

**BEFORE THE ARKANSAS SUPREME COURT  
COMMITTEE ON PROFESSIONAL CONDUCT  
PANEL A**

IN RE: **MAX M. HORNER, JR.**, Respondent  
Arkansas Bar ID # 2001067  
CPC Docket No. 2014-013

**FINDINGS AND ORDER**

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee in the opinion in Marcus Rackley v. State, 2014 Ark. 39, issued January 30, 2014. On February 14, 2014, Respondent Max Horner, Jr., an attorney practicing primarily in Little Rock, Arkansas, was served with a formal Complaint and he filed a timely response.

1. In 2005 Horner jointly represented spouses Marcus Rackley and Cynthia Rackley, on a joint fee, on multiple felony charges arising out of alleged sexual misconduct by Mr. Rackley with his step-daughter T. W., between 2002 and 2004. T. W. was the daughter of Cynthia Rackley.

2. Marcus Rackley was tried to a jury on June 22-23, 2005, in Faulkner County Circuit Court, resulting in verdicts of guilty on all counts and a thirty-seven year prison sentence. Rackley entered the Arkansas Department of Correction on June 27, 2005, and is still there as of January 31, 2014.

3. The felony charge against Mrs. Rackley was apparently later reduced to a misdemeanor, she was convicted of second degree endangering the welfare of a minor, and she received a suspended sentence.

4. Mr. Rackley's convictions were affirmed on direct appeal in 2007, see 371 Ark. 438, where Rackley was represented by different counsel. Rackley raised an ineffective assistance of counsel claim based on Horner's conflict-of-interest in the joint representation. The court held Rackley failed to preserve his conflict-of-interest claim at the trial court level and rejected it on direct appeal.

5. Rackley filed a petition for post-conviction relief, which resulted in a reversal and remand to the trial court in December 2010 for an evidentiary hearing. See Rackley v. State, 2010 Ark. 469.

6. In a *pro se* appeal, on January 30, 2014, Mr. Rackley received a reversal and remand for a new trial, based on Horner's conflict-of-interest in jointly representing both Rackleys at the same time at his 2005 trial, for the reasons stated in the opinion.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, and other matters before it, and the Arkansas Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. The conduct of Max M. Horner, Jr. violated AR Rule 1.1 in that according to his testimony at the post-conviction hearing, Horner recognized he was in an actual conflict-of-interest between his two clients and explained they agreed to the conflict, however he did not produce any written documentation that Mr. Rackley consented to the conflict of interest, as the Supreme Court stated is required by AR Rule 1.7. Arkansas Rule 1.1 requires that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. The conduct of Max M. Horner, Jr. violated AR Rule 1.7(a) in that (1) Horner jointly represented both Marcus Rackley and his wife Cynthia Rackley in serious criminal charges arising from the same matter; Horner represented Marcus Rackley at a jury trial in which he received a thirty-seven year prison sentence, where Horner had a concurrent conflict of interest; and his representation of Mrs. Rackley was directly adverse to Horner's stated trial defense strategy for her husband. (2) Horner jointly represented both Marcus Rackley and his wife Cynthia Rackley in serious criminal charges arising from the same matter, and Horner represented Marcus Rackley at a jury trial in which he received a thirty-seven year prison sentence, where Horner had a concurrent conflict of interest, and there was a significant risk that the representation of Mr. Rackley would be materially limited by the lawyer's responsibilities to Horner's other joint client, Mrs. Rackley. (3) Horner attempted to jointly represent both Marcus Rackley and his wife Cynthia Rackley in serious criminal charges arising from the same matter; Horner represented Marcus Rackley at a jury trial in which he received a thirty-seven year prison sentence, where Horner had a concurrent conflict of interest, and there was a significant risk that the representation of Mrs. Rackley would be materially limited by the lawyer's responsibilities to another client, Mr. Rackley; and at Mr. Rackley's trial, Horner had Mrs. Rackley take the Fifth Amendment to attempt to keep her testimony from Mr. Rackley's jury, when her testimony clearly might have been favorable to Mr. Rackley, especially to counter or explain adverse testimony by State witnesses Luebke and Thessing about their conversations with Mrs. Rackley. Arkansas Rule 1.7(a) requires that, except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the

representation of one client will be directly adverse to another clients; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer, (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

C. The conduct of Max M. Horner, Jr. violated AR Rule 8.4(d) in that Horner's failure to properly and timely act upon his obvious and admitted conflict of interest in jointly and concurrently representing clients Marcus Rackley and his wife Cynthia Rackley in the same criminal matter resulted in Horner's inadequate trial representation of Mr. Rackley, a later post-conviction proceeding, and now what may likely be a new trial for Mr. Rackley, conduct and consequences causing the need to devote to the Rackley case additional time and resources by both the trial and appellate courts, conduct by Horner that was avoidable and is prejudicial to the administration of justice. Arkansas Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court

Committee on Professional Conduct, acting through its authorized Panel A, that Max M. Horner, Jr., Arkansas Bar ID# 2001067, be, and hereby is, **REPRIMANDED** for his conduct in this matter.

ARKANSAS SUPREME COURT COMMITTEE ON  
PROFESSIONAL CONDUCT - PANEL A

By: Danyelle J. Walker, Chair, Panel A

Date: July 31, 2014

Original filed with the Arkansas Supreme Court Clerk on  
August 27, 2014.

