

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel

Relator,

v.

Christopher T. Cicero

Respondent.

CASE NO. 2012-0278

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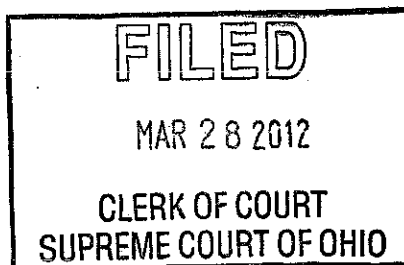
**MOTION TO REMAND TO BOARD FOR RECONSIDERATION OF  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION  
AND TO EXTEND OR VACATE BRIEFING SCHEDULE**

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Now comes Respondent Christopher T. Cicero, and hereby moves this Court for an Order remanding this matter to the Board of Commissioners on Grievances and Discipline and directing the Board to reconsider its Findings of Fact, Conclusions of Law and Recommendation in light of the corrected Transcript, revealing that Mr. Cicero did not concede a critical fact in dispute during his testimony. As will be discussed, the transcript of the proceedings contained a material inaccuracy at page 238 upon which the Panel and Board heavily relied in their determination that Relator met its burden of proof of clear and convincing evidence.

As the present briefing schedule requires that Respondent's Objections to the Board's Report be filed by April 4, 2012, Respondent additionally requests that the briefing schedule be extended or vacated to permit the Court to rule upon the instant Motion.

## **MEMORANDUM IN SUPPORT**

### **I. STATEMENT OF THE CASE**

This case arises from Disciplinary Counsel's allegations that Christopher T. Cicero violated the Ohio Rules of Professional Conduct when he revealed information that he allegedly learned in connection with an alleged consultation with Edward Rife, who was, at the time, under investigation that led to a federal indictment for drug crimes. *See*, Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline (Board Report, Exhibit 1).

This case was heard on November 14, 2011, by a three-person panel of the Board of Commissioners on Grievances and Discipline. Relator called as witnesses, Mr. Cicero, on cross, Mr. Rife and attorney Stephen Palmer, who represented Mr. Rife in the federal drug case. *Id.* at ¶ 1.

Mr. Cicero testified again in his case and called as a witness, Joseph Epling, a longtime client of Mr. Cicero, who as the Panel noted, initially called Mr. Cicero and told him about the raid on Mr. Rife's home, the OSU memorabilia, and, most importantly, conveyed his concern that he could be drawn into the drug investigation along with Mr. Rife. There was no dispute that Mr. Epling was present during the conversations at issue. *Id.* at ¶¶ 24-28. Mr. Cicero also offered six character letters, written by four judges and a chief sheriff's deputy, attesting to Mr. Cicero's integrity and competence. *Id.* at ¶ 1.

The Panel, in its Report, recognized that Mr. Cicero denied the truth of much of Mr. Rife's testimony, however, the Panel erroneously determined that Mr. Cicero conceded on the witness stand that that he had quoted Mr. Rife a legal fee to represent

him. *Id.* at ¶¶ 21-23. In fact, the Panel, in its Report, quoted Mr. Cicero's testimony from the page 238 of the transcript as follows:

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

Respondent: No. The purpose of the meeting, Mr. Caligiuri, was so that he could come in and tell me that Mr. Epling didn't have any involvement with his federal drug investigation.... He never came into my office to ask me to represent him. He never came into my office to ask me to get back OSU memorabilia. I **quoted him a legal fee** and just that's it. *Id.* at 237-238. (Emphasis added).

*Id.* at ¶ 21. As the corrected transcript reflects, Mr. Cicero actually testified "[h]e never came to my office to ask me to represent him. He never came to my office to ask me to get back OSU memorabilia. I **never quoted him a legal fee**, and that's just it."

(Emphasis added). Board's Motion to Supplement the Record and Corrected Transcript Pages, Exhibit 2.

Based on this erroneous testimony, the Panel found that Relator proved by clear and convincing evidence that Respondent offered to represent Mr. Rife in the criminal case for a fee of \$10,000. (Board Report at ¶ 23). This fact alone could have formed the basis for a lawyer-prospective client relationship and the attending ethical duties.

Accordingly, this is a significant development because without this "concession" the only evidence presented to the Panel that Mr. Rife was a prospective client was from Mr. Rife.

Given that the Panel highlighted by specifically quoting this erroneous testimony in reaching its determination that clear and convincing evidence supported the finding of ethical rule violations, Respondent requests that this Court remand this case to the Board

and direct the Board to reconsider its Findings of Fact, Conclusions of Law and Recommendation.

As the present briefing schedule requires Respondent's Objections to the Board's Report to be filed by April 4, 2012, Respondent requests that the Briefing schedule be extended or vacated to permit the Court to rule upon this important Motion.

## **II. ARGUMENT**

Remanding this matter to the Board of Commissioners on Grievances and Discipline is legally proper because (a) the Panel and the Board premised their determinations on erroneous information and (b) to ensure that the Panel's and Board's recommendation is based on clear and convincing evidence. Given that the Board has filed a Motion to Supplement the Record, the existing record is inconsistent with determinations of the Panel and the Board that Mr. Cicero conceded that he quoted Mr. Rife a legal fee. As explained below, the Panel and Board should therefore reconsider their determinations before this matter is submitted to this Court for final decision.

### **A. Error in Hearing Transcript**

After this Court issued an order to show cause, the Court Reporter determined that there were inaccuracies in the hearing transcript, and on March 20, 2012, the Board of Commissioners on Grievances and Discipline properly moved to supplement the record. (See, Exhibit 2). The Board's Motion to Supplement the Record is important because the Panel and Board premised their findings and conclusions that Mr. Cicero violated Prof. Cond. Rule 1.18 (revealing information learned from consultation with a prospective client) and Prof. Cond. Rule 8.4 (h) (conduct adversely reflecting upon fitness), on

erroneous information. Remanding the matter to the Board is proper because amendments to the record should be made prior to this Courts consideration and final order. Gov. Bar R. V,

(11) (D) states in relevant part:

The process of procedure under this rule in regulations approved by the Supreme Court shall be a summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report, or an order to show cause may be made at any time prior to the final order of the Supreme Court. The party affected by the amendment shall be given reasonable opportunity to meet any new matter presented.

Gov. Bar R. V (11)(D). Additionally, there is precedent for remanding the matter to the Board where this Court has issued its order to show cause and the interests of justice require additional consideration by the Board before this Court gives a matter final consideration. *Butler County Bar Association v. Portman*, 116 Ohio St.3d 1450, 2007-Ohio-6842 (Court remanding matter to board for additional testimony and consideration of the matter).

**B. Requirement of Clear and Convincing Evidence**

Mr. Cicero's legal interests are undoubtedly affected by the correction to the transcript and the Panel and the Board should consider whether the Relator met its burden of clear and convincing proof of an ethical violation, given this significant development. According to the Panel many disputed issues were simply Mr. Cicero's word against Mr. Rife's. The Panel, however, outlined only four pieces of evidence it found pertinent to its conclusion that a "lawyer-client relationship" was discussed between Mr. Cicero and Mr. Rife: (1) statements in an email to Coach Tressel; (2) admission during testimony that

Mr. Cicero quoted a \$10,000 fee; (3) the testimony of Mr. Rife; and, (4) the collaborating” testimony of Palmer regarding the \$10,000 fee. (Board Report at ¶ 25)

Mr. Cicero’s alleged “concession” regarding a legal fee can no longer be a basis for the Panel’s conclusion, as it did not occur. The third and fourth pieces of evidence are Mr. Rife’s testimony and his statement to attorney Palmer. Both, however, rely upon the credibility of Mr. Rife. Based upon the Panel’s findings that Mr. Rife was an admitted drug dealer; was previously convicted for felony forgery and possession of criminal tools, and, pled guilty to, and was convicted of federal charges of, drug trafficking and money laundering, the Panel could not have placed much, if any, reliance upon his testimony. (Board Report at ¶ 6).

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 Assn. v. Reid* (1999), 85 Ohio St.3d 327, 331, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the

syllabus. The proof of Mr. Cicero's alleged improprieties must meet this standard in order for him to be disciplined.

As Mr. Cicero's testimony was transcribed incorrectly and Mr. Rife cannot be trusted, the only evidence left to support the Panel's conclusion that a lawyer-client relationship was discussed is the email. Mr. Cicero explained that his intent in drafting the email was to conceal the identity of his client, Mr. Epling:

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. at 218). It is anticipated that Relator may argue that the Panel found that Mr. Cicero's testimony "at times" was disingenuous and not credible. (Board Report at ¶ 44). Notwithstanding, it is Relator's burden to prove its case by clear and convincing evidence. Moreover, the Panel did not single out any testimony of Mr. Cicero's for specific criticism. Thus, based upon the corrected transcript, Relator's entire case now rests upon the credibility of Mr. Rife.

The weight given to Mr. Epling's testimony, which was consistent with Mr. Cicero's and opposite Mr. Rife's testimony, was never commented on by the Panel. It should be noted that the Panel found that Mr. Epling was a former associate of Mr. Rife in the tattoo parlor business and had knowledge that Mr. Rife was a drug dealer. (Board



Report at ¶ 7).<sup>1</sup> The Panel did find that Mr. Epling called Mr. Cicero concerned about being drawn into the drug matter along with Mr. Rife. (Board Report at ¶ 11).

Mr. Cicero and Mr. Epling both testified that it was Mr. Epling who was the “potential client” and that the purpose of the meeting was to have Mr. Rife confirm to Mr. Cicero that Mr. Epling had no involvement in the drug matter. (Tr. at 180). In fact, the Panel found that Mr. Cicero gave advice to Mr. Epling, essentially that Mr. Epling did not need to hire a lawyer at that time. (Board Report at ¶ 25). Mr. Epling testified Mr. Cicero told [him] it would cost \$10,000 for Mr. Cicero to represent Mr. Epling, should he require representation. (*See*, Epling Affidavit ¶ 18).

The Panel found it significant that Mr. Cicero expressed other opinions at the meeting. (Board Report at ¶ 25-27). This, however, does not lead to the conclusion that Mr. Rife was the potential client. In fact, Mr. Epling testified that “Chris has always been my lawyer -- I’ve always used Chris for everything, ever since I met Chris.” (Tr. at 204). Therefore, Mr. Cicero could have discussed Mr. Rife’s criminal matter when meeting with Mr. Epling and Mr. Rife without forming a prospective client relationship with Mr. Rife. As long as Mr. Epling was Mr. Cicero’s client, any information provided by Mr. Rife, about Rife, would have no protection from disclosure. *See*, Prof. Cond. Rule 1.6. A lawyer has the ability, with his client’s permission, to provide an evaluation of a matter affecting a client for the use of someone other than the client. *See*, Prof. Cond. Rule 2.3.

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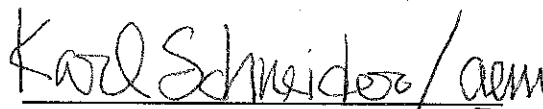
<sup>1</sup> It should be noted that the Panel found that Epling was a former associate of Mr. Rife in the tattoo parlor business and had knowledge that Mr. Rife was a drug dealer. (Board Report at ¶ 7). In fact, Mr. Rife claimed that he and Mr. Epling were supposed complete a drug purchase of 70 lbs of marijuana on the day of raid on Mr. Rife’s house. (Tr. at 97).

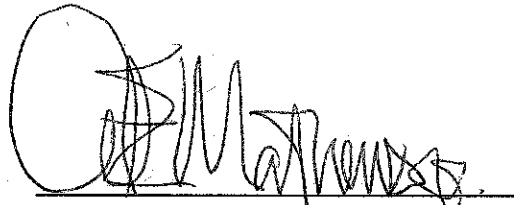
## CONCLUSION

After this Court issued an order to show cause, the Court Reporter determined that there were inaccuracies in the hearing transcript, and the Board properly moved to supplement the record. Absent the alleged concession that Mr. Cicero quoted Mr. Rife a fee of \$10,000, the Panel primarily relied upon Mr. Rife's testimony to conclude that Mr. Rife was Mr. Cicero's prospective client. Upon remand, the Panel and Board may find that Relator did not meet its burden of proof. Accordingly, remanding the matter to the Board for further consideration ensures that the Panel's and Board's recommendation is based on clear and convincing evidence.

Accordingly, Respondent Christopher T. Cicero respectfully urges the Court to remand this matter to the Board of Commissioner on Grievances and Discipline, so the Board may reconsider its Findings of Facts, Conclusions of Law and Recommendation, due to the material error in the transcript. Mr. Cicero further requests that the Court extend or vacate the current briefing schedule so that this court has sufficient time to make this important determination.

Respectfully submitted

  
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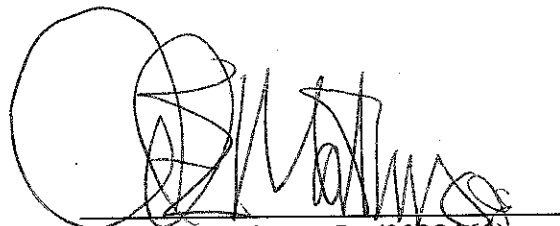
**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Motion to Remand to Board For Reconsideration of Findings of Fact, Conclusions of Law and Recommendation and to Extend or Vacate Briefing Schedule*, was served, by Regular U.S. Mail, postage prepaid, this 28<sup>th</sup> day of March 2012, upon the following:

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Alvin E. Mathews, Jr. (0038660)

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

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

**OVERVIEW**

{¶1} This matter was heard on November 14, 2011, before a panel consisting of Judge Thomas F. Bryant, Judge Lee H. Hildebrandt, Jr. and Lawrence R. Elleman, chair. None of the panel members is from the appellate district from which the complaint arose or served on the probable cause panel in this matter. Relator was represented by Joseph M. Caligiuri. Respondent was represented by Karl H. Schneider and Alvin E. Mathews, Jr. Relator called as witnesses the grievant Edward Allen Rife and attorney Stephen Palmer. Respondent testified in his own behalf and called as a witness Joseph Epling. Respondent also offered six character letters, four of which were written by municipal court judges plus a former municipal court judge and a chief deputy sheriff, attesting to Respondent's professional integrity and competence.

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

**EXHIBIT**

**A**

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

### **FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respondent: No, I was not.

November 14, 2011 Hearing Tr. at 61.

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

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

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

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

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

### ANALYSIS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

*Id.* at ¶39 (citations omitted).

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

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

### **AGGRAVATING AND MITIGATING FACTORS**

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

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

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

### **RECOMMENDATIONS**

{¶45} Relator recommended a six-month actual suspension from the practice of law.

Respondent recommended that the complaint be dismissed with no sanction.



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

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

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

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

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

#### **BOARD RECOMMENDATION**

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

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.**

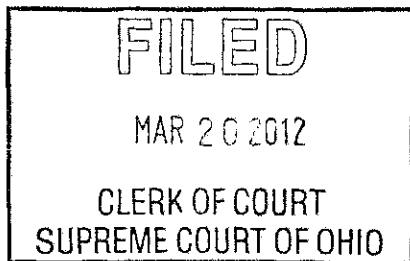



**RICHARD A. DOVE, Secretary  
Board of Commissioners on  
Grievances and Discipline of  
the Supreme Court of Ohio**

THE SUPREME COURT OF OHIO

In Re: :  
Complaint against : SCO Case No. 2012-0278  
Christopher T. Cicero :  
Respondent :  
Disciplinary Counsel : MOTION TO SUPPLEMENT  
Relator : RECORD

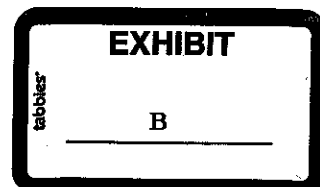
The Board of Commissioner on Grievances and Discipline formally moves to supplement the record in this case by permitting a corrected transcript to be filed. Respondent notified the court reporter of some typographical errors in the original transcript, they were corrected and a corrected transcript is now being submitted for filing.



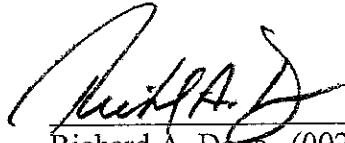
  
Richard A. Doye (0020256)  
Secretary to the Board of Commissioners  
on Grievances and Discipline of  
the Supreme Court of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Supplement Record was served on Respondent Christopher T. Cicero, at 1308 West Mound Street, Columbus, OH 43223; Alvin Mathews, co-counsel for Respondent at 100 South Third Street, Columbus, Oh 43215; Karl H. Schneider, co counsel for Respondent at 250 Civic Center Drive, Suite 500, Columbus, OH 43215; Jonathan Coughlan, Disciplinary Counsel and Joseph E. Caligiuri, Senior Assistant



Disciplinary Counsel at 250 Civic Center Drive, Suite 325, Columbus, OH 43215 on this 20<sup>th</sup>  
day of March, 2012.

A handwritten signature in dark ink, appearing to read "Richard A. Dove", is written over a horizontal line.

Richard A. Dove (0020256)  
Secretary to the Board of Commissioners  
on Grievances and Discipline of  
the Supreme Court of Ohio

McGINNIS & ASSOCIATES, INC.  
614.431.1344 COLUMBUS, OHIO 800.498.2451

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

- - -

In Re: )  
Christopher Thomas )  
Cicero, Esq. )  
Respondent, ) Board No. 11-055  
and )  
Disciplinary Counsel )  
Respondent. )

- - -

Hearing Room 106  
65 South Front Street  
Columbus, Ohio 43215  
Monday, November 14, 2011  
Met, pursuant to assignment, at 9:00  
o'clock a.m.

BEFORE: Lawrence R. Elleman, Esq., Chair  
The Honorable Lee Hildebrandt,  
Panel Member  
Retired Judge Thomas Bryant,  
Panel Member

- - -

CORRECTED TRANSCRIPT

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1 office and sort of throw yourself on the sore,  
2 right?

3 A. Yes.

4 Q. And that didn't sit well with you,  
5 right?

6 A. No.

7 Q. Okay. At the time that advice was given  
8 to you, Mr. Palmer didn't know any more -- did he  
9 know any more about your case than you did the  
10 night of the raid?

11 A. I couldn't tell you if he did or not.

12 Q. Okay. But in any event, you weren't  
13 sure, as you put in your grievance, he was doing  
14 all he could do for you, right?

15 A. Right.

16 Q. So you went and talked to Chris?

17 A. Yes.

18 Q. And Chris, you testified, sort of had  
19 this hard line approach with the government, go  
20 screw themselves sort of mentality, right?

21 A. Yes.

22 Q. And that didn't sit well with you?

23 A. No.

24 Q. Okay. What didn't sit well with you  
25 with Mr. Palmer's advice? What was your concern?

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1 whenever, and it was a Saturday in your office.  
2 When did you first establish contact with the  
3 AUSA, if you know?

4 A. I think it was the 5th of April.

5 Q. Okay. Was that much of a substantive  
6 conversation, or was it --

7 A. Well, it would have been introductory in  
8 nature.

9 Q. Sort of feeling each other out a little  
10 bit?

11 A. Sure.

12 Q. And was it at that point in time, or was  
13 it later, that Mr. Kelley talked about this is  
14 sort of an historical reference?

15 A. It would have been early on. Probably  
16 started in that conversation, and would have  
17 followed up in other conversations.

18 Q. Okay. Mr. Rife testified that one of  
19 the concerns he had, at least as of April 15th,  
20 was that he thought you were telling him he  
21 should march himself right down and sort of bury  
22 his sole to the United States Attorney. Are you  
23 aware that was his testimony?

24 A. Well, I didn't know what his testimony  
25 was, but I'll take your word for it.

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1 me and my family. I request that my name or  
2 the contents of this document be confidential  
3 and not released to any person, news media or  
4 other organization whatsoever. If the  
5 Supreme Court cannot abide by this request  
6 then I want this Affidavit returned to me  
7 without making it part of any record."

8 Those are your words?

9 A. Yes.

10 Q. Or are those Mr. Cicero's words?

11 A. They may be worded just a little  
12 different, but this is what I expressed to him.

13 Q. But you didn't have any concern for your  
14 safety of your family?

15 A. Why wouldn't I? You have no idea the  
16 type of person Ed is and who he knows.

17 Q. But yesterday you said it wasn't a  
18 safety issue, it was just the drama.

19 A. Drama comes with safety.

20 Q. I see. Now, you and Ed, after the  
21 tattoo business -- after the partnership ended  
22 in 2008, there was a long period of time when you  
23 and Ed didn't talk?

24 A. Correct.

25 Q. All the way through most of 2009, right?



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1 whether or not you ever told him you can't  
2 represent him?

3 A. No. The purpose of the meeting,  
4 Mr. Caligiuri, was so that he could come in to  
5 tell me that Mr. Epling didn't have any  
6 involvement with his federal drug investigation.

7 So I'm going to say this one last time  
8 to these three gentlemen right here. He never  
9 came into my office to ask me to represent him.  
10 He never came into my office to ask me to get  
11 back OSU memorabilia. I never quoted him a legal  
12 fee, and just that's it.

13 Q. So the answer to my question is no, you  
14 never did tell him that you couldn't represent  
15 him?

16 A. He came into my office because Joe  
17 Epling asked him to come into my office so that  
18 he could tell me that he wasn't involved in his  
19 federal drug investigation.

20 Mr. Epling is and always has been my  
21 client.

22 Q. Now, you testified on direct examination  
23 a minute ago that Jim Tressel could have cared  
24 less about your relationship -- I think you said,  
25 about your relationship with these guys,