial, and his actions or inactions did not rise to the level of a RPC 3.8 violation.

10. This ruling as to what Mr. Rush knew and when he knew it is substantially based on the Hearing Panel’s listening to and observing Mr. Rush’s testimony at the disciplinary

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<sup>1</sup> Illingworth later denied in court that he had been asked to slow walk the investigation. (Ex. 2, pp. 35-36).

<sup>2</sup> It is unclear whether the information known by Mr. Rush—without the information later revealed by Mr. Cavett—was Brady Material that should have been disclosed. See, e.g., Tankleff v. Senkowski, 135 F.3d 235, 251 (2<sup>nd</sup> Cir. 1998) (Failure to disclose Cumulative Immaterial Impeachment Evidence after a witness’ credibility has been called into question generally will not support a Brady claim.)

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11. The Hearing Panel finds that Mr. Rush did not violate RPC 3.8(d) of the Tennessee Rules of Professional Conduct.

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14. The State filed a Rule 404 Motion in the Younger case. (Ex. 3) On May 3, 2010, after a hearing that occurred on April 19, the Court ruled on the admissibility of certain evidence. (Ex. 4).

15. At the April 19 Rule 404(b) hearing, the State attempted to introduce evidence that witnesses Amy Lonas, Anita Wilson, and Vivian Denise Carter had each purchased drugs from defendant Michael Younger. The Court clearly denied the State's motion and ruled that this evidence was not admissible.

16. At the Rule 404 hearing, the State also presented proof from Ms. Pamela Upton. This proof related to Mr. Younger's actions at a party that occurred a few days before the murders. Ms. Upton gave testimony the State would use to show that Mr. Younger had shown hostility toward a murder victim prior to the murders. The Court ruled that this evidence was

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Q. Ok. Thank you. What about Tart Blair, do you know if she was a drug dealer?

A. Not that I know of, sir.

Ex. 5, p. 21.

19. Then, upon redirect examination, without approaching the bench or making a motion, or in any way preparing the Court for what he was about to ask, Mr. Rush asked Ms. Upton:

Q. Did you know Maurice Johnson?

A. Yes, sir.

Q. Do you know what he did for a living?

A. Yes, sir.

Q. Was he a drug dealer?

A. Yes, sir.

Q. Do you know Mr. Younger?

A. Yes, sir.

Q. Was he a drug dealer?

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Ex. 5, pp. 21-22.

20. We find that Mr. Rush's questions were in direct violation of a court order.<sup>3</sup>

21. We find that Mr. Rush's questions violated Rule 404(b) of the Tennessee Rules of Evidence.

22. We find credible Mr. Rush's testimony that he believed Mr. Cavett had "opened the door" for his questions.<sup>4</sup>

23. Nevertheless, the requirements of Rule 404 are clear and the Court's order was clear. Mr. Rush knew what the Rule 404 order said and understood the requirements of Rule 404.

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<sup>3</sup> Mr. Rush has admitted that his questions violated the trial Court's Order. See, e.g., Exhibit 10 (transcript of December 17, 2010 hearing before Judge Kerry Blackwood on the State's Motion to *Nolle Prosequi* the Younger case):

THE COURT: Okay. All right. And a result of that 404 hearing, you were ordered that you would not be able to ask your witnesses any questions about whether or not drug dealing may have been a motive.

GENERAL RUSH: That's correct.

THE COURT: In this event. That was the order of the Court.

GENERAL RUSH: Absolutely.

Exhibit 10, P. 15, LL. 4 -- 11.

THE COURT: Okay. No -- all right. Then are you saying that on redirect -- you're saying that on redirect, then you asked the question that you had been prohibited from asking.

GENERAL RUSH: Yes.

Exhibit 10, P. 18, LL. 9 -- 13.

<sup>4</sup> As noted by the trial Judge, defense counsel on cross-examination elicited testimony from the State's witness that "Desmond Benton was a drug dealer." While the trial Judge concluded that the defense's line of questioning was "not relevant" and was "improper," the State asserted no objection at trial. Had Mr. Rush objected to the defense's questioning, "the Court would have sustained an objection, but the objection did not come." Exhibit 5, P. 53, LL. 19 -- 25.

24. Mr. Rush's actions interfered with a legal proceeding by causing a mistrial. (Ex. 7).<sup>5</sup>

25. In a later order the Court noted, "On 5/8/10 a mistrial was declared due to the State of Tennessee violating a court order and intentionally soliciting statements from a state's witness that violated the order relative to 404 evidence." (Ex. 8)

26. This conduct violates Rule 3.4(c) of the Tennessee Rules of Professional Conduct, which states that a lawyer shall not "knowingly disobey an obligation of the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." In addition, the conduct violates RPC 8.4(d) because Mr. Rush engaged in conduct that is prejudicial to the administration of justice.

27. We note that the solicitation of improper statements from a witness was alleged only in passing in Paragraph 30 of the Board's Petition for Discipline.

28. Mr. Cavett's August 19, 2010 letter (Ex. 14) to the Board of Professional Responsibility did not raise in the letter itself an issue about Mr. Rush's improper questions.

29. Mr. Rush's response to Mr. Cavett's letter (Ex. 13) did not address the improper questioning because this issue was not raised in Mr. Cavett's letter. Nor was the Rule 404(b) issue raised in the Board of Professional Responsibility's August 23, 2010 letter to Mr. Rush that required him to respond to Mr. Cavett's letter. (Ex. 12) In other words, this allegation was never the thrust and focus of the Board's complaint against Mr. Rush.

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<sup>5</sup> Mr. Rush does not contend that his question - which violated Rule 404(b) and the Court's order - was accidental or inadvertent. On the contrary, he admits his question was intentional, but he denies that the question was asked for the purpose of causing a mistrial. See Ex. 10, P. 22, LL. 1 - 3 ("There was no question that I intended to ask that question. I did it. I did it intentionally, but it was to get out motive, not to cause a mistrial.")

30. However, this issue was raised at the September 9, 2013 hearing and addressed by Mr. Rush's counsel and counsel for the Board.

Failure to Report Conduct to the Board of Professional Responsibility

31. On the record, during the hearing at which the Court granted a mistrial, Judge Reedy, the trial court judge, stated:

I do have the power to either report unethical conduct or questionable unethical conduct. I am not finding here that General Rush or General Stutts intentionally committed unethical conduct. That is not what this hearing is about, but I do think I have the inherent power to order that they self-report, and, General Rush, I am ordering that you and General Stutts do a self-report as to this situation. That is what all lawyers do in a proud manner on a regular basis. This is something that you have a duty to report to the Board of Professional Responsibility and let them decide, and I am ordering that you do so. And I am ordering that you do with a transcript of these proceedings.

Ex. 2, pp. 72-73. The Court also ordered that defense attorneys Parton and Cavett report the "situation" to the Board. Id.

32. Mr. Rush did not report this situation to the Board of Professional Responsibility. Mr. Rush's first contact with the Board about this situation was his response to Mr. Cavett's letter (Ex. 13 -- Letter from Paul Rush to Preston Sharp (Disciplinary Counsel) (Sept. 8, 2010)).

33. Mr. Rush admitted that he did not self-report this situation. He stated "I did not self-report because I behaved well within the ethical guidelines of Rule 3.8(d) and Brady as reviewed by the Tennessee Court of Appeals in McKay v. State, 2010 Tenn. Crim. App. LEXIS 49." Id.

34. By failing to self-report as ordered by Judge Reedy, Mr. Rush violated RPC 8.4(d) by engaging in conduct that is prejudicial to the administration of justice.

35. We further find that Mr. Rush failed to self-report because he had a good faith belief that he did not commit an ethical violation. But Mr. Rush's good faith belief that he did

not commit an ethical violation – however sincerely that belief is held - is not a defense to, or a justification for, his admitted failure to comply with Judge Reedy's Order. Nothing prevented Mr. Rush from complying with Judge Reedy's Order. Mr. Rush could and should have self-reported (and he could certainly have included his contentions, research, argument, explanation, and conclusions in the self-report). His subjective conclusion that he committed no ethical violation does not relieve him of his duty to comply with Judge Reedy's Order, nor does it relieve him of the consequences for failing to do so.

36. We do not find that Mr. Rush's age and experience were an aggravating circumstance.

37. We further find that Mr. Rush's failure to report did not cause injury or potential injury to a client or party, nor did it interfere with a legal proceeding.


It is therefore ordered by the hearing panel as follows:

1. That the Respondent receive a public censure for intentionally soliciting evidence during a trial that was prohibited by a court order and for failing to follow the procedure required by Rule 404(b) of the Tennessee Rules of Evidence before presenting to the jury in a capital murder case evidence of other crimes, wrongs or acts causing a mistrial.

2. In addition, the public censure shall note that Mr. Rush failed to self-report possible ethical violations despite being ordered by a court to do so.

3. All other allegations and claims against the Respondent set forth in the Petition for Discipline are dismissed with prejudice and on the merits. Respondent shall pay one-half of the costs.

The Findings of Fact, Conclusions of Law and Judgments in the case In Re Paul Donald  
Rush, Doc. No. 2012-2136-3-RW are entered this 20<sup>th</sup> day of September, 2013.



BARRY L. GOLD, ESQ.  
Panel Chairperson



CHESTER CREWS TOWNSEND, ESQ.  
Panel Member



SCOTT M. SHAW, ESQ.  
Panel Member

Notice: This judgment may be appealed pursuant to Tenn. Sup. Ct. R. 9, Section 1.3, by filing a petition for writ of certiorari, which shall be made under oath or affirmation and shall state that it is the first application for the writ. See Tenn. Code Ann. 27-8-104(a) and 27-8-106.