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Motion to Exclude Testimony of David Doughton

Terry H. Gilbert
Attorney for Sheppard Estate

George H. Carr
Attorney for Sheppard Estate

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Gilbert, Terry H. and Carr, George H., "Motion to Exclude Testimony of David Doughton" (1999). *1995-2002 Court Filings*. 47.
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

ALAN J. DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

STATE OF OHIO

Defendant


Judge Ronald Suster

Case No. 312322

MOTION TO EXCLUDE
TESTIMONY OF DAVID
DOUGHTEN

Plaintiff hereby moves this Court for an Order striking David Doughten as a potential witness and to preclude the Defendant State of Ohio, from offering any testimony of David Doughten. The reasons and authorities for granting this motion are set forth fully in the attached brief in support, which is hereby incorporated by reference.

Respectfully submitted,



Terry H. Gilbert (0021948)

George H. Carr (0069372)

1700 Standard Building

1370 Ontario Street

Cleveland, OH 44113

(216) 241-1430

Attorneys for Plaintiff



Brief In Support

I. Background

In its recent witness list, the State has proffered David Doughten as a potential witness. Mr. Doughten is an attorney who represented Richard Eberling, who is now deceased, in post-conviction and appellate challenges to his 1989 conviction for the aggravated murder of Ethel Durkin, an elderly Lakewood widow. The State is aware that Mr. Eberling is, was and should be a suspect in the 1954 murder of Marilyn Sheppard, based on evidence discovered since the 1954 conviction of Dr. Samuel Sheppard.

Mr. Doughten's appearance on the State's witness list can only be construed as an attempt to disclose attorney-client communications between Mr. Eberling and Mr. Doughten.

II. Law and Argument

It is axiomatic that the attorney-client relationship is a fiduciary one, *see In re Harris-Miles*, 187 B.R. 178 (N.D. Ohio 1995), and that attorney-client communications are statutorily privileged and protected from disclosure, *Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St. 3d 1, 688 N.E.2d 258 (1998). It is also well established that the attorney-client privilege survives the death of the client. *Swindler & Berlin v. U.S.*, 524 U.S. 399, 118 S.Ct. 2081 (1998); *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892 (1961).

Further, the attorney-client privilege encompasses not only the words spoken between the attorney and his or her client, but also observations and mental impressions made by the attorney of the client. As the *Taylor* court stated:

[T]he knowledge upon which the attorney bases his conclusion is not knowledge gained as a layman during the ordinary course of life...but is knowledge which he obtained solely by reason of the fact that he was requested by the decedent to render professional services and which was gained during the attorney-client

relationship. Clearly, therefore, the rule must be that *knowledge gained by an attorney, during the attorney-client relationship, which knowledge relates to the services for which he was employed, whether it be by words or merely observations made by the attorney, falls within the rule relating to privileged communications.* [emphasis supplied]

Taylor at 124, 173 N.E.2d at 896. This privilege cannot be waived, unless by the express consent of the client. R.C. 2317.02(A).¹ This waiver is the exclusive means by which an attorney may testify regarding the relationship with his client. *See State v. McDermott*, 72 Ohio St. 3d 570, 651 N.E.2d 985 (1995).


The sanctity of the attorney-client relationship has also been recognized in the Code of Professional Responsibility, specifically in DR 4-101, which forbids a lawyer from revealing a confidence or secret entrusted to the attorney during and within the scope of the attorney-client relationship. Any lawyer may invoke the implication of the Disciplinary Rules when there exists the threat that a Rule will be violated. DR 1-103(A).

¹ R.C. 2317.02(A) does allow the executor of a deceased client's estate to waive the privilege. However, Mr. Eberling died without a spouse and without an administered estate, leaving no evidence of any waiver of the attorney-client privilege.

III. Conclusion

For the reasons set forth above, this Court should enter an Order striking Mr. Doughten as a potential witness and the State should be precluded from violating the attorney-client privilege and the Disciplinary Rules by offering any testimony of Mr. Doughten learned during or relating to his relationship with Mr. Eberling.

Respectfully submitted,

Handwritten signatures of Terry H. Gilbert and George H. Carr, written in black ink over a horizontal line.

Terry H. Gilbert (0021948)

George H. Carr (0069372)

1700 Standard Building

1370 Ontario Street

Cleveland, OH 44113

(216) 241-1430

Attorneys for Plaintiff

Certificate of Service

The undersigned certifies that the foregoing Motion to Exclude Testimony of David Doughten has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 7th day of December, 1999.


George H. Carr (0069372)
Attorney for Plaintiff