

ARGUMENT

Respondent Waived his Opportunity to Seek Review

Gov. Bar R. V (8) sets forth the procedure for the Court's review of a report issued by the board. Upon receipt of the board's report, the Court issued "respondent an order to show cause why the report of the Board shall not be confirmed and a disciplinary order entered." Gov. Bar R. V (8) (A). Within 20 days of the issuance of the show cause order, "respondent or relator may file objections to the findings or recommendations of the Board and to the entry of a disciplinary order or the confirmation of the report...." Gov Bar R. V (8) (B). Relator filed his objections on January 10, 2011. Respondent chose not to file objections to the Board's report.

Notwithstanding that respondent chose not to file objections, he now claims that this Court "failed to rule" on an issue that he raised for review by the Court. Specifically, respondent claims that this Court failed to rule on his "appeal of the [Board's] denial below of his motion to disqualify Relator." This is simply not the case. This Court appropriately addressed all of the issues that were properly presented to the court in relator's objections. By choosing not to file any objections to the Board's report, respondent waived his opportunity to argue that any of the Board's findings of fact or conclusions of law were in error.¹

¹ Respondent's answer to relator's objections incorporates his motions to disqualify relator. This tactic is not an appropriate vehicle for raising objections to the board's rulings. Respondent's answer does not present any argument addressing a purported error in the board's rulings on his motions. Respondent waived his opportunity to seek review of the board's report when he chose not to file objections pursuant to Gov. Bar R. V (8).

Respondent's Motion to Disqualify Relator Lacks Merit

Respondent filed two motions to disqualify relator while the matter was pending before the board. Both motions were denied by the hearing panel chair, Judge Arlene Singer. In his current motion for reconsideration, respondent raises two arguments in support of his previously denied motions to disqualify relator. First, that relator's trial deposition of Mark Lay constituted a violation of the attorney-client privilege and, second, that relator's trial deposition of Mark Lay violated Ohio Prof. Cond. R. 4.2.

As a procedural issue, respondent never raised the alleged violation of the attorney-client privilege or the alleged violation of Prof. Cond. R. 4.2 in either of his motions to disqualify relator. Respondent cannot now, after a full evidentiary hearing and an argument before this Court, raise a new argument in support of his motion for reconsideration.

Moreover, there is no merit to respondent's claim that relator violated Mark Lay's attorney-client privilege. It is well-known that the privilege between an attorney and a client is recognized in both statutory and common law in Ohio. See R.C. 2317.02(A) and *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 660, 635 N.E.2d 331. The primary purpose of the attorney-client privilege is to shield access to information possessed by the attorney – not to shield information possessed by the client. See R.C. §2317.02. The privilege certainly does not allow a client to avoid answering questions under oath by simply first providing the information to an attorney.

Despite the assertions in respondent's motion, not every conversation or communication between respondent and Mark Lay is automatically privileged. The attorney-client privilege cannot stand in the face of counterbalancing laws or strong public policy and should be strictly

confined within the narrowest possible limits underlying its purpose. See, e.g. *United States v. Skeddle* (N.D.Ohio 1997), 989 F.Supp. 890, 900 (citations omitted).

Moreover, the attorney-client privilege is not an absolute privilege. It only applies where necessary to achieve its purpose, and it only protects those communications necessary to obtain legal advice. *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 36, 2003-Ohio-2750, 790 N.E.2d 817. The privilege does not extend to communication between attorney and client unless the communication relates to the client's legal interests and was made in the course of the client seeking advice related to the subject of the representation. See, e.g. *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 358 N.E.2d 521. In Ohio, it is axiomatic that:

[T]here must be something confidential in the nature of the communication in order to make the attorney incompetent as a witness; that is, the communication must be made in confidence for the purposes of the relation of attorney and client, and if it appears by extraneous evidence, or from the nature of the transaction or communication, that confidence was not contemplated, and that the communication was not regarded as confidential, then testimony of the attorney or client may be compelled.

Hawgood v. Hawgood (1973), 33 Ohio Misc. 227, 232, 294 N.E.2d 681 (citations omitted).

Ohio's statutory and the common law concepts of attorney client privilege are also limited to information that has not been shared with third parties. Here, the focus of the information sought by relator from Mark Lay involved funds being held in bank accounts, funds disbursed by respondent to third parties, and respondent's fee agreement with Mark Lay. Relator did not elicit privileged communications from Mark Lay. Relator did not ask questions relating to privileged conversations between Mark Lay and respondent. None of the subjects discussed at Mark Lays' trial deposition would qualify as "communications necessary to obtain legal advice." See, *Perfection Corp.*, 153 Ohio App.3d at 36.

Furthermore, two weeks prior to Mark Lay's trial deposition, respondent was deposed by relator. The very same topics were covered in both depositions. Respondent never asserted that he was unable to answer relator's questions because of the attorney-client privilege. "The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication." Restatement (Third) of The Law Governing Lawyers § 79 (2001). Having answered relator's questions about Mark Lay in his own deposition, respondent cannot assert that the privilege was violated when his client answered the same questions two weeks later.

Respondent's assertion that relator's questioning of Mark Lay violated Prof. Cond. R. 4.2 is equally without merit. Again, respondent has misconstrued the rule in question. Prof. Cond. R. 4.2 prohibits an attorney who is representing a client in a matter from contacting another represented person in that same matter without permission of the contacted person's counsel.

The prohibition on contacting represented parties is limited to lawyers who are representing a client in the matter. "[T]he anti-contact prohibition extends to any nonclient that the contacting lawyer knows to be represented by counsel in the matter in which the lawyer is representing a client." Restatement (Third) of The Law Governing Lawyers § 99 (c) (2001). (Emphasis added.) Moreover, Comment 1 to Prof. Cond. R. 4.2 states that "This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter...." (Emphasis added.)

Relator has never represented a client in any of the legal matters in which Mark Lay is involved as a client. The very policy behind Prof. Cond. R. 4.2 – preventing undue influence on a represented person by another counsel in the same matter – is in no way implicated by relator's

trial deposition of Mark Lay in respondent's disciplinary case. Moreover, respondent, as Mark Lay's counsel, was well aware of the proposed trial deposition months in advance and never once stated an objection to relator conducting the deposition. Even after respondent indicated that he would not be present at the deposition, he made no objection to the trial deposition proceeding in his absence. By analogy, had relator been able to produce Mark Lay at the disciplinary hearing and had respondent chosen not to be present, Prof. Cond. R. 4.2 would not have been implicated. Relator did not violate Prof. Cond. R. 4.2 and respondent waived any objection to the testimony by failing to object in a timely manner.

For all the reasons set forth above, relator respectfully requests that respondent's motion for reconsideration be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing "Relator's Memorandum Opposing Respondent's Motion for Reconsideration" was served upon respondent's counsel, William C. Wilkinson, at 341 S. 3rd Street, Suite 101, Columbus, OH 43215, via regular U.S. Mail, on this 28th day of November, 2011.



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Counsel of Record