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December 1, 2021

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Via email to amarks@markslawoffices.com

In re Jason A. Carey, Esquire
D.C. Bar Registration No. 469317
Disciplinary Docket No. 2020-D197

Dear Mr. Carey:

I have completed my investigation of the above-referenced matter. I find that your conduct reflected a disregard of certain ethical standards under the District of Columbia Rules of Professional Conduct. I am, therefore, issuing this Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8.

The Office of Disciplinary Counsel opened an investigation after receiving a complaint, dated September 23, 2020, from Paul L. Knight, Esquire on behalf of his client, ("the complainant").

I find that your conduct violated Rule 4.4(b), which requires a lawyer who receives a writing related to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, to not examine the writing but to notify the sending party and abide by its instructions. That Rule has been interpreted to apply to metadata embedded in electronic documents that can be read by manipulating the document by computer. D.C. Bar LEO 341 (2007). There is no meaningful distinction between metadata and these ineffective redactions. Both are types of information that the sender intended not to disclose but which could be read by manipulating the documents electronically.

You represented your client in a bid protest before the Government Accountability Office, concerning a contract awarded by the United States Army Contracting Command to the complainant. The Army awarded the contract to the complainant on March 20, 2020, and you filed the protest on April 13, 2020. Following some initial skirmishing over the scope of the protests and the documents that the Army was required to produce, on May 12, 2020 GAO dismissed all but three of your protests and limited the Army's document production accordingly.

On May 15, 2020, a Friday, the Army produced its documents to you. At the time, the pandemic had hit, and the Army lawyer was compelled to work from home. He was unable to redact the documents he produced in a secure fashion, but instead resorted to obscuring portions with black hi-lighting. When you received the documents, you were able to read some of the words that were redacted. You did not inform the lawyer for the Army that his redactions were, at least in part, ineffective. Instead, you manipulated the documents electronically and discovered you were able to read all the redacted parts. You caused an associate to produce a readable version of the entire document, including the redacted parts.

On Monday, May 18, 2020, you filed an objection with GAO to the scope of the document production, revealing that the redactions had been ineffective, and you used some of the redacted parts to support a claim for broader discovery. The next day, the Army responded, and argued that you were in violation of Rule 4.4(b). GAO also issued a minute order that the Army need not produce any additional documents, at least at that time. These actions caused you to consult with an ethics expert at your law firm, but the consultation was cursory, and you had only minimal research conducted on the ethics issue in preparing a response to the Army.

On May 26, 2020, GAO entered another minute order that provided that if your client used the redacted material in any of its filings, GAO would require you to brief whether your case should be dismissed. Despite this implicit warning, you filed a supplemental protest bid based on the redacted documents and disclosed the text of two of them. GAO almost immediately issued another minute order requiring briefing on whether the bid protest should be dismissed because you had used the redacted information. Following briefing, on June 1, 2020, GAO partly dismissed your bid protest, citing your failure to alert the Army when you discovered the documents were ineffectively redacted and your electronic manipulation of the documents in order to read the redactions completely.

Because the Army intended not to reveal the redacted portions of the discovery it produced, you knew you were in receipt of the documents parts, of which had been inadvertently disclosed. Before reading the redacted portions, Rule 4.4(b) required you to notify the Army of the failed redactions and abide by its instructions as to what to do. Instead, without any consultation of the Rules of Professional Conduct, you took affirmative steps to ensure that you could read all the redacted portions. Then, despite the Army's protest and what could only be interpreted as a warning from GAO, you used the documents in your pleadings and disclosed the text of some of

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them. This is a violation of Rule 4.4(b).

In mitigation, you fully disclosed what you had done to the Army and GAO the first business day after receiving the discovery. Your honest disclosure has persuaded me not to press a Rule 8.4(c) violation, conduct involving dishonesty, although I am troubled by your taking efforts to look at portions of documents that you knew another party had meant to keep secret. The materials that you uncovered were not privileged and were not disclosed to anyone who was not a party to a very restrictive protective order. You were involved in an accelerated process with short decision-making time limits. You have also been cooperative and candid throughout this investigation, and I credit your statement that you would handle such a situation differently were you to confront it again.

This letter constitutes an Informal Admonition pursuant to D.C. Bar Rule XI, §§ 3, 6, and 8 and is public when issued. Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing before a Hearing Committee.

If you would like to have a formal hearing, you must submit a written request for a hearing to the Office of Disciplinary Counsel, with a copy to the Board on Professional Responsibility, within 14 days of the date of this letter, unless Bar Counsel grants an extension of time. If a hearing is requested, this Informal Admonition will be vacated, and Bar Counsel will institute formal charges pursuant to D.C. Bar R. XI, § 8 (b). The case will then be assigned to a Hearing Committee, and a hearing will be scheduled by the Executive Attorney for the Board on Professional Responsibility pursuant to D.C. Bar R. XI, § 8 (c). Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a finding of culpability, in which case the sanction recommended by the Hearing Committee is not limited to an Informal Admonition.

Very truly yours,

Hamilton P. Fox, III

Hamilton P. Fox, III
Disciplinary Counsel

Encl.: Attachment to Letter of Informal Admonition

HPF:act