

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO**

In Re:	:	Case No. 2014-021
Complaint against	:	
Jason Richard Phillabaum Attorney Reg. No. 0072219	:	Findings of Fact,
	:	Conclusions of Law, and
Respondent	:	Recommendation of the
	:	Board of Professional Conduct of
Disciplinary Counsel	:	the Supreme Court of Ohio
	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on July 31 and August 1, 2014, in Columbus before a panel consisting of Judge John Willamowski, Patricia Wise, and John Polito, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to former Gov. Bar R. V, Section 6(D)(1).¹

{¶2} Respondent was represented by George D. Jonson and Lisa M. Zaring. Catherine M. Russo appeared on behalf of Relator.

{¶3} Based upon the evidence and agreed stipulations, the panel concludes that Relator has proven by clear and convincing evidence that Respondent in the Tyree Johnson Case (Count II) violated the following: Prof. Cond. R. 3.3(a)(1) [knowingly make a false statement of fact to a tribunal or fail to correct a false statement of material fact previously made to the tribunal by the lawyer]; Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of

¹ Effective January 1, 2015, the Supreme Court amended Gov. Bar R. V and the Board's Procedural Regulations. This report distinguishes between the former and current versions of Gov. Bar R. V and the Procedural Regulations, as appropriate.

justice]; and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law].

{¶4} Based upon the evidence and agreed stipulations, the panel concludes that Relator has not proven by clear and convincing evidence that Respondent violated the Rules of Professional Conduct as charged in Count I (Yu Yang David Bai case) and a portion of Count II (Jason Saylor case) and therefore dismisses those charges.

{¶5} Upon consideration of the violations, aggravating and mitigating factors, and the legal precedents cited herein, the panel recommends that the appropriate sanction is a one-year suspension with six months stayed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶6} Respondent was admitted to the practice of law in the state of Ohio on September 8, 2000 and is subject to the Code of Professional Responsibility, the Rules of Professional Conduct, and the Rules for the Government of the Bar of Ohio.

{¶7} Respondent was employed as an assistant prosecuting attorney in Butler County, Ohio from July 10, 2000 to February 8, 2011 when he was terminated upon Mr. Gmoser becoming the county prosecutor.

{¶8} The panel accepts the stipulated facts, exhibits, and mitigating factors and incorporates the same as though fully rewritten herein.

Count I--Bai

{¶9} Respondent is charged with violating Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 3.3(a)(3), Prof. Cond. R. 3.8(d), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h) while serving as an assistant county prosecutor for failing to turn over exculpatory

evidence (victim's handwritten statement) in a criminal case to defense counsel in response to a discovery request.

{¶10} Respondent believed that the statement was not discoverable as exculpatory under *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S.Ct. 1194.

{¶11} Following the defendant's conviction for gross sexual imposition and assault on a peace officer, the Twelfth District Court of Appeals reversed and remanded the gross sexual imposition charge due to prosecutorial misconduct [Respondent's failure to turn over the victim's handwritten statement] and ineffective assistance of counsel [defense counsel's failure to request any statements following the victim's testimony at trial in accordance with Crim. R. 16(b)(1)]. See *State v. Bai*, 2011-Ohio-2206.

{¶12} The gross sexual imposition charge was subsequently dismissed by the prosecutor's office.

{¶13} The panel finds that a *Brady* violation including prosecutorial misconduct does not, *ipso facto*, result in a violation of the Rules of Professional Conduct.

{¶14} The panel concludes that the *Brady* violations committed by Respondent were the result of miscalculation of the evidence rather than an egregious or willful attempt to thwart the administration of justice. The panel therefore dismisses the alleged violations of Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 3.3(a)(3), Prof. Cond. R. 3.8(d), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h).

Count II--Saylor

{¶15} Respondent is charged with violating Prof. Cond. Rule 3.3(a)(1), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h) for signing an indictment containing a

weapons under disability charge which was not voted on by a Butler County Grand Jury. The main charges included one count each of burglary and theft.

{¶16} The grand jury process in 2010 was that a grand jury legal assistant employed by the county prosecutor would record the testimony of the witnesses by tape recorder. Questions of grand jurors, comments of the prosecutor and prosecutor's requests for charges were not recorded.

{¶17} The grand jury assistants prepared two vote sheets for the votes and one sheet was kept by the assistant and one by the foreperson. Handwritten notes could be made on the vote sheets.

{¶18} During the grand jurors votes and discussions only the grand jurors were present.

{¶19} Following the grand juror votes, the legal assistant prepares draft indictments for the prosecutor to review.

{¶20} The prosecutor would sign the indictments a few days later. During the interim, changes or clerical errors could be corrected.

{¶21} The grand jury foreperson would come back a few days, or a week later to sign the indictments issued during a session.

{¶22} Respondent testified that upon reviewing the Saylor indictment he noticed it did not contain a weapons under disability charge and told the legal assistant, Jill Grove, "you forgot to add the weapons under disability charge." Hearing Tr., Vol. I, 40.

{¶23} Grove added the charge to the indictment even though she did not believe that the grand jury voted on that charge.

{¶24} Grove did not question the instruction to add the charge and did not advise any superiors of this until approximately five months later when Respondent had been terminated by the new prosecutor, Mr. Gmoser.

{¶25} Respondent testified he certainly would have presented the weapons under disability charge to the grand jury since his trial preparation packet, which he reviews prior to presenting cases to the grand jury contained copies of Saylor's prior felony convictions, which would bar him from possessing weapons in the burglary charge, which was under consideration. Respondent's Ex. C 1-2.

{¶26} Saylor pled guilty to all of the charges in the indictment and was sentenced to three years on each charge to be served consecutively. The court eventually dismissed the weapons under disability charge and retained the original sentence.

{¶27} The panel concludes that Relator failed to provide clear and convincing evidence that Respondent violated the Rules of Professional Conduct in connection with the Saylor case as alleged in Count II of the complaint. The panel therefore dismisses the alleged violations of Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h).

Count II - Johnson

{¶28} Respondent was charged with violations of Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h).

{¶29} In Respondent's absence, on December 13, 2010, assistant prosecutor, Josh Muennich, presented the case of Tyree Johnson to the Butler County Grand Jury.

{¶30} The grand jury in the Johnson case was instructed to vote on charges of aggravated robbery and felonious assault.

{¶31} Muennich did not present any evidence or ask the grand jury to vote on any charges containing gun specifications in the commission of the crime.

{¶32} Respondent reviewed the indictment on December 20, 2010 and told the legal assistant, Lisa Staph to add gun specifications to the indictment.

{¶33} Staph advised Respondent that the gun specifications were not included because no evidence of same was presented to the grand jury by Muennich.

{¶34} Staph told Respondent that she felt uncomfortable adding the charges since they were not presented and Respondent advised her to add them to the indictment for Muennich to sign.

{¶35} Muennich refused to sign the indictment containing the gun specifications since he did not present that evidence to the grand jury.

{¶36} Respondent then signed the indictment containing the gun specifications even though he did not present the case to the grand jury.

{¶37} Respondent knew that the indictment containing a false statement would be filed with the clerk of courts.

{¶38} The indictment against Johnson was dismissed and a superseding indictment including the firearm specifications was obtained a few months later.

{¶39} On May 3, 2012, Respondent was indicted for two counts of forgery, one count of dereliction of duty, one count of interference with civil rights, and one count of using a sham legal process all involving the Tyree Johnson case.

{¶40} Respondent pled guilty to one count of dereliction of duty, a second degree misdemeanor for which he was sentenced to 90 days in jail, which was suspended on conditions of community control and community service.

{¶41} The panel concludes that Respondent's conduct in the Johnson case violated Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h). Respondent's conduct was egregious so as to justify the Prof. Cond. R. 8.4(h) violation as set forth in *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998.

AGGRAVATION, MITIGATION, AND SANCTION

{¶42} The panel finds no aggravating factors were present in this case.

{¶43} The panel agrees with the following stipulated mitigating factors pursuant to former BCGD Proc. Reg. 10(B)(2): Respondent has no prior disciplinary record; Respondent displayed a cooperative attitude in the proceedings; other penalties were imposed upon Respondent related to some of the conduct; and Respondent has fully complied with those penalties including completing one year of community control in excess of 100 hours of community service and having no new violations of law. Respondent presented several letters from judges, attorneys, and clients attesting to his reputation in the legal community.

{¶44} When imposing sanctions for attorney misconduct, the Court must consider the relevant factors including the ethical duties violated and sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743. And, in making a factual determination, evidence of aggravating and mitigating factors are considered. *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251.

{¶45} Relator recommends a sanction of a one-year suspension citing as precedent the cases of *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 1995-Ohio-261 and *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415, 2010-Ohio-282.

{¶46} Respondent recommends that if a violation is found a public reprimand would be appropriate or at most a fully stayed suspension relying on *Disciplinary Counsel v. Wrenn*, 99 Ohio St.3d 222, 2003-Ohio-3288.

{¶47} Sanctions for violations of Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h) have ranged from a public reprimand to indefinite suspension depending on the nature of the conduct and aggravating and mitigating factors.

{¶48} A public reprimand was issued in *Disciplinary Counsel v. Wilson*, 2014-Ohio-5487 where the respondent notarized a signature on an affidavit without indicating permission to do so, then filing it with the court as part of a pleading. The Court dismissed Prof. Cond. R. 8.4(h) charge finding the conduct not sufficiently egregious.

{¶49} The Court issued a two-year suspension, with one year stayed in the cases of *Dayton Bar Assn. v. Swift*, 2014-Ohio-4835 and *Disciplinary Counsel v. Harmon*, 2014-Ohio-4598. In *Swift*, the respondent over billed fees in multiple cases as a court-appointed attorney, and the Court noted four aggravating factors including multiple offenses and a pattern of misconduct. In *Harmon*, the respondent falsely testified at his bankruptcy hearing regarding full disclosure of his assets. Harmon was not charged with Prof. Cond. R. 3.3(a) violation, although facts noted in the opinion may have supported one.

{¶50} The Court issued an indefinite suspension in *Disciplinary Counsel v. Cicero*, 2014-Ohio-4639 where the respondent improperly amended a speeding ticket by misleading the court. The aggravating factors included two prior disciplinary actions, multiple offenses, and a pattern of lying.

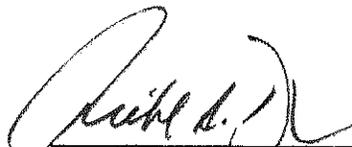
{¶51} The panel finds that the conduct of Respondent is more severe than *Wilson* but does not contain the aggravating factors in the *Swift*, *Harmon*, or *Cicero* cases and that a sanction falling between those cases is appropriate.

{¶52} Therefore, the panel recommends that an appropriate sanction for Respondent is a one-year suspension, with six months stayed pending no further misconduct.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on February 13, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Jason Richard Phillabaum, be suspended from the practice of law for one year, with the final six months stayed on the conditions that Respondent commit no further misconduct and pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct 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, Director