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State's Brief in Opposition to Plaintiff's Motion to Exclude Papers of Dr. Sheppard + State's Exhibit C

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GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES MURRAY, ADMSTR,
Plaintiff

v.

STATE OF OHIO,

Defendant

: CASE NO. 312322

: JUDGE: SUSTER

: STATE'S BRIEF IN OPPOSITION
: TO PLAINTIFF'S MOTION TO
: EXCLUDE PAPERS OF DR.
: SHEPPARD

The State of Ohio, by and through counsel, William D. Mason, Cuyahoga County Prosecutor, and A. Steven Dever, Assistant Prosecutor, submits herewith its Brief in Opposition to Plaintiff's Motion to Exclude Papers of Dr. Sheppard. Defendant's position is based upon the principles that Plaintiff must prove any alleged privileged nature of the papers, and there is ample evidence that the papers are not privileged, all as set forth in the brief attached hereto and expressly incorporated herein by reference.

Respectfully submitted,
WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR



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1200 Ontario Street
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BRIEF IN SUPPORT OF MOTION

The Estate of Sam Sheppard has filed a motion to exclude papers of Dr. Sheppard. The stated bases for exclusion of those papers are attorney-client privilege and work product doctrine. There is no evidence that this diary was made at the request or direction of Sheppard's attorney, William Corrigan. Furthermore, the substance of the notes reflects Sam Sheppard's intention to have them published. The notes have been openly in the public realm for years, with no effort by the Sheppard estate to assert a privilege. Finally, Sheppard's second attorney, F.L. Bailey, testified under oath that he could recall no subject relative to Sheppard's case that would be subject to the attorney-client privilege.

Attorney Client Privilege/Work Product Privilege

It is well settled that the burden of showing that testimony sought to be excluded under the doctrine of privileged attorney-client communications rests upon the parties seeking to exclude it. Further, it must be shown that the communications claimed as privileged are connected with and related to the matter for which the attorney had been retained. *Lemley v. Kaiser* (1983), 6 Ohio St. 3d 258. In modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential . .

However, the privilege is not absolute. That is to say, the mere relation of attorney and client does not raise a presumption of confidentiality of all communications made between them. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 66 Ohio St.3d 638, citing *Spitzer v. Stillings* (1924), 109 Ohio St. 297.

Moreover, "The protection of the privilege extends only to communications and not to facts. " *Upjohn Co. v. U.S.* (1981), 449 U.S. 383, 101 S.Ct. 677 at 685. The work product doctrine is most typically applied in discovery proceedings and protects the mental impressions and thought process of the attorney in the representation of his client. See *Hickman v. Taylor*, (1947) 67 S.Ct. 385.

Plaintiff has baldly asserted that Sheppard's diary is a privileged attorney- client communication or privileged work product. Plaintiff has put forth absolutely no evidence to support the proposition that it was made within the scope of the attorney client relationship, or that it is in fact a communication. To the contrary, there is abundant evidence, discussed below, demonstrating that no privilege exists.

Markers of intended confidentiality are notably absent with regard to Sheppard's diary. First, the diary has been in the public domain for years. Defendant obtained portions of it from the Western Reserve Historical Society as well as from the archive at Northeastern University in Boston. Indeed, it was Dr. Sheppard's son who placed the diary at the Boston archive, where it has been viewed by numerous people, including Cynthia Cooper, co-author with Sam Reese Sheppard of *Mockery of Justice*.

Second, Sheppard states within the text itself his desire to publish the journal:

"Finally, I'll state that I hope sincerely that some day soon I'll be able to submit [sic] this for publication and possibly add further details, so that the true wonderful dynamic Marilyn Sheppard might be known . . ." See Exhibit 1, Attached.

Third, the estate through its lawyers and trial representative, Samuel Reese Sheppard, have at no time conducted the affairs of the estate in such a way as to denote that, in their

view, any privilege attaches to the diary. In fact, the notes, having been publicly available, were not a source of discovery disagreement between the parties since access to them was entirely open. The estate's concoction of a so-called privilege argument smacks of a *post hoc*, wholly -unsupportable- in law- effort to exclude highly relevant, highly probative, and likely, damaging evidence.

Finally, F. Lee Bailey Esq. testified under oath, as a former attorney for Sheppard, that he (Bailey) could recall no subject among the facts and circumstances rooted in the events of the murder of Marilyn Sheppard wherein Sheppard retained a privilege, where any existed at all.

CONCLUSION

For the foregoing reasons, plaintiff's Motion to Exclude the Papers of Dr. Sheppard should be denied.

Respectfully submitted,

WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR



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CERTIFICATE OF SERVICE

A copy of the foregoing State's Brief in Opposition to Plaintiff's Motion to Exclude Papers of Dr. Sheppard was hand delivered this 15 day of March, 2000 to Terry Gilbert at Court Room 20 B, Courts Towers, 1200 Ontario Street, Cleveland, Ohio 44113.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. Dever", written over a horizontal line.

A. Steven Dever
Assistant County Prosecutor

learned of Marilyn's pregnancy only
two days previous to her murder.
Finnell will state that I hope sincerely
that some day soon I'll be able to
submit this for publication and
possibly add further details, so that
the true wonderful dynamic
Marilyn Shepard might be known
to the world rather than the very
poor ~~picture~~ that Eleanor Harris
has given.

Note:

- ① The picture of Marilyn on the
first page of Miss Harris's article is
extremely poor and like the entire
article is not a true representation.
- ② I have never transported any
portion or portions of a human body
over any state line. This is a
bold lie and I intend to challenge it.
Since when, however is it against
the law for a Dr. to study
anatomic specimens? (is it uncommon?)
Dr's often study anatomic specimens
and it would be queer if they did not.
- ③ No mention was made of the
quite complete insurance program
purchased designed to protect Marilyn
in every way possible.
- ④ Marilyn's ^{outstanding} ability as a swimmer,
horse back riding, house keeping,