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BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **Dennis K. Burke,** **Bar No. 012076,** Respondent.	**PDJ-2014-** 9028 **AGREEMENT FOR DISCIPLINE BY CONSENT** State Bar No. 12-2964

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent Dennis K. Burke, who is represented in this matter by counsel, James J. Belanger, hereby submit their Tender of Admissions and Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. The parties reached an agreement for discipline by consent before the matter was submitted to the Attorney Discipline Probable Cause Committee; therefore, there is no order of probable cause. Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, unless otherwise ordered, and waives all motions, defenses, objections

or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

In File No. 12-2964, the Respondent self-reported, therefore no notice of this agreement is required pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.6 and 8.4(c). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding.[1] The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit "A."

FACTS

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 25, 1988.

2. At all times relevant, Respondent was the U.S. Attorney for the District of Arizona. He served in that position from September of 2009 until he resigned on August 30, 2011.

3. As background, an investigation known as Fast and Furious ("F&F") was initiated by the ATF's Phoenix Field Office with the assistance of the U.S. Attorney's Office ("USAO") in Phoenix. The goal of the investigation was to identify and prosecute criminals involved in trafficking firearms in Mexico. In late 2010, a U.S. Border Patrol Agent Brian Terry was shot and killed. The homicide brought the

[1] Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

investigation to national attention. Multiple congressional investigations and hearings were initiated and conducted regarding the F&F investigation.

COUNT ONE (State Bar File No. 12-2964)

4. In late January of 2011, Senator Charles Grassley, as ranking member of the Senate Committee on the Judiciary, requested information about F&F from the Department of Justice ("DOJ"). At approximately the same time, Representative Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, also requested similar documents. The information requested included documents relating to a December 17, 2009 meeting between ATF and the Federal Firearms Licensee ("FFL") who had sold weapons to Jaime Avila.

5. On January 28, 2011, an Assistant United States Attorney in Phoenix, wrote a three-page memo ("the Avila Memo") to Respondent and the Criminal Chief for the Phoenix USAO, containing, among other information, a summary of the December 17, 2009, meeting referenced above.

6. On June 6, 2011, as part of this ongoing production of documents, an Associate Deputy Attorney General, sent an email to the Criminal Chief for the Phoenix USAO, copying Respondent, concerning whether to release various documents in response to the Congressional requests. One of the documents in question was the Avila memo. The Criminal Chief eventually replied that he had spoken by telephone with Respondent, who was travelling out of state at the time, and that they opposed the release of the Avila memo on the grounds of the work product privilege. This was one of numerous daily communications Respondent had with the Criminal Chief. Respondent maintains that he does not specifically recall this conversation.

7. On June 14, 2011, a report prepared for Representative Darrell Issa and Senator Charles Grassley regarding the Department of Justice's F&F Operation (the "F&F Report") was unofficially released to several media outlets, including the New York Times. The F&F Report was to be the subject of a congressional hearing the following day.

8. After the F&F Report was released, but before the hearing, the New York Times Arizona Bureau Chief sent an email to the media liaison for the USAO saying that the F&F Report stated that Agent Brian Terry's death was a result of the F&F operation and was preventable. The media liaison reviewed a copy of the F&F Report and then met with Respondent and other assistant United States Attorneys, to determine what, if anything, to do in response. According to Respondent, the consensus at the meeting, and his view, was that, because of its own political interests, DOJ would not adequately defend the USAO against what the USAO perceived to be the congressional report's unfair conclusion that the Terry murder was preventable and a direct result of the F&F operation.

9. After the meeting, the media liaison released a redacted version of the Avila Memo to the New York Times to respond to the allegations made about the USAO in the F&F Report. The Avila Memo was not intended to be attributed to the USAO. Respondent does not believe that he was the one who raised the topic or existence of the Avila Memo during the meeting or that he specifically directed the Avila Memo to be released. However, Respondent agrees that he was aware that the media liaison was going to release the memo, that he authorized such a release, and that the media liaison would not have released the Avila Memo unless he believed that Respondent authorized its release.

10. The release of the Avila Memo, which was briefly posted by the New York Times on its website, was not coordinated with the DOJ Office of Public Affairs (the "OPA").

11. Two days later, on June 16, 2011, Respondent's immediate supervisor, Deputy Attorney General James Cole ("DAG Cole") spoke briefly with Respondent about the release of the Avila Memo to the New York Times. DAG Cole asked how the Avila Memo was released. Respondent told him that five or six people had access to the document, but did not tell DAG Cole that his office released the Avila Memo to the New York Times. Respondent agrees that DAG Cole could reasonably have inferred from their conversation that Respondent did not know how the New York Times obtained the Avila Memo. Respondent agrees that he was not forthcoming with DAG Cole in this conversation.[2]

12. On June 24, 2011, the DOJ Office of Professional Responsibility ("OPR") spoke very briefly with Respondent. The call was not recorded nor was Respondent questioned in detail. Respondent told OPR that as the head of the USAO, he was responsible for the actions of his staff. Although Respondent maintains that he does not recall that he specifically directed the media liaison to release the Avila Memo, he agrees that the media liaison would not have released the Avila Memo if he did not believe he was authorized to do so by Respondent. Respondent agrees, therefore, that he was responsible for the release of the Avila Memo.

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[2] Respondent would contend that at this time he believed (1) that the Deputy Attorney General and his staff had not been frank with his office about how they were handling F&F with and (2) that the DOJ was posturing the matter to portray the USAO as a scapegoat. The State Bar has no information regarding the accuracy of Respondent's opinions.

13. On June 27, 2011, DAG Cole again called Respondent and advised him that he understood from OPR that Respondent had accepted responsibility for the leak of the Avila Memo. DAG Cole asked if this was correct. Respondent confirmed that it was. Respondent told DAG Cole that he had not been fully candid with him on June 16, 2011, and that he in fact was ultimately responsible for the release of the Avila Memo.

14. At the time of the June 14, 2011 meeting, Respondent was aware that F&F was a matter of national political importance, that DOJ and/or the OPA would not have authorized the release of the Avila Memo to the media, and that he was not authorized under the circumstances to make media disclosure decisions on this particular matter.[3]

15. Respondent contends that the Avila Memo was released due to Respondent's dissatisfaction with how DOJ was handling the F&F controversy and portraying the role of the USAO, to provide accurate information to the media in response to allegations in the F&F Report about the role and conduct of the USAO that Respondent believed were false and inaccurate, and to refute those allegations.

16. Ultimately, an OPR investigation was conducted and a report was prepared. That report is confidential and the subject to a protective order in this case.

17. OPR submitted a copy of its report, dated July 27, 2012, to the State Bar regarding this incident. Prior to that time, Respondent had self-reported this matter to the State Bar.

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[3] The parties agree that in most circumstances, Respondent had full authorization and discretion to deal with the media on behalf of the USAO.

18. During the investigation of this matter, the State Bar became aware of a report of investigation concerning improper disclosure of information that was authored by the Office of the Inspector General, dated May 2013. This second disclosure concerned a document referred to as the "Dodson Memo." John Dodson, an ATF Special Agent, authored a memo that was sent to his supervisor in which he proposed an operation in which he would act in an undercover capacity as a straw purchaser of firearms. Thereafter, in contradiction to his memo, Dodson provided an interview with CBS News wherein he described and criticized the ATF's operations in allowing gun-walking into Mexico and provided similar testimony before a Congressional committee.

19. The Dodson memo was requested and/or subpoenaed by Congress. DOJ provided a redacted version of the Dodson memo to Congressional investigators on June 21, 2011. The investigators were permitted to view the memo only in the presence of DOJ and were not permitted to copy it. DOJ also informed the USAO that redacted portions of the memo had been made available to the investigators.

20. On or about June 29, 2011, Respondent was contacted by a reporter. Respondent had known and had significant contact with the reporter for several years. The reporter told Respondent that he was working on a story involving Dodson, provided him with details, and asked Respondent to provide him with the Dodson Memo. Based on this conversation, Respondent contends that he believed that the reporter either already had a copy of the Dodson Memo or had reviewed it.

21. Respondent agreed to provide the Dodson Memo to the reporter, but did so indirectly through his personal email accounts.

22. At the time that Respondent disclosed the memo, he was aware that F&F was a matter of national political importance, that DOJ and/or the Office of Public Affairs ("OPA") would not have authorized the release of the Dodson Memo to the media, and that he was not authorized under the circumstances to make media disclosure decisions on this particular matter.

23. The Dodson Memo was released by Respondent a few days after he was admonished by DAG Cole about releasing the Avila Memo.

24. Although the second disclosure was not included in the July 27, 2012 OPR Report or in Respondent's self-report, on November 8, 2011, Respondent contends that he had written a letter to Congress admitting that he had disclosed the Dodson Memo. Respondent's contends that his admission received media attention in November 2011 including an article in the Arizona Republic, an article in the Phoenix New Times and coverage on National Public Radio.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent conditionally admits that his conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.6 and 8.4(c).

RESTITUTION

Restitution is not an issue in this matter.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanction is appropriate: Reprimand.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

The parties agree that Standard 4.23 applies to the ER 1.6 violation. Standard 4.23 states that reprimand is appropriate when a lawyer negligently reveals information relating to the representation of a client and the disclosure causes injury or potential injury.

The parties agree that Standard 5.13 should apply to the ER 8.4(c) violation in this matter.[4] Standard 5.13 states that reprimand is appropriate when a lawyer knowingly engages in conduct involving misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

The duty violated

As described above, Respondent's conduct violated his duties to his client and the public.

The lawyer's mental state

For purposes of this agreement the parties agree that Respondent negligently revealed confidential information and knowingly misled DAG Cole and that his conduct was in violation of the Rules of Professional Conduct.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was potential but no actual harm to the client and the profession.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is reprimand. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

In aggravation:

Under Standard 9.22, the following factors should be considered in aggravation:

[4] The State Bar would argue that Standard 4.62 calling for a suspension when a lawyer knowingly deceives a client is applicable to the violation. Respondent asserts that he did not consider DAG Cole a client at the time of the misstatements, and that therefore that section is not relevant. Use of either this standard or 5.13 does not affect the agreed upon sanction in this matter. The State Bar would also argue that the ER 1.6 violation was knowing and also subject to the presumptive sanction of a suspension. However, even if suspension was the presumptive sanction, the State Bar is satisfied that the agreed upon discipline herein is appropriate given the facts and circumstances.

9.22(d): multiple offenses: Respondent revealed confidential information on two separate occasions.

9.22(i): substantial experience in the practice of law: Respondent has been admitted to practice law in Arizona since 1988.

In mitigation:

Under Standard 9.32, the following factors should be considered in mitigation:

9.32(a): absence of a prior disciplinary record.

9.32(e): full and free disclosure to the State Bar.

9.32(g): character or reputation.

Additional considerations:

In addition to the aggravating and mitigating factors listed above, both parties agree that the specific facts and circumstances of this case should also be considered. On one hand, at the time of the misconduct, Respondent held a position of high public trust and authority. It could be argued that he should be held to an even higher standard than that expected of most attorneys. On the other hand, the misconduct occurred at a time of high partisan political pressure. The following considerations are appropriate:

- Respondent has never previously had a bar charge of any kind.
- Respondent accepted responsibility for his conduct and resigned from his position.
- Respondent self-reported to the State Bar of Arizona and has been fully compliant with the Bar disciplinary process.

- Respondent contends that these events occurred in a political context in which allegations were being published and made in congressional hearings that the USAO had failed to take actions that would have prevented the death of a federal agent.

- Respondent did not have a self-serving, selfish or pecuniary motive. Respondent contends that any actions undertaken were done with the desire to protect the reputation and integrity of the USAO and to refute what he believed to be false allegations that went directly to the competence and integrity of the USAO. [5]

- Respondent has been a public servant for over twenty years. He has always had an excellent reputation for integrity and professionalism.

- Respondent contends that, throughout 2010 and 2011, he and the USAO were under tremendous strain as they dealt with an unprecedented series of national issues. First and foremost, the tragic shootings of Congresswoman Gabrielle Giffords, Chief Judge John Roll, and 17 other people on January 8, 2011, affected the USAO and Respondent like no other event in the office's history. Staff members of the USAO's Tucson office were devastated by the shootings. Respondent arranged for grief counseling and personally spent

[5] ER 1.6(d)(4) provides that "[a] lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, ... or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ..." Respondent would argue that his disclosures in this matter were authorized by ER 1.6(d)(4). The State Bar would dispute this application. Nonetheless, Respondent accepts that his actions violated ER 1.6 as set forth herein.

many, many hours meeting with staff members in an effort to comfort and console them.

- Respondent contends that the shootings also deeply affected him on a personal level. He had a 20-year friendship with Chief Judge Roll, who asked to preside over Respondent's investiture when he was confirmed as the U.S. Attorney for the District of Arizona. Respondent also had a close personal friendship with Congresswoman Giffords and members of her staff. Respondent again spent hours and hours in the months following the shootings visiting the victims and their families. Respondent was commended by DOJ for his exemplary and sensitive handling of these events while at the same time the F&F controversy was ongoing.

Discussion

The presumptive sanction in this matter is reprimand and the parties agree that is appropriate due to the unique facts of the situation. The misconduct occurred under unique circumstances not likely to repeat. Respondent believed that his office and employees were not being fairly protected by DOJ, and that accurate and complete information about F&F was not being provided to the national media. Respondent agrees that, despite this situation, his actions were not appropriate. In addition, Respondent no longer holds the position he held at the time of the misconduct.

Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is the appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of Reprimand and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit "B."

DATED this 21 day of March, 2014.

STATE BAR OF ARIZONA

Amy K. Rehm
Deputy Chief Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

DATED this 25 day of March, 2014.

Dennis K. Burke
Respondent

DATED this 25 day of March, 2014.

James J. Belanger
Counsel for Respondent

Approved as to form and content

Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this 27th day of March, 2014.

Copies of the foregoing mailed/emailed
this 27th day of March, 2014, to:

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Copy of the foregoing emailed
this 27th day of March, 2014, to:

William J. O'Neil
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Copy of the foregoing hand-delivered
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By: Rodney T. Bard
AKR/ rtb

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DENNIS K. BURKE,** Bar No. 012076 Respondent.	**PDJ-2014-9028** **FINAL JUDGMENT AND ORDER** [State Bar No. 12-2964] **FILED APRIL 11, 2014**

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on March 27, 2014, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement.

Accordingly:

IT IS HEREBY ORDERED that Respondent, **Dennis K. Burke**, is hereby reprimanded effective this date for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Mr. Burke pay the costs and expenses of the State Bar of Arizona in the amount of $1,200.00. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 11th day of April, 2013.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
11th day of April, 2014.

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by: MSmith