DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of **MATHEW B. TULLY, ESQUIRE,** **Respondent.** **A Member of the Bar of the District of Columbia Court of Appeals** **Bar Number: 491695** **Date of Admission: March 7, 2005**	:	**Disciplinary Docket No. 2017-D030**
In the Matter of **GREGORY T. RINCKEY, ESQUIRE,** **Respondent.** **A Member of the Bar of the District of Columbia Court of Appeals** **Bar Number: 980732** **Date of Admission: May 9, 2008**	:	**Disciplinary Docket Nos. 2016-D371 & 2018-D052**

SPECIFICATION OF CHARGES

The disciplinary proceedings instituted by this petition are based upon conduct that violates the standards governing the practice of law in the District of Columbia as prescribed by D.C. Bar Rule X and D.C. Bar Rule XI, § 2(b).

Jurisdiction for these disciplinary proceedings is prescribed by D.C. Bar Rule XI. Pursuant to D.C. Bar Rule XI, § 1(a), jurisdiction is found because:

1. Respondent Mathew B. Tully is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on March 7, 2005 and assigned Bar Number 491695. Respondent Tully is also admitted to practice in New York and Virginia.

2. Respondent Gregory T. Rinckey is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on May 9, 2008 and assigned Bar Number 980732. Respondent Rinckey is also admitted to practice in New York and New Jersey.

3. In 2004, Respondents formed the law firm Tully Rinckey P.L.L.C., a New York Professional Limited Liability Company with principal offices in Albany, New York. Tully Rinckey has offices in several other locations, including the District of Columbia. The D. C. office was established in 2008.

4. Respondents refer to themselves as the "Founding Partners" or "Managing Partners" of Tully Rinckey. Until 2020 and at all relevant times, they were the only lawyers with an equity interest in the Firm. Respondents actively managed the Firm. All other lawyers reported to them either directly or indirectly. Respondents established, delegated, approved, and enforced Firm policies, practices, and procedures, many of which were set forth in the Firm's Standard Operating Procedures (SOPs). Respondents also approved and enforced the provisions of certain document templates, including engagement agreements (aka retainer

agreements), employment agreements, confidentiality agreements, and separation agreements.

I. Working Conditions in the D.C. Office

5. The work environment in the D.C. office sought to maximize billable hours and revenues, to the detriment of client interests. Respondents established weekly qualified billable hour requirements and annual revenue objective requirements. Working on client matters when the client did not have sufficient funds in his or her advance account did not count toward the billable hour requirements, even if the client subsequently replenished the account or the Firm eventually recovered attorney's fees, or even if the work was required to competently and diligently represent the client. If lawyers did not strictly comply with these requirements, they received frequent written and in-person counseling, and discipline from being found in violation of their employment agreements up to termination of employment.

6. Respondents and Firm managers monitored lawyers' activities on security cameras and the use of Firm telephones and computers (both internet use and emails). Respondent Tully occasionally called or emailed lawyers in the D.C. office from Albany based on what he had observed on security cameras or based on information from the IT staff about internet conduct.

7. There was considerable turnover in the D.C. office. Much of the practice in that office involved military or federal employment matters. In early 2010, a lawyer handling military matters left the Firm. Later that same year, a lawyer handling federal employment matters did the same. These lawyers formed a competing D.C. law firm.

II. <u>Restrictions on the Right to Practice of Departing Lawyers</u>

8. Respondent Tully filed lawsuits against lawyers who left the Firm if the lawyers took clients to their new employment, regardless of the clients' choice. These lawsuits included, *In re Donna Cole-Paul*, No. 9310-09 (N.Y. Supr. Ct.) and *In re Elizabeth Fletcher*, No. 6892-09 (N.Y. Supr. Ct.). Respondents also used confidentiality agreements to restrict client choice and the right of departing lawyers to practice. The agreements defined the term "confidential information" broadly to include "client lists, client data, case files, and information . . . ." Disclosure of such information to "former employees of the Firm [or] future employers of the Employee" was prohibited. Thus, such agreements would forbid departing lawyers from taking the identity of and contact information for Firm clients, or from sharing such information with new employers. They also would subject former Firm lawyers to $10,000 in liquidated damages for such use or disclosure.

9. In late 2010 and 2011, Respondents began to require lawyers already employed in the D.C. office and new hires to sign an employment agreement, which

Respondents counter-signed. These agreements included restrictive, anti-competitive provisions. In addition to confidentiality provisions to prohibit a departing attorney from taking client files or contact information, the employment agreements included a three-to-five-year term of employment, enforced by liquidated damages provisions as high as $50,000 for lawyers who left before their terms were completed. A typical employment agreement provided:

> The parties hereto agree that the attorney's execution of this Agreement is a material inducement for the firm's increase in marketing expenses to promote the Attorney and training the attorney and that the attorney's termination of employment by the firm for Cause or by the attorney without Good Reason prior to the completion of the agreement would result in material harm to the firm, the dollar value of which is uncertain. Therefore, the attorney agrees that **in the event his employment hereunder is terminated by the firm for Cause or by the attorney without Good Reason prior to the end of this agreement, the attorney shall pay the firm an amount as liquidated damages. "Liquidated Damages Amount" shall be *XX* Thousand Dollars** ($*XX*,000.00).

(Emphasis added). Some attorney employment agreements calculated the amount of liquidated damages on a graduated basis, with the amount decreasing the longer the lawyer stayed at the Firm.

10. The employment agreements also provided that, for 36 months after leaving the Firm, departing lawyers shall not:

> directly or indirectly solicit, endeavor to entice away from the firm . . . any person who, to the knowledge of the attorney, is employed by or otherwise engaged to perform services for the firm . . . . Upon

> termination of . . . employment plus eighteen (18) months after he leaves the Firm, the attorney shall not enter into any business arrangement, office sharing, [or] partnership . . . with an attorney who was employed in any manner with the firm[.]

(Emphasis added.) This prevented departing lawyers from working with other Firm alumni or from "poaching" Firm employees.

11. The employment agreements sometimes included a provision that required a lawyer who left or was fired before the end of the term of the agreement and took clients to pay the Firm a "referral fee" of one-third of the fees billed to the client after the client discharged the Firm. This provision did not require client consent or provide that the Firm would assume joint responsibility for the on-going representation as required by Rule 1.5(e). Employment agreements containing the "referral fee" provision include the January 21, 2014 Employment Agreement of Virginia Harrison and the March 14, 2014 Employment Agreement of Robert Watkins IV. The provision served as an unenforceable, *in terrorem* threat to departing lawyers. Respondents sometimes included similar provisions in separation agreements, and could demand a "referral fee" of up to 50 percent of all fees generated by the client after it discharged the Firm. Separation agreements containing the "referral fee" provision include the January 30, 2014 Separation Agreement of Monica Molnar and the March 10, 2015 draft Separation Agreement of Janice Gregerson.

12. The employment agreement also provided that if a lawyer left before the expiration of the contract term and the Firm sued or sought arbitration, the lawyer would have to pay the Firm's legal fees and litigation costs. Respondents took the position and informed Firm employees that the provision applied even if the Firm lost the case.

13. Respondents also included a provision in the employment agreements that required lawyers to pay liquidated damages of $10,000 for each material breach of the employment agreement itself (except for early termination of the employment agreement, which breach was subject to its own liquidated damages).

14. Respondents included similar anti-competitive provisions in the Firm's employment contracts with non-lawyer paraprofessionals. These employees likewise would be subjected to liquidated damages of up to $30,000 for a material breach of the contract, including violation of the non-compete provision. Such non-lawyer paraprofessional employment agreements incorporating these anti-competitive provisions include the May 10, 2013 Employment Agreement of Shaun May and the March 26, 2014 Employment Agreement of Wendy Milone.

15. Respondents incorporated the SOPs they created, approved, and enforced into employment agreements, including the weekly qualified billable hour requirements and annual revenue requirements. Failure to meet these requirements could subject lawyers to discipline up to and including termination for cause, or

Respondents could sue them for breach of contract and seek liquidated damages, lawyer's fees, and litigation costs.

16. Lawyers in the D.C. office were counseled for failing to meet the qualified billable hour requirement or for some other infraction that would be a violation of the SOP or employment agreement. If a lawyer attempted to leave the Firm before the term of his or her employment agreement expired, Respondents—or managers whom Respondents supervised--would demand liquidated damages for the early departure, and would demand liquidated damages for the lawyer failing to meet the billable hour requirements or committing some other violation of the SOP or employment agreement. Further, even if a lawyer was willing to risk early departure, Respondents would threaten to fight the lawyer in court or before an arbitrator and, even if the Respondents lost, they would seek lawyer's fees and litigation costs under the terms of the employment agreement. Lawyers from whom managers demanded liquidated damages on Respondents' behalf and against whom Respondents threatened arbitration or lawsuit include Meghan Peters and Christina Quashie.

17. It also was difficult for lawyers to simply complete the term of their employment agreement and then leave the Firm. If Respondents wanted a lawyer to stay at the Firm, around six months before the lawyer's employment contract was set to expire, managers would engage the lawyer in negotiations for a new

employment agreement, which Respondents would counter-sign. The lawyers were afraid to offend Respondents for fear they would be fired and pursued for liquidated damages for early termination of their employment agreement as well as any accumulated contract violations.

18. Some lawyers wishing to leave the Firm before the term of their employment contracts expired acquiesced to Respondents' liquidated damages demands and actually paid the Firm in order to leave including Yancey Ellis, who repaid the Firm accumulated vacation pay in lieu of liquidated damages pursuant to a Separation Agreement dated September 2, 2011, and Chuck McCullough, who paid a portion of the liquidated damages owed under his Employment Agreement pursuant to a Separation Agreement dated June 29, 2018. Generally, however, Respondents leveraged the liquidated damages provisions by waiving them in exchange for the departing lawyer signing a separation agreement that perpetuated the restrictions on the lawyer's ability to take clients with him or her, enforced by a new liquidated damages clause. The separation agreements generally required that the departing lawyer agree that he or she did not have any clients directly assigned to him or her with whom he or she would need to communicate about the departure. (The Firm immediately reassigned clients once notified of the lawyer's desire to leave.) The lawyer agreed not to contact clients without the Firm's written permission. The lawyer also agreed to abide by confidentiality provisions of the

employment agreement or separate confidentiality agreements, thus agreeing not to take client files or contact information. And the lawyer agreed not to "poach" Firm employees or work with Firm alumni. If the lawyer breached the separation agreement, regardless of whether the breach was material, the liquidated damages provision of the employment agreement would be reinstated. Monica Molnar signed such an agreement on January 30, 2014.

19. If lawyers in the D.C. office wanted to leave the Firm without recrimination, lawsuits, or arbitration, or the threats thereof, they had to sign a separation agreement.

20. Respondents kept these restrictive, anti-competitive provisions in their employment agreements even though lawyers employed by the Firm or lawyers who represented employee-lawyers challenged the provisions as violating the Rules of Professional Conduct. Such challenges include a September 11, 2013 letter from Joanna Friedman to Respondent Rinckey, stating that abrupt reassignment once lawyers give notice was inconsistent with Rule 1.4 which requires advance notification of departure to be provided to clients with whom a departing lawyer has had significant contact. In 2015, arbitrators determined that the liquidated damages provisions for early departure in the Firm's employment agreements ran afoul of the Rules of Professional Conduct. In a September 1, 2016 letter to Mathew Tully on behalf of Isabel Casteleiro, Ms. Casteleiro's counsel stated that her post-employment

notification to Firm clients about her departure was warranted under Rule 1.4 and that Respondents' employment agreements violated Rule 5.6. Notwithstanding such challenges, Respondents persisted in including such provisions in later agreements.

21. In 2014, Respondent Tully threatened to sue Monica Molnar, a former Firm lawyer, for early departure and disclosure of confidential information (*i.e.*, client lists, client contact information). Counsel for Ms. Molnar obtained Legal Ethics Opinion 368 from the D.C. Bar Legal Ethics Committee, declaring that the post-employment restrictions and liquidated damages provisions in Respondents' employment contracts violated the Rules of Professional Conduct. As a result, Respondents removed from their employment agreements restrictions on post-employment association with Firm alumni and post-employment solicitation of Firm employees. But they left in place other provisions restricting client choice and lawyer mobility.

22. In 2016, in *Tully Rinckey PLLC v. Friedman*, *et al.*, No. 6046-16 (N.Y. Supr. Ct. Oct. 17, 2016), Respondents filed for arbitration against former Firm lawyers and a paraprofessional who had begun to work for a competing law firm. Respondents alleged in the arbitration that these former Firm employees violated their respective confidentiality agreements and provisions of their respective employment agreements by leaving the Firm before the end of their contract terms; by disparaging Respondents and the Firm, and by taking and sharing with their new

employer firm Tully Rinckey "trade secrets and confidential information" (*e.g.*, client lists and contact information).

23. Also, in 2016, in *Tully Rinckey PLLC v. Federal Practice Group, et al.*, No. 05296-16 (N.Y. Supr. Ct. Jan. 25, 2017), Respondents filed a lawsuit against a competing D.C. law firm, founded by Firm alumni, and the founding partners of that firm. Respondents alleged that the defendants had interfered with Tully Rinckey's employment contracts, made disparaging statements about them and the Firm, and "poached" Firm lawyers and clients. Respondent Tully offered to forego the lawsuit if the firm agreed to give Tully Rinckey 49 percent ownership and $100,000 in damages.

24. Respondents informed the lawyers employed in the D.C. office of these enforcement activities in order to discourage them from leaving and competing with Tully Rinckey.

III. Respondents' Supervision

25. As part of their efforts to discourage departing lawyers from taking firm clients, Respondents failed to make reasonable efforts to ensure that the Firm had in effect measures giving reasonable assurance that the conduct of subordinate lawyers and non-lawyers was compatible with the Rules of Professional Conduct. Respondents also ordered (including through Firm SOPs), knowingly ratified, or

failed to remedy conduct by subordinate lawyers and non-lawyers that was inconsistent with the Rules of Professional Conduct.

Practices with Regard to Notifying Clients of Lawyer Departures

26. When lawyers left the D.C. office of the Firm, Firm policies and procedures impeded clients' ability to learn that the lawyer who had been handling their matter was departing and to exercise their right to choose to follow the departing lawyer to his or her new employment. Respondents or the Firm SOP, adopted under Respondents' supervision and authority, directed departing lawyers to discuss their departure with certain managers whom Respondents supervised. These managers would immediately reassign clients whose cases the departing lawyer was handling and, in violation of Rule 1.4(a), direct departing lawyers either not to have any contact with the clients going forward or not to inform clients that they were leaving the Firm. The Firm SOP also prohibited departing lawyers from directly informing clients of their departure, stating: "The departing attorney and the Firm will jointly notify all clients . . . of the attorney's departure. The departing attorney shall not contact any client in any other manner." Standard Firm separation agreements, which one of the Respondents signed and which departing lawyers were asked to sign as soon as the lawyer notified supervisors that the lawyer was leaving the Firm, provided that each contact a departing lawyer had with a client without Firm approval could subject the lawyer to Respondents' suing the lawyer for

$100,000 in liquidated damages. Managers followed Respondents' directions and policies, including in September 2013 when Joanna Friedman gave notice to Respondent Rinckey that she intended to leave the Firm. Within days, Stephen Carr, the Director of Legal Services – North (working in Albany, New York), informed her that her cases would immediately be reassigned. Also, within days, Graig Cortelyou, the Firm Chief Operating Officer (working in Albany, New York), asserted that he was management's point of contact on her departure or continued employment and reminded Ms. Friedman of her alleged ethical duty not to inform clients of her departure. Similarly, in March 2015, when Janice Gregerson gave notice of her intention to resign to Larry Younger, the Managing Partner of the D.C. Office of the Firm, he told her that her cases would be reassigned immediately and that she could have no contact with clients.

27. Although the SOP referred to joint notification of a lawyer's departure, such joint notification usually was not provided. Sometimes clients were simply notified by a newly assigned lawyer that the lawyer who had been handling the case had left. The Firm provided such after-the-fact notification of departures including for the April 2016 departure of Robert Watkins IV. A client, Everett Chatman, tried to reach Mr. Watkins about his case several times without success. On April 28 2016, Anthony Kuhn finally informed Mr. Chatman by email that

Mr. Watkins no longer worked at the Firm and that he had been assigned to work on Mr. Chatman's case.

28. If the Firm provided any advance notification, it would frequently be one-sided, not including the place where the departing lawyer would be working and withholding contact information. The Firm provided such one-sided notifications of departures including for the October 2013 departure of Joanna Friedman, and the August 2016 departure of Isabel Casteleiro. Firm attorneys, including Respondent Rinckey, notified clients by email in late September 2013 that Ms. Friedman would shortly be departing from the Firm, that the notifying attorney would be handling the client's case, and that the Firm did not know where Ms. Friedman would be practicing. Likewise, in August 2016, Cheri Cannon, the Managing Partner of the D.C. Office, notified clients by letter that Isabel Casteleiro had left the Firm (although her last day was four days later) and that the client's case was being reassigned. In violation of Rule 1.16(d) and Rule 1.4(b), clients were deprived of the opportunity and information needed to make informed decisions as to whether they wanted the departing lawyer to continue to represent them.

29. Respondents' policies and practices prevented or impeded clients from choosing to continue to work with lawyers who were familiar with their cases and with whom they had built a rapport. The policies and practices also prevented and impeded departing lawyers from continuing their representation despite their desire

to do so. At times, even when clients asked for contact information to reach the former Firm lawyers with whom they had been working, the Firm would not provide it, specifically including in response to requests from clients Everett Chatman and Denise Sullivan.

30. On occasion, clients and lawyers departing from the D.C. office were able to continue their lawyer-client relationship. However, the employment, confidentiality, or separation agreements that one of the Respondents approved or signed prohibited the departing lawyer from taking client files or even client contact information. The Firm's policy was to treat client files and contact information as confidential, and Respondents claimed the right to seek liquidated damages of $10,000 if a departing lawyer took such information.

31. According to the Firm's SOP, the only way that departing lawyers could be involved in notifying clients of their departure was if the Firm and the lawyer provided a joint notification. Thus, departing lawyers were not permitted to send out job announcements before leaving the Firm. Respondents sought to have the Firm control the circumstances under which a client would be notified of a lawyer's departure.

<u>Practices with Regard to Producing Former Client Files</u>

32. Respondents delegated the task of transferring files, unused advance fees, and other information to subordinates, including non-lawyers. Respondents'

SOPs did not instruct the subordinates of the need to promptly provide client files and funds to the departing lawyers or their new firms. Violations of Rule 1.16(d) resulted.

33. One departing lawyer, Rachelle Young, gave the Firm notice of her departure but agreed to stay six months before leaving. The Firm delayed notifying clients whose cases she was handling that she was leaving until 15 days before Ms. Young's scheduled departure. Ms. Young took clients with her, some of whom had hearing dates, deadlines, or other pressing events within 30 days of her departure. Despite several requests to the D.C. managing partner and the Firm's director of legal administration (a non-lawyer) for client files and unused funds to be transferred to her new firm, particularly those files and funds for clients with upcoming hearings or other events, Ms. Young did not receive all the files for more than 45 days after her departure. In one instance, a case involving two clients, the Firm did not mail the client files to her until the Friday before a Monday hearing. The files did not arrive until after the hearing, and the clients lost the case.

IV. Discouragement of Voluntary Cooperation with Disciplinary Counsel's Investigation

34. Respondents or persons under their supervision drafted and Respondents signed on behalf of the Firm employment or separation agreements containing standard language prohibiting voluntary cooperation with any investigation, such as:

> The Attorney agrees **not to assist or otherwise participate willingly or voluntarily in** any claim, . . . **investigation** or other proceeding of any kind that relates to any matter that involves the Firm in any way, shape or form, the Firm owners, Firm Employees, to include prior, current or applicants, Affiliates of the firm's owners . . ., Firm clients, and/or Firm vendors **unless required to do so by Court order, subpoena, or other compulsory lawful means.**

(Emphasis added.) The provisions further required employees or former employees to provide 24-hour notice to the firm's Managing Partner of any request for information or receipt of compulsory process compelling involvement in any investigation.

35. Respondents also signed employment or separation agreements containing provisions that prohibited lawyers from discussing those agreements with third parties unless compelled to do so by law, and non-disparagement clauses that prohibited lawyers from communications that "criticize, ridicule or make any statement which disparages or is derogatory of the Firm or its affiliates or any of their respective employees, directors, Attorneys, members, clients, vendors or officers." Respondents considered any criticisms to be "disparagement" and required lawyers to refrain from such criticisms "whether truthful or not."

36. These non-cooperation and non-disparagement provisions were enforced by liquidated damages clauses in the event of violations. Based on these contract provisions, Respondents' threats and efforts to enforce the various contract provisions and Respondents' claims to be entitled to attorney's fees if contract

enforcement was required or challenged lawyers who formerly were employed at the Firm reasonably believed they were obliged to and did inform the Managing Partner before speaking to Disciplinary Counsel. Respondents did not inform these lawyers that Disciplinary Counsel's investigation was not within the ambit of these provisions or that they could voluntarily cooperate in the investigation without providing Respondents notice or risking the filing of a contract enforcement action.

THE CHARGES

37. Respondents violated the following Rules of Professional Conduct:

a. Rules 8.4(a) and 5.6, in that they attempted to participate in, or did participate in, offering and making employment and similar type agreements that restricted the rights of lawyers to practice after termination of their relationship with the Firm;

b. Rules 5.1(a) and 5.3(a), in that they failed to make reasonable efforts to ensure that their law firm had effective measures giving reasonable assurance that all lawyers and non-lawyer assistants conform to the Rules of Professional Conduct, specifically Rules 5.6, 1.4(b), and 1.16(d);

c. Rule 5.1(b) and Rule 5.3(b), in that, having direct supervisory authority over other lawyers and non-lawyer assistants, they failed to make reasonable efforts to ensure that those persons conformed to the Rules of Professional Conduct, specifically Rules 5.6, 1.4 (b), and 1.16 (d);

d. Rule 5.1(c)(1) and (2), in that they ordered or, with specific knowledge of the conduct, ratified conduct that violated the Rules of Professional Conduct; and they were partners who knew or reasonably should have known of conduct by subordinate lawyers at a time when its consequences could be avoided or mitigated but failed to take reasonable remedial action; and

e. Rules 8.4(a) and 8.4(d), in that they attempted to engage in, or engaged in, conduct that seriously interfered with the administration of justice, by deterring witnesses from cooperating with Disciplinary Counsel.

Respectfully submitted,

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VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that I verily believe the facts stated in the Specification of Charges to be true and correct.

Executed on this 24th day of February, 2022.

Jerri Dunston

Jerri Dunston
Assistant Disciplinary Counsel