ORIGINAL

The Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS

ON CHARACTER AND FITNESS OF

THE SUPREME COURT OF OHIO

15-0540

In re: Application of
Matthew Ashley Swendiman

Case No. 592

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS OF THE SUPREME COURT OF OHIO

This matter is before the board pursuant to its *sua sponte* investigatory authority. Gov. Bar R. I, Sec. 10(B)(2)(e).

A duly appointed panel of three Commissioners on Character and Fitness was impaneled for the purpose of hearing testimony and receiving evidence in this matter. The panel filed its report with the Board on January 26, 2015.

Pursuant to Gov. Bar R. I, Sec. 12(D), the board considered this matter on February 6, 2015. The board adopts the panel report as attached, including its findings of fact and recommendation of disapproval.

Therefore, the Board of Commissioners on Character and Fitness recommends that the applicant, Matthew Ashley Swendiman, be disapproved; that he be permitted to reapply for admission to the practice of law in Ohio by filing a new application; and that upon reapplication, he undergo a complete character and fitness investigation, including a character and fitness investigation and report by the National Conference of Bar Examiners, in order to determine whether he possesses the requisite character, fitness and moral qualifications for admission to the practice of law in Ohio.

FILED
APR 03 2015
CLERK OF COURT
SUPREME COURT OF OHIO

TC Hicks

TODD C. HICKS, Chair, Board of Commissioners on Character and Fitness for the Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS OF THE SUPREME COURT OF OHIO

FILED
JAN 26 2015
BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS

IN RE: APPLICATION OF	)	
MATTHEW SWENDIMAN	)	
	)	**CASE NO. 592**
	)	
	)	

REPORT AND RECOMMENDATION OF PANEL

I. Introduction

Mr. Swendiman seeks admission without examination to the Bar of Ohio. The Board of Commissioners on Character and Fitness invoked its *sua sponte* investigatory authority under Rule I, Section 10(B)(2)(e) of the Rules for the Government of the Bar with respect to this applicant because of concerns arising from investigations initiated by OSHA and by the CFA Institute, a professional organization of chartered financial analysts, and also concerns as to whether the applicant had engaged in the unauthorized practice of law.

Because of the illness of the panel chair on the morning that the hearing was scheduled, the parties agreed that they would proceed before two commissioners, one of whom became panel chair.

II. Statement of Facts

Applicant has to date been admitted to practice law in several jurisdictions, including Indiana in 2001, Connecticut in 2003 (although his license is no longer active), and the District of Columbia in 2005. Since his initial admission, Mr. Swendiman has primarily been engaged in the financial investment business both as a lawyer and as a financial advisor. His original positions were with companies engaged in providing investment advice and other financial services to institutional and individual clients. In 2006, he came to Ohio to begin working with Fifth Third Bank and its asset management subsidiary, FTAM. He began his employment in the law department at Fifth Third. In his position as a corporate counsel, he provided legal services to the various offices of the asset management subsidiary. Eventually he became Chief Administrative Office of that subsidiary where he was "responsible for all legal, compliance, administrative, and governance matters". [Amended Affidavit of Past Practice filed June 9, 2013]. During his time with Fifth Third, Mr. Swendiman registered for corporate status under Gov. Rule VI.

As a consequence of his work at Fifth Third, Mr. Swendiman was named in two investigations, one initiated by OSHA and one by CFA Institute triggered by the OSHA investigation. Both investigations arose out of complaints by two employees of FTAM who were terminated after they complained about alleged exaggerations and misrepresentations in various prospectuses for the products offered by the asset management company. The OSHA complaint also contained allegations that Mr. Swendiman had failed to correct alleged misinformation in prospectuses regarding the identity of managers of FTAM's funds. Inexplicably, according to Mr. Swendiman, OSHA never interviewed Mr. Swendiman despite his position at FTAM. OSHA has apparently taken no action on the complaints and CFA terminated its investigation, based in

part on the fact that internal investigations at FTAM found no evidence of wrongdoing. Additionally, K&L Gates did an investigation and, according to Mt. Swendiman, it likewise found no wrongdoing.

Mr. Swendiman remained at Fifth Third until April 2011 when he left to take a position as Chief Operating Officer of Retirement Corporation of America. Because of differences with the CEO, Mr. Swendiman's tenure with that company was a short 7 months, and in November 2011 he started his own investment company, Swendiman Wealth Strategies, Inc. In September 2012, Mr. Swendiman became Of Counsel to the Cincinnati law firm Graydon Head & Ritchey LLP. He worked there initially part time while continuing to run his own business. He became fulltime and then eventually in late 2014 closed Swendiman Wealth Strategies. As his June 2013 Amended Affidavit of Past Practice avers, he has been and is practicing law at Graydon Head. At the hearing, Mr. Swendiman explained that his practice focused on the Investment Act of 1940 and the Investment Advisers Act of 1940. Because of his extensive experience in the investment advising arena, he testified that he had contacts with institutional clients around the country and part of his responsibility was to establish client relationships and serve as a resource to the Graydon Head securities group. He further stated that at least in part his taking a position with Graydon Head was because clients and other contacts within the industry were asking him to provide not only financial investment advice but also to perform legal services for them. On March 27, 2013 Mr. Swendiman filed an application for admission on motion, some 6 months after he went to Graydon Head.

III. Conclusions of Law

Rule VII, Section 2 of the Rules for the Government of the Bar defines the practice of law in Ohio. In pertinent part, it makes the practice of law unauthorized unless it is permitted by

certain defined rules. Thus unless an individual is certified as a legal intern under Gov. Bar R. II or granted corporate status under Gov. Bar R. VI or certified under Gov. Bar R. IX or registered as a foreign legal consultant under Gov. Bar R. XI or granted pro hac vice status by a tribunal under Gov. Bar R. XII or abiding by Rule 5.5 of the Rules of Professional Conduct, then the rendering of legal services by that person constitutes the unauthorized practice of law.

Mr. Swendiman rests upon Rule 5.5 for his contention that he may practice law in Ohio although he is not admitted here.

One of Rule 5.5's clear admonitions is that a lawyer who is not admitted to practice in Ohio shall not "except as authorized by these rules or other law, establish an office or other systematic presence in this jurisdiction for the practice of law." Rule 5.5(b)(1). Indisputably, Mr. Swendiman has established an office and a continuous presence in Ohio, and indeed, admits that he is practicing law here. He claims that he is "authorized by these rules" because he is providing services that are authorized by 5.5(d)(2). That provision allows a lawyer admitted and in good standing in another U.S. jurisdiction to provide legal services in Ohio if "the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law." Specifically, Mr. Swendiman contends that he is authorized by federal law. His argument appears to be that, since he is advising clients regarding federal investment act and securities act matters and since D.C. is where filings before the SEC and other government agencies are made, his D.C. admission authorizes him to render services regarding these federal laws in Ohio.

Mr. Swendiman has not cited any case authority for his seemingly novel premise nor has the panel found any authority directly on point. However, based upon the language of Rule 5.5 and cases discussing circumstances where a lawyer was deemed to be authorized by federal law, the panel concludes that Mr. Swendiman's reliance upon Rule 5.5 is misplaced. First, while

stressing that he is practicing federal, not Ohio law, such a distinction is not made in Rule 5.5. It prohibits the practice of law unless the requirements of the Rule are met, not just the practice of *Ohio* law, however that is defined. Moreover, in cases in which the Supreme Court of Ohio has recognized authorization based upon federal law it has been under circumstances in which there exists a separate federal admission authority. For example, in *Disciplinary Counsel v. Harris*, 137 Ohio St.3d 1, 2013-Ohio-4026, the Supreme Court found that Mr. Harris did not engage in the unauthorized practice of law in representing a client before the U.S. Bankruptcy Court for the Northern District of Ohio because he had been admitted to Northern District of Ohio and was authorized to practice before the Bankruptcy Court. As the Court noted, "[a] bankruptcy court has the power to regulate the practice of law in the cases before it." Harris, ¶ 15, citing In *re Ferguson*, 326 B.R. 419, 422 (Bankr. N.D. Ohio 2005). *See also In re Desilets*, 2002 FED App. 0196P, ___ F.2d. ____ (6th Cir. 2002) in which the Court discussed separate federal admission provisions for federal courts and federal agencies. Mr. Swendiman, however, has not been admitted by any federal tribunal or agency. Admission to the bar of the District of Columbia is not tantamount to admission by a separate federal authority. Indeed, under Mr. Swendiman's reasoning, he could continue to be with an Ohio law firm, practicing in Ohio by advising clients on federal laws, but never have to become admitted in Ohio. In light of the further holding in *Harris* that a lawyer admitted in another jurisdiction but not admitted in Ohio is not subject to the Ohio Rules of Professional Conduct, this would mean that arguably there would be no protection afforded the public from the misdeeds in Ohio of such an individual. Similarly, under his reasoning, an individual could be admitted in D.C. and never have to be admitted in any other jurisdiction so long as the person advised clients on federal securities laws. In short, it does not

appear that either the language of Rule 5.5 or case law supports Mr. Swendiman's interpretation of the Rule.

IV. Recommendation

As noted Mr. Swendiman is seeking admission on motion, a matter that is in the sole discretionary determination of the Supreme Court. Our only task is to assess character and fitness issues. Among the factors to be assessed in making a recommendation regarding character and fitness is commission of an act constituting the unauthorized practice of law. The panel concludes that Mr. Swendiman has committed such acts.

It appears from his testimony that his conduct was not intentional in any respect, although there is a strong suggestion that he also was not particularly attentive to Rule 5.5 or thoughtful about how he should proceed once he decided he wanted to go back to rendering legal services. Despite being a lawyer since 2001, his testimony reflects that he was not diligent in understanding the provisions of Rule 5.5. He has been in Ohio since 2006; by 2011 he had started his own business and presumably by that time at the latest no longer could practice law in Ohio under his grant of corporate status. He testified that he decided to return to practice law because clients and others contacted him seeking his legal as well as financial advice. Thus, as he indicated, while he continued to provide financial advice through Swendiman Wealth Strategies, he joined Graydon Head so as to be able also to provide legal advice. Nonetheless, he did not file his application before going with Graydon Head and, indeed, did not do so for almost 6 months after he was with the firm. Also of concern is the fact that this is not conduct that is in the past. Mr. Swendiman is continuing to practice law and in light of the fact that there appears no basis for his being able to do so, the panel concludes that he does not currently possess the requisite character and fitness.

John C. Fairweather

Suzanne K. Richards, Panel Chair