[Cite as *Kutnick v. Fischer*, 2004-Ohio-5378.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81851

DIANE KUTNICK	:	
	:	
Plaintiff-appellant	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
PHILIP J. FISCHER, M.D., et al.	:	
	:	
Defendant-appellees	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	OCTOBER 7, 2004
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga
	:	County Common Pleas Court
	:	Case Nos. CV-292712,
	:	CV-299085, CV-319302
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant, the administrator of the estate of Diane Kutnick,[1] appeals from court orders granting summary judgment for the defendants in these three consolidated actions, asserting that the court erred by granting each of the defendants' motions and by denying plaintiff's motion. We find no error in the court's decisions, so we affirm.

PROCEDURAL HISTORY

{¶ 2} Attorneys John and Peggy Widder filed the first of these three cases in Shaker Heights Municipal Court to recover their fees for the successful defense of Diane Kutnick in an involuntary commitment proceeding. Kutnick counterclaimed, asserting that the Widders disclosed confidences and breached their fiduciary duties to her in a guardianship proceeding which the Widders instituted

[1]To avoid unnecessary confusion, we will refer to both Diane Kutnick and the administrator of her estate as "Kutnick."

against her. This action was eventually certified to the Cuyahoga County Common Pleas Court and became Case Number CV-319302.

{¶ 3} Kutnick filed the second action, Case Number CV-292712, in common pleas court against her psychiatrist, Dr. Philip J. Fischer, M.D., and attorney Richard C. Klein. Kutnick alleged that Fischer breached his fiduciary duty to Kutnick and violated the physician-patient privilege and thereby caused Kutnick to suffer emotional distress. Kutnick further claimed that Klein acted in concert with the Widders to institute guardianship proceedings against Kutnick, and disclosed confidential information to the probate court in violation of the Widders' fiduciary duties, the attorney-client privilege, and the physician-patient privilege. Klein sought indemnity and contribution from John Widder via a third-party complaint.

{¶ 4} Finally, Kutnick filed a separate action, Case No. CV-299085, against John and Peggy Widder, claiming that they, Fischer and Klein disclosed confidential information in violation of their fiduciary duties, the attorney-client privilege, and the physician-patient privilege. The Widders counterclaimed for their fees in representing Kutnick in the commitment proceeding.

{¶ 5} All three cases were consolidated before the common pleas court. All parties moved for summary judgment on Kutnick's claims. The court granted summary judgment for defendant Klein without opinion. It further granted judgment for the Widders and for Fischer; a separate opinion accompanied each of those judgments.

{¶ 6} The court concluded that the Widders did not breach any duty of confidentiality to Kutnick by applying to place her under guardianship. The court also determined that Kutnick was not prejudiced by Mr. Widder's request to be appointed as her guardian, because the court in the

guardianship proceeding actually appointed someone else. Finally, the court held that Kutnick did not have a cause of action against her attorneys for violation of disciplinary rules.

{¶ 7} The court held that Dr. Fischer reasonably believed his actions complied with the terms of a release under which Kutnick authorized Fischer to discuss her health care and related matters with the Widders. The court also found that Kutnick did not take reasonable steps to protect the physician-patient privilege by objecting to Fischer's testimony in the guardianship proceeding.

{¶ 8} Kutnick attempted to appeal these rulings but her appeal was dismissed for lack of a final appealable order. She then moved the common pleas court for a judgment entry finding no just reason for delay in entering final judgment on these claims, pursuant to Civ.R. 54(B). While that motion was pending, Kutnick died, and her attorney moved the court to substitute the administrator of her estate as the plaintiff in this action. The court granted both of these motions on September 4, 2002. The administrator of Kutnick's estate then filed this appeal.

FACTUAL BACKGROUND

{¶ 9} The evidence presented with the parties' summary judgment motions discloses the following undisputed facts. Dr. Fischer began treating Kutnick for psychiatric illness in 1991. Throughout their relationship Dr. Fischer cooperated with attorneys at Kutnick's request to assist Kutnick with various legal matters.

{¶ 10} In 1994, Kutnick retained the Widders to represent her in her capacity as executor of her mother's estate. In May 1994, Kutnick provided Dr. Fischer with the following release:

> I, Diane R. Kutnick, hereby give Philip Fischer, M.D. permission to discuss my health care and related matters with my attorneys, John M. Widder and Peggy M. Widder.

> I hereby release the said Dr. Fischer from any and all liability with regard to such discussions with the above-named attorneys.
>
> By signing the herein release, I specifically waive the doctor/patient confidentiality privilege as to my above-named attorneys, while specifically retaining such privilege with regard to all others unless specifically waived by me in a separate document.

{¶ 11} On July 14, 1994, Kutnick presented at the emergency room of Hillcrest Hospital seeking assistance for an alleged poisoning. She was transferred to Laurelwood Hospital that evening. Hillcrest Hospital officials initiated involuntary commitment proceedings. Kutnick retained the Widders to represent her in these proceedings. Dr. Fischer testified at the hearing. The court ultimately determined that the statutory test for involuntary commitment had not been met and ordered Kutnick discharged. The physician-patient relationship between Dr. Fischer and Kutnick was terminated at this time, although the attorney-client relationship between the Widders and Kutnick continued.

{¶ 12} On July 26, 1994, John Widder applied to the Cuyahoga County Probate Court for appointment as Kutnick's guardian. Attorney Richard Klein represented Widder in this proceeding. Kutnick retained new counsel to represent her in connection with both the guardianship proceedings and her mother's estate, and terminated the Widders' representation.

{¶ 13} At the Widders' request, Dr. Fischer prepared a physician's certificate for filing with the court which included his diagnosis and evaluation of Kutnick's mental condition. Dr. Fischer indicated that Kutnick suffered from a delusional disorder (paranoid type), severe obsessive-compulsive disorder, dissociative disorder, and borderline personality disorder; that her judgment was impaired; that she was unable to make relevant decisions because of her paranoia, anxiety, and

depression; that she could not perform basic self-care; that she was "emotionally paralyzed from carrying out the most routine activities of daily living"; and that her living conditions were unhealthy because of her inability to organize her thoughts and affairs. An independent investigator for the probate court recommended that Kutnick be placed under guardianship.

{¶ 14} The court held a guardianship hearing on September 27, 1994. Dr. Fischer submitted an affidavit to the court in lieu of testifying. Another hearing was held on March 29, 1995, after which the court appointed attorney Nellie Johnson as Kutnick's guardian. The probate court vacated this judgment on June 20, 1995 on Kutnick's motion.

LAW AND ANALYSIS

{¶ 15} We review de novo the common pleas court's decisions to grant summary judgment for the defendants, applying the same test that the trial court applied. Summary judgment is appropriate only if (a) there is no genuine issue as to any material fact that remains to be litigated, (b) viewing the evidence in the light most favorable to the party opposing the motion, reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-movant, and (c) the moving party is entitled to judgment as a matter of law. See, e.g., *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶ 16} Kutnick supports her claims with several alternative theories. Some of these theories are based on legal principles which do not afford her with a cause of action. For example, Kutnick asserts the defendants should be held liable for breaches of the attorney-client privilege and the physician-patient privilege. These privileges allow the client (or patient) to preclude attorney (or physician) testimony about confidential matters. They are not rights, the violation of which might

entitle the client to damages. Testimonial privileges are not the source of tort duties of care upon which Kutnick might base a cause of action.

{¶ 17} In addition, Kutnick claims the Widders should be liable to her because they violated the Code of Professional Responsibility. An attorney's professional obligations under the disciplinary rules do not necessarily translate into tort duties the attorney owes to his or her client which, if breached, may be the subject of a malpractice claim. The purpose of the disciplinary rules is to protect the public interest and ensure that members of the bar are competent to practice their profession. *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171. These purposes are different from the purposes underlying tort law, which provides a means to redress a person harmed by tortious conduct. *Id.* Thus, the only authorized sanctions for violation of the disciplinary rules is a disciplinary action, which may result in reprimand, suspension, or disbarment of the subject lawyer by the Ohio Supreme Court. The rules do not create a claim for civil liability. *American Express Travel Related Services Co. v. Mandilakis* (1996), 111 Ohio App.3d 160, 166. "It is well established that the violation of a disciplinary rule does not create a private cause of action." *Montali v. Day*, Cuyahoga App. No. 80327, 2002-Ohio-2715, at ¶35.

{¶ 18} With these principles in mind, we now address Kutnick's claims.

A. Kutnick's Claims Against the Widders

{¶ 19} Kutnick's first assignment of error challenges the summary judgment in favor of the Widders. Kutnick alleges that the Widders breached a duty of loyalty by taking a position adverse to her in guardianship proceedings, and disclosed in those proceedings confidential information they acquired in the course of their professional relationship with her.

{¶ 20} In order to prove that these actions constituted malpractice, Kutnick must show "*** (1) an attorney-client relationship giving rise to a duty, (2) breach of that duty, and (3) damages caused by the breach." *David v. Schwartzwald, Robiner, Wolf & Rock* (1992), 79 Ohio App.3d 786, 797-98.

{¶ 21} There is little doubt that there was an attorney-client relationship between Kutnick and the Widders. The real issue is the duties which Kutnick claims this relationship imposed. The existence of a duty in tort depends upon the relationship of the parties and the foreseeability of injury to someone in plaintiff's position. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 645.

{¶ 22} Kutnick's claim for malpractice must fail to the extent it is based on the Widders' alleged breach of a duty of loyalty by taking a position adverse to Kutnick in the guardianship proceeding. Kutnick relies upon DR 7-101(A)(3) of the Code of Professional Responsibility for this claimed duty. Canon 7 describes an attorney's obligation to represent his or her client zealously. DR 7-101 specifically prohibits an attorney from intentionally prejudicing or damaging the client during the course of the professional relationship.

{¶ 23} An attorney representing an incompetent has special responsibilities, as the ethical considerations under Canon 7 demonstrate. See EC 7-12. We do not believe that any tort duty of loyalty precludes an attorney from pursuing the client's best interests by seeking a court determination of the client's competency and the appointment of a guardian in a proceeding separate from that in which the attorney is representing the client. The torts of malicious civil prosecution and abuse of process are available to the extent the client claims the attorney pursued the guardianship action without probable cause or for some ulterior purpose. See *Yaklevich v. Kemp*,

Schaeffer & Rowe Co., L.P.A. (1994), 68 Ohio St.3d 294. We do not understand this to be the basis of Kutnick's claim here.

{¶ 24} Even if we were to find that DR 7-101 created a tort duty of care, there is no evidence that the application for guardianship was intentionally prejudicial or damaging to Kutnick. Admittedly, Kutnick did not want a guardian, but given her history of mental problems and the question as to her competency, there is no evidence the Widders' application for appointment of a guardian was *intentionally* harmful. Furthermore, the allegedly prejudicial and damaging statements by the Widders were not made during the course of their professional relationship. They were made in a new proceeding. Therefore, even if we were to find that a violation of DR 7-101(A)(3) constituted an actionable tort, we would not find any violation here. Cf. *Montali v. Day*, Cuyahoga App. No. 80327, 2002-Ohio-2715, at ¶¶36-38, 42, 44-50 (genuine issues of fact precluded summary judgment on malpractice claim with respect to attorney's alleged failure to deliver client funds).

{¶ 25} Kutnick also claims the Widders breached a duty of care by disclosing her confidences and secrets to the probate court in the guardianship proceeding. Although an attorney's ethical obligation to preserve his or her client's confidences and secrets under DR 4-101 does not provide Kutnick with a cause of action, the tort of invasion of privacy imposes liability on a party who discloses medical information or other personal information of another without the other's consent.[2] *Alexander v. Culp* (1997), 124 Ohio App.3d 13; *Rothstein v. Montefiore Home* (1996), 116 Ohio App.3d 775, 780; *Greenwood v. Taft, Stettinius & Hollister* (1995), 105 Ohio App.3d 295.

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[2]Notably, the Widders were parties to the guardianship litigation; they were not acting as counsel. Therefore, cases which allow the court to disqualify an attorney who represents an interest adverse to his or her former client are inapposite. See, e.g., *Sarbey v. National City Bank* (1990), 66 Ohio App.3d 18, 23-24

{¶ 26} *Housh v. Peth* (1956), 165 Ohio St. 35, is the seminal case in this area. In *Housh*, the court held that an actionable invasion of privacy occurs with (a) the unwarranted appropriation or exploitation of one's personality, (b) the publicizing of private affairs with which the public has no legitimate concern, and (c) the wrongful intrusion into one's private activities. Id., at paragraph two of the syllabus. The tort alleged here would be the publicizing of private affairs. The elements of this tort are (a) public disclosure of (b) a clearly private fact, (c) the nature of which is such that making it public would be highly offensive and objectionable to a reasonable person. *Greenwood,* 105 Ohio App.3d at 303.

{¶ 27} Under the doctrine of absolute privilege, statements made in a judicial proceeding which bear some reasonable relationship to the proceeding are not actionable. *M.J. DiCorpo, Inc. v. Sweeney* (1994), 69 Ohio St.3d 497, 505. This privilege precludes actions for invasion of privacy as well as defamation. See, e.g., *Pisani v. Pisani* (Dec. 11, 1997), Cuyahoga App. No. 72136. There is no question that the attorney's statements in this case were part of and relevant to the guardianship proceedings. See *Hecht v. Levin* (1993), 66 Ohio St.3d 458. Therefore, they were absolutely privileged. Accordingly, we find no error in the court's judgment in favor of the Widders.

{¶ 28} Furthermore, a cause of action for invasion of privacy is personal to the individual whose privacy is allegedly invaded, and lapses with his or her death.[3] *Leach v. Shapiro* (1984), 13 Ohio App.3d 393, 398; *Rosenfeld v. Shafron* (August 27, 1997), Cuyahoga App. No. 52585. Therefore, the question whether the court properly entered summary judgment for the Widders on

[3]The personal nature of this cause of action should be contrasted with the duration of the attorney-client testimonial privilege, which survives the death of the client. *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 122.

this claim is a moot point. Even if summary judgment was not appropriate at the time it was entered, the court should have dismissed the matter when it was notified that Kutnick was deceased. Therefore, we affirm the judgment in favor of the Widders.

{¶ 29} Kutnick's Claims against Dr. Fischer.

{¶ 30} Kutnick also urges that the court erred by entering summary judgment for Dr. Fischer. Kutnick claims that Dr. Fischer made unauthorized public disclosures of private medical information which he learned through the physician-patient relationship. She claims he made these disclosures in a physician's certificate filed with the probate court to initiate the guardianship proceeding and in an affidavit submitted to the court in lieu of oral testimony. Kutnick further claims that these disclosures were not authorized by the release she signed.

{¶ 31} In *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, paragraph one of the syllabus, the Ohio Supreme Court held that an independent tort exists under Ohio law for the unauthorized, unprivileged disclosure of nonpublic medical information to a third party that a physician or hospital has learned through a physician-patient relationship. This duty of confidentiality is not absolute. "[A] physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." Id., 86 Ohio St.3d at 402.

{¶ 32} This is the situation we find in this case. First, as noted above, there is an absolute privilege for statements made in a judicial proceeding so long as the statement bears some reasonable relationship to the proceeding. The societal interest in encouraging uninhibited testimony, without

fear of civil liability, outweighs the patient's interest in maintaining the confidentiality of the physician-patient relationship.[4] There is no doubt that Dr. Fischer's statements were made in and relevant to the guardianship proceedings. Therefore, Dr. Fischer is not subject to liability for any statements he made to the court regarding Kutnick.

{¶ 33} Furthermore, there is a strong societal interest in protecting and caring for mentally ill persons who are unable to care for themselves. See *In re Miller* (1992), 63 Ohio St.3d 99, 108. This interest is evidenced by the statutory procedures for appointment of guardians under R.C. Chapter 2111. The patient's treating psychiatrist is generally in the best position to determine whether the patient is able to care for him- or herself, and thus is the most logical person to provide evidence to the probate court when necessary. This interest outweighs the patient's interest in maintaining the confidentiality of the physician-patient relationship. When competency is in question, the patient's competency to decide whether to disclose confidential information to the court must be considered questionable as well. Therefore, we hold that a physician is qualifiedly privileged to disclose a patient's mental condition to the probate court in connection with guardianship proceedings.

{¶ 34} We recognize that the patient can still preclude the disclosure by asserting the physician patient privilege in the guardianship proceedings. If the patient does so, the court may need to appoint a physician to examine the alleged incompetent. See R.C. 2111.03.1. The issue here

[4]As noted elsewhere in this opinion, the patient's ability to assert the physician-patient privilege to preclude the testimony in the first place is not at issue here. We are only concerned with the patient's ability to assert a civil claim afterward.

is not whether the physician can be prevented from testifying, however, but whether he is subject to civil liability for damages if he does.

{¶ 35} Dr. Fischer was privileged to disclose Kutnick's medical condition to the probate court in connection with the guardianship proceedings. Accordingly, the court properly entered summary judgment in his favor.[5]

{¶ 36} Kutnick's Claim Against Richard Klein

{¶ 37} Kutnick also claims the court erred by entering summary judgment for Richard Klein, the attorney who represented the Widders in the guardianship proceeding. She claims that, because Klein was the Widders' attorney, Klein owed the same duties to Kutnick that the Widders did. We disagree.

{¶ 38} Kutnick relies upon *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453 for the proposition that Klein owes fiduciary duties to her. *Arpadi* is inapposite. In *Arpadi*, the Supreme Court held that an attorney representing a general partner in connection with partnership matters also had an attorney-client relationship with the limited partners, because of the fiduciary relationship

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[5]Both the parties and the common pleas court argued extensively about whether the court filings at issue here were within the scope of the written release Kutnick provided to Dr. Fischer. It is unnecessary for us to address this question, given our finding that the disclosure was privileged. We note, however, that the release only allowed Fischer to discuss Kutnick's medical condition with her attorneys, not with the court. Thus, we cannot say, as a matter of law, that the disclosures to the court were "authorized" by the release, despite Kutnick's history of freely consenting to the disclosure of her mental health history in connection with various legal proceedings.

Nor was Fischer authorized to make the disclosures because he was asked to do so by the Widders. Given the adversarial nature of a guardianship proceeding, Fischer could not reasonably believe that the Widders' request for a physician's certificate and affidavit were the equivalent of a request by their client.

between the general partner and limited partners with regard to partnership matters. Therefore, the attorney could be held liable to the limited partners for breaching a duty of care to protect their interests. In this case, Klein did not represent the Widders with respect to a matter in which the Widders had a fiduciary duty to Kutnick. The Widders were not representing Kutnick in the guardianship proceedings, and did not owe her any duty in those proceedings. Klein did not owe any duty to represent Kutnick's interests in the guardianship proceedings. She had her own counsel. "As a general rule, an attorney is liable to his client alone, not to third parties, for negligence in the conduct of his professional duties." *American Express Travel Rel. Servs. Co. v. Mandilakis* (1996), 111 Ohio App.3d 160, 165. Kutnick concedes that Klein did not represent her. Therefore, Klein could not have breached any duty of care to Kutnick. Furthermore, Klein's statements to the court regarding Kutnick in the guardianship proceeding were absolutely privileged. For these reasons, the court properly entered summary judgment for Klein.

{¶ 39} Denial of Summary Judgment for Kutnick.

{¶ 40} Having concluded that the court properly entered summary judgment for each of the defendants on Kutnick's claims, Kutnick's assertion that the court should have entered summary judgment in her favor is a moot point. Therefore, we overrule the fourth assignment of error.

Affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO
PRESIDING JUDGE

ANNE L. KILBANE, J.
CONCURS IN PART AND DISSENTS
IN PART(SEE SEPARATE OPINION)

DIANE KARPINSKI, J.
CONCURS IN JUDGMENT ONLY
(SEE SEPARATE OPINION)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

ANNE L. KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 41} On this appeal from the orders of Judge Daniel Gaul that granted summary judgment against the late Ms. Kutnick's claims of legal malpractice and breach of a physician's duty of confidentiality, I concur in finding that Richard Klein had no attorney-client relationship with her, nor did he owe her any fiduciary duty. However, I respectfully dissent from the grant of summary judgment to Dr. Philip Fischer, and I dissent from the determination that John Widder and Peggy Widder did not breach duties owed to Ms. Kutnick. To countenance this conduct violates time-

honored traditions of the legal profession as well as the Code of Professional Responsibility, and such violations are relevant as evidence that the Widders breached a duty to their client.

{¶ 42} When the probate court receives information that a person may be incompetent, R.C. 2101.24(A)(1)(g) authorizes it "[t]o make inquests respecting persons who are so mentally impaired as a result of a mental or physical illness or disability *** that they are unable to manage their property and affairs effectively, subject to guardianship[.]" Guardianship proceedings can be commenced sua sponte or upon the filing of an application for appointment of a guardian.[1] Through its investigators the court conducts an informal interview with the alleged incompetent and obtains a report of the investigator's observations and recommendations regarding the necessity of a guardianship or "a less restrictive alternative."[2] Furthermore, "[i]n connection with an application for the appointment of a guardian for an alleged incompetent, the court may appoint physicians and other qualified persons to examine, investigate, or represent the alleged incompetent, to assist the court in deciding whether a guardianship is necessary."[3]

{¶ 43} The record shows that, following the July 22, 1994, involuntary commitment hearing, John Widder discussed with Dr. Fischer the merits of having Ms. Kutnick placed under a guardianship, even though he acknowledged that she was absolutely opposed to such an action. Widder, who is a former Probate Court Referee and appears to enjoy a close relationship with its personnel, claimed that three days after the hearing, on July 25th, he told Probate Court Chief Referee Donahue that Ms. Kutnick had been released from Laurelwood and, notwithstanding his

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[1]R.C. 2111.02(A).

[2]R.C. 2111.041.

[3]R.C. 2111.031.

protestations that he did not want to be Ms. Kutnick's guardian, he claimed that Donahue advised him that he "must" apply to be her guardian.

{¶ 44} Although Widder could have acted both as the applicant and as the attorney for himself as the applicant, he retained Klein to act as his attorney, and together they prepared the guardianship application and filed it on July 26th, 1994. **At that time, Widder still represented Ms. Kutnick.** The following day, attorney Richard Johnson wrote a letter discharging the Widders as Ms. Kutnick's lawyers.

{¶ 45} In mid-August, the Widders obtained from Dr. Fischer a "Physician's Certificate" to support the guardianship application. Not only were the Widders no longer Ms. Kutnick's attorneys at that time, the release given while they were her attorneys permitted Dr. Fischer only to **speak** with Widder & Widder about her mental health, etc. Nevertheless, in that document Dr. Fischer certified that he had examined Ms. Kutnick on July 23, 1994 - which he had not[4] - and set forth various reasons why she needed a guardian and why she was mentally incapacitated. When Dr. Fischer indicated he would be unable to honor a subpoena to testify at the September 24, 1994, hearing on the application, the Widders prepared an affidavit and obtained the doctor's signature attesting to information supporting the physician's certificate.

{¶ 46} Presiding Probate Judge Donnelly ordered an independent psychiatric evaluation, and the appointed expert recommended appointment of a guardian for Ms. Kutnick's estate, but not for her person. On March 29, 1995, Nelli Johnson was appointed as guardian of Ms. Kutnick's estate.

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[4]The record does not clearly show the date of Dr. Fischer's last examination of Ms. Kutnick, but it was prior to May of 1994. However, he did admit in his deposition that he had only a "brief interaction" with her on July 23, 1994, "in making arrangements for care to another facility."

On June 20, 1995, Judge Donnelly granted Ms. Kutnick's motion for relief from judgment, vacated the guardianship order in its entirety, and dismissed the application for guardianship.

{¶ 47} Ms. Kutnick's counterclaim/complaint against the Widders alleged an attorney-client relationship giving rise to a duty, a breach of that duty, and monetary damages proximately caused by that breach.[5] The attorney-client relationship imposes both contract and tort obligations on an attorney, and the client has a property interest in seeing those duties fulfilled.[6] The unique relationship between an attorney and his client was aptly described by the Ohio Supreme Court as follows:

{¶ 48} "The discharge of professional duties, demands great and unreserved confidence from the client, and the connection of the attorney with courts, and his access to papers, require unsuspected integrity. Hence *general honesty* and *fidelity to clients*, is not only necessary to his success, but even to the performance of his duties. Other good qualities may be wanting in his character, and some vices may be present, but *these* are the *essential virtues of his calling*, no more to be dispensed with than courage in a soldier, or modesty in a woman."[7] (Emphasis added.)

{¶ 49} Article IV, Section 2(B)(1)(g) of the Ohio Constitution grants the Ohio Supreme Court the authority to prescribe the standards of the practice of law in our state. Since 1970, the Ohio Code of Professional Responsibility ("OCPR") has been the primary source of the standards of

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[5] *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058, syllabus.

[6] *Loveman v. Hamilton* (1981), 66 Ohio St.2d 183, 184-185, 20 O.O.3d 194, 420 N.E.2d 1007.

[7] *State ex rel. Kilbourn v. Hand* (1839), 9 Ohio 42.

conduct for Ohio attorneys. A lawyer is liable for the failure to exercise due care and diligence in fulfilling the duties owed to a client,[8] and the OCPR mandates duties owed a client.

{¶ 50} "The code has the force of law; this is especially true with respect to the Disciplinary Rules, which are described in the code's preamble as 'mandatory,' rather than 'aspirational,' in nature.

{¶ 51} "***

{¶ 52} "Laws intended to protect individuals may create norms of behavior, the violation of which may be deemed to be actionable upon the theory that the violator has not acted with due care."[9]

{¶ 53} Although I agree that a violation of the OCPR does not, in itself, create a claim for civil liability, it is a basis for claiming a breach of the standard of due care.[10] In *Fred Siegel Co., L.P.A. v. Arter & Hadden*,[11] the Ohio Supreme Court agreed that the violation of a disciplinary rule does not create an independent cause of action, but that case does not contradict *Krischbaum*. In rejecting a private cause of action for a disciplinary rule, the *Fred Siegel* court relied on *Am. Express Travel Related Serv. Co. v. Mandilakis*,[12] a case in which a third party sought to recover for the violation of a disciplinary rule because there had been no attorney-client relationship and could not

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[8]*Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 68, 567 N.E.2d 1291.

[9]Id.

[10]Id.; see, also, *Montali v. Day*, Cuyahoga App. No. 80327, 2002-Ohio-2715, at ¶36-38 (conduct comprising breach of disciplinary rule could be used to support a legal malpractice claim).

[11]85 Ohio St.3d 171, 1999-Ohio-260, 707 N.E.2d 853.

[12](1996), 111 Ohio App.3d 160, 675 N.E.2d 1279.

claim legal malpractice. I agree that the OCPR does not create private actions outside the context of legal malpractice, but the lead opinion's view, that the Widders can defeat Ms. Kutnick's legal malpractice complaint by arguing that the only remedy available is the public disciplinary process, has the effect of making a violation of the OCPR a defense to a legal malpractice claim. This cannot be the intent of the lead opinion.

{¶ 54} DR 7-101(A)(3) states:

> **"A lawyer shall not intentionally: Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B)."**[13]

{¶ 55} DR 4-101 provides in part:

> **"(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.**
>
> **"(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:**
>
> **"(1) Reveal a confidence or secret of his client.**
>
> **"(2) Use a confidence or secret of his client to the disadvantage of the client.**
>
> **"* * *"**
>
> **"(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except**

[13] DR 7-102(B) concerns the duty to reveal a client's fraudulent acts.

> **that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."**

{¶ 56} Furthermore, EC 5-1, entitled "Loyalty to Client," states:

> **"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."**

{¶ 57} There was a duty owed to Ms. Kutnick, the Widders breached it, and the only question in dispute was the damages she sustained as a result of his breach. The legal malpractice action stems from the Widders' breaches of private duties of loyalty expressed in DR 7-101(A)(3) and DR 4-101 and owed to their client, Ms. Kutnick, not the public duties enforceable through disciplinary action.

{¶ 58} The fact that a third party eventually was appointed as the guardian of the estate does not excuse the Widders' breach of duty, because Ms. Kutnick was forced to defend herself in proceedings that they instituted in violation of their duty of loyalty, that they prosecuted themselves, and that they supported using evidence obtained in violation of the duties of loyalty and confidentiality. In addition, the majority has overlooked the fact that Nelli Johnson was appointed only as guardian of Ms. Kutnick's **estate,** and that the guardianship action was eventually vacated. Because there was ample evidence of breach of duty, summary judgment was not appropriate on this issue unless there had been a determination that Ms. Kutnick had not sustained any monetary damages in defending against John Widder's application.

{¶ 59} The lead opinion completely sidesteps this patent breach of duty. It first concludes that the Widders did not violate the duty expressed in DR 7-101(A)(3) because they took no action

prejudicial to Ms. Kutnick until after the relationship was over. As noted, however, John Widder admittedly represented her at the time he filed the application. Thus, prejudicial conduct did take place during the course of the relationship, and the lead opinion's statement to the contrary is incorrect. It is clear that Widder violated DR 7-101 when he filed an application to be appointed guardian to this **then** client.

{¶ 60} The lead opinion not only ignores what John Widder did as Ms. Kutnick's lawyer, it also claims that it is entirely appropriate to prejudice and damage a client by revealing, when you are no longer her lawyer, personal and confidential information acquired during the attorney-client relationship. However, under DR 4-101(B)(3), the duties of loyalty and confidentiality continue even after the termination of the relationship.[14] Indeed, even the death of the client does not extinguish the duty.[15]

{¶ 61} The lead opinion trivializes the Widders' conduct by stating that their post-relationship breach of confidentiality is cognizable only as an action for invasion of privacy, rather than for legal malpractice or breach of fiduciary duty. Because the duty of confidentiality survives after the attorney-client relationship has ended, the Widders owed continuing, albeit limited, professional duties to Ms. Kutnick as both lawyers and as fiduciaries.[16] The elements of legal

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[14]*Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 4-5, 1998-Ohio-439, 688 N.E.2d 258.

[15]*Taylor v. Sheldon* (1961), 172 Ohio St. 118, 15 O.O.2d 206, 173 N.E.2d 892, paragraph two of the syllabus.

[16]*Kala*, supra; see, also, *Costin v. Wick* (Jan. 24, 1996), Lorain App. No. 95CA006133 (malpractice and intentional breach of fiduciary duty are distinguishable); *David Welch Co. v. Erskine & Tulley* (1988), 203 Cal App.3d 884, 890-892 and n.4, 250 Cal.Rptr. 339 (aspects of fiduciary duty and duty of loyalty continue after attorney-client relationship ends).

malpractice do not require that prejudicial conduct take place during the attorney-client relationship; it is necessary only that the lawyer violate a duty that arises from that relationship.[17] Included among the Widders' continuing responsibilities were the duties to refrain from breaching Ms. Kutnick's confidences, to refrain from inducing others to breach her confidences, and to refrain from using those confidences against her, all of which they breached.

{¶ 62} The lead opinion continues to misconstrue the true nature of the Widders' perfidy by asserting that they had an absolute privilege to disclose her confidences because judicial proceedings were involved. This absolute privilege applies to "statements" only[18] – even if it applied to the Widders' presentation of evidence as witnesses in the guardianship proceeding, the privilege cannot apply to the Widders' deliberate use of disclosures by Dr. Fischer after they no longer represented Ms. Kutnick, nor can it apply to their breaches of confidence and loyalty in instituting the proceedings, conducting discovery, and preparing the case. It is the Widders' conduct, not their statements, that is at issue here, and the witness privilege does not extend to the tortious use of a client's secrets in filing a complaint, nor does the privilege apply when those secrets are used to obtain evidence. John Widder used Ms. Kutnick's confidences to her disadvantage to initiate the proceedings and to make his case; his intimate knowledge aided him in, among other things, making discovery requests and preparing for witnesses' testimony, including that of Ms. Kutnick herself. The privilege for statements made in judicial proceedings cannot extend so far.

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[17] *Krahn*, supra.

[18] *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505-506, 1994-Ohio-316, 634 N.E.2d 203.

{¶ 63} The probate investigator's report indicates that she contacted John Widder, and that he discussed with her knowledge he gained as Ms. Kutnick's lawyer. Further evidence indicates the Widders requested specific medical records concerning Ms. Kutnick's history of psychiatric care, and that their knowledge of her medical history was obtained through the attorney-client relationship. It is hard to imagine a more blatant breach of loyalty than to sit at a trial table opposite one's former client while presenting evidence of, and cross-examining her about, private matters disclosed or derived during the course of the attorney-client relationship.

{¶ 64} Despite the fact that neither her pleadings nor her appellate brief ever refer to anything other than the Widders' breach of duty, the lead opinion asserts that summary judgment was appropriate because Ms. Kutnick's claims were for invasion of privacy. Through this incorrect analysis, buttressed by inapplicable case law,[19] the lead opinion grants summary judgment on a claim that was never raised and ignores the fact that the Widders violated continuing duties of loyalty and confidentiality. Calling such violations invasion of privacy fails to recognize the importance of the attorney-client relationship and does an injustice to Ms. Kutnick by absolving her lawyers of the duties created by that relationship. Moreover, by miscasting the case as one for invasion of privacy, the lead opinion also states an alternative holding that Kutnick's action abated on her death. When appropriately analyzed as a legal malpractice claim, however, Ms. Kutnick's action survives.[20] Therefore, I cannot agree with the lead opinion that a breach of duty evidenced by violation of DR 4-101 does not provide a client with a cause of action if that disclosure results in damages.

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[19]See appendix A for synopsis of the majority opinion's cases.

[20]*Loveman*, at syllabus.

{¶ 65} The lead and concurring opinions also ignore Ms. Kutnick's cause of action under *Biddle v. Warren Gen. Hosp.*,[21] which held that a patient has a cause of action for the unauthorized disclosure of privileged medical information, and that a third party can be liable for inducing such a disclosure.[22] A claim of privilege for judicial proceedings should not be allowed here, because cases interpreting *Biddle* contemplate that a physician is not allowed to disclose unauthorized medical information when requested by a party in litigation until ordered to do so by a court.[23] Nevertheless, even if Dr. Fischer could assert a privilege for voluntarily disclosing medical information upon a litigant's request,[24] such a defense would not be available to the Widders, who knew at the time of their requests that they had no legal authority to obtain Ms. Kutnick's confidential medical information.

{¶ 66} The Widders knew they had no court authority for this action, and knew that they were, in fact, inducing Dr. Fischer to disclose information to them, rather than to the court. This is exactly the type of situation covered by *Biddle*'s recognition of third-party inducement. When a lawyer uses a cloak of legality to extract an unauthorized disclosure from a physician, the patient has an action for unauthorized inducement. *Biddle* states, at paragraph three of the syllabus:

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[21]86 Ohio St.3d 395, 1999-Ohio-115, 715 N.E.2d 518.

[22]Id. at paragraphs one and three of the syllabus.

[23]See, e.g., *Sirca v. Medina Cty. Dept. of Human Servs.* (2001), 145 Ohio App.3d 182, 186, 762 N.E.2d 407 (seeking court order of disclosure); *Jones v. Records Deposition Serv. of Ohio, Inc.*, Lucas App. No. L-01-1333, 2002-Ohio-2269, at ¶11 (stating that disclosure can be compelled).

[24]In order to assert such a privilege, I believe Dr. Fischer would have to show that he reasonably believed the disclosure was mandated by the court, and that question is in dispute.

> **"A third party can be held liable for inducing the unauthorized, unprivileged disclosure of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship. To establish liability the plaintiff must prove that (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship, (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information, and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.**"

{¶ 67} These elements are inescapably applicable here. The Widders knew, at the time they sought the physician's certificate from Dr. Fischer, and at the time they sought his affidavit for the hearing, that they no longer represented Ms. Kutnick and, therefore, that they had no legal authority to obtain her confidential medical information. Although there is some dispute concerning whether the Widders notified Dr. Fischer that they no longer represented Ms. Kutnick, there is no dispute that they requested both the physician's certificate and the affidavit, that they prepared the affidavit for Dr. Fischer, and that they encouraged him to rely on their expertise in probate and guardianship matters.

{¶ 68} Ms. Kutnick presented substantial evidence that the Widders induced Dr. Fischer to breach the physician-patient privilege, not only in violation of their duties of loyalty and confidentiality, but also in violation of *Biddle*. This evidence is sufficient to defeat summary judgment against the Widders, because she had viable claims for legal malpractice, breach of fiduciary duty, and inducement of the breach of a physician-patient privilege.

{¶ 69} During his deposition taken for this case, John Widder admitted that, during a hearing on the guardianship application before Judge Donnelly, the judge advised him he had been wrong to file the guardianship application. Widder opined, however, that the judge was 110% wrong. Despite

this defiant attitude toward any criticism of his conduct, the Revised Code provides ample procedures allowing guardianship proceedings to go forward without requiring a lawyer to commit the breaches of duty evident here. Whatever their reasons, the Widders violated duties owed to Ms. Kutnick, and they should be liable for any damages she suffered as a result.

{¶ 70} The judge found that Ms. Kutnick had waived the physician-patient privilege because, among other things, she failed to revoke the release she gave the Widders and she failed to notify Dr. Fischer that the Widders no longer represented her. However, despite Ms. Kutnick's failure to notify Dr. Fischer that the Widders were no longer her lawyers, there is a factual dispute concerning whether the Widders themselves notified Dr. Fischer prior to obtaining the physician's certificate in August of 1994.

{¶ 71} Dr. Fischer stated that the Widders did not notify him that they no longer represented Ms. Kutnick, and John Widder testified that he did not inform Dr. Fischer of this fact, but Peggy Widder stated that she did notify him. Dr. Fischer also knew that Ms. Kutnick had employed and terminated a number of other lawyers prior to hiring the Widders. Therefore, summary judgment on the issue of waiver was inappropriate. Although I believe that Dr. Fischer can argue, in a defense or cross-claim, that his unauthorized disclosure was induced by the Widders' conduct, the dispute concerning his knowledge of the circumstances raises factual issues for disposition on remand.

{¶ 72} The separate concurring opinion apparently does not agree with the characterization of Ms. Kutnick's action as one for invasion of privacy, but it mistakenly finds that the Widders' conduct was within the bounds set by the OCPR, as modified by the Model Rules of Professional Conduct ("MRPC"). I first note that the MRPC has not been adopted in this state, and the OCPR

continues to be applicable. Moreover, even if MRPC Rule 1.14 did apply, the concurring judge has not provided a satisfactory rationale for her interpretation of that rule.

{¶ 73} The MRPC, like the OCPR, does not prevent a lawyer from notifying proper authorities that a guardianship investigation might be necessary, but neither set of rules can be viewed as condoning the events here. The Widders did not simply notify authorities and allow an independent investigation to take place – they instituted and prosecuted the guardianship proceedings themselves, and John Widder sought appointment as Ms. Kutnick's guardian. This is improper under any formulation of the rules, because MRPC 1.14(b) does not envision a lawyer seeking to have himself appointed as guardian "except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay."[25]

{¶ 74} Whatever Ms. Kutnick's condition may have been, the record here shows no imminent catastrophe that would justify the Widders' extraordinary intervention, even under the MRPC. It is one thing to raise competency issues "in general terms[,]"[26] but the lawyer is not authorized to actively prosecute such an action against one's client or former client; investigation can take place, proceedings can go forward, and evidence can be adduced from sources other than the prospective ward's lawyer. Absent a life-threatening emergency, the procedures set forth in R.C. Chapter 2111 make it unnecessary for a lawyer to make the decision contemplated in MRPC Rule

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[25] *In re Discipline of Laprath*, 2003 SD 114, 670 N.W.2d 41, 2003-SD-114, at ¶51, quoting ABA Com. on Ethics and Professional Responsibility, Client Under a Disability, Formal Op. 96-404.

[26] *Commonwealth v. Simpson* (1999), 428 Mass. 646, 648 n.1, 704 N.E.2d 1131.

1.14(b), because the proceedings can be otherwise initiated, and the investigation can be otherwise carried out.

{¶ 75} Whether under the OCPR or the MRPC, a lawyer is to act as advocate and adversary for his client, and not as a guardian ad litem, who can be separately appointed to seek the client's best interests, including the appointment of a formal guardian.[27] The Cleveland Bar Association has drawn the same distinction, and has opined that a lawyer should seek the appointment of a guardian ad litem rather than instituting an adversarial guardianship petition against his own client. In its conclusions, the opinion specifically states:

{¶ 76} "The attorney should not petition the probate court for the appointment of a guardian under [R.C. 2111.01,] for to do so would place him in an adversarial position in relation to his client and creates a conflict of interest. However, seeking the appointment of a guardian ad litem is generally an appropriate course of action."[28]

{¶ 77} I also disagree with the concurring opinion's finding that none of Ms. Kutnick's confidences were breached, because the Widders sought, obtained, and filed Dr. Fischer's affidavit after they were no longer authorized to do so. Regardless of whether one disputes the character of other information, the information disclosed in Dr. Fischer's affidavit was confidential, and the Widders disclosed, or were substantially responsible for the disclosure of, that information. Nevertheless, the Widders breached duties of loyalty even if one finds no technical disclosure of confidential information.

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[27] *In re M.R.* (1994), 135 N.J. 155, 175-176, 638 A.2d 1274; *In re Estate of Milstein* (Colo. App. 1998), 955 P.2d 78, 83.

[28] 1989 Cleveland Bar Assn. Professional Ethics Commt. Op. No. 89-3.

{¶ 78} There is no justification in the OCPR, the MRPC, or otherwise, for a lawyer to institute and prosecute a guardianship proceeding against his client, much less to seek to become the client's guardian. Filing such an action against one's client, and seeking to be named guardian, is inexcusable. Prosecuting such an action oneself, using information gained during the relationship, furthers the disloyalty, regardless of whether the information used is viewed as confidential. Whatever the character of the information, the Widders' knowledge was gained through their attorney-client relationship, and they used that knowledge to file and prosecute an action against their client.

{¶ 79} I note also that, by finding only that the information used against Ms. Kutnick was not confidential, the concurring opinion has ignored or diluted the importance of the word "secret" in DR-4-101(A), which defines the term as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Even if not confidential, facts such as the condition of Ms. Kutnick's home and her police records should not be considered public knowledge. Certainly the interior of Ms. Kutnick's home should have been considered a private matter, and her police record, while publicly available, is not a matter to arouse great public interest. One would be hard-pressed to argue that the Widders did not use information "gained in the professional relationship" against Ms. Kutnick, and it is by no means clear that such records would have been sought or obtained had the Widders not learned of their existence during the professional relationship.

{¶ 80} Ms. Kutnick has presented substantial evidence to show that the Widders breached their duty of loyalty and confidentiality by filing and pursuing the guardianship proceeding against her, and by using confidential or "secret" information against her in that proceeding, whether through

direct statements or by gaining advantages in discovery, preparation, and strategy. The Widders used information gained during the attorney-client relationship to initiate the proceedings and to make the case for guardianship and, as already noted, their intimate knowledge aided them in all aspects of prosecuting that case.

{¶ 81} The term "secret" in DR 4-101(A) is intended to further ensure a client's ability to maintain a candid relationship with the lawyer. The information disclosed in such a relationship stems from the trust engendered not only by the duty of confidentiality, but by the duty of loyalty. In order to obtain the best possible representation, the client must make himself vulnerable to the lawyer, and this vulnerability can occur through the disclosure of information that might not be confidential, but would not necessarily be disclosed or discovered otherwise. In order to retain the "great and unreserved confidence"[29] so vital to the attorney-client relation, a lawyer must protect a client's unprivileged secrets as well as privileged matter.

{¶ 82} Although the Widders filed and prosecuted the action against Ms. Kutnick, and used information learned in the course of the attorney-client relationship against her, the concurring opinion concludes that they did nothing more than "seek the appointment of a guardian" under MRPC Rule 1.14(b). The concurrence also argues that the same result would have occurred had the Widders notified the probate court that a guardianship might be necessary, rather than filing and prosecuting the action themselves. I have already noted that MRPC Rule 1.14 has not been interpreted to allow a lawyer to prosecute a guardianship against his client,[30] and one should not assume that a probate court investigation would have resulted in a guardianship proceeding against

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[29] *State ex rel. Kilbourn v. Hand*, supra.

[30] *Laprath*, supra.

Ms. Kutnick,[31] or that such a proceeding, if it occurred, would have taken on the same character as the one prosecuted by the Widders. For example, such a proceeding might have sought only guardianship of the estate, and not of the person. And, as discussed, it is reasonable to suspect that defending an action against one's former lawyer would seem a more daunting, costly proposition than defending against a stranger.

{¶ 83} I would reverse and remand for further proceedings.

APPENDIX A.

{¶ 84} *Alexander v. Culp* (1997), 124 Ohio App.3d 13, 705 N.E.2d 378: a complaint for **statutory negligence and invasion of privacy** against a minister who, after counseling the husband, told the wife that husband was having an extra-marital affair. The court, per Judge Dyke, held that R.C. 2317.02, which protects persons against confidential disclosures in legal proceedings, does not create a statutory negligence cause of action should confidential information be disclosed outside of legal proceedings. However, the husband had a common law negligence action and would have had a clergy malpractice action if the confidences had involved or compromised any religious tenets.

{¶ 85} *Greenwood v. Taft, Stettinius Hollister* (1995), 105 Ohio App.3d 295, 663 N.E.2d 1030: a complaint for **wrongful discharge and invasion of privacy** by an attorney who alleged he was fired from his firm because he was gay and that information about his male partner was disseminated.

{¶ 86} *Rothstein v. The Montefiore Home* (1996), 116 Ohio App.3d 775, 689 N.E.2d 108: another **invasion of privacy claim** that arose when the nursing home released a potential patient's

[31]As noted, the guardianship was eventually dismissed.

financial information to his children. Because the person died before the information was disclosed, there was no invasion of his privacy for which he could claim compensation for mental suffering, shame or humiliation. Because the person was never a patient, there was no violation of R.C. 3721.17 (Patients' Bill of Rights).

{¶ 87} *Pisani v. Pisani* (Dec. 11, 1997), Cuyahoga App. No. 72136: **defamation claims** against persons who said things about Ms. Pisani during her divorce proceedings.

{¶ 88} *Hecht v. Levin*, 66 Ohio St.3d 458, 1993-Ohio-110, 613 N.E.2d 585: a **defamation claim** arising out of the filing of a grievance with the certified grievance committee of the bar association. The Supreme Court held that filing the grievance - which is confidential - is privileged as a statement within a judicial proceeding.

{¶ 89} *M. J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 1994-Ohio-316, 634 N.E.2d 203: **defamation and libel claims** arising out of affidavit that was filed with the County Prosecutor but somehow got to a newspaper. DiCorpo claimed that false information placed it in a false light before the public. The Supreme Court held that if filing a grievance with a local bar association is part of a judicial proceeding, the same must be true of an affidavit filed with the prosecutor because each sets in motion an investigation that may lead to a formal complaint or possible prosecution. Therefore, the affidavit qualified as a witness statement.

{¶ 90} None of these cases has any relationship to claims of attorney malpractice/breach of duty.

KARPINSKI, J., CONCURRING:

{¶ 91} I concur in judgment with the lead opinion but write separately regarding the Widders, because I reach my decision by a somewhat different route. There are two breaches of loyalty alleged here: first in filing an application for guardianship and second in disclosing confidential information. I find no malpractice based on either claim.

{¶ 92} I do not see a basis for a malpractice claim in the Widders' filing of an application for guardianship. Such an application merely initiates a case. This filing in itself does not automatically prejudice or damage a client. Indeed, the dissent explained that probate court could sua sponte file an application. "When found necessary, the probate court on its own motion *** shall *** appoint a guardian ***." R.C. 2111.02(A). More importantly, the disciplinary code does not expressly prohibit an attorney from filing such an application, although attorneys might well consider the less conflicted alternative of contacting Adult Protective Services instead.

{¶ 93} A task force appointed by Chief Justice Moyer has recently published its revisions to proposed rules to modernize Ohio's ethics rules and replace the current Code of Professional Responsibility with a form of the ABA's Model Rules of Professional Conduct. As of June 2004, the proposed rule regarding clients with diminished capacity would reaffirm the requirement that a lawyer, "as far as *reasonably* possible, maintain a normal client-lawyer relationship." However, the proposed rule, which tracks the Model Rules, further specifies that the lawyer may take "*reasonably* necessary protective action *** including seeking the appointment of a guardian *ad litem*, conservator or guardian." For such an action, the proposed rule states three conditions: "When the lawyer *reasonably believes* that the client has diminished capacity, is at risk of *substantial* physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest."

{¶ 94} The proposed rule, furthermore, would "impliedly" authorize the lawyer under another proposed rule "to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest." Proposed Rule 1.14. Following the proposed rule are comments which clarify that "[w]hen taking protecting action [as described above], the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. *** The lawyer's position in such cases is an unavoidably difficult one." This proposed rule and comments track the ABA Model Rules of Professional Conduct. The Task Force further observed: "There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity." The proposed rules, along with the Model Rules, therefore, specify an exception for an attorney seeking the appointment of a guardian for a client, as well as for revealing limited information.

{¶ 95} Ohio's current disciplinary code, moreover, is not inconsistent, I believe, with the proposed rule. This rule does not prohibit a lawyer taking protective action and under that action disclosing confidential information under limitations. The proposed rule is merely more explicit in permitting such actions. Also noteworthy is that over forty states have adopted the Model Rules, although "[n]o state has adopted the Model Rules in their entirety." Frequently Asked Questions, Supreme Court Task Force on Rules of Professional Conduct (as of June 22, 2004). Although a violation of the Code of Professional Responsibility is not, in itself, a form of legal malpractice, the Code sets a background against which legal practice is understood. To understand that practice in Ohio, one need not ignore more explicit rules widely adopted in other states, as well as proposals recommended by a Task Force of the Ohio Supreme Court and currently pending.[1] As the Task

[1]Proposed rules l.1-1.6 were circulated for comment in January 2004; comments

Force stated, "The Supreme Court often cites to the Model Rules in disciplinary opinions and has relied on the Model Rules for many recent revisions to the Ohio Code of Professional Responsibility." Frequently Asked Questions, supra.

{¶ 96} From that background, I conclude that the disciplinary code does not establish an absolute duty that prohibited the Widders from filing, without the permission of Kutnick, an application for guardianship. I therefore disagree with the dissent because I believe its reading of the current code, specifically DR 7-101, is too limited for the purpose of establishing a violation of a duty of loyalty on the facts here and thus a basis for a malpractice action regarding the Widders' filing an application.

{¶ 97} Also relevant is the statement by Kutnick's counsel, made at the hearing in which Probate Court appointed a guardian on March 29, 1995. Her counsel stated: "in the best interest of my client, I think that a guardian of the estate ought to be appointed in this case, at least long enough to put the financial affairs of the estate back in order and to protect my client's assets." Tr. at 4. There is no evidence to indicate the Widders were not acting to protect Kutnick's interests.

{¶ 98} I further note that even if the Widders had chosen the alternative of referring the matter to Probate Court or to Adult Protective Services, then the costs of the proceeding,[2] including

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were accepted through April 2, 2004. In late April, the Task Force adopted the current form of this set of proposed rules. Once the Task Force recommendations are complete and submitted to the Supreme Court, the Supreme Court will publish the proposed rules for comment.

[2]Under R.C. 2111.031, costs are charged against either the ward or the applicant, unless the court for good cause shown charges them to the county. The applicant initially pays the costs and the expert witness's fee. If the guardianship is ruled to be warranted, the applicant may recover the cost of proceedings from the ward's estate. If the guardianship is denied, the applicant is liable for those costs.

attorney fees, the examining physician's fees, and the court reporter's fees, would still have occurred. Thus the costs could not automatically be attributed to the Widders as damages caused by their action if those costs would have accrued even if the application had been made by Adult Protective Services, a county agency whose purpose is to protect vulnerable adults or by Probate Court motion. Without those damages, there can be no claim for legal malpractice.[3] The concession by Kutnick's attorney as to the need for a guardian for her estate further supports there would be no damages since the costs for the hearing presumably would have been the same no matter who applied for guardianship.

{¶ 99} The second breach Kutnick claims is that the Widders disclosed confidences. In her motion for summary judgment below, however,

{¶ 100} Kutnick does **not** cite any specific confidences the Widders revealed at the guardianship hearing. In her motion for summary judgment in the trial court, she states, "[i]t is apparent from the depositions of the Widders that everything that they knew about Diane Kutnick, her concerns, her fears, her living conditions, etc. that they asserted to be a basis for her guardianship over her was learned by them during the course of their representation of Kutnick. They specifically represented her in competency issues in the expunged involuntary commitment proceedings that included the hearing on July 22, 1994 (Widder Dep. Ex. 19). They specifically represented her in housing matters related to the condition of her home. (J. Widder Dep. pp. 37, 43; Widder Dep. Ex. 4)." Plaintiff's Motion for Summary Judgment at 8.

[3]The record here shows, however, that an application for attorney fees from the indigent fund was granted. Ex. 21 of the guardianship case docket.

{¶ 101} This is the same argument Kutnick makes in her appellate brief. Both briefs, however, fail to specifically support the claim of breached confidences by citing precisely what revealed information was confidential.

{¶ 102} Kutnick alleges only broadly, however, that the Widders breached their obligation to preserve her confidences because they gained their knowledge of her through their representation of her. Much of the evidence of Kutnick's illness, however, was clearly apparent to anyone observing her. The condition of the house, for example, was not confidential as was shown by exhibits the Widders included in their deposition. One exhibit was a letter from a cleaning service which stated that it had "never seen a house in such a bad condition." Deposition of Widders and Klein, Plaintiff's Exhibit 5. If the cleaning service saw the house and stated that it was filthy, then this information is not confidential.

{¶ 103} Additionally, the exhibits include letters from Widder to the Beachwood police chief requesting and then acknowledging receipt of numerous police reports and complaints about Kutnick. Anything that occurred which required police intervention would not be confidential information. Moreover, the letters were sent after the Widders were discharged on July 28, 1994. These letters are dated Dec. 20, 1994 and Jan. 5, 1996. (Exhibits 40 and 41.)

{¶ 104} In her reply brief to the Widder's motion for summary judgment, Kutnick cited the incident in which the police broke into her house at the urging of her psychiatrist because he feared for her safety. Reply brief at 2. Again, if the police were present, the incident was not confidential.

{¶ 105} The dissent argues that the Widders allegedly induced Dr. Fisher into providing the physician's certificate for their application for guardianship as to the certificate.

Because this allegation is not found in either Kutnick's trial motions or briefs below, this issue must be deemed waived. Nor is this claim articulated in her appellate brief. Neither side indicated the circumstances that prompted Dr. Fisher to provide the written

{¶ 106} physician's certificate, so the record is devoid of facts to support inducement or persuasion as to the certificate. There is no evidence that Dr. Fisher produced the physician's certificate **at the Widders' request as Kutnick's counsel**.

{¶ 107} His earlier assessment that she needed to be committed indicates he had independently arrived at a decision. Nothing in his deposition indicates that Dr. Fisher was induced or encouraged to provide the certificate. Rather, it appears that he agreed **a guardianship** was needed.

{¶ 108} Further, the Widders did not deceive Dr. Fisher concerning their representation of Kutnick at the time **they filed the application**, because when he examined her for this certificate, on July 23, 1994, the Widders still represented her. Although Dr. Fisher did not complete the affidavit until after the Widders were discharged, nothing in evidence indicates that he executed it for the Widders as counsel. Rather, the evidence shows he executed it because he felt it was necessary for the guardianship to go forward.

{¶ 109} The actual affidavit Dr. Fisher executed for the guardianship hearing also was not induced deceptively. Although he did not know at the time he executed the affidavit that the Widders no longer represented Kutnick, this fact is of no consequence. Dr. Fisher was required to respond to the subpoena and he submitted the affidavit in lieu of being present for testimony. There is no evidence he was induced by the Widders to provide the affidavit. Rather, he was fulfilling his obligation under the law.

{¶ 110} In the attorney-client relationship, "the only materials protected are those which involve communications with his client's attorney." *State v. Jergens* (Sept. 3, 1993), Montgomery App. No. 13294, 1993 Ohio App. LEXIS 4322 at *21. Observations which may be made by anyone, therefore, do not qualify as attorney-client communications. Id.

{¶ 111} In her reply brief below, Kutnick cited to a reference in the Widders' motion for summary judgment. This reference is to Peggy Widder's deposition, in which she offered the following explanation as to why she felt Kutnick needed a guardian: "I was aware of her living conditions. I was aware of difficulties she had had with the health department. I was aware that she wasn't taking her medications. I was aware that she wasn't able to separate reality from fantasy. I was aware that she was delusional. I had reason to believe that she was not able to maintain herself in a safe fashion." Deposition at 26. Peggy Widder did not make these statements, however, until **after** she had been sued by Kutnick for malpractice. Their revelation, therefore, arose solely as a defense to Kutnick's suit and does not qualify as confidences breached. *Ward v. Graydon, Head & Ritchey* (2001), 147 Ohio App.3d 325, 330.

{¶ 112} Neither in her motion for summary judgment nor her appellate brief does Kutnick cite to any portion of the guardianship hearing transcript itself, nor does she specify any confidential information which the Widders allegedly divulged in that proceeding. Instead, she makes a blanket statement that the Widders violated confidences.

{¶ 113} Nor is there any disclosure of confidences in the initial guardianship application filled out by the Widders. The application states only: "She is unable to handle her personal or financial affairs." Ex. 22.

{¶ 114} There is, therefore, no evidence to show that the Widders violated the duty of confidentiality to their client, either before or after their representation of her. There is, moreover, no specific evidence of other duties violated to make this a question of factual controversy.

{¶ 115} The only transcripts in the record are of three Probate Court hearings, on September 14, 1994, on November 10, 1994, and March 29, 1995. In the September hearing, Widder declined to testify, citing attorney-client privilege. In the November hearing, the referee asked Mr. Widder, "Do you know the reasons that she was treated by Dr. Fisher, physical or mental?" Mr. Widder responded, "Well, Dr. Fisher is a psychiatrist, and I am a little leary [sic] of answering that question, Mr. Donahue, because I don't want to betray the attorney-client privilege." Tr. at 5. Mr. Widder again later raised the attorney-client privilege when he was questioned about the proceedings at Kutnick's competency hearing at Laurelwood Hospital. He stated: "Again, I have got problems with the attorney-client privilege because we were at that point still her attorneys." Tr. at 7. At the hearing, the Widders attempted to balance two different attorney-client obligations; maintaining a reasonably normal attorney-client relationship which would include following only the client's wishes, and taking a reasonably protective action to ensure the well-being of their client. The Model Rules described this as an "unavoidably difficult" task.

{¶ 116} I would thus affirm the lower court.