ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

vs.

William Matthew Crosby

Respondent.

CASE NO. 2011-1453

RELATOR'S MOTION TO STRIKE
RESPONDENT'S MOTION TO INCLUDE SEALED FILING

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FILED
OCT 18 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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CASE NO. 2011-1453

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On October 17, 2011, respondent filed a Motion to Include Sealed Filing asking this Court to allow him to file a copy of the presentence investigation report [PSI] from respondent's criminal proceeding, in this disciplinary proceeding. For the foregoing reasons, respondent's motion should be denied and the PSI should be stricken from the record.

On January 24, 2011, relator filed a five-count amended disciplinary complaint against respondent alleging extensive unethical conduct, including his felony conviction for attempted tax evasion. On June 2, 2011, respondent filed a Motion for Leave to File Documents Under Seal with the Board of Commissioners on Grievances and Discipline [board]. This motion requested the board allow respondent to file his PSI with the board as an exhibit under seal. On June 17, 2011, the board overruled respondent's motion and denied his request to file the PSI under seal. [Exhibit A]

Respondent's disciplinary matter was heard on June 28 and 29, 2011. At the conclusion of respondent's case, he renewed his request to admit the PSI as an exhibit and asked to make the evidentiary submission under seal. At this time, the hearing panel denied respondent's request for two reasons. First, the panel found no legitimate basis for sealing this document in a public attorney disciplinary proceeding. Second, the panel found that the PSI was hearsay, and held that it would not be admitted over relator's objection. The panel permitted respondent to proffer the document under seal, to preserve respondent's right to object to the panel's evidentiary decision in his brief to this Court. [Exhibit B]

Respondent filed objections to the board's report on October 12, 2011. However, respondent did not object to the decision of the hearing panel not to admit the PSI into evidence. Now, respondent has filed this motion in an improper attempt to object to the hearing panel's evidentiary ruling declining to admit the PSI, after the time for him to file such an objection has passed.

Additionally, the only copy of this document provided to relator prior to the present filing was in a sealed envelope, with a directive from the hearing panel that the envelope not be opened without an order from this Court. Therefore, relator had never seen the PSI prior to respondent's current motion. Respondent's improper attempt to file the PSI with this Court deprives relator of the opportunity to challenge and/or rebut this information.

CONCLUSION

For the foregoing reasons, respondent's Motion to Include Sealed Filing should be denied and respondent's PSI should be stricken from the record.

Respectfully submitted,

Jonathan E. Coughlan (by LB 0040142)

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Disciplinary Counsel

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CERTIFICATE OF SERVICE

A copy of the foregoing Relator's Motion to Strike Respondent's Motion to Include Sealed Filing has been served upon Respondent's Counsel Patrick J. Perotti, Esq., Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077, via regular U.S. mail, postage prepaid, this 18th day of October, 2011.

Robert R. Berger
Counsel of Record

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

In re:
William Matthew Crosby
Respondent

CASE NO. 10-091

FILED
JUN 17 2011
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

Disciplinary Counsel
Relator

ORDER

Respondent's Motion for Leave to File Documents Under Seal with the Board is hereby overruled.

Documents and pleadings filed with the Board after a finding of probable cause shall be public pursuant to Gov. Bar R. V.

Respondent's reliance on *Cleveland Bar Assn. v. Kraus*, 124 Ohio St.3d 1529, 2010-Ohio-1315, to support the filing of documents under seal in a disciplinary matter is misplaced. The court in *Kraus* permitted the filing of health records under seal pursuant to the federal HIPPA privacy rules. There is no authority in the instant case that would pre-empt the application of Gov. Bar R. V.

Bernard Bauer
Panel Chair

EXHIBIT A

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

- - -

FILED
JUL 19 2011
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In Re:

Disciplinary Counsel, Relator, vs. William Matthew Crosby, Respondent.	Case No. 10-091 Volume II

- - -

FORMAL HEARING

June 29, 2011

- - -

E & A Reporting Service, Inc.
915 South Front Street
Columbus, Ohio 43206
(614) 445-6300

EXHIBIT B

1 - - -

2 Formal hearing before the Board of
3 Commissioners on Grievances and Discipline of the
4 Supreme Court of Ohio, taken before me, Laurel A.
5 Aurigema, RPR, a Notary Public within and for the
6 State of Ohio, at 65 South Front Street, Room 106,
7 Columbus, Ohio 43215, commencing at 10:05 a.m.

8 - - -

9 APPEARANCES:

10 Robert R. Berger, Esq., Office of
11 Disciplinary Counsel, 250 Civic Center Drive, #325,
12 Columbus, Ohio 43215, Appearing on behalf of the
13 Relator.

14 Lester S. Potash, Esq., 55 Public Square,
15 Suite 1717, Cleveland, Ohio 44113, Appearing on
16 behalf of the Respondent.

17

18 Panel Members

19 Bernard K. Bauer, Esq., Chairperson
20 Stephen C. Rodeheffer, Esq.
21 Lisa Lancione Fabbro

22 - - -

23

24

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- - -

1 MR. POTASH: I do not.
2 COMMISSIONER BAUER: Very well. At this
3 point the panel unanimously dismisses the alleged
4 violation of DR 9-102(B)(4) in Count 2 and the
5 alleged violation of DR 9-102(B)(3) in Count 3.
6 MR. BERGER: Thank you, your Honor.
7 COMMISSIONER BAUER: Now, at this point,
8 before you rest, Mr. Potash, I understand you have a
9 matter to address to the panel; is that correct?
10 MR. POTASH: That is correct.
11 COMMISSIONER BAUER: You may do so.
12 MR. POTASH: Thank you.
13 If it please the panel, I am renewing my
14 request to submit the September 16, 2010 presentence
15 report prepared by the United States probation and
16 presentence office in connection with Mr. Crosby's
17 federal conviction. I received the panel's decision
18 previously, but I am renewing for the reasons
19 previously stated as well as for the fact that this
20 is for purposes of mitigation. Mitigation
21 information is received many times by letters or by
22 other documents as opposed to direct testimony.
23 Secondly, for purposes of sentencing, a
24 presentence report is not a public document. It is

1 normally given to -- it is -- at least in Cuyahoga
2 County -- I can't speak for the other 87 counties.
3 In Cuyahoga County, the prosecuting attorney and
4 defense attorney are entitled to look at the report,
5 are not entitled to copies of it, and clearly cannot
6 make -- other than commenting to the court at the
7 time of sentencing, it is not a document that is a
8 public document once the case is over.
9 In other words, whether it's an appeal,
10 whether it's a closed file, that report is never
11 made public; however, the judge does consider it
12 along with other information, both hearsay and
13 testimonial, in determining the disposition of the
14 individual. No different in the federal court with
15 the exception that under our local federal rules for
16 the Northern District of Ohio, we are provided with
17 copies of the report, but it is not to be published.
18 In fact, it isn't even to be given to the defendant.
19 He can review it, but it remains in the attorney's
20 possession. This is no different.
21 I would submit that the panel can take
22 this into consideration, give it whatever weight
23 it's worth, give it whatever background -- for the
24 background purposes or other purposes, but it is not

1 a public document that can be part of the file and
2 disclosed with the rest of the file.
3 So for the reasons previously stated --
4 and sealed documents are not unusual. It is not as
5 commonly accepted as other, but sealed -- documents
6 submitted under seal is not an unusual practice.
7 So I would again renew my request to
8 submit on Mr. Crosby's behalf the presentence
9 report, have it under seal, for whatever
10 consideration you may give it for mitigation
11 purposes only. I'll stop.
12 COMMISSIONER BAUER: Mr. Berger?
13 MR. BERGER: Your Honor, Relator has made
14 their arguments against the submission of the sealed
15 report. I would just add to that that Relator has
16 never seen the report, nor would Relator agree to
17 the admissibility of such a hearsay-filled document.
18 Thank you.
19 COMMISSIONER BAUER: First of all,
20 Mr. Potash, from my experience, yes, character
21 letters, matters of that sort are admitted in
22 mitigation in disciplinary cases with the agreement
23 of opposing counsel. If there's no agreement, they
24 aren't admitted at least when I'm chair of the

1 hearing panel.

2 Mr. Berger offered you the opportunity in

3 his response to your motion, as I remember, that you

4 could in fact unbundle the report and use individual

5 letters and offer those as exhibits in mitigation in

6 this case.

7 Am I correct in that regard, Mr. Berger?

8 MR. BERGER: Your Honor, I wasn't opposed

9 to reviewing the documents to see whether or not we

10 would agree to him being able to use them, but I've

11 not seen them. I can't agree to something without

12 seeing the document, but I'm not opposed to consider

13 the submission of character letters. Certainly not.

14 Those are submitted all the time.

15 COMMISSIONER BAUER: And what steps have

16 you taken to try and facilitate that sort of a

17 compromise as to this particular document?

18 MR. POTASH: I wasn't speaking of the

19 character letters. I was only speaking about the

20 presentence report. I'm not submitting the

21 character letters.

22 COMMISSIONER BAUER: Very well.

23 MR. POTASH: And with all due respect, I

24 was uncertain -- again, law is never clear until

1 somebody in a robe tells you what it is at that
2 moment. I was uncertain whether I could publish or
3 disclose the presentence report under the
4 circumstances as you suggest.
5 As I said, it is not to be published. I
6 did get permission to disclose it under seal, and I
7 can't -- as I said, out of an abundance of caution
8 felt that I was not permitted to do so.
9 COMMISSIONER BAUER: But, Mr. Potash, you
10 indicated that the order permitted disclosure --
11 permitted disclosure to counsel for the Relator, to
12 the hearing panel, and the Supreme Court. Why --
13 you've already got an order that said you could have
14 Mr. Berger review the material.
15 MR. POTASH: Again, you know, you see how
16 things sometimes can be interpreted different ways.
17 My intention was that if it were accepted, then it
18 could be disclosed. If it were not accepted under
19 seal, then I could not disclose it. Whether that
20 thinking makes sense, I'm just giving you my belief
21 as to what I was authorized to do. In other words,
22 if you reject it, I would not give it to Mr. Berger.
23 COMMISSIONER BAUER: Well, here's the way
24 we're going to resolve this: I'm going to deny your

1 motion to submit the report on two grounds. First
2 of all, it's hearsay. Secondly, you cited a case in
3 which medical records were permitted to be filed in
4 a disciplinary case under seal; and specifically the
5 case that permitted those records to come in was
6 based upon HIPAA. They would have remained
7 confidential under the federal statute; and as a
8 result of that, they were permitted to be filed
9 under seal.
10 Now, that said, you may always mark and
11 proffer under seal a matter in the record for
12 consideration by the Court when they proceed to
13 review this matter; but we're not going to consider
14 it because I'm excluding it on two grounds. First
15 of all, it doesn't fall into the classification of
16 privileged information that the Court has already
17 recognized; and, number two, it's hearsay.
18 Now, do you wish to proffer the
19 presentence report under seal?
20 MR. POTASH: All right. I am treading on
21 ground I -- this is totally new for me. So if it
22 sounds like I'm asking -- and I don't know whether
23 you can help me with this --
24 COMMISSIONER BAUER: Well, we've been at

1 this for two hours this morning. Obviously, we're
2 going to do your closing remarks. Why don't we take
3 a 20-minute break at this point, and you can sort
4 out what you want to do and everybody can organize
5 their closing remarks.
6 MR. POTASH: I mean, I have the documents.
7 I guess, do I get an envelope?
8 COMMISSIONER BAUER: Are they sealed?
9 MR. POTASH: They're here.
10 COMMISSIONER BAUER: Well, then you better
11 get an envelope and put them under seal and put a
12 Respondent's exhibit sticker on it, if you want to
13 proffer them, as Exhibit A. When you offer them,
14 I'm going to -- I'm going to overrule your motion to
15 admit them; but you may, however, under the rules of
16 evidence, as I understand them, then proffer them to
17 the court reporter to remain under seal with the
18 court reporter and transmitted to the Court -- to
19 the Board with the final transcript, no copies to be
20 made.
21 MR. POTASH: Excellent. I will do that.
22 COMMISSIONER BAUER: And there's your
23 record for the Supreme Court, if you want it.
24 MR. POTASH: Thank you.

1 COMMISSIONER BAUER: We'll be in recess
2 until 20 after 12:00.
3 (Recess taken.)
4 COMMISSIONER BAUER: Before we recessed,
5 an issue arose as to the motion that had been made
6 before the hearing regarding admissibility of a
7 certain presentence report generated in the United
8 States District Court for the Northern District of
9 Ohio in connection with Mr. Crosby's prosecution in
10 that court. I overruled the motion and instructed
11 Mr. Potash to place the presentence report in a
12 sealed envelope, which I assume he has now done. Is
13 that correct, Mr. Potash?
14 MR. POTASH: That's correct.
15 COMMISSIONER BAUER: Have you had that
16 marked as Respondent's Exhibit A?
17 MR. POTASH: Yes.
18 COMMISSIONER BAUER: And are you offering
19 Respondent's Exhibit A?
20 MR. POTASH: I am.
21 COMMISSIONER BAUER: Mr. Berger, without
22 going through everything that's been said before,
23 are you opposed to the admission of Respondent's
24 Exhibit A?

1 MR. BERGER: Yes, your Honor.
2 COMMISSIONER BAUER: Very well, the offer
3 of Respondent's Exhibit A will be denied. The
4 materials contained in Respondent's Exhibit A are to
5 be maintained with the official record in this case.
6 The envelope containing Respondent's Exhibit A is
7 not to be opened by anyone without first order of
8 the Supreme Court of Ohio, and that is to be so
9 noted on the outside of the envelope. And I'm
10 instructing the court reporter to do so now, and we
11 will stop for a moment. We will not say anything
12 until the court reporter marks the envelope
13 indicating that it's being offered under seal and
14 it's not to be opened without an order of the
15 Supreme Court of Ohio.
16 MR. POTASH: Could I just add one thing,
17 is that I've provided a copy under seal to
18 Mr. Berger and request that the same admonition be
19 made that unless and until the Supreme Court of Ohio
20 has accepted the document for use in this matter,
21 that it not be opened by Mr. Berger or his office.
22 COMMISSIONER BAUER: That's acceptable.
23 That's what will be done.
24 MR. BERGER: Yes.