

ORIGINAL

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In Re:	:	09-2302
Complaint against	:	Case No. 08-092
Paul Joseph Kellogg Attorney Reg. No. 0062303	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Cincinnati Bar Association	:	
Relator	:	

FILED
 DEC 22 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

This matter was heard May 21, 2009, in Cincinnati, Ohio and on May 22, 2009, at the Ashland Federal Correctional Institute in Ashland, Kentucky. The panel consisted of Judge Beth Whitmore of Akron, Alvin R. Bell of Findlay, and Nancy D. Moore, Chair, of Columbus, Ohio. None of the panel members is a resident of the district from which the complaint originated or a member of the probable cause panel that certified this matter to the Board.

Susan R. Bell and Peter Rosenwald represented Relator, Cincinnati Bar Association. Respondent, Paul Joseph Kellogg, was present only on May 22, 2009, but was represented by James Fleisher both days.

FINDINGS OF FACT

Respondent graduated from the University of Dayton Law School and was admitted to the practice of law by the Supreme Court of Ohio in November 1993. In 2003, Respondent was working at a Cincinnati firm handling primarily estate planning and small business matters.

One day in 2003 Respondent received a call from a childhood friend and fraternity brother, Steve Warshak, and met him for lunch to catch up on each other's lives. Warshak was the owner of a quickly growing supplement company, and complained that while he enjoyed the marketing aspect of managing his company, he disliked dealing with legal issues and attorneys. Respondent suggested that Warshak hire General Counsel for his company.

About two weeks later Respondent got an e-mail from Warshak offering him the position of General Counsel for his company. The offer included a generous salary and full benefits. After a few weeks of evaluating his options, Respondent accepted the position and began working for Berkeley Premium Nutraceuticals [Berkeley].¹ At that time Berkeley employed about 1500 people.

Respondent's workload was light until late in 2003, when Berkeley was notified that they were being investigated by the Federal Trade Commission. Respondent was responsible for providing all documents and information requested by the FTC. Shortly thereafter, seventeen state attorney generals also began an investigation of Berkeley based upon numerous consumer complaints. In March 2004 the first of six class action lawsuits was filed against Berkeley.²

On May 13, 2004, representatives from the Food and Drug Administration came to conduct an immediate inspection at Berkeley. Respondent was given the responsibility for giving the investigators access to the company's facilities. One facility (the call center) was to be inspected that day and their warehouse facility was to be inspected the following day.

Shortly after being informed of the impending inspection, Respondent saw the operations manager of the company and told him that the warehouse would be inspected the following day.

¹When Respondent began his employment there, Berkeley was still operating under the names of the three companies which later combined to form Berkeley.

² The primary focus of the investigations and complaints was the Berkeley continuity program. After receiving a "free sample" of the supplements, monthly shipments were automatically sent to customers and billed to the customer's credit card. Consumers found it difficult or impossible to cancel the shipments and get refunds.

Respondent admits that he told the manager to “make sure the warehouse is in order” for the inspection.³ Respondent admitted that testimony at the criminal trial indicated that he was informed about some misbranded supplement in the warehouse, and as a result Respondent instructed others to “get rid of” the misbranded supplement.⁴ Respondent indicated that it was possible that he told someone to “get rid of it,” but that he would never have instructed workers to simply hide the misbranded supplement.

As an result of Respondent’s warning regarding the impending warehouse inspection, a night warehouse manager had workers load all of the misbranded supplement into a truck and remove it from the warehouse. The supplement was then returned to the warehouse after the FDA inspection was completed.

In September 2004, as the investigations into Berkeley’s activities increased, Warshak’s financial planner encouraged Warshak do some estate planning to protect assets. Outside counsel prepared documents and counseled Warshak on the trusts that needed to be established for Warshak’s wife and children. Outside counsel also recommended how much money should be transferred to the trusts. At one point Respondent was asked to review the trust paperwork to be sure it was compliant with Ohio law, which he did.

Warshak eventually transferred \$13 million to a trust for his wife and \$1 million to a trust for his children. Respondent served as trustee for both trusts. The establishment and funding of the trusts by Warshak effectively hid the proceeds of the conspiracy to deprive and defraud consumers.

On February 22, 2008, as a result of Respondent’s involvement in the removal of the supplement from the warehouse, Respondent was convicted by a jury of Conspiracy to Obstruct

³ May 22, 2009 hearing transcript, page 38.

⁴ May 22, 2009 hearing transcript, page 41

Proceedings before the U.S. Food and Drug Administration. Respondent was acquitted of two counts involving the actual misbranding of the supplement.

As a result of his involvement in the review, execution and funding of the trust agreements, Respondent was convicted of two counts of Money Laundering and one count of Conspiracy to Obstruct Proceedings before the Federal Trade Commission in U.S. District Court for the Southern District of Ohio. He was acquitted of one count of making a false statement to a bank. Additionally, Respondent was convicted of two counts of Conspiracy to Commit Money Laundering for his role in the continuity program where supplements were automatically shipped to customers.

Despite guidelines recommending a sentence of nearly twenty years, on August 29, 2008, Respondent was sentenced to one year and one day in federal prison. He began serving his sentence on January 15, 2009. Respondent qualified for a fifteen percent reduction in his sentence and had been informed that he would be released to a halfway house on August 31, 2009, and that his remaining sentence would then actually expire on November 29, 2009. Respondent is subject to a three year period of supervision once released from incarceration. Respondent chose not to appeal his conviction or sentence. The Board received a certified copy of Respondent's felony conviction from the Relator in mid-November 2009. The Supreme Court suspended Respondent on an interim basis on December 14, 2009.

CONCLUSIONS OF LAW

At hearing the issue of whether the Disciplinary Rules or the Rules of Professional Conduct applied in this case was raised. Respondent's misconduct occurred prior to the change in the rules on February 1, 2007, but the convictions actually occurred after the change in the rules. As a precaution, the parties subsequently agreed to an amendment of the complaint, which

was approved by the panel, to include alleged violations of both the Code of Professional Responsibility and the Rules of Professional Conduct.

Respondent was charged in the First Amended Complaint with the following rule violations:

DR 7-102(A)(7) A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Prof. Cond. R. 1.2(d) A lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

DR 7-102(A)(8) A lawyer shall not knowingly engage in other illegal conduct.

DR 7-109(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

Prof. Cond. R. 3.4(a) A lawyer shall not unlawfully obstruct another party's access to evidence.

DR 1-102(A)(3) Illegal conduct involving moral turpitude.

Prof. Cond. R. 8.4(b) Illegal act that reflects adversely on the lawyer's honesty or trustworthiness.

DR 1-102(A)(4) Conduct involving dishonesty, fraud, deceit or misrepresentation.

Prof. Cond. R. 8.4(c) Conduct involving dishonesty, fraud, deceit or misrepresentation.

DR 1-102(A)(5) Conduct prejudicial to the administration of justice.

Prof. Cond. R. 8.4(d) Conduct prejudicial to the administration of justice.

Based upon the evidence, the Panel finds that Respondent's conduct, by clear and convincing evidence, violated the following rules: DR 7-102(A)(7); DR 7-107(A)(8); DR 7-109(A); DR 1-102(A)(3); DR 1-102(A)(4); and DR 1-102(A)(5).

Additionally, the Panel finds that the following rules were not violated since all misconduct occurred prior to February 1, 2007, when the Rules of Professional Conduct became effective: Prof. Cond. R. 1.2(d); Prof. Cond. R. 3.4(a); Prof. Cond. R. 8.4(b); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d).

MITIGATION AND AGGRAVATION

Respondent is married and the father of three young children. Beginning in September of 2004, Respondent began to notice a lack of energy. After his vision became affected, Respondent sought medical attention, and in October of 2004 was diagnosed with hairy cell leukemia. At that point Respondent took a leave of absence from Berkeley until after Thanksgiving when he had completed chemotherapy. By January 2005 Respondent's leukemia was in remission.

Unfortunately Respondent's leukemia returned in the summer of 2008, and he required an additional course of chemotherapy shortly before his sentencing hearing in Federal Court. However, at the time of the panel hearing, Respondent believed that his leukemia was in remission.

Respondent immediately ceased practicing law upon being sentenced in September of 2008, and has been cooperative with authorities since his conviction. Respondent was allowed to continue to work at Berkeley for a period of time following his indictment and conviction, assisting the bankruptcy trustee in his efforts. Respondent believes that he has learned from his mistakes, and would be an asset to the legal profession if allowed to practice law in the future.

The Panel finds that Respondent has no prior disciplinary record, has been cooperative in the disciplinary proceedings, and has made some efforts to rectify the consequences of his misconduct. Additionally, Respondent has accepted responsibility for his actions, has expressed remorse, and has otherwise been penalized for his misconduct. Witnesses testified that Respondent is a man of good character and reputation, despite his criminal convictions.

The Panel further finds that Respondent did act with a dishonest or selfish motive, although Respondent apparently did not benefit financially from his actions. The Panel also finds Respondent committed multiple offenses of misconduct.

PANEL RECOMMENDATION

Relator recommended a sanction of permanent disbarment from the practice of law. Respondent requested a two-year suspension, with the second year stayed upon the condition that he comply with all requirements of his supervised release. Respondent further requests that his suspension be retroactively effective as of September 2, 2008.

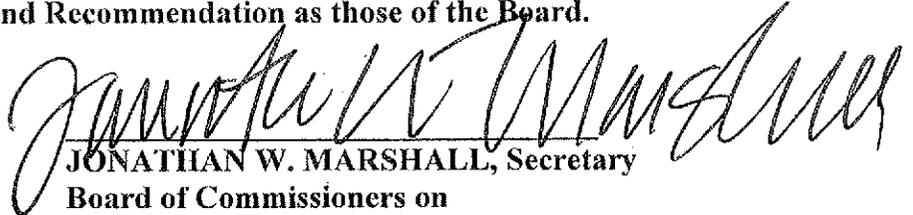
It is the recommendation of the Panel that Respondent be suspended from the practice of law for a period of two years, with the final six months of the suspension stayed upon the condition that he comply with the requirements of his supervised release. The Panel further recommends that the suspension begin retroactive to January 15, 2009, when Respondent began serving his prison sentence.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 4, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Paul Joseph Kellogg, be suspended on the panel's conditions

for a period of two years with six months stayed, with the suspension to begin to run January 15, 2009. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.

A handwritten signature in cursive script, appearing to read "Jonathan W. Marshall", is written over a horizontal line.

**JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**

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CINCINNATI BAR ASSOCIATION, :
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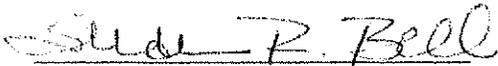
MAY 8 - 2009
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

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1. Respondent Paul J. Kellogg (Attorney Registration No. 0062303), has been duly admitted to the practice of law in the State of Ohio in November, 1993.
 2. Relator, through its counsel, has presented to Respondent and his counsel eight (8) Exhibits for use at the Hearing before the Panel in this cause.
 3. Each Exhibit is an accurate copy of various documents from United States of America vs. Paul J. Kellogg, Case No. 1:06-CR-0111(3) in the United States District Court for the Southern District of Ohio.
 4. Paul Joseph Kellogg, Respondent herein, is the Paul J. Kellogg as set forth in the Exhibits.

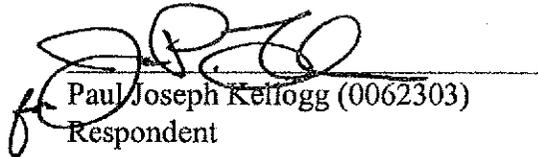
5. Relator's Exhibits shall be admissible at the Hearing before the Panel (and for such later proceedings as may be appropriate) without the need for testimony as to authenticity or accuracy.

Neither the Respondent nor the Government has filed an appeal, or any other post-conviction proceeding, from the Jury Verdicts, Judgment Entry or Sentencing in the criminal case and no appeal or post-conviction proceeding is presently pending.

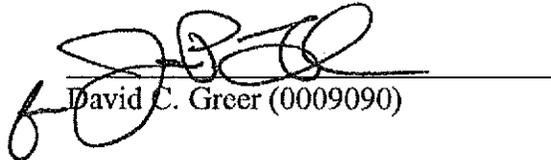
Respectfully submitted,



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Paul Joseph Kellogg (0062303)
Respondent

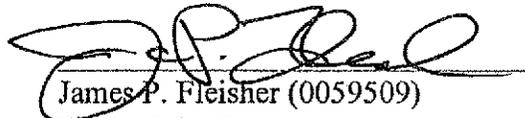


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