

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel	:	
	:	
	:	CASE NO. 2012-0278
Relator,	:	
	:	
v.	:	
	:	
Christopher T. Cicero	:	
	:	
Respondent.	:	

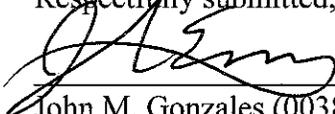
**RESPONDENT CHRISTOPHER T. CICERO'S OBJECTIONS
TO THE FINDINGS, CONCLUSIONS
AND RECOMMENDATIONS OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

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Relator Christopher T. Cicero, by and through counsel, objects to the findings, conclusions and recommendations of the Board of Commissioners on Grievances and Discipline in his case. These Objections are supported by Respondent's brief, concurrently filed.

Respectfully submitted,



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SUPREME COURT OF OHIO**

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2012, I served a copy of the foregoing, by regular U.S. mail, upon Counsel of Record for Relator:

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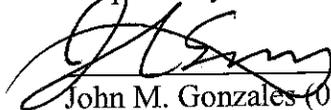
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**BRIEF IN SUPPORT OF RESPONDENT'S OBJECTIONS
TO THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS
OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

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STATEMENT OF THE CASE

This case arises from an ethics complaint filed by Edward Rife against Christopher T. Cicero. It was alleged that Mr. Cicero violated the Ohio Rules of Professional Conduct when he sent several emails to then-Ohio State University head football coach Jim Tressel, containing information Mr. Cicero allegedly learned during an alleged consultation with Mr. Rife. In 2010, Mr. Rife was under FBI investigation for drug activity. On April 1, 2010, his home was raided by law enforcement officials and, among other items, numerous boxes of OSU football memorabilia were seized. Mr. Cicero denied ever speaking with Mr. Rife for the purpose of representing him. He testified that the only time they spoke was on April 15, 2010, when Mr. Cicero's long standing client, Joseph Epling, brought Mr. Rife to Mr. Cicero's office. The purpose of Mr. Epling bringing Mr. Rife was solely for Mr. Rife to confirm to Mr. Cicero that Mr. Epling was not going to be implicated in the FBI drug investigation. Moreover, the information given to Coach Tressel in the email sent by Mr. Cicero on April 2, 2010, nearly two weeks before Mr. Cicero and Mr. Rife spoke, was known to Mr. Cicero, independent of any information discussed with Mr. Rife on April 15, 2010.

The matter was heard on November 14, 2011, before a three-person Panel of the Board of Commissioners on Grievances and Discipline. Despite the fact that the Relator's case was based mostly upon the credibility of Mr. Rife, a known drug dealer, the Panel found that Mr. Cicero had discussed with Mr. Rife the possibility of representing Mr. Rife. The Panel therefore concluded that Mr. Rife was Mr. Cicero's "prospective client" at the time some of the emails were sent to Coach Tressel. The Panel then concluded that even though the information given to Coach Tressel may have been publicly known, Mr. Cicero 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). (Board Report, ¶ 42).

Finally, after admitting that this area of ethical duties was unclear and unsettled, the Panel nonetheless recommended that Mr. Cicero be suspended from the practice of law for a period of six months.

Respondent objects to the findings, conclusions and the sanction recommended by the Board, given all the circumstances.

STATEMENT OF THE FACTS

Christopher Cicero is 55 years old and a former Marine who was admitted to the practice of law in Ohio in May of 1988. (Tr. pp. 206-207). Mr. Cicero played football for OSU from 1981 to 1983 when Jim Tressel was an assistant coach under Earl Bruce. (Tr. p. 31). Mr. Cicero graduated from The Ohio State University in 1984 and received his law degree from the University of Toledo College of Law in 1987. (Tr. p. 207). Mr. Cicero practices law in Columbus, where he focuses primarily on criminal law.

As attested to by Jennifer Brunner, former Judge of the Franklin County Common Pleas Court, Mr. Cicero is an attorney upon whom judges can rely to take difficult cases involving indigent clients, giving zealous representation while upholding the integrity of the legal and judicial system. (Exhibit E-4). Franklin County Municipal Judges David Tyack and Paul Herbert both recognized Mr. Cicero's professionalism, courtesy and superior knowledge of the law and procedures affecting his clients. (Exhibits E-2 and E-3). Chief Deputy Mark Barrett of the Franklin County Sheriff's Office knows Mr. Cicero to be dedicated to his profession, courteous in his dealings with the Sheriff's staff, loyal and compassionate. (Exhibit E-1). The Panel found that Mr. Cicero has an excellent reputation among judges and attorneys for professional integrity and professional competence. (Board Report, ¶ 43).

In contrast to Mr. Cicero's reputation, Eddie Rife is a convicted felon with a reputation for criminal activity that dates back over a decade. Mr. Rife admitted to the Panel that he was a

drug dealer. (Tr. p. 89). In 2001, Mr. Rife pled guilty to forgery and possession of criminal tools. (Tr. p. 92). In 2003, Mr. Rife was witness to the murder of one of his associates in the parking lot of the Doll House Strip Club in Columbus. (Tr. pp. 92-93). He testified that on the morning his house was raided by the FBI he was supposed to purchase 70 pounds of marijuana from Mr. Epling and had \$70,000 in cash at his home for the purchase. (Tr. pp. 111, 120). He freely admitted that the \$70,000 was money he made from selling drugs. (Tr. pp. 138-139). Shortly after testifying to the Panel, Mr. Rife was scheduled to report to a federal prison to begin a three-year sentence on his guilty plea for drug trafficking and money laundering. (Tr. p. 90). According to Mr. Rife, he made a deal to cooperate with the federal prosecutor in order to have his sentence reduced from ten years. (Tr. pp. 131-132). Notwithstanding that this agreement with the government necessitated him "being truthful," Mr. Rife testified that he never told the government about the alleged drug deal with Mr. Epling (Tr. p. 136) or the \$70,000 of cash hidden at his home. (Tr. p. 138). As he admitted, Mr. Rife actually used the undisclosed drug money to purchase the OSU memorabilia back from the federal government. (Tr. pp. 122-123). Mr. Rife's multiple felony convictions and dishonesty in dealing with the federal prosecutor make his credibility questionable.

Another key witness in this case was Joseph Epling. The Panel acknowledged that Mr. Epling was present at the meeting at Mr. Cicero's office and was a long time client of Mr. Cicero. Furthermore, the Panel found that Mr. Cicero gave legal advice to Mr. Epling at the meeting. (Board Report, at ¶ 25). The Panel, however, never discussed Mr. Epling's status or how Mr. Cicero's consultation with Mr. Epling affected the alleged prospective client duty the Panel erroneously determined to exist between Mr. Cicero and Mr. Rife. This omission is

critical, because it was essential to determine who Mr. Cicero actually represented to determine whether he owed a duty of confidentiality to Mr. Epling or Mr. Rife. See Prof. Cond. R. 2.3.

LAW AND ARGUMENT

PROPOSITION NO. I: A lawyer does not violate an ethical duty to a prospective client by disclosing information received from that person if the information is generally known or if the information was obtained independent of the consultation.

It was clear from the Panel's questions and subsequent decision that it struggled with the scope of the duty a lawyer owes to a prospective client. (Tr. p. 287). Even Relator conceded that the comments to the rule, providing "prospective clients should receive some, but not all of the protections afforded clients" are "very vague." (Tr. p. 288). It appears, therefore, that this is a case of first impression in Ohio.

With respect to the duty owed to a prospective client, Prof. Cond. Rule 1.18 provides:

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

The relevant Commentary to Rule 1.18 further observes: "[p]rospective clients should receive some but not all of the protection afforded clients." Further, the Commentary reads:

[2] Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of division (a).

Id. Comment [1] and [2].

The Panel, in its decision, correctly recognized that the duty under Rule 1.18(b) owed to a prospective client is less than the duty owed to a client. In finding that Mr. Cicero violated this

duty, however, the Panel essentially established a new ethical rule whereby a lawyer may not reveal information provided by a prospective client, even when such information was known by the lawyer independent of the consultation. In the context of this case, Mr. Cicero is criticized for revealing to Coach Tressel information about Mr. Rife that Mr. Cicero obtained independent of any alleged consultation with Mr. Rife and that was known by Mr. Cicero before he had ever spoken with Mr. Rife.

To reach its conclusion, the Panel relied upon *Akron Bar Ass'n v. Holder*, 102 Ohio St.3d 307, 2004-Ohio-2835, for the proposition that the information Mr. Cicero revealed in his emails, while publicly known, was nonetheless a “secret” and, therefore, protected from disclosure. The respondent in *Holder* testified in a deposition, taken in regard to a fee dispute, that his client had a criminal record. The fact that such information was a matter of public record did not dissuade the court from concluding that a lawyer cannot disclose secrets of a client learned during the professional relationship. A close reading of the *Holder* decision, however, shows that the “secret” revealed was learned in the course of the lawyer-client relationship. The Supreme Court specifically commented that:

Under DR4-101(A), a client “confidence” refers to “information protected by the attorney-client privilege under applicable law,” and a client “secret” includes “other information gained in the professional relationship that * * * would be embarrassing or would be likely to be detrimental to the client.”

The Panel’s and Board’s application of *Holder* to the instant case is misplaced in the first instance because Mr. Rife was never a client. More importantly, the information Mr. Cicero communicated to Coach Tressel was not only generally known, but specifically known by Mr. Cicero before he ever met with Mr. Epling and Mr. Rife on April 15, 2010.

After conceding that there “appears to be no applicable Ohio law regarding the construction of Prof. Cond. R. 1.18” the Panel surmised that the “last sentence of Comment 1

[some but not all of the protection] refers the reader back” to Prof. Cond. R. 1.6. (Board Report, ¶ 37). The Panel, however, inexplicably ignored the direct reference within Rule 1.18 (b) to Rule 1.9, providing that a lawyer “may not reveal information learned in a consultation, **except as Rule 1.9 would permit** with respect to information of a former client.” Prof. Cond. R 1.18(b). (Emphasis added). Rule 1.9 specifically allows the use of information relating to the representation of a former client when “the information has become generally known.” It follows therefore, that in the context of a prospective client, Rule 1.18 allows a lawyer to use information that he learns in a consultation if that information is or has otherwise become generally known. As shown, most, if not all of the information Mr. Cicero related to Coach Tressel about Mr. Rife was generally known.

Prior to the FBI raid on Mr. Rife’s home on April 1, 2010, Mr. Cicero was well aware of Mr. Rife’s criminal activities, including Mr. Rife’s previous felony convictions. Mr. Cicero testified that “I’ve known Ed Rife for about ten years and the only thing I’ve ever known him to do is sell drugs.” (Tr. p. 70). Mr. Cicero also knew that Mr. Rife owned Fine Line Ink tattoo parlor, in Columbus.

Mr. Epling testified that after speaking with Mr. Rife the day of the raid, he called Mr. Cicero, concerned about being implicated alongside Mr. Rife in the federal drug investigation. Mr. Epling told Mr. Cicero that law enforcement seized \$70,000 in cash from Mr. Rife’s home, and also told him about the seizure of OSU football memorabilia and that certain OSU football players had been trading their memorabilia for tattoos. (Tr. pp. 175-176). Mr. Rife conceded that he spoke with Mr. Epling on April 1, 2010, while the raid was in progress, and told him [Epling] everything that he knew at that point. (Tr. p. 126). Mr. Cicero testified that “I learned all the

information about all the memorabilia that was taken in the first phone call that Joe Epling gave me on April 2 and that's in the [first] email." (Tr. p. 60).

Mr. Cicero testified that he felt a moral obligation to inform Coach Tressel of what he learned. (Tr. p. 32). He therefore communicated everything Mr. Epling had told him in his first email to Coach Tressel, imploring Coach Tressel to "keep these kids away from drug dealing Eddie Rife." (Tr. p. 59). Mr. Cicero testified that that the "impact of that message was to keep those kids away from Eddie Rife. 'That's a dangerous guy, Coach.' And I was throwing everything that I knew in there so that he would call those kids" in. (Tr. p. 227).

Adopting the Panel's reasoning in this case would result in an absurd ethical duty to prospective clients. In this case, the Panel has faulted Mr. Cicero for sharing information about Mr. Rife with Coach Tressel on April 2, 2010, almost two weeks before Mr. Cicero had ever spoken with Mr. Rife or had any opportunity to establish the alleged prospective client relationship on April 15, 2010. The Panel's interpretation would also create an anomaly where a lawyer would owe a greater duty to a prospective client (to keep confidential information generally known yet discussed in consultation) than to a former client (where information learned during the professional relationship that has become generally known could be disclosed.)

PROPOSITION NO. II: When a non-client third person provides information to an attorney during a consultation between the attorney and his client, the attorney has no duty to keep any information received from the non-client confidential, even if the attorney may provide counsel to his client that is also useful to the non-client.

It was undisputed that Mr. Cicero had an ongoing attorney-client relationship with Joseph Epling. Mr. Epling testified that "Chris has always been my lawyer. I've always used Chris for everything, ever since I first met Chris." (Tr. p. 204). Even Mr. Rife acknowledged that Mr. Cicero was Mr. Epling's lawyer and that even though he had known Mr. Cicero for over 15

years, Mr. Rife never used Mr. Cicero as his lawyer. (Tr. pp. 94-105). Mr. Epling was also a former associate of Mr. Rife's in the tattoo parlor business and, according to Mr. Rife, "partners in selling drugs." (Tr. pp. 95-96). Mr. Rife confirmed that he had called Mr. Epling the night of the raid to "give him a heads up" that his house could be raided next, testifying that "Joe was my partner, so if they were watching me, obviously they were watching Joe, too, the way I looked at it." (Tr. pp. 127-128). If Mr. Rife's testimony is to be believed, Mr. Epling had good reason to be concerned. According to Mr. Rife, he and Mr. Epling were supposed to meet for a drug deal the very morning of the raid. (Tr. p. 111). Mr. Epling testified that following Mr. Rife's phone call he called Mr. Cicero concerned about being drawn into the drug matter along with Mr. Rife. (Board Report, ¶ 11).

The Panel never discussed the significance of Mr. Epling's presence at the meeting or his testimony that the purpose of the meeting was to have Mr. Rife confirm to Mr. Cicero that Mr. Epling had no involvement in the drug activities under investigation by the FBI. In fact, the Panel found that Mr. Cicero gave advice to Mr. Epling, essentially telling him that he (Epling) did not need to hire a lawyer at that time. (Board Report, ¶ 25). Mr. Epling testified that he and Mr. Cicero discussed that it would cost \$10,000 for Mr. Cicero to defend him, should he require representation. (See Epling Affidavit ¶ 18). The Panel simply dismissed Mr. Epling's status as Mr. Cicero's client, commenting only that such "testimony does not necessarily preclude the possibility that there was also a discussion at the meeting about Respondent representing Rife in the criminal case." (Board Report, ¶ 19). To the contrary, the sole duty owed by Mr. Cicero was owed to Mr. Epling, and Mr. Cicero was ethically precluded from representing both absent a written waiver of potential conflict.

Not all persons who communicate information to a lawyer are entitled to protection. In addition, not all situations where a lawyer is asked to express an opinion give rise to a duty not to disclose information. The Panel found it significant that Mr. Cicero may have expressed his opinions on matters relating to Mr. Rife at the meeting. (Board Report, ¶ 25-27). This, however, does not necessarily lead to the conclusion that Mr. Rife was the potential client. Under Rule 2.3, a lawyer has the ability, with his client's permission, to provide an evaluation of a matter affecting a client that happens to benefit someone other than the client who is listening. See Prof. Cond. R. 2.3.

As the comments to Rule 2.3 provide, "it is essential to identify the person by whom the lawyer is retained." In this case, Mr. Epling testified that Mr. Cicero was his lawyer and that he called Mr. Cicero concerned about being the next target of the federal drug raid. Mr. Cicero testified that "I saw him [Rife] as an ally and resource for Joe Epling. That's how I viewed Mr. Rife's purpose in my office." (Tr. p. 80). Further, Mr. Rife was represented by Attorney Stephen Palmer at the time of the meeting. (Tr. p.153). Mr. Cicero could have discussed Mr. Rife's criminal matter when meeting with Mr. Epling and Mr. Rife without establishing a prospective client relationship with Mr. Rife. As long as Mr. Epling was Mr. Cicero's client and asked for Mr. Cicero's evaluation of the possible criminal ramifications to him of the federal drug investigation of Mr. Rife, any information provided by Mr. Rife, about Mr. Rife, would have no protection from disclosure.

The Panel's failure to analyze the evidence in light of Rule 2.3 is unfortunate; however, the overwhelming evidence is that Mr. Epling was Mr. Cicero's client. Mr. Cicero's duty was to Mr. Epling, not Mr. Rife. As such, Mr. Cicero was free to warn Coach Tressel that his players were associating with a drug dealer and felon who was under federal investigation.

PROPOSITION NO. III: The evidence on the record did not rise to the level of clear and convincing, and the Panel therefore erred in determining that an ethical violation occurred.

It is axiomatic that lawyer discipline cases must be decided upon clear and convincing evidence. Gov. Bar R. V(6)(J), states:

If the hearing Panel determines, by clear and convincing evidence, that respondent is guilty of misconduct and that public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the hearing Panel shall file its certified report of the proceedings, its finding of facts and recommendations, including any recommendations as to probation and the conditions of probation, with the Secretary. Gov. Bar R. V(6)(J).

“Clear and convincing evidence” has been defined as “that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Ohio State Bar Ass’n v. Reid*, 85 Ohio St.3d 327, 331 (1999), quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

Many disputed issues were simply Mr. Cicero’s word against Mr. Rife’s. The Panel originally outlined only four pieces of evidence it found pertinent to its conclusion that a “client-lawyer relationship” was discussed between Mr. Cicero and Mr. Rife: (1) Statements in an email to Coach Tressel; (2) testimony that Mr. Cicero quoted a \$10,000 fee to Mr. Rife; (3) the further testimony of Mr. Rife; and, (4) the “corroborating” testimony of Mr. Palmer regarding the \$10,000 fee. (Board Report, ¶ 35).

Mr. Cicero’s “admission” regarding a legal fee is no longer a basis for the Panel’s conclusion, as it did not happen. (See corrected Tr. p. 238). The third and fourth pieces of evidence are Mr. Rife’s testimony at the hearing and his statement to Attorney Palmer regarding the alleged \$10,000 fee quoted to him by Mr. Cicero. Both however, rely upon the credibility of

Mr. Rife. Regrettably, on remand the Panel reaffirmed its reliance on the statements of an admitted felon, drug dealer and liar over a member of the practicing bar. In any other context and any other situation, Mr. Rife's credibility would be nil and his testimony viewed with skepticism. Mr. Cicero submits that where there is a direct conflict in the testimony, without further corroboration, the clear and convincing standard was not met.

The Panel also reaffirmed its reliance upon the statement Mr. Rife made to the attorney he did hire, which has dubious evidentiary value. In general, prior consistent statements of a witness are not admissible. As reasoned by Judge Norris, in *Motorists Mut. Ins. Co. v. Vance*, 21 Ohio App.3d 205, 207 (1985), "the relevancy of many such statements would be suspect—an improbable story is not made more probable simply because it is repeated." Because hearsay is generally inadmissible, such statements are only admissible to rebut a charge of recent fabrication or improper influence, neither of which exceptions apply here. See Evid.R. 801(D)(1)(b). Contrary to the Panel's position, Mr. Palmer's recitation of what he was told by Mr. Rife is not corroboration of Mr. Rife's testimony; it is merely a parrot of Mr. Rife's statement.

The Panel did not explain why it readily accepted Mr. Rife's testimony over Mr. Cicero's. It did, however, take time to explain that Mr. Cicero's testimony lacked credibility in light of the statements made to Coach Tressel in the emails. The wording of the emails is the only evidence that arguably supports Relator's position that Mr. Cicero formed a prospective client relationship with Mr. Rife on April 15, 2010. When viewed in their proper context, however, the email statements fall well short of establishing any legally significant relationship between Mr. Rife and Mr. Cicero.

First, the Panel failed to consider the purpose of the emails and the context in which they were sent. The emails were directed solely to Coach Tressel, whom Mr. Cicero knew well. As Mr. Cicero explained, "If I'd have wrote [sic] to Coach Tressel everything and every reason as to what was transpiring in my office on April 15th * * * Jim Tressel could have cared less, he could care less today, yesterday, the day I wrote it, because the impact of the message was to keep those kids away from Eddie Rife." (Tr. pp. 226-227). He further testified that "I didn't see a purpose, when I wrote this * * * [to] inform Coach Tressel of every single reason and nuance and detail as to why they were both in my office." (Tr. pp. 62-63).

It was the message that was important, Mr. Cicero emphasized: "I wanted to make sure that unequivocal, one hundred percent, Jim Tressel keep [sic] these kids away from that guy." (Tr. pp. 72-73). "So I didn't give him that information because it wasn't pertinent to my message to him, which was keep these kids away from drug dealing Eddie Rife." (Tr.p.59).

Mr. Cicero further explained that, in drafting the emails, he took care to conceal the identity of Mr. Epling, his client. He testified that:

I was sensitive about divulging the identity and details of Mr. Epling, who might have become involved in - - as a target in the federal drug investigation as it related to Mr. Rife, and I didn't want to send that to him. And that really was my purpose for it.

(Tr. p. 218). Because Mr. Epling was the actual client, Mr. Cicero recognized his duty of confidentiality and explained that "there was no reason, when I wrote my e-mails to Coach Tressel, to ever disclose, divulge, or give up the identity of my long-standing client, Joe Epling." (Tr. p.59). Because Mr. Rife was not Mr. Cicero's client, or potential client, Mr. Cicero did nothing improper by disclosing the information he received about Mr. Rife to Coach Tressel. Even if Mr. Cicero somewhat embellished the circumstances and his relationship with Mr. Rife

to ensure that Coach Tressel took the matter seriously and got involved quickly, such conduct is not uncommon, improper, or unethical given the circumstances.

The last point that the Panel failed to recognize from the emails was that Mr. Cicero clearly intended to seek the return of the OSU memorabilia to the university, not Mr. Rife. Mr. Cicero explained that he made a phone call to United States Assistant District Attorney Kevin Kelley to “see and to explore whether or not there would have been any way to have gotten this memorabilia back to the University” and that:

Eddie Rife was never going to be my client. And I don't even know how anybody could think that anyway, when I'm in fact making a phone call to the United States District Attorney to try to get it back for these kids.

(Tr. p. 64). Under no circumstances could Mr. Cicero have obtained the memorabilia for Ohio State University and represented Eddie Rife at the same time.

Considering the heightened burden of proof, if the Panel had insufficient evidence to determine whether Mr. Epling or Mr. Rife was the client at the meeting where Mr. Rife's case was discussed, then the Relator failed to prove misconduct by clear and convincing evidence. Likewise, if the Panel had insufficient evidence to determine whether the information in the emails to Coach Tressel was learned by Mr. Cicero prior to April 15, 2010, or during the alleged “consultation” with Mr. Rife, then the Relator again failed to meet its burden of proof.

PROPOSITION NO. IV: The Board erred in determining that certain aggravating factors existed that supported a six-month actual suspension, when the sole aggravating factor that was actually present was Mr. Cicero's prior disciplinary record.

Mr. Cicero has strong mitigating factors in his favor, which this Court should consider in imposing sanction, if any, in this case: lack of dishonest or selfish motive, good character and reputation. In fact, the Panel recognized that Mr. Cicero “has an excellent reputation among judges and attorneys for professional integrity and professional competence.” (Board Report, ¶

43). It is well-settled that the primary purpose of imposing a disciplinary sanction is not to punish the offending lawyer, but to protect the public. When imposing sanctions for misconduct, the Board and this Court consider all relevant factors, including the duties the lawyer violated, and the sanctions imposed in similar cases. *Stark Cty. Bar Ass'n v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743. In recommending and imposing disciplinary sanctions, the Panel, the Board and the Court likewise weigh evidence of the aggravating and mitigating factors listed in Section 10(b) of the Rules and Regulations Governing Procedure on Complaints and Hearings before the Board of Commissioners on Grievances and Discipline ("BCGD Proc.Reg."). *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251.

The Panel erroneously determined that several aggravating factors applied to Mr. Cicero's case. First, the Panel and the Board inappropriately determined that Mr. Cicero's disclosure of the prospective client relationship with Mr. Rife was for the purpose of self-aggrandizement and therefore was for a selfish motive. As mentioned, Mr. Cicero is a former member of The Ohio State University football team and he remains loyal to The Ohio State University and its football program. Mr. Cicero was previously acquainted with Coach Tressel when Coach Tressel was an assistant coach during Mr. Cicero's time on the team and the two had regular contact once Coach Tressel became the head football coach.

Mr. Cicero's motivation for sending the emails to Coach Tressel can be clearly discerned in his second email. Mr. Cicero wrote to Coach Tressel:

These kids are selling these items for not that much and I cant understand how they could give something so precious away like their trophy's and rings that they worked so hard for. In their life they will have children or maybe a parent who can really appreciate their hard work for what they earned. My father had two jobs; he worked 30 years at Republic Steel in Cleveland, and when he got off work he spent 26 as a police officer. I gave him my 1984 Fiesta Bowl watch he wore every day while on duty as a police officer. He died in 2001 at age 67. I now have the watch which sits in my office that I wont even wear because it meant so

much to me that HE wore with pride. I dont get it and I am still old fashion. (All sic).

The Board, without sufficient basis, concluded that Mr. Cicero styled the emails as he did for no other reason than self-aggrandizement. To the contrary, the overwhelming evidence showed that Mr. Cicero genuinely wanted Coach Tressel to prevent his players from having any contact with Mr. Rife, and to protect those players, the University and the football program.

Secondly, under the unique circumstance here, the Panel improperly found Mr. Cicero's refusal to acknowledge the wrongful nature of his misconduct to be an aggravating factor. Mr. Cicero never considered Mr. Rife a client or potential client. Mr. Rife never retained Mr. Cicero and in fact, had already hired an attorney by the time he met with Mr. Cicero and Mr. Epling on April 15, 2010. Mr. Cicero only spoke with Mr. Rife on one occasion, and Mr. Cicero's client Mr. Epling was present and had legitimate concerns about being implicated in the federal drug investigation of Mr. Rife. The Panel conceded that this area of law is unsettled and that if a duty was owed as a result of the alleged "consultation," it was something less than the protection afforded clients. Therefore it is not clear that Mr. Cicero violated any ethical rule and, until guidance is provided by this Court with regard to the scope of the ethical duty owed to a prospective client, Mr. Cicero should not be penalized for failing to acknowledge any wrongdoing.

Finally, the Panel improperly determined that Mr. Cicero's disclosure of the information subjected Mr. Rife and his family to criticism and harassment. Such conclusion is contrary to the facts. More than two months before Mr. Cicero's emails to Coach Tressel were made public, *The Columbus Dispatch* on December 29, 2010, reported the entire story regarding the football players trading OSU memorabilia for tattoos. In fact, the *Dispatch* identified Mr. Rife as the person responsible for Ohio State football players trading and selling memorabilia for tattoos. The article identified Mr. Rife by name, identified his business, Fine Line Ink, stated his felony

record, provided the location of his business, and noted his association with Mr. Epling. Again, this was two months before Mr. Cicero's emails to Coach Tressel became public. (Tr. pp. 81-82).

Moreover, Mr. Rife acknowledged on cross-examination that his activities in collecting OSU football memorabilia were conducted openly. (Tr. p. 148). Mr. Rife cavalierly continued to purchase memorabilia after his activities plagued the OSU football program. (Tr. p. 141). He posted photographs of OSU football players' tattoos and OSU football memorabilia on his Facebook page. (Tr. pp. 141, 150-151). The evidence does not support the conclusion that Mr. Rife, an acknowledged drug dealer who put himself above the players and the university he claimed to support, received adverse publicity solely because of Mr. Cicero's emails.

While Mr. Cicero concedes that his prior disciplinary record qualifies as an aggravating factor, it is only one factor that is significantly counter-balanced by Mr. Cicero's reputation in the legal community for honesty and competence. Among local judges particularly, Mr. Cicero is recognized for being a reliable advocate on difficult court-appointed and privately retained cases alike. Mr. Cicero has worked tirelessly to rehabilitate himself and has remained in good stead with those who work in the trenches of the criminal justice system. Mr. Cicero's rehabilitation from his 1996 discipline had been admired by many. The Court should not give Mr. Cicero's prior discipline significant weight as a factor that aggravates his conduct and warrants an actual six-month license suspension.

PROPOSITION NO. V: Even if Mr. Cicero's conduct constituted an ethical violation, a six-month stayed suspension of Mr. Cicero's license appropriately addresses his conduct and protects the public.

As explained above, whether Mr. Cicero violated an admittedly ambiguous tenet of the Rules of Professional Conduct at all is questionable, and most of the aggravating factors that were attributed by the Panel and Board are not supported by this record. Even if a violation is found, Mr. Cicero's conduct does not warrant a six-month actual suspension of his license to practice law.

Given the absence of legal authority addressing the precise duty owed to a prospective client, the Panel and the Board relied on case law where lawyers disclosed confidential information of clients who actually hired them. Such cases constitute a more serious breach of confidentiality because the lawyer is more likely to appreciate his or her conduct is wrong, and because the distinction is often a bright-line one. Decisions involving a sole rule violation of disclosure of confidences of an existing client (as opposed to a prospective client) reveal sanctions ranging from a public reprimand to a stayed license suspension. See, e.g., *Disciplinary Counsel v. Yurich*, 78 Ohio St.3d 315 (1997) (lawyer publicly reprimanded for disclosing the content of his client's trust for the sole purpose of trying to solicit new clients, and increase his client base); *Disciplinary Counsel v. Shaver*, 121 Ohio St.3d 393, 2009-Ohio-1385 (lawyer reprimanded for improper disposition of client files); *Geauga County Bar Ass'n v. Psenicka* (1991) 62 Ohio St.3d 35 (lawyer publicly reprimanded for disclosure of confidences and a 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 (lawyer publicly reprimanded for violating former DR 4-101). In fact, even when the disclosure of an existing client's confidential information was combined with other disciplinary violations, the Court has frequently imposed sanctions including a stayed suspension of the respondent's license. See, e.g. *Disciplinary Counsel v. Kimmins*, 123 Ohio St.3d 207, 2009-Ohio-4943 (lawyer received one-year stayed suspension for disclosure of confidential information and deceitful conduct, among other things).

Here, Mr. Cicero's disciplinary sanction, if any, should not be governed by cases construing Rule 1.6 and/or former DR 4-101. Unlike Mr. Cicero, lawyers actually hired by clients know that they possess information that they are prohibited from disclosing. Mr. Cicero did not appreciate that he might be prosecuted by Relator for disclosing to Coach Tressel information discussed in the meeting he had with Mr. Epling, his longtime client, and Mr. Rife solely in order to warn Coach Tressel about his players associating with a known drug dealer.

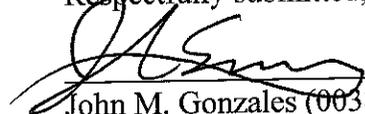
Thus, if Mr. Cicero is disciplined for disclosing confidential information in this circumstance, which he should not be, a less severe sanction should be imposed because of the imprecision associated with evaluating the ethical duties owed to prospective clients.

CONCLUSION

Mr. Cicero objects to the findings, conclusions and sanction of the Board of Commissioners on Grievances and Discipline. Mr. Cicero objects to the finding that Eddie Rife was ever a "prospective client" of his, and to the conclusion that Mr. Cicero owed any duty whatsoever to Mr. Rife on the basis of that alleged relationship. Even assuming a duty was owed, however, the Board erroneously concluded that Mr. Cicero had breached that duty because all information that Mr. Cicero disclosed to Coach Tressel was already generally known.

Based on the above, Mr. Cicero asks this Court for a finding that no relationship existed between Mr. Cicero and Mr. Rife, and a conclusion that no duty was owed (or, in the alternative, that any duty owed was not breached. Even if this Court should find that a relationship existed, a duty was owed, and that Mr. Cicero somehow breached that duty, the sanction imposed by the Board was unjust and inappropriate, and Mr. Cicero asks that a less severe sanction (e.g., a six month stayed suspension) be imposed.

Respectfully submitted,



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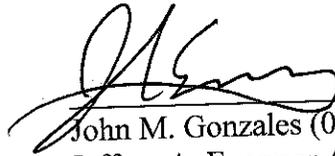
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COUNSEL OF RECORD FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of **July, 2012**, I served a copy of the foregoing, by regular U.S. mail, upon Counsel of Record for Relator:

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