

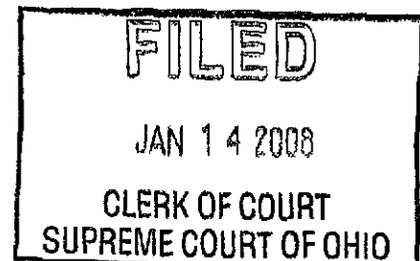
IN THE SUPREME COURT OF OHIO

MONA A. HAMILTON, : Case No. 2007-2363
Appellant, :
vs. : On Appeal from the Warren
JEFFREY KIRBY, : County Court of Appeals, Twelfth
Appellee. : Appellate District, Judgment filed
November 5, 2007
Court of Appeals Case No. CA2006-06-71

**MEMORANDUM OF APPELLEE JEFFREY KIRBY IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This appeal involves neither an issue of public or great general interest nor a substantial constitutional question; indeed, the Appellant does not explain how her appeal involves a substantial constitutional question. Public interest indicates something in which the public, the community at large, has some interest by which their legal rights or liabilities are affected. *State ex rel. Ross v. Guion* (1959), 161 N.E.2d 800, 803 (citing *State ex rel. Freeling v. Lyon*, 63 Okl. 285, 165 P. 419, 420). Rather than presenting such matters, the Appellant instead brings to this Honorable Court her frustration over her former husband's successful effort to obtain a divorce that she opposed. This Honorable Court should not award its jurisdiction to matters solely borne of the Appellant's personal irritation when the evidence is clear that a statute of limitations has expired.

The Appellant posits two issues in support of jurisdiction, neither of which is supported by the record. Concerning the Appellant's specious claim of concealment, the Twelfth District Court of Appeals appropriately noted "there is no evidence to support Hamilton's conclusory assertion[.] * * *"
*"
*"
Hamilton v. Kirby, 12th Dist. No. CA2006-06-71, 2007-Ohio-5901, at ¶ 21. As directed by the Appellant, and as required by the ethical rules, Mr. Kirby surrendered all client documents to the Appellant's next attorney, Karan Horan. With regard to this issue, the Appellant also ignores the overwhelming record evidence that she terminated Mr. Kirby, asserted multiple allegations of negligence against the Appellee and was advised by two attorneys to sue Mr. Kirby more than twenty months before filing her complaint.

By her second issue, the Appellant attempts to turn the privacy afforded attorneys forced into a disciplinary investigation by dissatisfied clients on its head. To accomplish this feat, the Appellant conflates confidentiality and privacy, ascribes to herself the privacy provided to lawyers and, without basis, asserts favoritism by this Court's Office of Disciplinary Counsel ("ODC"). Furthermore, the Appellant's misguided efforts are compounded by the fact that Mr. Kirby's contacts with the ODC in the instant litigation were mandated by her efforts to evade the record. Because the issues herein do not present matters of public or great general interest or a substantial constitutional question, this Honorable Court should not accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

The Appellant, Mona Hamilton, filed a legal malpractice action against Appellee Jeffrey Kirby on January 16, 2004 in the Court of Common Pleas of Warren County, Ohio. Previously, Hamilton filed a malpractice suit against another of her attorneys, Karan Horan, on May 13, 2003. During the intervening eight months, the Appellant attempted to: add Mr. Kirby as a defendant by motion; compel discovery from Mr. Kirby when he was not a party; and, seek a default judgment against Mr. Kirby before properly joining him to the action. The trial court denied these motions. The Appellant amended her complaint to add Mr. Kirby as a party-defendant on January 16, 2004.

The parties filed cross-motions for summary judgment. The Common Pleas Court granted Mr. Kirby's motion and denied Appellant's request. Thereafter, the Appellant filed a motion for reconsideration and a supplemental motion for reconsideration. The trial court denied these motions and entered final judgment in favor of Mr. Kirby. The Appellant filed an appeal with the Court of

Appeals of Ohio, Twelfth Appellate District, on June 13, 2006. The Twelfth District affirmed the trial court's decision by judgment entry dated November 5, 2007.

The instant case arises from Mr. Kirby's representation of the Appellant in a divorce action filed by the Appellant's former husband, Douglas Hamilton ("Douglas"), in September 2000. The Appellant paid Mr. Kirby a retainer in October 2000 to represent her in the divorce case and made clear she did not want a divorce. Following a hearing in April 2001, the Common Pleas Court granted Douglas a divorce and divided the marital property. The Appellant was unhappy with the results: she believed no grounds existed for the divorce and that she did not receive an equitable property division.

The Appellant met Mr. Kirby at his office on May 15, 2001 and, shortly thereafter, called the Appellee to terminate the attorney-client relationship. On or about May 22, 2002, the Appellant hired Attorney Karan Horan to represent her. After hiring Ms. Horan, the Appellant executed a "Release," dated May 22, 2001, stating, "I, MONA HAMILTON, hereby request that all files, documents, paperwork, etc., regarding my legal separation/divorce be released to my *present* attorney, Karan M. Horan." Mr. Kirby complied with the request and delivered his file to Ms. Horan. The Appellee, however, did thereafter review and comment upon the proposed Decree. Mr. Kirby believed this was his job because he represented Appellant at the hearing. The trial court filed the Decree on June 4, 2001.

Following her termination of the attorney-client relationship, the Appellant commenced a sustained litany of written complaints to the ODC against Mr. Kirby. These complaints confirmed that the Appellant terminated the attorney-client relationship on May 15, 2001 and that, by spring

2002 at the latest, she believed the Appellee committed professional negligence. On or about April 3, 2002, the Appellant wrote to the ODC and stated, *inter alia*, the following complaints against Mr. Kirby:¹

1. “Jeff was signing divorce papers for me in June, 2001, when I had terminated him on May 15, 2001, per phone message, (followed up by a FAX from Karan Horan’s office on May 22, 2001, requesting my records be sent to her).”;
2. “Jeff didn’t turn in any evidence on my behalf in the 3 hour hearing on April 5, 2001. * * * I terminated Jeff because he turned in only his fee bill for evidence in my case.”;
3. “Karan Horan, my current attorney, * * * told me that I should file a malpractice suit against Jeff Kirby[.] * * *”;
4. “Grievance against: former attorney, Jeffrey T. Kirby * * * I employed Jeff from October 2, 2000 to May 15, 2001”;
5. “I had employed Jeff Kirby from 10-2-00 to 5-15-01. Jeff Kirby was not my attorney, when he was signing divorce papers for me in June, 2001.”
6. “Karan Horan did tell me that I need to file a malpractice suit against Jeff on June 14, 2001, but that she wouldn’t do it.”;
7. “Jeff didn’t seem to present my case professionally. * * *”;
8. “Jeff didn’t like it that every time Doug lied while on the stand, I would write down on the legal pad what Doug had lied about. Jeff seemed impatient during the hearing that was taking longer than expected. * * * Jeff seemed [*sic*] because he was being delayed for his next appointment * * * and at one point, Jeff called a recess so he could call his office.”

¹ The Appellant testified it was “possible” this letter was a copy of the April 3 letter to Counsel and that it “looks like some of the facts that I am familiar with”; however, she did not remember preparing the document.

The Appellant continued the same themes in an April 4, 2002 letter to the ODC, including that Ms. Horan advised her to sue Mr. Kirby for malpractice.² About six weeks later, in a May 17, 2002 letter to the ODC, Appellant recounted meeting with attorney David Hopper, who “gave me much insight into what has been done against me because of both Jeff Kirby and Karan Horan.” The Appellant reiterated her reasons for terminating Kirby.³ In a May 20, 2002 correspondence to the ODC, the Appellant “praise[d] David Hopper for his advice he gave me, advising me to file a Malpractice Suit against Karan Horan and also Jeff Kirby.”⁴

Counsel also received an undated letter from Hamilton. Ms. Stacy Solochek Beckman, an Assistant Disciplinary Counsel assigned to Appellant’s grievance, testified the letter was included in a packet of documents ODC received on April 4, 2002 and that she recognized the Appellant’s signature. In this correspondence, the Appellant stated that Ms. Horan was her “current attorney.” She also reiterated her termination of Mr. Kirby on May 15, 2001, and that Ms. Horan told her to file a malpractice claim against Mr. Kirby. Finally, the Appellant sent a handwritten letter that the ODC received on July 1, 2002. In this letter, she alleged Mr. Kirby did not adequately represent her in attempting to avoid a divorce; that he was not her attorney when the decree was filed; that he failed to keep her informed and failed to “pursue my lawful directives”; and, that he destroyed her life.

² The Appellant testified her name was on this letter but did not recall whether she authored it, had anything to do with its preparation or had someone prepare the letter at her request.

³ The Appellant admitted her name was on this document, that it “appear[ed]” she signed the document and that the “document speaks for itself.” She did not, however, “recollect” who prepared it.

⁴ Appellant was again evasive regarding authenticity of this letter. She admitted her name was on it; in response to a query whether she signed the correspondence, she replied, “It appears that may be my signature.” But she could not recollect who prepared the document.

Despite her *ad infinitum* repetition that she terminated the relationship on May 15, 2001 followed by the May 22 Release, the Appellant asserted she did not consider the relationship with Mr. Kirby to have been terminated; that she “took away Jeff’s privileges of either speaking for me or for being responsible for filing any motions after he and I and my dad talked on May 8, 2001.” She also claimed she hired Ms. Horan “to assist Jeff Kirby.” The Appellant stated she *intended* to fire Mr. Kirby but “never put it in writing to him.” These claims are belied not only by the substantial paper trail, but also by her judicial admission in her First Amended Complaint that “Kirby continued to hold himself out as the legal representative of [Appellant] *after his client terminated his services.*”

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

OPPOSING PROPOSITION OF LAW NO. I: The statute of limitations, R.C. 2305.11, begins to run when there is evidence of termination of the attorney-client relationship and a “cognizable event,” whichever is later.

Ohio law is clear that legal malpractice actions must be brought within one year after the cause of action accrues. R.C. § 2305.11(A). The cause of action accrues on the date of: (1) termination of the attorney-client relationship; or (2) a “cognizable event,” whichever is later. *Zimmie v. Calfee, Halter and Griswold* (1989), 43 Ohio St.3d 54, syllabus. A cognizable event “is an event that puts a reasonable person on notice ‘that questionable legal practice *may* have occurred’ and that the client *might* need to pursue remedies against his attorney.” *Lintner v. Nuckles*, 12th Dist. No. CA2003-10-020, 2004-Ohio-3348, at ¶ 18 (quoting *Zimmie*, 43 Ohio App.3d at 58) (emphasis added). Thus, “the Ohio Supreme Court has never held that a party must be aware or suffer the full extent of his injury before there is a cognizable event triggering the statute of limitations in a legal malpractice action.” *Deutsch v. Keating, Muething & Klekamp, L.L.P.*, 2nd Dist. No. CA020121,

2005-Ohio-206, at ¶ 16. The record shows Appellant failed to file her action against Mr. Kirby within one year applying either of these measures.

- A. The Appellant expressly terminated Mr. Kirby on May 15, 2001; furthermore, her subsequent conduct supports the appellate court's finding of termination on that date.**

The Appellant terminated the attorney-client relationship on May 15, 2001. "In determining when the attorney-client relationship is terminated, the court must point to an affirmative act by either the attorney or the client that signals the end of the relationship." *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839, 843. That is precisely the avenue Appellant took with Mr. Kirby: she called and terminated his services on May 15, 2001, followed by the Release on May 22, 2001. She asserts no fewer than eleven times in correspondence to the ODC that she terminated Mr. Kirby, or that he was no longer her attorney, after May 15, 2001. The Appellant admitted similar facts in her First Amended Complaint.

Even accepting, *arguendo*, that Appellant did not affirmatively terminate Kirby's representation, it is clear her actions subsequent to the Decree filing manifest termination by spring 2002. "[C]onduct which dissolves the essential mutual confidence between attorney and client signals the termination of the attorney-client relationship." *Brown v. Johnstone* (1982), 5 Ohio App.3d 165, syllabus. Such conduct includes filing a disciplinary grievance. *Id.* at 167. The Appellant initiated a grievance by her first letter to the ODC, dated April 3, 2002. This act alone terminated the relationship; however, Appellant's April 3, 2002 correspondence, along with subsequent letters, expresses a loss of confidence in Appellee that occurred long before April 2002. Moreover, seeking the advice of two attorneys regarding malpractice is additional evidence of termination. Whether the

Court holds the relationship terminated on May 15, 2001, May 22, 2001, June 4, 2001 or April 3, 2002, one fact is clear: all of these dates preceded January 16, 2004 by more than one year. The Appellant's action was time-barred.

The Appellant presents several excuses, often at odds with the record, as to why she did not terminate Mr. Kirby: (1) Karan Horan failed to file a Civ.R. 60(B) motion for relief; (2) Mr. Kirby did not terminate the relationship; (3) Appellant was "depressed"; (4) "Hamilton's lawyer" [Horan] told her Mr. Kirby did no wrong; (4) Appellant was "incapable of making truly rational decisions"; and (5) Appellant did not actually mean Mr. Kirby was fired, just that he could not sign anything without her knowledge. (Appellant's Mem. in Support of Jurisdiction at 3-5). The Appellant's multiple letters to the ODC, describing Mr. Kirby as "terminated," "not my attorney," "my former attorney" and Ms. Horan as "my current attorney," belie Appellant's claims. In addition, the Appellant related to ODC that Ms. Horan told her to file a malpractice action against the Appellee, as did Mr. Hopper. Whether or not Ms. Horan filed a motion for relief does not alter the fact that Appellant terminated Mr. Kirby and directed him to surrender her case file. Moreover, the record does not reflect that Appellant was ever adjudicated an incompetent -- she is responsible for her choices.

On the issue of whether Mr. Kirby failed to terminate the relationship by filing a withdrawal notice pursuant to the trial court's local rule, this Honorable Court held such notice is not a prerequisite to termination. *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, at ¶ 12. Considering Appellant took the affirmative act of termination, her argument is warranted neither pursuant to law nor fact. The record manifests, and the Twelfth District correctly held, that

Appellant terminated the relationship on May 15, 2001, more than two-and-a-half years before suit.

B. The Appellant was on notice of a cognizable event on or before April 3, 2002.

If the Appellant suffered harm as a direct and proximate result from Mr. Kirby's representation, she knew she needed to seek remedy, at the latest, by April 3, 2002, the date she filed her grievance with ODC. Although the focus is on when the client learns "of a nexus between her injury and her attorney's conduct," *Crystal v. Wilsman*, 151 Ohio App.3d 512, 2003-Ohio-427, at ¶ 18, based upon her grievance letters, the Appellant possessed sufficient knowledge of a cognizable event shortly after she terminated Kirby or, in the alternative, some 18 months prior to filing suit. The Appellant informed ODC on April 3, 2002 that she terminated Kirby, *inter alia*, because he failed to present evidence on her behalf at the divorce hearing that resulted in a divorce over her objection and an unfavorable property division. Although failure to present evidence may not put Appellant on notice of potential malpractice, since she claimed the result of that failure was the divorce and property division, the date of the decree is the date of the cognizable event. *Smith*, 2006-Ohio-2035, at ¶ 5. In addition, in mid-June 2001, Ms. Horan advised Appellant to sue Appellee for malpractice. At the latest, as the Twelfth District held, the cognizable event occurred by April 2002, as shown by the Appellant's many ODC letters.

The gist of the Appellant's argument is that, despite her contrary deposition testimony and the ODC letters, the cognizable event occurred in October 2003 when she reviewed correspondence between Mr. Kirby and the trial court concerning the Decree. Mr. Kirby provided these letters to Ms. Horan in response to the Appellant's "Release"; the correspondence was available to the Appellant in June 2001. Whether Ms. Horan shielded these letters from the Appellant does not support

Appellant's specious concealment claims against the Appellee.

Moreover, the correspondence between Mr. Kirby and trial court contains nothing Appellant did not already suspect, as documented in her ODC letters. Mr. Kirby raised issues with the trial court, including: (1) proposed modifications to the Decree language concerning the marital residence and attorney fee payment by Douglas; (2) Mr. Kirby had not shown the proposed Decree to Appellant; (3) Appellant had requested transfer of her file to Ms. Horan; (4) Mr. Kirby attempted but was unable to explain to Appellant's satisfaction why the spousal support award was less than he had advised; and (5) he "continually" advised Appellant a divorce was inevitable. The trial court responded that: (1) it signed the Decree with language addressing Mr. Kirby's concerns about attorney fees; (2) the Appellant was underemployed and had higher earning potential; (3) property issues were proven to the court's satisfaction; and (4) the Appellant's challenge to marital expenses was not as effective because of her focus on disputing grounds for divorce.

In her ODC letters, the Appellant addressed all of the issues contained in the letters between Mr. Kirby and the trial court. The Appellant specifically claimed: Mr. Kirby did not present evidence at the divorce hearing; Mr. Kirby failed to challenge Douglas on insufficient evidence of his separate property interests; Mr. Kirby did not adequately represent her interests; the property division was inequitable; and, there were no grounds for divorce. Appellant, therefore, believed there was substandard legal representation at the time of these letters. Her October 2003 review of the trial court-Kirby correspondence added nothing to her suspicions.

The Appellant relies on *Landis v. Hunt* (1992), 80 Ohio App.3d 662, where the court found a triable issue on cognizable event date. Although the facts are distinguishable because the *Landis*

trial court erroneously found no attorney-client relationship, the *Landis* panel determined a jury question existed as to whether the event occurred more than a year before suit or after the client consulted another attorney less than twelve months prior to suit. *Id.* at 670-71. By spring 2002, the Appellant herein had consulted at least two attorneys – both of whom advised her to sue Mr. Kirby. Similarly, although there is no question but that a cognizable event must exceed subjective dissatisfaction with an attorney’s services, *Koch v. Gross* (1990), 64 Ohio App.3d 582, 586-87, the record below manifests Appellant’s complaints against Kirby, from the time she consulted Ms. Horan and thereafter, concerned her perceived damages resulting from his representation. This Honorable Court should not extend its jurisdiction to revisit either termination or cognizable event based upon these facts.

OPPOSING PROPOSITION OF LAW NO. II: The disciplinary process established in Gov.Bar.R. V provides an attorney with a right of privacy that the attorney may waive when necessary to defend against a malpractice action.

The Appellant raises the quintessential red herring and, regrettably, distorts the record when she argues her statements to the ODC are off-limits. Contrary to the Appellant’s view, she did not have a right of “confidentiality” to her letters. As the Respondent in the disciplinary proceedings, *Mr. Kirby* had a right to privacy regarding the Appellant’s communications. Gov.Bar.R. V(11)(E)(1)(c)(i). “[T]he Supreme Court of Ohio created a substantive right of privacy for a *respondent attorney* with respect to the disclosure of uncertified grievances.” *Everage v. Elk and Elk*, 159 Ohio App.3d 220, 2004-Ohio-6186, at ¶ 11 (emphasis added). The attorney may waive his privacy right, Gov.Bar.R. V(11)(E)(1), a waiver that Mr. Kirby unambiguously exercised, (Deft’s Mem. in Opp’n to Plt’s Mot. in *Limine*, T.d. 121 and Exh. B). There is no requirement, as stated by

Appellant, that the privacy waiver occur “during the disciplinary proceedings.” Furthermore, the relevant issue is not the privacy of the proceedings or the confidentiality of deliberations, Gov.Bar.R. V(11)(E)(1)(c)(ii); rather, the salient issue is Mr. Kirby’s right to privacy and his ability to waive the right. Gov.Bar.R. V(11)(E)(1)(c)(i).

It is essential for the Court to consider why this issue arose. The impetus for the Appellee’s involvement of ODC, aptly stated by the trial court, was that “Hamilton, during her deposition, was evasive about whether these documents were actually submitted by her.” The Appellant’s evasiveness is shown in footnotes 1-4, *supra*. In addition, once the Appellant realized the fatal nature of these letters to her case, she commenced an attempt to create a triable issue on termination and cognizable event by filing multiple affidavits completely at odds with her deposition testimony and exhibits. At no time did Appellant present any evidence to “sufficiently explain the contradiction” between her deposition testimony and her affidavits; therefore, she cannot create a genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶ 29). The same proposition applies to deposition documents. *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756.

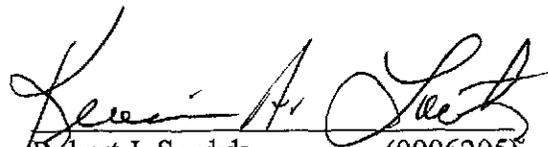
The Appellant misplaces her reliance upon *Hecht v. Levin* (1993), 66 Ohio St.3d 458. *Hecht* is much narrower than she represents. This Supreme Court held statements made in disciplinary proceedings may not be used offensively against a claimant to prove defamation – the claimant is entitled to immunity as in other judicial proceedings. *Id.* at 462. *Hecht* said nothing regarding the defensive use of such statements to protect a defendant from a plaintiff’s improper attempts to alter history. As the Twelfth District correctly noted, “Kirby is not suing Hamilton for defamation, and so

the fact that Hamilton's statements to Disciplinary Counsel may be privileged from liability for defamation is immaterial. These statements * * * show Hamilton's state of mind and knowledge with respect to Kirby's representation of her. For that purpose, they are admissible." *Hamilton*, 2007-Ohio-5901, at ¶ 23. Mr. Kirby's waiver of privacy was not an offensive use of the Appellant's ODC letters, which were initially obtained elsewhere. Instead, Mr. Kirby was forced to involve the ODC to show the authenticity of the Appellant's correspondence, when faced with the Appellant's obfuscation. The Court should not entertain the Appellant's efforts to ascribe to herself Mr. Kirby's right of privacy.

CONCLUSION

For the reasons discussed above, there is no need for this Honorable Court to exercise its jurisdiction in this case. This case does not involve matters of public or great general interest and does not involve a substantial constitutional question. Appellee respectfully requests that this Court decline to review the decision of the Twelfth District Court of Appeals.

Respectfully submitted,



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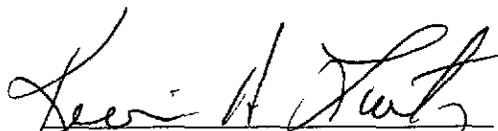
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. Mail to Mona A. Hamilton, Pro Se Appellant, P.O. Box 222, Middletown, Ohio 45042 on this 11th day of January, 2008.

A handwritten signature in black ink, appearing to read "Kevin A. Lantz". The signature is written in a cursive style with a horizontal line underneath it.

Robert J. Surdyk
Kevin A. Lantz