

|                             |   |                                 |
|-----------------------------|---|---------------------------------|
| First National Bank of      | ) | CASE NO. 96-G-1369              |
| Southwestern Ohio,          | ) |                                 |
|                             | ) | (REAL PROPERTY TAX)             |
| Appellant,                  | ) |                                 |
|                             | ) |                                 |
| vs.                         | ) |                                 |
|                             | ) |                                 |
| Butler County Board of      | ) |                                 |
| Revision, Butler County     | ) | (ORDER)                         |
| Auditor and Board of        | ) |                                 |
| Education of the Middletown | ) | (Granting Motion for Protective |
| City School District,       | ) | Order)                          |
|                             | ) |                                 |
| Appellees.                  | ) |                                 |

APPEARANCES:

|                     |   |                                      |
|---------------------|---|--------------------------------------|
| For the Appellant   | - | Christopher P. Finney                |
| First National Bank |   | Finney, Bacon & Stagnaro Co., L.P.A. |
|                     |   | 2623 Erie Avenue                     |
|                     |   | P.O. Box 8804                        |
|                     |   | Cincinnati, Ohio 45208               |
| <br>                |   |                                      |
| For the County      | - | John F. Holcomb                      |
| Appellees           |   | Butler County Prosecuting            |
|                     |   | Attorney                             |
|                     |   | By: Harry B. Zornow                  |
|                     |   | Assistant Prosecuting Attorney       |
|                     |   | 216 Society Bank Building            |
|                     |   | P.O. Box 515                         |
|                     |   | Hamilton, Ohio 45012                 |
| <br>                |   |                                      |
| For the Board       | - | Sheldon A. Strand                    |
| of Education        |   | Attorney at Law                      |
|                     |   | 11 S. Main Street, Suite 200         |
|                     |   | Middletown, Ohio 45044               |

Entered July 21, 1997

This cause and matter is now considered by the Board of Tax Appeals upon an amended "Motion For A Protective Order" filed under date of June 10, 1997, by counsel for the Board of Education ("BOE"). The BOE's motion seeks an order from this Board prohibiting counsel for the First National Bank of Southwestern Ohio ("First National") from taking the deposition of Robert L. Johnson,

Jr., an appraiser hired by the BOE. Counsel for First National filed a memorandum contra to the motion, and a reply was filed by counsel for the BOE.

First National served a subpoena on Mr. Johnson, an appraiser retained by the BOE, to take his deposition regarding appraisal work performed on the subject property. The BOE, unsatisfied with with Mr. Johnson's methodology and end result, decided he would not be used as a witness at trial. Therefore, the BOE claims that First National is not allowed to take the deposition of a non-testifying expert witness pursuant to Civil Rule 26(A) O.R.C.P.<sup>1</sup>, which states:

"It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."

Therefore, since Mr. Johnson will not be testifying for the BOE at trial, the BOE specifically cites Civ. R. 26(B)(4)(a) and (b) which provides:

"(4) Trial Preparation: experts.

"(a) Subject to the provisions of (B)(4)(b) of this rule and Rule 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation

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<sup>1</sup>Pursuant to Ohio Adm. Code 5717-1-11(A), this Board will follow the Ohio Rules of Civil Procedure to the extent they are not inconsistent with other Board rules.

or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

"(b) As an alternative or in addition to obtaining discovery under subdivision (B)(4)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given to the other party or those to be given on direct examination at trial."

(Emphasis added)

Thus, the BOE contends that since it does not intend to call Mr. Johnson as a witness, the appraisal report is attorney work product and not discoverable absent a showing of undue hardship or exceptional circumstances.

In its memorandum contra, First National claims that protection does not lie in this case for two reasons:

"1) The identification of Johnson and the repeated disclosure of the content of his opinions from both Johnson and counsel for the school district constitute a waiver of what ever privilege may have existed to protect the discovery of such information.

"2) There is evidence that counsel for the School District attempted to tamper with evidence by conditioning Johnson's payment

upon him changing the appraisal after it had already been developed, a scheme in which he refused to participate. These facts constitute "exceptional circumstances" that are an exception to the work-product doctrine established with respect to expert witnesses in Civ. R. 26(B)(4). Further, there is no way other than taking the deposition of Mr. Johnson that Appellant can establish the actions of Strand in tampering with evidence, an extremely important set of facts for appellant."

Initially we note that Mr. Strand states in the affidavit attached to his reply memorandum that he did not ask Mr. Johnson to raise the value of his appraisal.

Our rules provide that discovery may be permitted by deposition. Ohio Adm. Code 5717-1-11. The issue before us today is whether the opinions and work of Mr. Johnson are properly protected as attorney work product. Civ. R. 26(B)(4)(a) protects from disclosure an expert's opinion, when that expert has been retained in anticipation of litigation. The broad protection is limited by allowing for discovery upon a showing of undue hardship or exceptional circumstances.

Both counsel cite B & L Associates v. Franklin Cty. Bd. of Revision (interim order, Apr. 5, 1996), B.T.A. Case No. 95-M-297, and TRW, Inc. v. Cuyahoga Cty. Bd. of Revision (interim order, June 7, 1996), B.T.A. Case No. 95-M-1019, in their memorandum. In B & L Associates, supra, this Board found that waiver of an attorney's work product protection occurred when the attorney instructed his appraiser to meet with the appraiser for the property owner and discuss the general market place as well as the valuation of the

property in issue. Thus, we denied the motion to quash the subpoena. In the present case, it appears that Mr. Strand arranged for Mr. Johnson to meet with a Mr. Mark D. Ayer, an employee of Real Estate Tax Consultants, Inc., to view the property and obtain income and expense information for his appraisal. Any other conversation between the two was not at the instruction of Mr. Strand.

In TRW, Inc., supra, this Board granted a motion to quash subpoenas which would have required appraisers for the BOE, not expected to testify at hearing, to be deposed. We stated:

"Given the BOE's right to research value of a property in the preparation of its case and for settlement purposes, this Board does not believe that disclosure of such information, prepared in anticipation of litigation, is required if the expert is not expected to testify \*\*\*"

Although Mr. Johnson spoke with counsel for First National in general terms regarding his valuation determination, there is nothing in the record to suggest that Mr. Strand instructed him to do so thereby waiving his right to attorney work product protection. Also, there is a dispute as to what was actually said. Since Mr. Strand has terminated his association with Mr. Johnson and does not intend to call him as a witness, we find that Mr. Strand did not waive his protection.

Addressing First National's second allegation that Mr. Strand attempted to tamper with evidence by asking Mr. Johnson to change his appraisal value, the Board of Tax Appeals is not the forum to determine whether unethical conduct occurred. We do not

find this allegation constitutes "exceptional circumstances" as set forth in Civ. R. 26(B)(4). First National has not shown that denial of the requested discovery will impact upon its ability to obtain facts and opinions on the value of the subject property, as opposed to evidence that possible misconduct has occurred.

Civ. R. 26(B)(4)(a) protects from disclosure an experts opinion, when the expert has been retained in anticipation of litigation. The broad protection is limited by allowing for discovery upon a showing of undue hardship or exceptional circumstances. Hudson Local School Dist. Bd. of Edn. v. Hudson Park Estates, Inc. (1989), 64 Ohio App. 3d 199. The rule, an exception to the Civil Rules' general inclination to permit broad discovery of information either relevant to the issue at hand or capable of leading to relevant information, is designed to allow an attorney to prepare his or her case without concern as to what the preparation may reveal. English v. Johns-Manville Sales Corp. (1984), 13 Ohio Misc. 2d 22. See TRW, Inc., supra. As stated previously, there has been no showing of undue hardship or exceptional circumstances.

Lastly, counsel for the BOE has requested that attorney fees be awarded for the preparation and filing of the motion for protective order. Ohio Adm. Code 5717-1-14 provides for sanctions, which includes attorney fees, when a party has failed to comply with an order of this Board. In the instant case, there has been no failure to comply with an order of this Board. Therefore, we find the request for attorney fees is not well taken and the same is hereby denied.

Giving consideration to the foregoing, we find the BOE's request for protective order is well taken and it is therefore granted. The subpoena directed to Mr. Johnson is hereby quashed.