

ARGUMENT

Exhibit A does not contain information protected by the attorney-client privilege.

Despite respondent's assertions, not every conversation or communication between an attorney and a client is privileged. The attorney-client privilege 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).

The accounting and related documents that respondent is attempting to place under seal relate to respondent's handling of the \$113,228.18 insurance proceeds and the \$280,000 Defense and Welfare Fund. These documents are not communications between respondent and his client relating to the client's legal needs. With regard to the \$113,228.18, Mark Lay testified during his trial deposition that he does not recall having any conversations with respondent about the \$113,228.18, nor does he know how the \$113,228.18 was spent. This alone indicates that Mark Lay was not "in the course of seeking legal advice" while speaking to respondent about the

\$113,228.18 assuming that there were even any conversations with respondent about the \$113,228.18. Moreover, the \$113,228.18 was the remainder of a civil settlement due to Mark Lay. This money was transmitted to respondent only after the case was concluded and the judgment was final. If Mark Lay spoke to respondent about the funds, it would not have been in the course of seeking legal advice about the case because the case was already over. Moreover, the documents respondent seeks to seal do not reflect any conversations between respondent and his client.

Likewise, the \$280,000 Welfare and Defense Fund was comprised of donations from Mark Lay's friends and associates. This money was transmitted to respondent after Mark Lay's conviction, and it was to be used to pay Mark Lay's legal fees and personal expenses while he was incarcerated. Antoine Smalls and respondent both served as the trustee of the Defense and Welfare Fund. Mark Lay executed no direction over the fund, nor did he have "any say so over how the money was spent." Given Mark Lay's lack of control over the expenditure of the \$280,000, which is in part the subject of Exhibit A, he clearly did not share any privileged information with respondent when speaking to him about the \$280,000.

Furthermore, Exhibit A largely consists of checks or wire transfer slips from respondent's IOLTA. Not only are these documents already a part of the record, but several jurisdictions have held that bank records and trust account records are not protected by the attorney-client privilege. *See Attorney Grievance Comm'n of Maryland v. Zdravkovich*, 852 A.2d 82 (Md., 2004) (holding that escrow account records are not subject to attorney-client privilege); *State v. Investigation*, 802 So.2d 1141 (Fla., 2001) (holding that bank records in the hands of a third-party are not protected by the attorney-client privilege); *Gannet v. First Nat. State Bank of New Jersey*, 546 F.2d 1072 (N.J., 1976) (holding that federal law provides no basis for protection of

bank records under the attorney/client privilege); and *U.S. v. Bank of California*, 424 F.Supp. 220 (Cal. 1976) (holding that in writing a check to an attorney which the attorney will later cash or deposit at a bank, the client has set the check “afloat on a sea of strangers;” therefore, it is not a confidential communication).

The checks and wire transfer slips are documents that have been maintained by the respective banks and were the subject of testimony during respondent’s deposition, during Mark Lay’s trial deposition, and were testified to and admitted as exhibits at respondent’s disciplinary hearing. It was not until after this court indefinitely suspended respondent that respondent claimed that some of the exhibits admitted as evidence at his hearing were protected by the attorney-client privilege; however, even then, he did not claim that his IOLTA records were protected. In fact, neither respondent, nor Mark Lay, has ever asserted that they were unable to discuss respondent’s IOLTA records because they contained privileged information. “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). Because these records have already been the subject of testimony, respondent cannot now assert that the records are protected by the attorney-client privilege.

The remaining documents in Exhibit A consist of enclosure letters to various third parties and respondent’s summation of the withdrawals and deposits from his IOLTA. The enclosure letters were all provided to relator by respondent nearly two years ago – again in the absence of any claim of protection, and the summations contain nothing that is not already in the IOLTA records themselves, which, as already discussed, are not privileged. Once again, having

previously disclosed these items, respondent cannot now claim that they are protected by the attorney-client privilege.

Less restrictive means are available to protect any personal or confidential information that may be contained in Exhibit A.

Respondent also claims that Exhibit A should be sealed to protect the “personal and confidential financial information of Mark Lay.” As discussed above, Exhibit A contains nothing that has not already been previously disclosed and/or admitted into evidence in this matter. Accordingly, any information that could possibly be gleaned from Exhibit A can also be found elsewhere in the record.

However, should the court determine that the information contained in Exhibit A is subject to protection, Superintendence Rules 45(E)(3) requires that the “least restrictive mean” be used when restricting public access to a case document. Specifically the rule states that

“When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:

- (a) Redacting the information rather than limiting public access to the entire document;
- (b) Restricting remote access to either the document or the information while maintaining its direct access;
- (c) Restricting public access to either the document or the information for a specific period of time;
- (d) Using a generic title or description for the document or the information in a case management system or register of actions;
- (e) Using initials or other identifier for the parties’ proper names.

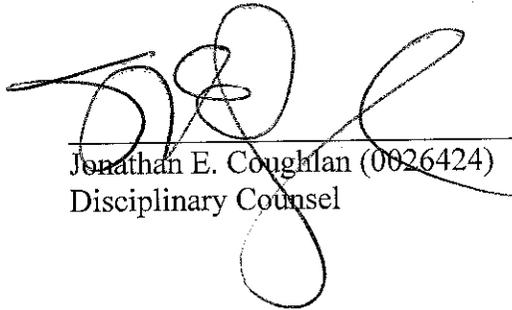
Relator notes that the document in question has already been redacted. Furthermore, this court has already restricted remote access to the document by not including the scanned version of Exhibit A on its online docket. Moreover, on the court’s online docket, the document that contains Exhibit A is merely referred to as an “Affidavit of Compliance.” There is absolutely no

indication that the document contains any financial information. Relator respectfully submits that adequate steps have already been taken to protect any confidential or personal information that may be contained in Exhibit A. Accordingly, sealing of the document is not necessary.

CONCLUSION

In closing, there are no factors that would support the sealing of Exhibit A. Exhibit A does not contain attorney client privileged information, and reasonable steps have already been taken to protect any personal or confidential information that may be contained in Exhibit A. Because public policy dictates that the public is served by having access to documents filed with the court, relator respectfully requests that this court deny respondent's motion to seal Exhibit A.

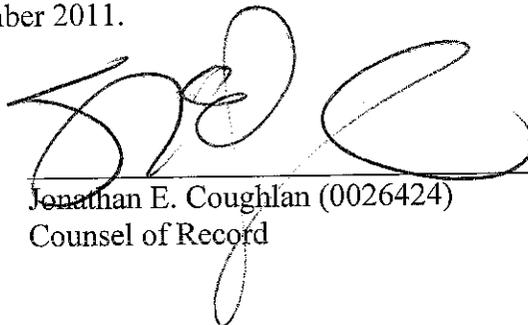
Respectfully submitted,



Jonathan E. Coughlan (0026424)
Disciplinary Counsel

CERTIFICATE OF SERVICE

A copy of the foregoing "Relator's Memorandum Opposing Respondent's Motion to Place Documents Under Seal" was served upon respondent, Percy Squire, and respondent's co-counsel, William C. Wilkinson, at 341 S. Third Street, Suite 101, Columbus, OH 43215, via regular U.S. Mail, on this 9th day of December 2011.



Jonathan E. Coughlan (0026424)
Counsel of Record