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IN THE TENNESSEE COURT OF THE JUDICIARY 2010 FEB 10 PM 12:35

IN RE: THE HONORABLE JOHN A. BELL
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE

APPELLATE COURT CLERK
NASHVILLE

Docket No. M2009-02115-CJ-CJ-CJ

COMPLAINT OF DAVID PLEAU
FILE NO. 08-3508

**MOTION TO COMPEL
and
MOTION IN LIMINE**

COMES NOW Joseph S. Daniel, Disciplinary Counsel for the Tennessee Court of the Judiciary, pursuant to Rules 26, 30, and 37, Tennessee Rules of Civil Procedure, and would respectfully move the Court for an Order compelling Thomas V. Testerman to answer discovery heretofore propounded, and for remedies thereunder, including sanctions, and as grounds therefore would state as follows:

1. At his deposition, on January 12, 2010, deponent Thomas Testerman on numerous occasions and at the specific direction of Gordon Ball, attorney for Judge Jahn A. Bell, asserted a claim of attorney client privilege (see, deposition transcript, heretofore filed).

2. The privilege assertion was unfounded, improper, in violation of the applicable statute, the Tennessee Rules of Civil Procedure and wholly unsupported and in intentional derogation of rudimentary and established Tennessee jurisprudence and fundamental principles of law.

3. The pragmatic effect of the continuing effort of Thomas V. Testerman, if not remedied or otherwise tempered by the necessary intervention of this Court, would be to obstruct legitimate discovery efforts necessary to the prosecution of this matter.

Summary of Argument

- The Tennessee Rules of Civil Procedure govern the scope and practices incident to discovery.
- Tennessee embraces a broad policy favoring discovery.
- The attorney-client privilege is established in Tennessee by statute and the statute adopts common law principles.
- Rule 26.02 (5), Tennessee Rules of Civil Procedure, provides that in making a privileged claim, the party withholding information must follow specific steps in asserting the privilege, a fundamental and direct process that in this instance has been ignored by Mr. Testerman.
- The attorney client privilege is by no means unlimited and most certainly does not by its mere invocation terminate relevant testimony unless multiple predicates are established by that claimant. Both Tennessee and general multi-jurisdictional standards agree. By way of example and not limitation, the burden is on the party claiming the privilege to establish its proper application.
- The leading Tennessee cases offer a decisional blueprint for analysis and scope of the attorney client privilege and utilization of those evaluative processes assuredly instructs that Thomas Testerman's conduct in discovery is unequivocally erroneous.
- The questions put to Testerman during discovery in by the far the majority of instances are, under applicable law, not susceptible to a plausible privilege claim.
- The effect on discovery by Testerman's unwarranted behavior have unduly delayed discovery and necessitated as of this moment this Motion to Compel, and to the extent the instant Motion to Compel is granted, an additional trip to Knoxville for needlessly repetitive deposition testimony and expense.
- To the extent matters which are properly subject to the attorney privilege will prevent certain discovery items or issues, those items or issues will as a practical matter not be available to Disciplinary Counsel. Hence, those matters should be identified with clarity and to the extent asserted by Testerman, any such assertions as elected should be binding on Testerman at trial.

- A Motion in Limine is a reasonable and proper tool to insure that discovery is thorough and not subject to being frustrated by an eleventh hour reversal of determination by Testerman.

Argument

The Movant would respectfully adopt and incorporate by reference the legal authorities and precepts set forth in the “Argument” section of a Motion to Compel and Motion in Limine being contemporaneously filed concerning testimony of the Honorable John A. Bell, in the hope of rendering duplication of effort by this Court unnecessary.

Appendix

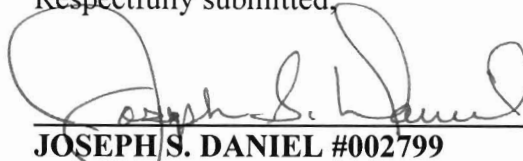
Movant has attached as an Appendix those questions to which Mr. Testerman improperly asserted the attorney-client privilege.

Conclusion and Relief Sought

The Disciplinary Counsel would therefore respectfully ask that this Court enter an Order directing Thomas V. Testerman to answer deposition questions as determined by the Court with respect to the proper procedure and scope of the asserted privilege; that appropriate sanctions be ordered and that a Motion in Limine be granted requiring Mr. Testerman to stand on his properly excluded testimony or in the alternative provide notice of intent to waive or otherwise abandon the privilege claim sufficiently in advance of trial to permit reasonable discovery, and for such other and further relief as may be just and proper.

NOTICE is hereby given that the undersigned will appear before the Honorable Don R. Ash, Presiding Judge, Court of the Judiciary, at his courtroom, 4th Floor, Judicial Bldg., Public Square, Murfreesboro, Tennessee on the 3rd day of March, 2010, at 10:00 a.m. central standard time, for a hearing on this Motion.

Respectfully submitted,



JOSEPH S. DANIEL #002799

Disciplinary Counsel

PATRICK J. McHALE, #004643

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Certificate of Service

I certify that a true and exact copy of the foregoing has been mailed, delivered, and/or transmitted by facsimile to Mr. Gordon Ball, BALL & SCOTT Law Offices, Attorneys at Law, Attorney for The Honorable John A. Bell, 550 W. Main Street, Suite 601, Knoxville, Tennessee 37902, and to Mr. Thomas Testerman, Attorney at Law, 301 East Broadway, Newport, TN 37821 on this the 10th day of February, 2010.

Patrick J. McHale, Assistant Disciplinary Counsel

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Appendix

Disciplinary Counsel for the Tennessee Court of the Judiciary, by way of Appendix to his Motion to Compel Deposition Testimony heretofore filed, would submit this Appendix as to Questions not properly subject to a claim of privilege, by witness/deponent Thomas V. Testerman. All page and line numbers are taken from the deposition of Thomas V. Testerman, taken January 12, 2010. Copies of relevant pages are attached hereto for the benefit of the Court, however, the deposition itself has been filed with the Clerk.

Questions for which no valid attorney-client claim exists:

Page(s)	Lines	Page(s)	Lines	Page(s)	Lines
14	19-20	33	11-14	42	21-24
18	10-11	33	21-22	52	11-12
25	17-18	34	9-12	53	8-9
28	14-15	37	6-10		
28	20-21	37	22-25		
29	1	38	23-25		
31	4-7	through 39	1		
31	19-25	39	11-13		
32	6-9	39	19-23		
32	15-19	40	3-4		
33	2-4	40	22-24		
