ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. WAYNE T. DONER, et al.,	:	Case No. 2009-1292
Relators,	:	Original Action in Mandamus
v.	:	
SEAN D. LOGAN, Director, Ohio Department of Natural Resources, et al.,	:	
Respondents.	:	

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO RELATORS' MOTION TO COMPEL DISCOVERY

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MEMORANDUM OF RESPONDENTS
IN OPPOSITION TO RELATORS' MOTION TO COMPEL DISCOVERY

I. INTRODUCTION

Relators seek to compel Respondents to disclose attorney-client privileged communications they may have had with J. Anthony Logan, their former Chief Legal Counsel. They insist that any communications Mr. Logan had with ODNR about this case cannot be privileged because he had (1) formerly represented a different group of landowners in the *Post* mandamus case, and (2) conveyed a settlement offer to ODNR on behalf of several landowners, some of whom are Relators in this litigation. In responding to Relators' interrogatory, Respondents never stated that Mr. Logan did, in fact, have any substantive legal discussions with ODNR about this litigation.

Relators' citations to the Rules of Professional Conduct does not defeat Respondents' claim of privilege, and there is no basis to argue that Mr. Logan violated those rules. Because Mr. Logan served as ODNR's chief general counsel, ODNR and its personnel reasonably inferred that he was their attorney and that they were his client.

Relators have no evidence that Mr. Logan disclosed any former client confidences or breached any ethical duties while serving as ODNR's counsel.

Relators' motion to compel should be denied without further inquiry because it improperly seeks disclosure of privileged attorney-client communications. However, if this Court finds it necessary to consider Mr. Logan's communications with ODNR, Respondents are filing, under seal, their answer to Relators' Interrogatory No. 8 for in camera review by the Court.

II. ARGUMENT

A. Respondents properly objected to, and refused to answer, Relators' Interrogatory No. 8 because the information sought is protected by attorney-client privilege.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swindler & Berlin v. United States* (1998), 524 U.S. 399, 403. The intent of the privilege is to create an atmosphere where clients can have "full and frank communications" with their attorneys. *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389. The privilege applies to government agency communications with in-house counsel. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 30.

The attorney-client privilege belongs to the client, not the attorney. *Allen Cty. Bar Assn. v. Williams*, 95 Ohio St.3d 160, 2002-Ohio-2006, ¶ 9. Barring very few exceptions, the client is the *only* one who may waive the privilege. *Leslie*, 2005-Ohio-1508, ¶ 21.

While Relators aver that disclosure of privileged communications should be allowed to determine if an attorney has violated the professional conduct rules, this Court

has held differently. In *Allen Cty. Bar Assn. v. Williams*, this Court held that privileged materials could not be released to a monitoring attorney without the client's specific waiver, even when that review was pursuant to an attorney disciplinary action and attempting to determine whether the attorney was upholding his duty under the professional conduct rules. 2002-Ohio-2006, ¶¶ 15-16.

Relators' belief that there has been some type of inappropriate communication between Mr. Logan and ODNR does not entitle Relators to all privileged communications from Respondents. Their motion to compel conspicuously lacks any case law supporting their contention that an alleged breach of the professional conduct rules by an attorney requires a client to disclose privileged communications. Rather, Relators' arguments for compelling Respondents to disclose attorney-client privileged communications stem from the underlying assumption that a breach has occurred and that ODNR improperly received privileged information from Mr. Logan. While Relators purportedly try to "level the playing field" so that they are not unfairly disadvantaged, they fail to consider the possibility that no breach has occurred, and that divulging the requested information would give *them* an unfair advantage in this litigation.

Although the professional conduct rules allow an attorney to disclose privileged information to defend against allegations concerning his or her representation of the client, they do not *require* it:

> A lawyer ***may*** reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:
>
> > . . . to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client.

(Emphasis and ellipses added.) Professional Conduct Rule 1.6(b)(5).

If an attorney is not required to disclose privileged communications to defend allegations concerning his representation of a client, then likewise the client cannot be compelled to disclose this information. "Although an adversary may ordinarily inquire as to what the client knows, he 'cannot [compel him] to answer the question "What did you say or write to your attorney?'" (Bracketed text sic.) *Martin v. Lauer* (D.C. Cir. 1982), 686 F.2d 24, 32, quoting *Upjohn*, 449 U.S. at 396, quoting *Philadelphia v. Westinghouse Elec. Corp.* (E.D. Pa. 1962), 205 F. Supp. 830, 831. Therefore, ODNR has properly refused to answer Relators' Interrogatory No. 8, because the information sought is privileged.

B. An attorney-client relationship did, in fact, exist between Mr. Logan and ODNR and its personnel.

Relators erroneously claim that no attorney-client relationship existed between Mr. Logan and ODNR. Specifically, they argue that ODNR personnel could not have reasonably believed that an attorney-client relationship existed between them and Mr. Logan because Mr. Logan had allegedly previously represented several landowners in the same matter at issue in this case. Relators' argument incorrectly assumes that knowledge of one necessarily negates a reasonable belief in the other.

Relators correctly indicate that "[t]he determination of whether an attorney client relationship was created turns largely on the reasonable belief of the prospective client." *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, ¶ 10. "An essential element in evaluating whether an attorney-client relationship exists is whether 'the relationship invoked such trust and confidence in the attorney that the communication became privileged and, thus, the information exchanged was so

confidential as to invoke an attorney-client privilege.'" *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.* (4th Dist.), 2002-Ohio-6170, ¶ 41, quoting *Landis v. Hunt* (10th Dist. 1992), 80 Ohio App.3d 662, 669.

ODNR and its personnel reasonably believed that they were Mr. Logan's client. Mr. Logan was chief general counsel for ODNR. There can be no doubt that an attorney-client relationship exists between ODNR and its chief general counsel. By its very nature, the relationship inspires the necessary trust and confidence to make any communications between the two privileged and confidential. And the privilege applies to government agencies. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 30. Therefore, ODNR did reasonably believe that an attorney-client relationship existed with Mr. Logan. Any legal communications ODNR had with him are therefore privileged and confidential.

C. Respondents are filing, under seal, their answer to Relators' Interrogatory No. 8 so the Court can review in camera, if necessary.

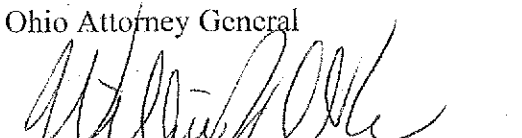
In order to resolve the discovery dispute that Relators insist upon, Respondents agree to file, under seal, their answer to Relators' Interrogatory No. 8. (See separate filing under seal.) This enables the Court to review Mr. Logan's communications with ODNR in camera, if necessary. By doing this, Respondents do not disclose to Relators any privileged communications they may have had with Mr. Logan, and they continue to assert the attorney-client privilege.

III. CONCLUSION

For these reasons, Relators' motion to compel should be denied.

Respectfully submitted:

RICHARD CORDRAY
Ohio Attorney General



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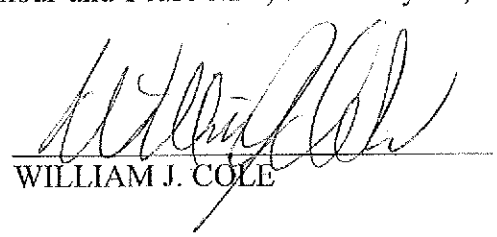
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular and electronic mail on February 1, 2010, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonic and Kristi Kress Wilhelmy, Vorys, Sater, Seymour and Pease LLP, 52 E. Gay St., P.O. Box 1008, Columbus, OH 43216-1008.



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