IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE JOSHUA JOHN WIGGINS, **Debtor.**	)	**Case No. 99-40458**
JOSHUA JOHN WIGGINS, an incapacitated person by and through his guardians and conservators, and DAVID HALE and EVA HALE; and L. D. FITZGERALD, as Trustee in Bankruptcy, **Plaintiffs,** **vs.** PEACHTREE SETTLEMENT FUNDING, **Defendant.**	)	**Adv. No. 99-06212** **SUMMARY ORDER RE PLAINTIFFS' MOTION TO COMPEL AND MOTION FOR PROTECTIVE ORDER**

Before the Court for disposition is Plaintiffs' Motion to Compel and Motion for Protective Order. Following a telephonic hearing on both motions on March 30, 2000, the motions were taken under advisement.

In the litigation, commenced September 13, 1999, Plaintiffs claim Debtor Joshua Wiggins was not mentally competent to sell his rights under an annuity contract to a series of deferred payments to Defendant Peachtree Settlement Funding in exchange for a lump sum. Debtor had suffered a head injury in an auto accident, and the annuity contract funded the settlement of a his personal injury action stemming from that accident.

Motion to Compel

On December 28, 1999, Plaintiffs served Defendant with interrogatories and requests for the production of documents. Defendant served responses to this discovery on March 1, 2000. In the responses, Defendant provided some of the information requested, while at the same time raising a general objection to the form and content of the interrogatories. Plaintiffs filed a Motion to Compel proper responses to the discovery on March 21. Defendant served supplemental and amended responses to the discovery on March 31, the day after the hearing on Plaintiffs' motion.

Defendant, in the original responses served on March 1 and in the amended or supplemental responses served March 31, objects to Plaintiffs' first set of interrogatories because, Defendant asserts, there are more than twenty-

five interrogatories in violation of the discovery rules.[1] *See* Fed. R. Civ. P. 33(a); Fed. R. Bankr. P. 7033 (incorporating Fed. R. Civ. P. 33). However, Rule 33(b)(4) provides that "[a]ny ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." The failure to raise objections within the time and in the manner required by Rule 33 of the Federal Rules of Civil Procedure may result in a waiver of potentially valid objections. *Walker v. Lakewood Condominium Owners Ass'n*, 186 F.R.D. 584 (C.D. Cal. 1999) (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.1981) (untimely service of response to interrogatories waives objections)); *Safeco Insurance Company of America v. Rawstrom*, 183 F.R.D. 668, 671 (C.D. Cal. 1998) (interrogatory objections not included in a timely response are waived even if the objections are contained in a later untimely response, absent a showing of good cause).

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[1] While Defendant's March 31 responses to Plaintiffs' discovery repeats the general objection concerning the number of interrogatories, Defendant has provided substantive responses to most of the questions and document inquiries. However, not having served these additional responses until the day after hearing on Plaintiffs' motion to compel is a less than impressive tactic in the Court's opinion.

Under Rule 33(b),[2] Defendant was required to respond to the interrogatories, or to raise any objections to them, within 30 days of service. Defendant made no timely response nor has it made any showing of good cause to justify its delay in responding. Therefore, any objection Defendant asserts concerning Plaintiffs' first set of interrogatories is deemed waived as untimely under Rule 33(b)(4), regardless of the merit of such objections.

Therefore, Plaintiffs' Motion to Compel responses to the interrogatories is hereby **GRANTED** and Defendant is hereby ordered to respond to all the interrogatories in Plaintiffs' first set of interrogatories, to the extent such interrogatories have not been previously answered, within fourteen (14) days of the date of this Order.

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[2] Fed. R. Civ. P. 33(b)(3), made applicable in bankruptcy by Fed. R. Bankr. P. 7033, provides:

> The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

Motion for Protective Order

Defendant has noticed the deposition of Plaintiffs' counsel, John Lezamiz, asserting that Mr. Lezamiz is a fact witness concerning the mental state of his client, Debtor Joshua Wiggins, at different times relevant to this action. Plaintiffs object to having Mr. Lezamiz deposed and on March 21, 2000, filed a Motion for Protective Order asking to be excused from testifying at any such deposition.[3]

Rule 30(a), made applicable in bankruptcy by Fed. R. Bankr. P. 7030, does not expressly prohibit a party from taking the oral deposition of opposing counsel. The Ninth Circuit has not addressed the propriety of such practice. Most courts who have examined the question have followed the lead of the Eighth Circuit case of *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). *Shelton* restricts the practice to limited circumstances. The party seeking to depose opposing counsel must establish that: (1) there are no other means by which the information can be obtained; (2) the information

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[3] The deposition was originally scheduled to take place on April 3, 2000. However, the Court directed that the deposition not occur pending disposition of Plaintiffs' Motion for Protective Order.

sought is relevant and is not subject to privilege; and (3) the information sought is critical for the party in preparation of the case. *Id.* (internal citations omitted); *see also American Casualty Company of Reading, Pennsylvania v. Krieger*, 160 F.R.D. 582, 588 (S.D. Cal. 1995) ("it is appropriate to require the party seeking to depose an opposing party's attorney to establish a legitimate basis for requesting the deposition.") Without appropriate guidance from the Ninth Circuit, this Court elects to follow *Shelton* as persuasive authority. *See Massachusetts Mutual Life Insurance Company v. Cerf*, 177 F.R.D. 472, 478 (N.D. Cal. 1998) (*Shelton* "is generally regarded as the leading case on attorney depositions.")

Here, Defendant points out that Lezamiz represented Debtor in connection with the prepetition personal injury case. Following the personal injury litigation and settlement, Lezamiz allegedly represented Debtor while Defendant and Debtor negotiated the contract to purchase Debtor's annuity payments. Lezamiz has also represented Debtor during proceedings in which a conservator was appointed for Debtor in state court. Finally, Lezamiz is Debtor's attorney in the pending bankruptcy case.

Defendant contends that because of the period of time over which Lezamiz has observed Debtor, and based upon the legal actions taken by

Debtor with Lezamiz' apparent advice, Lezamiz can express a relevant opinion concerning Debtor's mental condition at a variety of times, including at the time he signed the contract with Defendant. Defendant assumes and alleges it was Lezamiz who advised Debtor's mother that the contract he signed with Defendant was illegal. *See* Defendant's Memorandum in Opposition to Motion for Protective Order and Motion to Compel, at p. 2.

Based upon this showing, the Court is unwilling to allow Defendant to proceed with the deposition of Lezamiz. Obviously, as an attorney, most of the information Lezamiz may have about Debtor or his condition came from other sources, and so he would have limited personal knowledge of any facts. Fed. R. Evid. 602. While Lezamiz had an opportunity to observe and talk with Debtor during the times in question, other witnesses would also likely be available to testify about Debtor's conduct and condition. There appear to be other means whereby this information may be obtained. For instance, Defendant could begin by deposing Debtor's mother who supposedly told Defendant's agents she had been advised the purchase contract was illegal. Any additional opinions that Lezamiz could provide about Defendant's mental state would probably amount to expert testimony, something which Defendant has not shown Lezamiz is qualified to offer, Fed. R. Evid. 701; Fed. R. Evid. 702. Even assuming that

Lezamiz concluded, as an attorney, that Debtor may be legally capable of entering into the contract with Defendant, that conclusion is not binding in connection with, nor even relevant to, the Court's ultimate decision on that issue. Fed. R. Evid. 401; Fed. R. Evid. 402.

The information sought from Lezamiz, even if relevant, likely also treads on the attorney-client privilege or the work-product rule. Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness . . . shall be governed by the principles of the common law." Fed. R. Evid. 501. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981). The purpose of the privilege is to encourage full communication between the attorney and the client. Full communication provides the attorney with the necessary information to be an effective advocate for the client. *Id.*

While the Court, at this time, is not deciding what is or is not covered by the attorney-client privilege in this case, the Court can anticipate that much of the information sought by Defendant through the deposition of Lezamiz would require revelation of his privileged communications with his clients.

The work-product rule, while not a privilege, is a "qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Insurance Company v. United States District Court for the District of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989). Production of any documents or information that may reveal Lezamiz' mental impressions or opinions regarding the mental state or condition of his client, the Debtor, are also likely protected by the work-product rule and only subject to discovery upon a showing by Defendant of substantial need or the inability to obtain the information without undue hardship. *Id.* Defendant has not shown such a need or inability to obtain the information in this case.

Plaintiffs are under an obligation, upon request, to provide Defendant with relevant, non-privileged reports, data and other information they may have concerning Debtor's mental condition, such as Debtor's medical records. That other information likely constitutes the basis upon which Lezamiz may have formed his conclusions and is, in effect, what Defendant seeks through deposing Lezamiz.

For the reasons stated above, and for other good cause, the Court orders that Plaintiffs' Motion for Protective Order be and is hereby **GRANTED.**

Mr. Lezamiz is excused from being deposed. If Defendant, at a later date and after substantial other discovery has been undertaken in this action, persists in its belief that discoverable information may only be obtained by deposing Lezamiz, Defendant may move the Court for such an order. Any such motion must be accompanied, however, by a detailed listing of the subject matters of all questions to which Lezamiz will be asked to respond, and a detailed showing that Defendant can satisfy the requirements established by the case law set forth above.

Request for Award of Fees and Costs.

Defendant's failure to respond to Plaintiffs' interrogatories was not justified under the Rules. Pursuant to Rule 37(a), incorporated by Fed. R. Bankr. P. 7037, and as requested by Plaintiffs, the Court hereby orders Defendant to pay Plaintiffs the sum of $500.00 within fourteen (14) days of the date of this order, as and for reimbursement of Plaintiffs' attorneys fees and costs incurred in the prosecution of the above motions.

DATED This 10th day of April, 2000.

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JIM D. PAPPAS

CHIEF U.S. BANKRUPTCY JUDGE