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Mr. Chad Childers, Administrative Attorney
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Via email and facsimile
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Re: Case No. 201507089, Steven Gregory White

Mr. Childers:

Ben Selman's January 29, 2016 letter on behalf of Steven Gregory White raises more questions than it answers. In fact, it implicates Mr. White in additional ethical violations, and perhaps federal crimes. At the same time, the letter is largely unresponsive to my original charge that Mr. White violated Disciplinary Rule 8.04(a)(6). Essentially, Mr. White asserts a Nuremburg Defense, *i.e.*, that he was "just following orders" from his client. As explained below, the disciplinary rules expressly preclude such a defense.

First, I must address the January 27, 2016 memorandum from Mr. White to Mr. Selman wherein Mr. White described his representation of Judge Walter S. Smith, Jr. The memorandum is attached to Mr. Selman's letter as Exhibit 7. I suppose Mr. Selman thought Mr. White could avoid liability for making false statements to the bar if he addressed the memorandum to Mr. Selman rather than addressing it to you.

If that was his strategy, it comes at a very high price, because the memorandum revealed attorney-client communications, and it waived attorney-client privilege under state and federal law. *See* Tex. R. Evid. 511 and *Alpert v. Riley*, 267 F.R.D. 202, 209 (S.D. Tex. 2010)("Under federal law, 'voluntary disclosure of information which is inconsistent with the confidential nature of the attorney client relationship waives the privilege.'"). Worse, Mr. White's memorandum revealed privileged communications with Judge Smith. If Mr. Selman revealed the privileged communications without first getting permission from Mr. White, then he violated Disciplinary Rule 1.05(b). Likewise, if Mr. White revealed privileged communications without first getting permission from Judge Smith, then he also violated Rule 1.05(b).

If the privileges have been waived, then those waivers are quite significant, particularly if Mr. White and/or Judge Smith become the targets of a federal criminal

investigation, as they should. The Fifth Circuit Judicial Council already has found "that Judge Smith allowed false factual assertions to be made in response to the [judicial misconduct] complaint..." and, thanks to Mr. White's memorandum, we now know that the false factual assertions were made with the help of Mr. White.

I am sending copies of this letter to Fifth Circuit officials, as well as special counsel John Creuzot, because I suspect they will dispute Mr. White's claim on page 3 of his memorandum that the Fifth Circuit is somehow responsible for the misrepresentations that he and Judge Smith made to the investigative committee. If Mr. White or Judge Smith knowingly made false factual assertions to the committee's investigator, those misrepresentations could be grounds for felony charges. 18 U.S.C. §1001. Likewise, if Mr. White or Judge Smith conspired to mislead the Judicial Council, they could be indicted for felony fraud. 18 U.S.C. §371.[1] And there is good reason to doubt Mr. White's truthfulness.

On December 14, 2015, *Texas Lawyer* published an article containing the following excerpt:

> Greg White, a Waco solo who represents Smith in the disciplinary matter, said Smith believed the woman was attracted to him.
>
> "If you read the deposition that has been made public, you'll find that it was an event that occurred more than 10 years ago. The way the events read, it's apparent that Judge Smith pursued a woman that he was attracted to and thought she was attracted to him," White said.
>
> White said the woman later wrote a letter to Smith acknowledging that his advance "was a mistake and asking that their relationship remain professional."
>
> "I think he acknowledges that he put her in an awkward position. But reading the deposition makes it clear that he thought she was attracted to him," White said.

John Council, "Waco Federal Judge Reprimanded for Sexual Harassment," http://www.texaslawyer.com/id=1202744828306/Waco-Federal-Judge-Reprimanded-for-Sexual-Harassment#ixzz40C3b7GwK. There is absolutely nothing in that deposition indicating that Judge Smith thought E.S. was attracted to him. In fact, she had never spoken with him before the day of the assault. Worse, Mr. White admitted in his memorandum that he and Judge Smith knew that their story (*i.e.*, that E.S. was pursuing Judge Smith) was false shortly after filing the motion to dismiss the judicial complaint. In other words, when Mr. White told *Texas Lawyer* that E.S. had pursued Judge Smith, he had known for more than a year that it wasn't true.

[1] The conspiracy to commit fraud statute is notoriously broad, and it applies even where the defendants did not seek to obtain money or property from the United States. *See* FEDERAL CRIMINAL CONSPIRACY, 52 Am. Crim. L. Rev. 1089 (2015).

Mr. White's "smear the victim" strategy appears to be a violation of Disciplinary Rule 4.01 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person;") and Rule 8.04(a)(3)("A lawyer shall not... engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"). Granted, Mr. White did not mention E.S. by name, but there are plenty of us who knew exactly who Mr. White was talking about, including E.S. and her former co-workers.[2]

Even more troubling, it appears from Mr. White's memorandum that he represented Judge Smith free of charge. The informal nature of the attorney-client relationship described on pages 1-2 of the memorandum suggests that he was unpaid for at least some of the services that he provided to Judge Smith. If that is true, then Mr. White aided Judge Smith in additional violations of the Code of Conduct for U.S. Judges as well as federal law, *see* 5 U.S. Code §7353 (prohibiting gifts to officers and employees of the federal government) and Judicial Conference Regulations on Gifts §620.35, in which case Mr. White violated Disciplinary Rule 8.03(a)(6) yet again.

If Mr. White obtained a favorable ruling in exchange for providing free legal services to Judge Smith, then the matter is criminal. *See* 18 U.S. Code §201 (prohibiting bribery). Interestingly, Mr. White himself writes that Keith Langley began inquiring about the attorney-client relationship with Judge Smith because Mr. Langley "did not like" some of the rulings that Judge Smith made in favor of Mr. White's clients. In other words, Mr. Langley apparently wondered whether Judge Smith's favorable rulings were a *quid pro quo* for Mr. White's legal services.

Mr. White shouldn't have to wonder about that, and neither should the rest of us. Both Mr. White and Judge Smith should be questioned about any possible *quid pro quo*, and Mr. White should be directed to provide a copy of his retainer agreement and any other documents indicating whether (and when) he was paid by Judge Smith, whether he discounted his fees, etc. Since the attorney-client privilege between Judge Smith and Mr. White has been waived, they should have no objection.

On the first page of his memorandum, Mr. White writes that he is providing Mr. Selman "a flash drive with a group of documents relevant to" his representation of Judge Smith. "I have retained my email communications about this matter, but I know that I routinely received, and then deleted text communications from Judge Smith," he wrote. "I don't recall any text message that relates to this matter at all."

What was the subject matter of these text messages, and why were they deleted? Was Judge Smith texting football scores or dirty jokes, or was he communicating ex parte with Mr. White about the cases pending before him? Since the attorney-client relationships among Mr. Selman, Mr. White, and Judge Smith have been waived, all three of them should be questioned. Mr. Selman should be directed to produce the flash drive, and Mr. White should be directed to produce all of

[2] Accordingly, I ask that you supplement my grievance to include the charge that Mr. White violated Rules 4.01(a) and 8.04(a)(3).

his email communications with Judge Smith and/or his staff. Judge Smith should be subpoenaed to produce all of his text messages to Mr. White.

Now, back to the original basis for my complaint, *i.e.*, that Mr. White "knowingly assist[ed] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." *See* Disciplinary Rule 8.03(a)(6). The Fifth Circuit Judicial Council has already determined implicitly in its December 3, 2015 Order that the undisclosed attorney-client relationship between Mr. White and Judge Smith was improper, and it obviously takes two to tango.

Judge Smith could not have had an undisclosed attorney-client relationship without Mr. White's cooperation, therefore Mr. White "knowingly assist[ed] a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law." Period. In an attempt to get around this, Mr. Selman resorts to some rather bold misrepresentations, namely that governing law somehow *prohibited* Mr. White from disclosing the attorney-client relationship.

On page 3 of his letter, for example, Mr. Selman wrote that "[o]nly Judge Smith can make the full disclosure under the provisions of 28 U.S.C. §455(e)..." In reality, §455(e) says nothing of the sort. Here is the actual text:

> No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. §455(e). Nothing in that paragraph prevented Mr. White from disclosing his attorney-client relationship on the record. In the same paragraph, Mr. Selman wrote that the Judicial Council order "makes clear that the duty of disclosure of the attorney-client relationship was that of Judge Smith." In reality, the order says nothing to imply that Judge Smith had the exclusive duty to disclose the attorney-client relationship.

On page 6 of his letter, Mr. Selman really outdid himself, writing that "the rules of the tribunal" prohibited Mr. White from disclosing the attorney-client relationship. His selective excerpt of Judicial Council Rule 23(a) is disingenuous, because nothing in that rule prohibited disclosure of the attorney-client relationship. At most, it might prevent disclosure of an ongoing judicial misconduct investigation, but the rule is directed to the government officials involved in the investigation, not the attorney for the subject of the investigation. In fact, subsection (i) of the same rule expressly *permits* the subject of the investigation (in this case, Judge Smith) to disclose the fact that he or she is being investigated. Contrast that subsection with Mr. White's statement on page 5 of his memorandum, where he wrote that Judge Smith "correctly believed that the Rules of the Judicial Conference required him to keep the matter confidential." If Mr. White and Judge Smith had actually read the Rules of the

Judicial Conference, they might have known (1) that there is no such thing as a motion to dismiss a judicial misconduct complaint, and (2) the rules did not require Judge Smith to "keep the matter confidential."

But that really misses the point. Mr. White need not have disclosed the existence of the judicial misconduct proceeding in order to disclose the fact that he had an attorney-client relationship with Judge Smith, *i.e.*, he could have simply told Mr. Langley that he had an attorney-client relationship with Judge Smith without specifying *why* he was representing Judge Smith.

Far more significant, however, is the fact that Mr. White had already disclosed his attorney-client relationship *as well as the existence of the judicial misconduct case* as of January 14, 2015. On page 4 of his memorandum, Mr. White prints the email verbatim. It is profoundly disingenuous for Mr. White to claim that the Judicial Council's rules prohibited him from disclosing the attorney-client relationship to Mr. Langley when he had already disclosed it (and the existence of the misconduct case) to another attorney *nine months earlier*.

Mr. White's time line on page 4 of his memorandum is particularly damning. He had begun representing Judge Smith in September of 2014, and he began filing motions in Judge Smith's court shortly thereafter, on October 15, 2014. Apparently no disclosures were made until the following January, when Mr. White acknowledged the attorney-client relationship to an attorney in another case. Why the four month delay? Furthermore, Mr. White never made a disclosure to Mr. Langley *until he got caught* another nine months later. And the first footnote in Mr. White's memorandum shows that he was subjectively aware that his attorney-client relationship with Judge Smith was a conflict of interest, because by his own admission he "felt extremely uncomfortable."

Finally, I must address Mr. White's Nuremburg Defense. Throughout Mr. Selman's letter and Mr. White's memorandum, they argue that Mr. White was just following the directions of his client. So what? If Judge Smith tells Mr. White to shoot the clerk, will he just blindly follow orders? I don't doubt the difficulty of saying "no" to a client who happens to be a federal judge, but Mr. White was not without options, and I rather doubt that he called the bar's toll-free ethics helpline to find out what those options were.

As noted above, Mr. White had already decided on his own to disclose the attorney-client relationship in another case, as he was obligated to do. A lawyer may reveal confidential information when he "has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law." Disciplinary Rule 1.05(c)(4). He may also reveal confidential information when he "has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act." Disciplinary Rule 1.05(c)(7). For that matter, he can reveal confidential information after obtaining permission

from his client. Disciplinary Rule 1.05(c)(2). Did Mr. White even ask Judge Smith for permission to disclose the attorney-client relationship to Mr. Langley?

According to Disciplinary Rule 1.02(f), "[w]hen a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." If Judge Smith could not be persuaded to comply with the law, then Mr. White was obligated to withdraw from representing Judge Smith. *See* Disciplinary Rule 1.15(a)(1)(attorney is obligated to withdraw "the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law").

In his letter, Mr. Selman tried to pass the hot potato to Judge Smith's law clerk, Tammy L. Hooks. I would note that the alleged "Statement of Tammy L. Hooks" attached as Exhibit 5 to that letter is unsworn and it is not made under penalty of perjury, therefore it is not evidence. Regardless, Ms. Hooks could not absolve Mr. White of his professional obligations any more than Judge Smith could. In footnote 2 of his letter, Mr. Selman admitted that the attorney-client relationship should have been disclosed on the record, but it wasn't. That should be the end of the discussion. The law requires *public* disclosure, and that requirement exists precisely to prevent the sort of pass-the-buck chicanery that is happening now, *e.g.*, "Aw shucks, I thought the judge's clerk was going to tell them for me."

Mr. White should take responsibility for himself. Judge Smith didn't force him to do anything, and Ms. Hooks could not and did not relieve him of his professional obligations. At the very least, Mr. White violated Disciplinary Rule 8.04(a)(6). At worst, he may have participated in federal crimes. Either way, a formal disciplinary proceeding should be initiated against Mr. White.

Thank you for your attention to this matter.

Sincerely,

Ty Clevenger

cc: The Hon. Carl E. Stewart, Chief Judge
U.S. Court of Appeals for the Fifth Circuit
The Hon. John Creuzot, Special Counsel
Investigative Committee, Fifth Circuit Judicial Council
Mr. Raymond Hulser, Chief
Public Integrity Section, U.S. Department of Justice
Mr. Benjamin Farr, Supervisory Special Agent
Waco Resident Agency, Federal Bureau of Investigation