

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

**In re:**

**Case No. 2014-095**

**Complaint against**

**Christopher David Wiest  
Attorney Reg. No. 0077931**

**Findings of Fact,  
Conclusions of Law, and  
Recommendation of the  
Board of Professional Conduct  
of the Supreme Court of Ohio**

**Respondent**

**Cincinnati Bar Association**

**Relator**

**OVERVIEW**

{¶1} This matter was heard on August 10, 2015 in Columbus before a panel consisting of Judge William Klatt, Alvin Bell, and McKenzie K. Davis, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing, represented by George Jonson. James Brockman, Ann Lugbill, and Edwin Patterson appeared on behalf of Relator.

{¶3} After a lengthy discovery period and multiple motions, the matter was condensed into a one-day hearing. The parties filed three sets of stipulations. The parties agreed on matters of fact, mitigation, and a set of exhibits. Below is a recitation of the facts agreed to by the parties.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶4} Respondent was admitted to the practice of law in the state of Ohio on November 8, 2004 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶5} In 2005, Respondent was admitted to the practice of law in the state of Kentucky.

{¶6} Respondent has received no previous attorney discipline in Ohio or Kentucky.

{¶7} In September 2005, Respondent became employed as an associate attorney at Thompson Hine, LLP (the “firm”) and remained so employed until July 2012.

{¶8} The firm was retained by The Stanley Works, Inc. (“Stanley Works”) at some time prior to September 2005 to provide certain legal services, mostly relating to environmental, health, and safety legal matters.

{¶9} Beginning prior to 2005 and continuing thereafter, Stanley Works was a publicly-traded company.

{¶10} Starting in 2005, Respondent provided certain legal services for Stanley Works as requested by the company or an outside agent, such as an environmental consulting firm. Respondent’s work for Stanley Works included, services consisting of searching publicly available databases (LEXIS and other data bases, including databases containing documents, records, and information concerning environmental-related issues and matters) for records relating to the subject of the search (these searches are known as environmental due diligence services). In numerous instances, Respondent understood that these environmental search assignments were part of Stanley Works’ “due diligence” research into companies, or their assets, that Stanley Works was considering the acquisition of, or were related to a divestiture Stanley Works was contemplating making.

{¶11} For general environmental matters, including environmental due diligence services, the firm provided legal services to Stanley Works on a flat-fee retainer basis.

{¶12} Respondent conducted environmental due diligence services related to proposed acquisition or mergers, or divestitures for Stanley Works typically at the direct request of Debi

Geyer, who eventually become the vice president of Environmental Health and Safety at Stanley Works.

{¶13} On occasion, Respondent performed environmental due diligence services at the request of Stanley Works' environmental consultant, WSP Environmental and Energy, Inc. ("WSP").

{¶14} Respondent worked with WSP in providing environmental due diligence services for Stanley Works and Stanley, Black & Decker on various projects over the years. Typically, in communication about a proposed acquisition, actual use of the target company's name was replaced by a code name. This was a step to protect the nature of the business venture and overall due diligence effort as confidential.

{¶15} In approximately November 2009, Stanley Works merged with Black & Becker and formed a new company, Stanley, Black & Decker, Inc. From that time forward, Respondent performed for Stanley, Black & Decker the same or similar legal services that he had performed for Stanley Works, including environmental due diligence services, sometimes in conjunction with WSP, for proposed mergers and acquisitions or divestitures by Stanley, Black & Decker, in the course and scope of his employment with the firm and under the same flat fee retainer basis.

{¶16} On October 21, 2010, John Simon, a WSP senior vice president, sent Respondent an electronic email requesting that he perform environmental due diligence services for "Project Icon," relating to a potential Stanley, Black & Decker transaction with InfoLogix, Inc. A true and accurate copy of the email is attached to the Sealed Confidential Stipulations as Exhibit 1. A true and accurate copy of the attachment to Exhibit 1 is attached to the Sealed Confidential Stipulations as Exhibit 2. Exhibit 2 was not current on October 21, 2010. Exhibit 2 had been prepared by or for Stanley, Black & Decker on or before October 15, 2010 and reflected the nonbinding terms

that had been agreed to on October 7, 2010. These documents were not prepared for Respondent and his environmental due diligence assignment, but for purposes related to the overall InfoLogix acquisition project. Prior to receiving this assignment from Simon on October 21, 2010, Respondent had no knowledge or information about InfoLogix and had never known about nor heard of the company.

{¶17} WSP Senior Vice President Simon, at the request of Stanley, Black & Decker Vice-President Geyer, provided Respondent Exhibits 1 and 2 for the purposes of providing Respondent information about his assigned environmental due diligence services for Stanley, Black & Decker.

{¶18} On October 21, 2010 through October 26, 2010 and thereafter, Respondent knew and understood that Stanley, Black & Decker's interest in potentially acquiring InfoLogix contained in Exhibit 2, was nonpublic and confidential. Respondent knew and understood that Stanley, Black & Decker's interest or past interest in potentially acquiring InfoLogix was nonpublic and confidential client information from October 21, 2010 until it was made public, on December 15, 2010.

{¶19} At no time from September 2010 to December 15, 2010 did Stanley, Black & Decker Vice-President Geyer, WSP Senior Vice-President Simon, or any other agent of Stanley, Black & Decker or WSP tell Respondent that the Stanley, Black & Decker confidential information provided to Respondent on October 21, 2010 and thereafter regarding the proposed InfoLogix acquisition ceased to be nonpublic and confidential information.

{¶20} Respondent received Stanley, Black & Decker's nonpublic and confidential information from WSP's Senior Vice-President Simon in the course and scope of his employment with Thompson Hine and as an attorney for Stanley, Black & Decker.

{¶21} Additional electronic e-mails relating to Respondent's work on the environmental due diligence services for Project Icon occurred between October 22, 2010 and November 5, 2010. True and accurate copies of those emails are attached to the Sealed Confidential Stipulations as Exhibits 3-7. As of October 21, 2010, Respondent knew and understood that the information given to him about Stanley, Black & Decker's proposed acquisition of InfoLogix was considered confidential by Thompson Hine and by Stanley, Black & Decker.

{¶22} After November 5, 2010, there were no further written or oral communications between Respondent, and Vice-President Geyer, Senior Vice-President Simon, or anyone else at Stanley, Black & Decker or WSP relating to the potential acquisition of InfoLogix by Stanley, Black & Decker.

{¶23} Neither Thompson Hine nor Respondent was engaged to work on the acquisition of InfoLogix by Stanley, Black & Decker, except to conduct the environmental due diligence services.

{¶24} At no time, from October 21, 2010 through December 16, 2010 did Respondent ever seek consent or permission from Senior Vice-President Simon, Vice-President Geyer, anyone else at Stanley, Black & Decker or WSP, or Thompson Hine, to use any client nonpublic or confidential information for securities trading purposes.

{¶25} On October 21, 2010, InfoLogix received notice and disclosed on the date via press release and filing with the Securities and Exchange Commission, that a NASDAQ hearing panel determined to delist InfoLogix common stock from the NASDAQ stock market. Trading of the common stock was suspended effective with the open of trading on October 21, 2010. These actions were a result of the InfoLogix's noncompliance with the minimum \$2,500,000 stockholders' equity requirement. InfoLogix was advised by Pink OTC Markets, which operates

an electronic quotation services for securities traded over-the-counter (“OTC”), that its securities were eligible for quotation on the OTCQB, effective with the opening of trading on October 21, 2010. Respondent was aware of this financial development on or about October 21, 2010. Respondent made no inquiry of anyone at Stanley, Black & Decker or WSP as to whether the InfoLogix delisting impacted Stanley, Black & Decker’s proposed InfoLogix acquisition. On October 26, 2010, Respondent was contacted by Simon to inquire about the status of his Project Icon environmental due diligence services assignment. After that inquiry, Respondent completed the tasks involved and provided the results to WSP Environment and Energy’s Simon and Stanley, Black & Decker’s Geyer.

{¶26} True and accurate copies of reports for InfoLogix that are publicly available on the Securities and Exchange Commission’s Edgar’s website, and that may be relevant to this matter, are marked as Stipulated Ex. A.

{¶27} Respondent bought and sold securities in three separate accounts between 2007 and 2011. Those accounts include a Joseph Stevens/National Securities brokerage account, (Exhibit 21); an E-Trade brokerage account, (Exhibit 22); and a brokerage account with Charles Schwab, which was an account maintained by the Firm under a 401(k) plan, for the benefit of Respondent, (Exhibit 23).

{¶28} Exhibit 23 reflects trading in the common stock of InfoLogix by Respondent between October 28, 2010 and December 16, 2010 in his Thompson Hine 401(k) account.

{¶29} Respondent’s first purchase of InfoLogix common stock involved a purchase of 10,000 shares of InfoLogix common stock on October 28, 2010 and was a market order (*i.e.*, would be filled at the market price). Those shares were purchased at a price of \$2.84 for 9,500 shares, and a price of \$2.77 for 500 shares.

{¶30} The additional purchases by Respondent of InfoLogix stock, starting on November 8, 2010 through November 16, 2010, were on a limit purchase order basis (*i.e.* would be filled if the stock was trading at or below the limit price). By November 16, 2010, Respondent had acquired 35,000 shares of InfoLogix common stock as follows:

<u>Date</u>	<u>Number of Shares</u>	<u>Price</u>
11/8/2010	2500	\$2.15
11/9/2010	6100	\$2.15
11/9/2010	5300	\$2.00
11/12/2010	3229	\$1.95
11/15/2010	2347	\$1.95
11/16/2010	4524	\$1.95

{¶31} On November 18, 2010, with InfoLogix's stock price falling, Respondent placed a day-limit order to sell 25,000 shares of InfoLogix common stock at a limit price of \$1.35 per share (*i.e.* the order would be filled if the stock was trading at or above the limit price). The order was partially filled and resulted in Respondent selling 13,510 shares of such stock for at \$1.35 per share for a loss of \$17,701.36. After that sale, Respondent owned 21,490 shares.

{¶32} Respondent did not buy or sell InfoLogix stock in any account other than his Thompson Hine 401K account.

{¶33} On December 15, 2010, after the stock market closed, Stanley, Black & Decker publicly announced, via press release and Securities and Exchange Commission filing, that it was acquiring InfoLogix for consideration and valuation at \$4.75 per share. The press release is marked as Stipulated Ex. B.

{¶34} A true and accurate copy of the transitional document, under which Stanley acquired InfoLogix, is marked as Stipulated Ex. C.

{¶35} On December 16, 2010, Respondent conducted an internet search for a lawyer with expertise in SEC matters. As a result of that search, he contacted David R. Chase of Ft. Lauderdale, Florida for advice. Prior to December 16, 2010, Respondent neither sought nor obtained any advice of counsel regarding the propriety of his 2010 purchases and sales of InfoLogix securities. Respondent did not receive any legal advice on any topic prior to December 16, 2010 from Chase and did not know or know about Chase prior to December 16, 2010.

{¶36} On December 16, 2010, upon the advice of counsel, Respondent sold his remaining 21,490 shares of InfoLogix common stock, for a pre-tax profit of \$56,291.97.

{¶37} A written engagement agreement, by and between David R. Chase, PA and Respondent, dated December 17, 2010 is marked as Stipulated Ex. D.

{¶38} Checks written by Respondent to David Chase, PA dated December 20, 2010 and January 14, 2011 (with personal identifying information redacted) are marked as Stipulated Ex. E.

{¶39} From the above-stipulated conduct, Relator filed the complaint and three amended complaints, the last of which was filed on August 10, 2015 the day of the hearing.

### **Alleged Rule Violations**

{¶40} Relator's third amended complaint alleged the following rule violations.

{¶41} Prof. Cond. R. 1.6(a) [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 implied authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule].

{¶42} Relator asserted a violation of Prof. Cond. R. 1.6(a) “by using confidential information of his client’s proposed purchase of InfoLogix for his own advantage without his client’s consent and without any disclosure to the client.”

{¶43} Prof. Cond. R. 1.8(b) [a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent].

{¶44} Relator asserted a violation of Prof. Cond. R. 1.8(b) “by using information relating to the representation of a client for his own pecuniary gain without the informed consent of the client.”

{¶45} Prof. Cond. R. 8.4(b) [a lawyer shall not commit an illegal act that reflects adversely on the lawyer’s honesty or trustworthiness].

{¶46} Relator asserted a violation of Prof. Cond. R. 8.4(b) “by committing an illegal act that reflects adversely on his honesty or trustworthiness” (*e.g.* R.C. 1333.81 and R.C. 2317.03).

{¶47} Relator asserted a violation of Prof. Cond. R. 8.4(c) “by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

### **Analysis of Each Alleged Rule Violation**

#### *Prof. Cond. R. 1.6(a)*

{¶48} Relator argued at the hearing and in subsequent post-hearing briefs that Respondent violated Prof. Cond. R. 1.6(a) by providing the SEC with confidential client information and by testifying before the SEC. However, Relator never presented any factual allegations related to information or testimony provided to the SEC in violation of Prof. Cond. R. 1.6(a) in any of the three complaints it filed, the last of which was filed the day of the hearing. Additionally, all of the discovery correspondence between the parties regarding Prof. Cond. R. 1.6(a) allegation, prior to the

hearing, focused on Respondent's trading activity and his use of the confidential information, and not Respondent's conduct with regard to disclosing confidential information to the SEC.

{¶49} At the hearing and in his post-hearing briefs, Respondent requested that the alleged Prof. Cond. R. 1.6(a) rule violation be dismissed for failure to give Respondent adequate notice of the charge. Relator never addressed Respondent's request that the alleged rule violation be dismissed at the hearing or in either of the two post-hearing briefs it filed.

{¶50} The panel relies on *Columbus Bar Assn. v. Dougherty*, 99 Ohio St.3d 149, 2003-Ohio-2672 as authority. In *Dougherty*, the relator's complaint had alleged that the respondent notarized a signature she had not witnessed on an application for a liquor permit. However, at the hearing, the relator asserted for the first time a new allegation that the respondent had attempted to defraud the Ohio Division of Liquor Control. The respondent claimed the relator did not allege any facts in support of a charge that she had attempted to defraud the Ohio Division of Liquor Control.

{¶51} The Court held that the relator's complaint was deficient for failure to tie the factual allegations to the charge in the complaint. The Court specifically stated: "The complaint, therefore, did not give respondent sufficient notice of the fraud with which relator intended to charge her." *Id.* at ¶11.

{¶52} Similar to *Dougherty*, Respondent was not given sufficient notice of the conduct relating to the alleged activity Relator intended to charge. All filings by Relator related to Prof. Cond. R. 1.6(a) violation made prior to the hearing focused solely on Respondent's trading activity. In addition, all of Relator's arguments at the hearing and post-hearing briefs addressed only Respondent's SEC-related activity.

{¶53} The panel concludes none of Relator's four complaints provides Respondent with sufficient notice of the activity with which Relator intended to charge.

{¶54} Therefore, the panel dismisses Prof. Cond. R. 1.6(a) allegation.

*Prof. Cond. R. 1.8(b)*

{¶55} Relator asserted Respondent violated Prof. Cond. R. 1.8(b) by using confidential client information for his personal use to the disadvantage of the client without disclosure or permission.

{¶56} In order to find a violation of Prof. Cond. R. 1.8(b), there must be evidence of (1) the use of confidential information of a client, and (2) disadvantage to the client.

{¶57} Respondent claimed he did not use the confidential information of the client when he purchased the InfoLogix stock. Respondent claimed that while he possessed the client confidential information, he based his purchasing of the stock on other factors, including the delisting and general volatility of the stock. The panel finds this argument unpersuasive and therefore concludes Relator satisfied the first prong necessary to find a violation of Prof. Cond. R. 1.8(b).

{¶58} Relator appropriately pointed out that monetary disadvantage is not required to prove the second prong of the rule. Thus, any proven disadvantage proven to the client is sufficient.

{¶59} Relator relied heavily on the standard the Court laid out in *Akron Bar Assn. v. Holder*, 102 Ohio St.3d 307, 2004-Ohio-2835 to prove the disadvantage prong of Prof. Cond. R. 1.8(b). In *Holder*, the respondent provided information of his client's criminal record to a potential employer and the public as whole. The Court analyzed former DR 4-101(A) [now Prof. Cond. R. 1.8] and stated that the detrimental effect requires no more than a probability of disclosure of the client's secrets will be embarrassing. The Court found that the revelation of the client's prior criminal record violated DR 4-101(A) because it worked to the disadvantage of the client. *Id.* at ¶40.

{¶60} The facts in *Holder* are significantly different from the matter at hand. The relator in *Holder* was able to adequately demonstrate the probability of harm from the disclosure of his client's criminal record.

{¶61} Relator's evidence of disadvantage to the client, on the other hand, consisted of the deposition testimony of a Thompson Hine lawyer, Tom Feher. Feher opined that he believed the client (Stanley, Black & Decker) was forced to participate in an SEC process. Feher Depo. p. 56. The SEC process Feher alluded to was responding to subpoenas and producing "a witness or two, as well." *Id.* No additional evidence to further Feher's presumption was offered by Relator.

{¶62} Relator's evidence, or lack thereof, differs from the evidence of disadvantage to the client in *Holder*. Relator failed to provide any additional evidence of any disadvantage for the client. Stanley, Black & Decker employees or offices did not testify nor provide any deposition in this matter. While the panel acknowledges the threshold under *Holder* is low, simply relying on the opinion of a lawyer, who has no firsthand knowledge of disadvantage to the client, is insufficient. The panel is unable to conclude that Relator's submission of a general claim by a third party that the client had to participate in an SEC process, without any additional information, meets the necessary clear and convincing standard.

{¶63} Therefore, the panel dismisses Prof. Cond. R. 1.8(b) allegation.

Prof. Cond. R. 8.4(b)

{¶64} Relator asserts Respondent violated Prof. Cond. R. 8.4(b) by violating R.C. 1333.81 and 2717.03.

{¶65} R.C. 1333.81 states:

No employee of another, who in the course and within the scope of his employment receives any confidential matter or information, shall knowingly, without consent of his employer, furnish or disclose such matter or information to any person not privileged to acquire it. (Emphasis added.)

{¶66} R.C. 2717.03 states, in part:

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by expressing consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

\* \* \*

{¶67} Respondent was not criminally convicted with either of these violations. However, it is well settled that a criminal conviction is not necessary to warrant a Prof. Cond. R. 8.4(b) violation. *Cincinnati Bar Assn. v. Young*, 89 Ohio St.3d 306, 2000-Ohio-160.

{¶68} Additionally, Respondent's employment with the law firm and not with Stanley, Black & Decker does not provide any protection from a violation of these code sections. Respondent admitted he obtained the confidential information in the course of his employment with Thompson Hine.

{¶69} Respondent admitted to providing client confidential information to the SEC and to testifying before the SEC regarding client confidential information pursuant to a subpoena. However, Stanley, Black & Decker provided the SEC with the information prior to Respondent's disclosure to the SEC.

{¶70} Respondent claimed various defenses to the disclosure of the confidential information.

{¶71} First, Respondent claimed he disclosed confidential information to his attorney in order to obtain legal advice in compliance with his ethical obligations. The panel agrees with Respondent's position that providing the confidential information to his own lawyer in order to obtain legal advice falls under the exception stated in Prof. Cond. R. 1.6(b)(4). Therefore, the panel does not find a violation under Prof. Cond. R. 8.4(b) based on Respondent's disclosure of client confidential information to his attorney.

{¶72} Second, Respondent claimed he disclosed confidential information to the SEC in response of a lawfully issued subpoena. The existence of a lawfully issued subpoena does not absolve Respondent of his duty of confidentiality to his client under Prof. Cond. R. 1.6(a). Prof. Cond. R. 1.6(b)(6) provides an exception if the client confidential information was disclosed, in order to comply with other law or court order. A subpoena is a common discovery device used by parties to obtain information. Although Stanley, Black & Decker, unbeknownst to Respondent, may have disclosed the information to the SEC, Respondent made no attempt to protect the client information by asserting the attorney-client privilege. See, Prof. Cond. R. 1.6, Comment [15].

{¶73} Lastly, Respondent claimed Prof. Cond. R. 1.6(b)(5) permitted the disclosure. Prof. Cond. R. 1.6(b)(5) allows disclosure: "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil

claim against a lawyer based upon the conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client." At the time of the disclosure, Respondent was not establishing a claim or defense or responding to an allegation in any proceeding based on the client's conduct or Respondent's representation of a client. Therefore, the panel disagrees with Respondent's position.

{¶74} The panel concludes the last two defenses offered by Respondent do not excuse his conduct. The intent of the exceptions listed in Prof. Cond. R. 1.6 is to assist a lawyer in exercising professional discretion when the lawyer is acting as a conduit of information for his client. Here, Respondent was not acting as a conduit of information. Rather, Respondent utilized confidential information for his own pecuniary gain. Then, in an effort to defend himself from that conduct, he disclosed the information to the administrative agency investigating his conduct. Both the use of the information and the subsequent disclosure to the SEC were designed to benefit Respondent and had nothing to do with the client. The exceptions listed in Prof. Cond. R. 1.6 were designed to protect the lawyer when the client's conduct, not the lawyer's, forces the lawyer into an ethical dilemma. Respondent should not benefit from exceptions when only acting on behalf of himself.

{¶75} Respondent points to Comment [10] of Prof. Cond. R. 1.6 as authority for his reliance on the exceptions. The full wording of Comment [10] states "Where a legal claim or disciplinary charge alleges complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client, the lawyer may respond to the extent the lawyer reasonably believes to establish a defense." Specifically, the inclusion of the phrase "complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client" indicates an intent

to clarify the requirement that the lawyer must be acting in concert with or on behalf of the client in order to be eligible for the exceptions listed in Prof. Cond. R. 1.6.

{¶76} While Respondent obtained the confidential information during the course of the representation, Respondent used and disclosed the information in his individual capacity for pecuniary gain. The misconduct of Respondent did not “involv[e] representation of the client.” The misconduct of Respondent was committed after he obtained the confidential information from the client and used it in his own individual capacity, not while serving as the lawyer for Stanley, Black & Decker.

{¶77} Finally, Respondent claims the client waived the attorney-client privilege prior to the time Respondent provided the confidential information to and testified before the SEC. Respondent testified that he only became aware that Stanley, Black & Decker had disclosed information to the SEC during the course of his sworn testimony before the SEC.

{¶78} The voluntary disclosure of information by Stanley, Black & Decker to the SEC may constitute a waiver of the attorney-client privilege under R.C. 2317.02. Evidence was not presented that indicated the extent of the disclosure of information to the SEC by either party. Moreover, the relevant case law suggests that a waiver by the client in these circumstances is valid. *MA Equip. Leasing I, L.L.C. v. Tilton*, 10th Dist. No. 12-AP-564, 2012-Ohio-4668, ¶20, citing *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, ¶65 (1st Dist. 2004), citing *Mid-Am. Natl. Bank & Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 599 N.E.2d 699 (6th Dist. 1991), and *United States v. Skeddle*, 989 F.Supp. 905, 908 (N.D. Ohio 1997). *See also In re Teleglobe Communications Corp. v. BCE Inc.*, 493 F.3d 345, 361 (3d Cir. 2007) (“Disclosing a communication to a third party unquestionably waives the privilege.”). Therefore, Stanley, Black & Decker’s

waiver, despite being unknown to Respondent until he testified before the SEC, prevents the panel from finding that Respondent violated the attorney-client privilege under R.C. 2317.02.

{¶79} The panel is faced with determining whether Respondent violated R.C. 1333.81, and whether such a violation equates to a Prof. Cond. R. 8.4(b) violation.

{¶80} Respondent possessed confidential client information provided to him in the course of his employment and willingly provided that information to the SEC, without the consent of his employer, for the sole purpose of limiting any exposure he had in an investigation involving insider trading. This is a clear violation of R.C. 1333.81 and thus constitutes the commission of an illegal act for purposes of Prof. Cond. R. 8.4(b). The act of disclosing confidential client information obtained by Respondent in the course of his employment reflects adversely on Respondent's honesty and trustworthiness. Therefore, the panel concludes, by clear and convincing evidence, that Respondent violated Prof. Cond. R. 8.4(b).

*Prof. Cond. R. 8.4(c)*

{¶81} Relator alleged Respondent violated Prof. Cond. R. 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Specifically, Relator alleged that Respondent obtained confidential client information, which constitutes nonpublic confidential information, and then purchased stock based on the nonpublic information. Relator further alleged Respondent intentionally withheld the purchasing of the stock from his client and employer.

{¶82} Respondent, on the other hand, admitted he obtained confidential client information, which constitutes nonpublic confidential information, and purchased the stock, which was the subject of the nonpublic confidential information. However, Respondent testified that the purchase was based on other factors including the delisting and the volatility of the stock. Respondent offered evidence of other purchases of stock where a company was delisted and volatility were present.

{¶83} Additionally, Respondent presented evidence that Respondent believed the potential deal with InfoLogix and Stanley, Black & Decker was not moving forward. Therefore, Respondent contends, nonpublic confidential information was not relied upon to make his purchase.

{¶84} Finally, Respondent asserts Relator did not prove the necessary intent requirement to find a Prof. Cond. R. 8.4(c) violation.

{¶85} The panel is not persuaded by any of Respondent's arguments. First, the panel concludes Respondent purchased the stock based on the nonpublic confidential information. Under Respondent's logic, a purchaser of stock with insider information could simply assert the purchase was based on some other factor, and insider trading could never be proved.

{¶86} Secondly, the panel cannot accept Respondent's claim that he believed the deal was not moving forward. Respondent relies on the wording of emails and artificial deadlines as evidence. However, Respondent acknowledged such deadlines frequently change. The panel concludes Respondent knew or should have known the uncertainty of the deal would preclude his purchase of the stock. Additionally, Respondent never attempted to obtain informed consent from the client or employer to purchase the stock.

{¶87} Lastly, the panel cannot accept Respondent's claim that the necessary intent requirement was not proven. Respondent's argument rests on the belief that Respondent did not purchase the stock based on the insider information and the belief the deal was not moving forward. As discussed above, the panel does not accept either argument.

{¶88} Therefore, the panel concludes Respondent violated Prof. Cond. R. 8.4(c) by using insider information from a client to purchase stock for his own pecuniary benefit. This inherent dishonest and deceitful behavior not only meets the necessary requirements of the rule, but also the public policy of the rule. The attorney-client privilege is the cornerstone of any attorney client

relationship. Without the firm belief that an attorney will not use confidential client information for his own pecuniary benefit, the legal profession becomes nothing more than an occupation.

### **AGGRAVATION, MITIGATION, AND SANCTION**

{¶89} The guidelines governing mitigation and aggravation in attorney disciplinary cases are found in Gov. Bar R. V, Section 13(B) and (C), which list those factors that may be considered in recommending either a more or less severe sanction than is recommended by either party.

#### **Mitigation**

{¶90} The parties offered the following mitigating factors in their joint stipulations:

- The absence of a prior disciplinary record;
- Imposition of other penalties or sanctions by Respondent's payment to the SEC of \$56,292 in penalties, as well full restitution of all profits made, plus interest, in the amount of \$61,414.97, prior to the institution of these proceedings;
- Respondent has cooperated in these proceedings; and
- Prior to the SEC proceedings, Respondent had a good reputation in the legal community and has presented letters attesting to his good character which are marked as Stipulated Ex. F.

#### **Aggravation**

{¶91} Neither party offered any aggravation. However, the panel concludes Respondent exhibited a dishonest and selfish motive by virtue of his use of confidential client information for his own pecuniary benefit. Further, Respondent revealed confidential client information to the SEC without notifying the client, attempting to obtain a confidentiality waiver from the client, or contesting the subpoena.

## Recommended Sanction

{¶92} Relator recommended Respondent receive an actual suspension from the practice of law. Respondent requested the charges be dismissed. Respondent also suggested, that if one or more of the charges are not dismissed, that a public reprimand or fully stayed, six month suspension is appropriate.

{¶93} The primary purpose of the disciplinary sanction is not to punish the offender, but to protect the public. *Disciplinary Counsel v. O'Neil*, 103 Ohio St.3d 204, 2004-Ohio-4704. Furthermore, the Court has consistently stated each case presents unique facts and circumstances and all relevant factors should be considered in determining the appropriate sanction. *Disciplinary Counsel v. Streeter*, 138 Ohio St.3d 513, 2014-Ohio-1051, *Disciplinary Counsel v. Oberholtzer*, 136 Ohio St.3d 314, 2013-Ohio-3706, *Disciplinary Counsel v. Doellman*, 127 Ohio St.3d 411, 2010-Ohio-5990.

{¶94} This matter certainly underscores the Court's observation that each case does present its own set of unique facts and circumstances. Each party offered authority for its recommended sanction; however, because the panel dismissed the alleged Prof. Cond. R. 1.6(a) and Prof. Cond. R. 1.8(b) rule violations, that authority provides little guidance. The panel is left with recommending a sanction for Prof. Cond. R. 8.4(b) and Prof. Cond. R. 8.4(c) violations.

{¶95} A review of appropriate case law on Prof. Cond. R. 8.4(b) and Prof. Cond. R. 8.4(c) violations reveals three matters for consideration.

{¶96} *Cincinnati Bar Assn. v. Farrell*, 119 Ohio St.3d 529, 2008-Ohio-4540. In *Farrell*, the respondent created and forged several documents (employment offers) and signed and notarized his wife's signature on a \$50,000 home equity mortgage. All of the forgeries were designed to create the illusion he had accepted a higher paying attorney position.

{¶97} The respondent stipulated to violating R.C. 2921.13(A)(8) and thus DR 1-102(A)(3) [corresponding to Prof. Cond. R. 8.4(b)]. The respondent also stipulated to violating DR 1-102(A)(4) [corresponding to Prof. Cond. R. 8.4(c)]. The Court stated the illegal act in violation of R.C. 2921.13(A)(8) was a breach of the duty to the public, the legal profession, and judicial system to obey the law. The breach “lessens public confidence in the legal profession because obedience of the law exemplifies respect for the law.” Citing *Cleveland Bar Ass’n v. Stein*, (1972) 29 Ohio St.2d 77. The Court noted the mitigating factors of lack of prior discipline, cooperation during the disciplinary process, and remorse were not enough to warrant leniency. Additionally, the Court specifically acknowledged the lack of evidence of the respondent’s good character. The aggravating factors the Court included were: dishonest or selfish motive, pattern of misconduct, multiple offenses, and failure to make restitution. The Court imposed a two-year suspension, with one year stayed on conditions.

{¶98} In *Mahoning Cty. Bar Assn. v. Helbley*, 141 Ohio St.3d 156, 2014-Ohio-5064, the respondent pled guilty and was convicted on a federal felony charge for his role in wire fraud in furtherance of a fraudulent mortgage scheme. The respondent had acted as a title agent in the scheme.

{¶99} The Court found the respondent violated Prof. Cond. R. 8.4(b) and Prof. Cond. R. 8.4(e). The Court noted the mitigating factors of no prior misconduct, lack of selfish motive, offer of restitution, full and free disclosure, and evidence of good character. The Court found the aggravating factors of multiple offenses and failure to make full restitution.

{¶100} The Court, relying on the nearly identical facts of *Mahoning Cty. Bar Assn. v. Wagner*, 137 Ohio St.3d 545, 2013-Ohio-5087, imposed a sanction of indefinite suspension, credit for time served under the felony suspension.

{¶101} In *Cleveland Metro. Bar Assn. v. Hurley*, 143 Ohio St.3d 69, 2015-Ohio-1568, the respondent, as an assistant county prosecutor, had access to the Ohio Law Enforcement Gateway. Through that access, the respondent illegally searched the Ohio Law Enforcement Gateway 30-40 times to obtain information about his ex-wife and children.

{¶102} Hurley pled guilty to five counts including a fifth-degree felony and misdemeanors for aggravated menacing and threatening his ex-wife, and the Court found that the respondent violated Prof. Cond. R. 8.4(b) and Prof. Cond. R. 8.4(c). The Court noted the mitigating factors of cooperation, self-reporting, and other penalties. The aggravating factors present in *Hurley* were selfish and dishonest motive. The Court imposed a sanction of two-year suspension with conditions.

{¶103} None of the cited case law provides the panel with clear guidance as this matter has distinguishing characteristic from each of the cases. However, the cases suggest a baseline presumption of a suspension from the practice of law for attorneys who violate the law. The baseline presumption can be offset depending on the significance of mitigation and aggravation.

{¶104} The key distinguishing factor that separates this matter from *Helbley* and *Hurley* is that the respondents in both cases were found guilty by a court of law. Respondent, having not been found guilty by a court of law, eliminates those cases from providing guidance.

{¶105} *Farrell*, on the other hand, while not factually similar, offers assistance in that the rule violations are based on a finding by the panel that the Respondent violated the law. Additionally, the panel found Farrell's action in forging documents and signatures was deceitful. Both aspects of *Farrell* are present in this matter.

{¶106} The mitigating factors present in this matter warrant a lesser sanction than in *Farrell*. The respondent in *Farrell*, committed a number of forgeries and carrying the deception on over the course of a couple of years. Respondent in this matter committed one act of deception. Additionally,

Respondent in this matter had significantly more mitigating factors, including nearly 20 letters of Respondent's good character.

{¶107} However, the panel cannot completely stay the sanction. The Court in *Farrell* was clear that violations of the law are breaches of the public trust and lessening the public confidence of the legal profession cannot go unaddressed. A fully stayed suspension would send the wrong message both to our profession and the public as a whole. Therefore, the panel concludes the appropriate sanction is a two-year suspension from the practice of law, with the final 18 months stayed on the condition that Respondent refrains from engaging in 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 12, 2016. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Christopher David Wiest, be (1) suspended from the practice of law in Ohio for two years, with the final 18 months stayed on condition that Respondent refrains from engaging in further misconduct, and (2) ordered to 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**