

12-0278

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

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

In Re: :
Complaint against : Case No. 11-055
Christopher Thomas Cicero : Findings of Fact,
Attorney Reg. No. 0039882 : Conclusions of Law and
Respondent : Recommendation of the
Disciplinary Counsel : Board of Commissioners on
Relator : Grievances and Discipline of
 : the Supreme Court of Ohio
 :

OVERVIEW

{¶1} This matter was heard on November 14, 2011, before a panel consisting of Judge Thomas F. Bryant, Judge Lee H. Hildebrandt, Jr. and Lawrence R. Elleman, chair. None of the panel members is from the appellate district from which the complaint arose or served on the probable cause panel in this matter. Relator was represented by Joseph M. Caligiuri.

Respondent was represented by Karl H. Schneider and Alvin E. Mathews, Jr. Relator called as witnesses the grievant Edward Allen Rife and attorney Stephen Palmer. Respondent testified in his own behalf and called as a witness Joseph Epling. Respondent also offered six character letters, four of which were written by municipal court judges plus a former municipal court judge and a chief deputy sheriff, attesting to Respondent's professional integrity and competence.

{¶2} Respondent sent several email messages to Jim Tressel ("Coach Tressel"), who was then head football coach at The Ohio State University, revealing information that he had learned in connection with his consultation with Rife who at that time was under investigation

for drug related offenses. The panel concludes that Respondent had discussed with Rife the possibility of Respondent representing Rife, and that Rife was Respondent's "prospective client" at the time that some of the emails were sent. The panel concludes that Respondent violated Prof. Cond. R. 1.18 (revealing information learned from consultation with a prospective client) and Prof. Cond. R. 8.4(h) (conduct adversely reflecting upon his fitness to practice law). The panel recommends that Respondent be suspended from the practice of law for a period of six months.

FINDINGS OF FACT

{¶3} Respondent is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶4} Respondent was born in 1956 and was admitted to the practice of law in 1988. He is a 1984 graduate of The Ohio State University and a 1987 graduate from the University of Toledo College of Law. Respondent practices law in Columbus, where he focuses primarily upon criminal law.

{¶5} Respondent was previously suspended from the practice of law in Ohio for one year with six months of the suspension stayed on May 14, 1997 for, among other things, exaggerating his personal relationship with a sitting judge. *Office of Disciplinary Counsel v. Cicero*, 78 Ohio St.3d 351, 1997-Ohio-207.

{¶6} As of April 2010, Respondent had known Rife for many years and had previously represented Rife's wife in an unrelated matter. Rife owned a tattoo parlor in Columbus. Rife admits that he was at the time a drug dealer. November 14, 2011 Hearing Tr. 89. He was also a collector of Ohio State University athletic memorabilia. He was supposed to, within days after the panel hearing, report for a three-year federal prison sentence based on a guilty plea for drug

trafficking and money laundering. He also has a previous conviction for felony forgery and possession of criminal tools. *Id.* at 92.

{¶7} Respondent had previously represented Epling but was not representing him in any matters in April 2010. Epling was a former associate of Rife in the tattoo parlor business and had knowledge that Rife was a drug dealer. *Id.* at 187.

{¶8} On April 1, 2010, Rife and Epling were scheduled to have breakfast together. On that date, federal law enforcement officials raided Rife's residence as part of a criminal drug trafficking investigation. During the raid, the federal officers seized jewelry, cameras, GPS devices, cell phones, bank statements, and other paperwork. In addition, they seized a large amount of Ohio State athletic memorabilia that Rife testified had a value of \$15,000 to \$20,000. There were no drugs seized. *Id.* at 97-100.

{¶9} During the raid on April 1, 2010, Epling stopped by Rife's home and observed the raid in progress. Rife told Epling some of the details about the raid, including the seizure of the Ohio State athletic memorabilia.

{¶10} The evidence is conflicting as to what happened the next day. Rife testified that he made arrangements with Epling to set up an appointment with Respondent to discuss the possibility of Respondent representing Rife in the criminal matter and that Epling, Rife, and Respondent did, in fact, meet on April 2, 2010, to discuss Respondent's potential representation of Rife. *Id.* at 101-105.

{¶11} Epling and Respondent deny that such a meeting occurred on April 2, 2010, but on that date Epling did have a telephone conversation with Respondent wherein Epling told Respondent about the raid and the seizure of the Ohio State memorabilia, and further that Epling

was concerned that given his associations with Rife, he could be drawn into the matter along with Rife. *Id.* at 32-34, 175-179, 207-208.

{¶12} Respondent was a former member of The Ohio State University football team, a loyal Ohio State University sports fan, and an acquaintance of Coach Tressel. Respondent wanted to give Coach Tressel a heads-up that certain prominent OSU football players had been given free tattoos at Rife's tattoo parlor in exchange for signed memorabilia, warn Tressel that Rife had been involved in unsavory activities and has a felony record, and advise Tressel that OSU players should not be involved with this type of person. *Id.* at 240.

{¶13} On April 2, 2010, Respondent sent an email message to Coach Tressel informing Tressel of the above information that had come to his attention. Relator's Ex. 1.

{¶14} On April 2, 2010 or perhaps a day earlier, Rife contacted another Columbus criminal defense attorney, Stephen Palmer. They first met on April 2, 2010. Palmer was formally retained and given a \$25,000 retainer on or about April 5, 2010. Palmer testified that Rife told him that he had met with other lawyers, including Respondent, about representing him. November 14, 2011 Hearing Tr. 161.

{¶15} Between the dates of April 2 and April 17, 2010, Palmer was in contact with Rife and with representatives of the United States Attorney's Office. There was discussion of a plea deal with the possibility of a ten-year prison sentence. *Id.* at 107-108 and 162-164.

{¶16} By mid-April 2010, Rife was becoming dissatisfied with Palmer and was considering engaging in a contested trial rather than a voluntary plea. According to Rife, a meeting was scheduled with Respondent so that he could have a discussion with Respondent about Respondent, instead of Palmer, representing him. *Id.* at 108-109.

{¶17} On April 15, 2010, Rife, Epling, and Respondent met for approximately 90 minutes in Respondent's office.

{¶18} Respondent and Epling each testified that the purpose of this meeting was to have Rife confirm to Epling and to Respondent that Epling had no involvement in the drug activities which they perceived to be the subject of the pending drug investigation. *Id.* at 39 and 180-181.

{¶19} Assuming the truth of Respondent's testimony as to the purpose of the meeting, that testimony does not necessarily preclude the possibility that there was also a discussion at the meeting about Respondent representing Rife in the criminal case.

{¶20} Rife testified that the discussion at both the April 2 meeting, which Respondent denies occurred, and the April 15 meeting included the possibility of Respondent representing him. According to Rife, Respondent told Rife that Rife could go back to Palmer and ask for a refund of a portion of the retainer that he had given to Palmer and that Respondent would "take my case for \$10,000." *Id.* at 104-105.

{¶21} While denying the truth of much of Rife's testimony, Respondent conceded on the witness stand that he had quoted Rife a legal fee to represent him:

Mr. Caligiuri: * * * I'm asking whether or not you ever told him you can't represent him?

Respondent: No. The purpose of the meeting, Mr. Caligiuri, was so that he could come in and tell me that Mr. Epling didn't have any involvement with his federal drug investigation.

So I'm going to say this one last time to these three gentlemen right here. He never came into my office to ask me to represent him. He never came into my office to ask me to get back OSU memorabilia. *I quoted him a legal fee* and just that's it. *Id.* at 237-238. (Emphasis added).

{¶22} Mr. Palmer testified that Rife returned to Palmer's office on April 17, 2010, to discuss the issue of whether to take a plea deal or to do a contested trial. Rife told Palmer that he

had spoken to a number of attorneys including Respondent, and further that Respondent had quoted to Rife a fee of \$10,000 for representing him in the criminal matter. *Id.* at 165-166. Rife eventually decided not to hire Respondent but to stay with Palmer.

{¶23} The panel finds that Relator proved by clear and convincing evidence that Respondent offered to represent Rife in the criminal case for a fee of \$10,000.

{¶24} During the April 15 meeting among Respondent, Rife, and Epling, they discussed some of the details of the federal investigation. Respondent denies that he gave any legal advice at the meeting, but for the reasons set forth in ¶¶25-27 below, the panel finds that Relator proved by clear and convincing evidence that Respondent did express legal opinions.

{¶25} During the April 15 meeting and before, Respondent assured Epling that Epling did not need to hire a lawyer. *Id.* at 42 and 192-194. While this advice could be deemed to have been given to Epling rather than to Rife, the panel finds it was necessary for Respondent to give that advice in order for Respondent to clear the way for his representation of Rife because if Epling had needed counsel, Respondent would have had a potential conflict in representing both of them.

{¶26} During the meeting, there was a discussion about whether Rife could get his OSU athletic memorabilia back. Respondent advised that if the government believed the material had been purchased with drug money, Rife would not be able to get the memorabilia back. *Id.* at 222-223. Respondent apparently does not believe that this was legal advice, but the panel finds that this was something within the particular expertise of a criminal law attorney and constituted legal advice.

{¶27} At the meeting on April 15, the participants discussed the issue of potential penalties for drug trafficking. This part of the discussion lasted approximately a half an hour.

The discussion was about a “guide book” Rife had received from someone that apparently discussed some of the federal sentencing guidelines. Rife asked Respondent if he could really receive a ten-year prison sentence even though no drugs were found by law enforcement officers during the raid. Respondent stated he was unable to answer the question because he did not have enough information to do so. *Id.* at 57-58. However, Respondent did say during the meeting that “You’ve got basically two choices. You can either sit in the county jail for a long period of time, or you can start cooperating with the federal government and become a snitch.” *Id.* at 222-224.

{¶28} Respondent did not, during the meeting, expressly assure Rife of confidentiality. Rife did not specifically ask for it. However, given the nature of the information discussed, confidentiality was assumed by Rife (*Id.* at 134) and should have been assumed by Respondent. Rife never gave permission to reveal the contents of this discussion to Coach Tressel. *Id.* at 116-117.

{¶29} The panel finds that Respondent knew on April 15, 2010, that he was planning to forward the information he learned in the meeting to Coach Tressel, but he never disclosed this intent to Rife. *Id.* at 144-145.

{¶30} On the morning of April 16, Respondent sent his second email message to Coach Tressel in which he revealed the content of some of his discussions with Rife and Epling of the previous evening. In this message, he said that he had Rife in his office for an hour and a half and that the information he was giving Tressel “is confidential.” He described the specifics of the items that had been seized by the government and specifically identified Rife as his prospective client, stating: “If he retains me, and he may, I will try to get these items back that the government now wants to keep for themselves * * *.” Relator’s Ex. 2.

{¶31} Respondent initially testified that he had not intended in this email message to refer to Rife as his prospective client, but that he worded the message in the manner he did so as to conceal the fact that Epling had been in the meeting. He testified that he did this out of concern that Epling, his former client, might be implicated in some way if he used Epling's name in the email. Respondent testified about this as follows:

Mr. Caligiuri: And when you wrote, “. . .if he if retains me and he may,” you were referring Eddie Rife?

Respondent: No, I was not.

November 14, 2011 Hearing Tr. at 61.

However, Respondent later conceded that the message reads in such a way as to refer to Rife as the client who might retain him rather than anyone else. *Id.* at 62 and 68.

{¶32} On April 16, 2010, Respondent sent his third email message to Coach Tressel. In that message, he disclosed further information about Rife, stating that Rife “really is a drug dealer,” that Rife is “in really big trouble,” and that Rife “wanted my opinion” about the government’s best offer for a plea deal. Significantly, he stated “I have to sit tight and wait to see if he retains me, but at least he came in last night to do a face-to-face with me.” He closed the message with an instruction to Coach Tressel “just keep our emails confidential.” Relator’s Ex. 3.

{¶33} Respondent’s email messages to Coach Tressel were revealed in the news media on or about March 7, 2011. Rife filed a grievance on March 11, 2011. Respondent’s Ex. A. Respondent answered the grievance in a letter to Relator dated April 22, 2011. In that response, Respondent set forth various arguments as to why he did not believe he had disclosed Rife’s confidences. However, he did not in that letter assert that he had identified Rife as his

prospective client to Coach Tressel in order to protect Epling as he later asserted at the panel hearing. Realtor's Ex. 7.

{¶34} Respondent's motivation for revealing prospective client information to Coach Tressel in Exhibits 1, 2, and 3 was to permit Coach Tressel to better protect his players and the OSU football program. However, he could easily have given the coach a heads-up without identifying Rife as a prospective client. The panel finds that his explanation at the hearing that he identified Rife as the prospective client rather than Epling in order to protect Epling is not credible.

ANALYSIS AND CONCLUSIONS

{¶35} Prof. Cond. R. 1.18(a) provides that "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." The panel concludes that Relator has proved by clear and convincing evidence that Respondent discussed with Rife the possibility of client-lawyer relationship. The evidentiary basis for this conclusion is at least the following: (1) that Respondent admitted it in his email messages to Coach Tressel; (2) that Respondent admitted at the panel hearing that he quoted a fee to Rife for representing him; (3) the testimony of Rife; and (4) the corroborating testimony of Palmer that Rife told him that he had discussed representation with Respondent and that Respondent had quoted him a fee of \$10,000.

{¶36} Prof. Cond. R. 1.18(b) provides that "[E]ven when no lawyer-client relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation * * *."

{¶37} Comment [1] to Rule 1.18 provides:

Prospective clients, like clients, may disclose information to a lawyer, place documents or property in the lawyer's custody, or rely on the

lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all the protection afforded clients.

There appears to be no applicable Ohio case law regarding the construction of Prof. Cond. R. 1.18 regarding a lawyer's confidentiality obligations to prospective clients. However, the last sentence of Comment [1] refers the reader back to some of the "protection afforded clients" under Prof. Cond. R. 1.6. The panel therefore looks to Prof. Cond. R. 1.6 for guidance in construing Prof. Cond. R. 1.18.

{¶38} Prof. Cond. R. 1.6(a) provides that "a lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or division (c) of this Rule." Divisions (b) and (c) of Prof. Cond. R. 1.6 are not applicable to this case.

{¶39} Comment [3] to Prof. Cond. R. 1.6 makes it clear that the confidentiality under Prof. Cond. R. 1.6 is not limited to information covered by the attorney-client privilege or the work-product doctrine:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work-product doctrine apply in judicial and other proceedings in which the lawyer may be called as a witness or otherwise required to produce evidence concerning the client. The rule of client-lawyer confidentiality applies to situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law.

{¶40} In this case, the information disclosed to Respondent was disclosed in the presence of a third party, *i.e.* Epling. Therefore, that information may not have been covered by the attorney-client privilege but is nevertheless considered secret under the rules of ethics. In *Akron Bar Assn. v. Holder*, 102 Ohio St.3d 307, 2004-Ohio-2835, the Supreme Court of Ohio found that Holder violated DR 4-101(B)(1), a predecessor to the current Prof. Cond. R. 1.6, for disclosing his client's criminal background despite that the information was a matter of public record and that the respondent had learned of the information when his client disclosed it during a deposition. The Court stated:

There being an ethical duty to maintain client secrets available from sources other than the client, it follows that an attorney is not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records or the attorney learned of them in some other way.

Id. at ¶39 (citations omitted).

{¶41} The panel finds that Relator proved by clear and convincing evidence that Respondent disclosed to Coach Tressel personal information about Rife, including information that he exchanged free tattoos for OSU memorabilia, that "he really is a drug dealer," that "he is in really big trouble," that the federal government had told Rife that its best offer was to take ten years in prison, and that Rife asked for his opinion on the government's offer.

{¶42} The panel concludes that Relator has proved by clear and convincing evidence that Respondent violated Prof. Cond. Rule 1.18 and Prof. Cond. R. 8.4(h).

AGGRAVATING AND MITIGATING FACTORS

{¶43} The panel finds as a mitigating factor that Respondent has an excellent reputation among judges and attorneys for professional integrity and professional competence.

{¶44} The panel finds the following aggravating factors:

- Respondent has a prior disciplinary offense for violation of DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice) and Gov. Bar R. IV, Section 2 (duty of a lawyer to maintain respectful attitude toward the courts).
- Respondent's primary motivation in sending the email messages to Coach Tressel was to issue a warning in order for Coach Tressel to better protect the football players and the OSU football program. However, he could have accomplished that purpose without disclosing his prospective attorney-client relationship with Rife. His disclosure of the prospective client relationship with Rife was for the purpose of self-aggrandizement and therefore, was with a selfish motive.
- Respondent's testimony at the hearing was at times disingenuous and not credible.
- Respondent refused to acknowledge the wrongful nature of his misconduct.
- The disclosure of the information about the OSU memorabilia caused Rife (and his family) to be subjected to criticism and harassment, including persistent annoyance and unwelcome intrusion on family privacy by the news media and others as the person who took down the OSU football program. November 14, 2011 Hearing Tr. at 119.

RECOMMENDATIONS

{¶45} Relator recommended a six-month actual suspension from the practice of law. Respondent recommended that the complaint be dismissed with no sanction.

{¶46} The panel has reviewed the case law cited by Relator and Respondent. It appears there are no applicable reported cases in Ohio relating to sanctions for disclosing information regarding a prospective client under Prof. Cond. R. 1.18.

{¶47} Relator cites *Akron Bar Assn. v. Holder, supra* (two-year suspension with 18 months stayed for disclosing an existing client's criminal background and engaging in conduct involving fraud, deceit, or misrepresentation) and *Columbus Bar Assn. v. Dye*, 82 Ohio St.3d 64, 1998-Ohio-266, (two-year suspension for disclosing client confidences and numerous other serious violations, including conduct involving dishonesty, fraud, deceit, and misrepresentation). These cases are not instructive on the issue of sanctions because they involve other serious violations in addition to disclosing client information.

{¶48} Respondent cites case law involving the disclosure of existing client secrets or similar offenses where the sanction was a public reprimand or a stayed suspension. See *Office of Disciplinary Counsel v. Yurich*, 78 Ohio St.3d 315, 1997-Ohio-239 (public reprimand for disclosing client's secrets and sending an improper targeted mailing soliciting legal business); *Disciplinary Counsel v. Shaver*, 121 Ohio St.3d 393, 2009-Ohio-1385 (public reprimand for improper disposal of client files and other materials); *Geauga Cty. Bar Assn. v. Psenicka* (1991), 62 Ohio St.3d 35 (public reprimand for disclosure of client confidences and conflict of interest in representing one spouse in a divorce action after ceasing to represent the other spouse); *Columbus Bar Ass'n. v. Boggs* (1988), 39 Ohio St.3d 601 (cited and explained in *Columbus Bar Assn. v. Boggs*, 103 Ohio St.3d 108, 2004-Ohio-4657) (public reprimand for breaching a client's confidence). The panel concludes that the aggravating factors in this case exceed any aggravating factors in any of these cases cited by Respondent.

{¶49} Both sides cite *Disciplinary Counsel v. Kimmins*, 123 Ohio St.3d 207, 2009-Ohio-4943, where the Court imposed a one-year suspension, all stayed, for among other things disclosing client information. It is true that, as argued by Respondent, Kimmins violated numerous other sections of the Code of Professional Responsibility in addition to disclosing client information; yet he received only a stayed suspension. However, the Court noted fewer aggravating factors and more mitigating factors than in this case, including significantly, that Kimmins had no prior discipline, whereas Respondent in this case had previous discipline.

{¶50} The panel, having considered the relevant factors, including the ethical duties that Respondent violated, the sanctions imposed in similar cases, and the aggravating and mitigating factors, recommends that Respondent be suspended from the practice of law for six months.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 10, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Christopher Thomas Cicero, be suspended from the practice of law for a period of six months. The Board further recommends that the cost of these proceedings be taxed to 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.



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**