ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	:	Case No. 2011-1453
RELATOR,	:	
vs.	:	
WILLIAM MATTHEW CROSBY,	:	
RESPONDENT.	:	

RESPONDENT'S BRIEF IN OPPOSITION TO RELATOR'S MOTION TO STRIKE

Robert R. Berger, Esq. (#0064922)
Senior Assistant Disciplinary Counsel,
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, OH 43215

Counsel for Relator

Patrick J. Perotti, Esq. (#0005481)
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 Fax
Email: *pperotti@dworkenlaw.com*

Counsel for Respondent

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I. Introduction

Relator has moved this Court to strike Respondent William Crosby's sealed filings on the basis that Crosby did not properly preserve the issue for review by this Court by specifically delineating it as error in his objections to the Board's decision. Relator's motion to strike the proffered evidence should be denied because Crosby has continuously referenced and sought to include these filings as part of the record and Supreme Court Rule V, Section 11(D) allows a party to amend their objections at anytime prior to a final decision by this Court.

II. Background

On January 24, 2011, Relator initiated a disciplinary complaint against Crosby, asserting five violations of the Rules of Professional Conduct. One of the counts stemmed from Crosby's conviction for tax evasion in federal court. During the disciplinary proceedings before the Board of Commissioners on Grievances and Discipline, Crosby moved to file the pre-sentence investigation report from his tax evasion case as an exhibit under seal. The Board denied Crosby's motion. At the conclusion of the hearing, Crosby again renewed his motion to admit the PSI into evidence as a sealed exhibit. His request was denied.

On October 12, 2011, Crosby filed objections to the Board's decision, making numerous references to the federal court case and information contained in the PSI. On October 17, 2011, Crosby filed a Motion to Include Sealed Findings with this Court. The motion seeks to provide this Court with a copy of the PSI to aid in its review, and an order from Judge Polster granting disclosure of the PSI report for the purpose of allowing it to be submitted to this court.

On October 18, 2011, Relator filed a motion to strike Crosby's filings arguing that Crosby's failure to specifically assign the Board's failure to admit the PSI as error in his objections to constitute a waiver of this issue.

III. Law and Argument

In support of its motion to strike, Relator argues that in order for Crosby to submit the PSI to this Court for review, he was required to specifically delineate the Board's failure to admit the document as error in his objections to the Board's decision. However, Relator argues form over substance. Although not specifically delineated as an error, Crosby's objections repeatedly reference the federal proceedings, information contained in the PSI, and Judge Polster's decision to deviate downward from the sentencing guidelines. Further, Supreme Court Rule V, Section 11 allows for liberal amendment of objections.

The Relator cites to no Rule or case law which prevents Crosby from raising an issue which was not specifically delineated in his objections to the Board's decision. Although not separately listed as an error, Crosby discussed the federal court proceedings and findings throughout his objections. Crosby specifically noted Judge Polster's reasoning in Crosby's sentencing in which the Judge stated,

> "Your years of professional service, all the people you've helped, and most significantly the fact that you've suffered from one or more diseases, you didn't chose them, you didn't plan for them, you don't deserve them anymore than anyone else who gets sick does, they happen and they affect---anyone who gets sick is affected, and there is no doubt in my mind that those illnesses contributed to the flawed judgment and the continued flawed judgment that let you begin this, and more significantly keep this going." Sentencing Proceedings, 1:10cr253.

This was referenced as being part of the documents filed under seal with the Board. See Crosby's Objections, p. 2. Crosby also refers to Judge's Polster's remarks, in which he stated, "I am absolutely confident that you won't do anything like that again" to illustrate that he is repentant for this action and will not engage in this behavior in the future. Crosby Objections, p. 10.

The information is highly relevant to these disciplinary proceedings. Pursuant to the Section10(B) of the Board of Commissioners on Grievances and Discipline's Rules, this Court reviews numerous mitigating factors including timely good faith effort to make restitution or to rectify consequences of misconduct, full and free disclosure to disciplinary Board or cooperative attitude toward proceedings, character or reputation, and chemical dependency or mental disability. The PSI submitted by Crosby illustrates these mitigating factors and warrants consideration by this Court.

The submission of the PSI demonstrates Crosby's candor and cooperative attitude with this Court and the disciplinary process by willingly providing a report which contains sensitive information regarding Crosby's personal life, childhood abuse, mental health issues, substance abuse history, and financial situation. The PSI illustrates Crosby's accomplishments and reputation in assisting victims of sexual abuse and his pursuit of justice for these individuals. All of these factors are relevant in determining the appropriate sanction for Crosby's conduct.

Even if Crosby was required to specifically note the Board's failure to admit the PSI in his objections, the Supreme Court Rules freely permit Crosby to amend his objections. Pursuant to Supreme Court Rule V, Section 11(D), the rules governing disciplinary proceedings are to be construed liberally and provide that "[a]mendments to any complaint, notice, answer, objections, report, or order to show cause may be made at any time prior to final order of the Supreme Court. The party affected by an amendment shall be given reasonable opportunity to meet any new matter presented. No investigation or procedure shall be held to be invalid by reason of any nonprejudical irregularity or for any error not resulting in a miscarriage of justice."

This provision in the rules illustrates that disciplinary proceedings are to be decided on the merits, not procedural technicalities, and specifically allows for the amendment of objections.

Therefore, even if Crosby did not separately address the Board's failure to admit and consider the PSI in its recommendation, Crosby's motion to file the document with this Court should be construed as an amendment to the objections filed with this Court on October 12, 2011.

Pursuant to Supreme Court Rule V, Section 11(D), a party should be permitted to freely amend their objections, however, the opposing party should be afforded an opportunity to respond. In its motion to strike, the only reasons noted by in support of not admitting and considering the PSI were those articulated by the Board. The Board concluded that there was no legitimate need to seal the PSI and that the document constituted inadmissible hearsay. Both of these contentions lack merit.

Pursuant to federal case law, presentence reports are treated as confidential, allowing criminal defendants to freely disclose information. *United States v. Green*, 571 F.3d 604 (6th Cir. 2009). The U.S. Supreme Court has also noted that the information contained in presentence reports must be kept confidential in order to protect the sensitive information contained therein, and to ensure the willingness of defendants to provide information in the sentencing process. *United States DOJ v. Julian*, 486 U.S. 1, 12(1988).

Crosby was candid and detailed in the information he provided in his PSI. He detailed his childhood, sensitive information pertaining to his family members, his alcoholism and mental health, and private financial information. This information was never meant for public disclosure. It is necessary that this information be kept confidential; otherwise any member of the public could obtain and review the utmost private details of Crosby's life. Therefore, although this is a public disciplinary proceeding, this document still merits the confidential treatment it is afforded pursuant to well-established case law.

The Board also concluded that the PSI could not be accepted for review because it constituted inadmissible hearsay. The PSI submitted by Crosby does not constitute hearsay, and even if it does, it should still be considered by this Court as relevant in determining an appropriate sanction.

Hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Beard v. Meridia Hospital*, 106 Ohio St.3d 237, 239, 2005-Ohio-4787, 834 N.E.2d 323, citing Evid. R. 801(C). An individual's statements made from their own personal knowledge and observations does not constitute inadmissible hearsay. *City of Cleveland v. Mohamoud*, Eighth Dist. No. 84333, 2004-Ohio-6104, at ¶11. All of the statements made by Crosby and contained in the PSI relate to his own personal observations of his childhood, personal life, financial situation, and work in the legal field. Relator fails to explain how any of the statements contained in the PSI are outside of Crosby's personal knowledge.

However, even where information contained in a PSI is found to constitute hearsay, federal courts have routinely determined that the information contained in these reports can be utilized in fashioning an appropriate sentence despite the fact that they may include hearsay information. In *United States v. Berringer*, 393 Fed. Appx. 257, 262 (6th Cir. 2010), the court noted that in determining sentence; it may consider all relevant information without regard to its admissibility under the rules of evidence. See also *United States v. Robinson*, 898 F.2d 1111, 1115 (6th Cir. 1990) (hearsay may be considered in imposing sentence).

This same approach should be taken by this Court in fashioning an appropriate sanction in this disciplinary proceeding, especially when it is noted that the federal criminal proceeding is the basis for Count One of these disciplinary proceeding. Similar to a criminal proceeding, the

Court in this instance is charged with determining an appropriate sanction for Crosby's conduct. Therefore, the statements and information he provided in a criminal proceeding which is the subject of one of the alleged disciplinary violations is clearly relevant and merits consideration by this Court.

IV. Conclusion

For the reasons outlined in this memorandum, Crosby respectfully requests that this Court deny the Relator's motion to strike and consider all relevant evidence before it in imposing a sanction. In the alternative, Crosby requests that he be afforded an opportunity to formally amend his objections to include the Board's failure to accept and consider the PSI as error.

Respectfully submitted,

Patrick J. Perotti, Esq. (#0005481)
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 Fax
Email: *pperotti@dworkenlaw.com*

Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the Respondent's Brief in Opposition to Relator's Motion to Strike was sent via regular U.S. Mail Service on October 27, 2011, addressed as follows:

Robert R. Berger, Esq.
Senior Assistant Disciplinary Counsel
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, OH 43215

Counsel for Relator

Richard A. Dove, Secretary
Board of Commissioners on Grievances & Discipline
65 South Front Street, 5th Floor
Columbus, OH 43215

Patrick J. Perotti, Esq. (#0005481)
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 Fax
Email: *pperotti@dworkenlaw.com*

Counsel for Respondent