

ORIGINAL

IN THE SUPREME COURT OF OHIO

	)	Case No. 2009-0121
	)	
IN THE MATTER OF:	)	On Appeal from the Geauga County
	)	Probate Court of Appeals, Eleventh
THE GUARDIANSHIP OF	)	Appellate District
JOHN SPANGLER	)	
	)	Court of Appeals
	)	Case Nos. 2007-G-2800
	)	2007-G-2802
	)	

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**APPELLANTS' MEMORANDUM IN OPPOSITION TO  
 APPELLEE'S GABRIELLE AND JOSEPH SPANGLER'S MOTION TO DISQUALIFY  
 FRANKLIN J. HICKMAN AND JUDITH C. SALTZMAN AS COUNSEL FOR GEAUGA  
 COUNTY BOARD OF DEVELOPMENTAL DISABILITIES**

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## **I. Introduction**

Appellant Geauga County Board of Developmental Disabilities (“GCBDD”), formerly Board of Mental Retardation and Developmental Disabilities), opposes the Spanglers’ Motion to Disqualify Franklin J. Hickman and Judith C. Saltzman as counsel. Appellees Gabrielle and Joseph Spangler (“Spanglers”) have not met their burden of demonstrating that the factors justifying disqualification under either Rule 1.9 or Rule 1.18 of the Ohio Rules of Professional Conduct are present. Nor have Appellee’s shown that disqualification – a drastic measure – is even necessary. Moreover, to the extent that Appellee’s have any legitimate claim, Appellee’s have waived that claim for two distinct reasons. Reason first is their waiting to raise the claim a year after Appellee’s were aware of Mr. Hickman’s involvement. Reason second is that Appellee’s have asserted their formal opposition with only three weeks left in Appellant’s briefing period.

The Motion to Disqualify should be denied.

## **II. Facts**

Franklin J. Hickman has represented County DD Boards since approximately 1983. He was a founding trustee of the Ohio Association of County Boards of MR/DD in 1983, and has served as general counsel for the OACBMR/DD since approximately 1986. Hickman Affidavit, ¶ 29.<sup>1</sup> As counsel, Mr. Hickman has conducted hundreds of seminars and training programs for staff of DD Boards, has been counsel for various County DD Boards in numerous court actions, and has drafted legislation on matters affecting individuals with developmental disabilities. Hickman Affidavit, ¶¶ 30-33.

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<sup>1</sup> Three affidavits are submitted in support of this Opposition: Exhibit A, Affidavit of Franklin J. Hickman “Hickman Affidavit,” Exhibit B, Affidavit of Donald Rice, Superintendent, Geauga County Board of Developmental Disabilities, “Rice Affidavit,” and Exhibit C, Affidavit of Judith A. Miedema, Assistant County Prosecutor for Geauga County, “Miedema Affidavit.”

As stated by Donald Rice, Superintendent of the GCBDD, in the county board system, Frank Hickman is viewed by “everybody” in the MR/DD system “as the expert on legal issues affecting our agencies. When the county board superintendents meet and a legal issues arises, Franklin Hickman is viewed as the person to go to. I could not imagine getting into a legal issue without Franklin Hickman’s assistance.” Rice Affidavit, ¶ 3. Mr. Rice also noted that “It will be harmful to the Geauga DD Board’s position in this case if Mr. Hickman is disqualified from representing us, because we will lose the benefit of his years of experience in the very system under scrutiny in the Court.” Rice Affidavit, ¶ 6.

Mr. Hickman is also a supporter of the Ohio Coalition for Children with Disabilities, an advocacy group for whom he has provided trainings over the years. Hickman Affidavit, ¶ 4. Through this work, he came to know Mrs. Spangler. When she asked to meet with him on June 21, 2006, Mr. Hickman readily agreed. Hickman Affidavit, ¶ 5. Prior to this meeting, the Spanglers had obtained an emergency guardianship followed by a 30 day guardianship of their son, John Spangler. The hearing on a full guardianship was to occur in July, 2006. 2800 Rec. # 7, Tr. 6/15/06 and 6/19/06.<sup>2</sup> The gravaman of this meeting between Mrs. Spanger and Mr. Hickman was not the guardianship, which was supported by the Geauga County MR/DD. Rather, questions the Spanglers had concerned potential claims that both arose out of an incident of sexual abuse when John was a resident of the state-run Warrensville Developmental Center, and arose out of other alleged incidences of wrongdoing. Hickman Affidavit, ¶ 6.

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<sup>2</sup> “2800 Rec. #7 refers to the record number designation in the numbered docket for 11<sup>th</sup> Dist. Court of Appeals Case No. 2007-G—2800. A second appeal is involved in this case, namely 11<sup>th</sup> Dist. Court of Appeals Case no 2007-G-2802. The same transcripts were filed in 2802, at record number 6. To avoid confusing duplication, this memorandum cites only to the transcripts in Case No. 2007-G-2800, as the transcripts in the two cases relate to the same hearings.

During the June 21<sup>st</sup> meeting, Mr. Hickman told Mrs. Spangler that he represented the Geauga County MR/DD and could not represent her in any action involving them. Hickman Affidavit, ¶ 7. He did not agree to represent her on any other matter, no retainer agreement was requested or executed, and Mr. Hickman did not bill Mrs. Spangler for the meeting. Hickman Affidavit, ¶¶ 8-12.

On July 18, 2006, the Geauga County Probate Court conducted a hearing on the Spanglers' guardianship request and, with the support of the Geauga County MR/DD, the trial court granted co-guardianship of John to his parents. Hickman Affidavit, ¶ 10, Rec. #7, Tr. 7/18/2006. Mr. Hickman did not represent the Spanglers or the Geauga County MR/DD at this hearing. Mr. Hickman was neither aware of, nor involved in, proceedings initiated by the Geauga County MR/DD in October, 2006, that sought removal of the Spanglers as guardian for their son, and also sought the temporary appointment of APSI.<sup>3</sup> The Spanglers knew that Mr. Hickman was not their attorney in the removal proceedings: they were represented by Attorney Pamela Makowski. Assistant Geauga County Prosecutor, Brian Richter, represented Geauga County MR/DD. At the hearing on October 18, 2006, the Spanglers agreed to allow APSI to remain as guardian for a period of six months. Their attorney stated:

[W]e'll allow the temporary guardian to stay in place, and Mr. and Mrs. Spangler have agreed that they will do, each do a drug and alcohol assessment, that they will do, they'll meet with counselors to address some of their issues, follow those recommendations, and that they will work the ASPI (*sic*) and follow those recommendations.

2800 Rec. # 7, Tr. 7/18/2006, p. 5. The Spanglers also agreed to get a psychiatric evaluation.

*Id.* p. 6.

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<sup>3</sup> APSI is Advocacy and Protective Services, Inc., a non-profit corporation chartered in the State of Ohio. It is a statewide agency that provides guardianship and protective services to people with mental retardation and developmental disabilities under Ohio Rev. Code §5123.55, *et seq.*

On November 13, 2006, Mr. Hickman presented a training session on disciplinary procedures for children receiving special education services. Hickman Affidavit ¶ 13. He frequently presents on this topic, often talking with participants afterwards. He does not recall meeting with Mrs. Spangler on November 13, 2006, and has no notes, time records or other evidence of such a meeting. If Mr. Hickman did have a discussion with Mrs. Spangler on that date, he has no recollection of what was said. Hickman Affidavit, ¶13. Because Mrs. Spangler had a different attorney representing her on the guardianship matter by that time, she could not have reasonably thought that Mr. Hickman was her attorney with respect to her son's guardianship.

Hearings on the Geauga County MR/DD's motion to remove the Spanglers as guardians were subsequently held on April 27, 2007, June 13, 2007, and July 24, 2007. Attorney Makowski represented the Spanglers at each of these hearings. Mr. Hickman did not represent any party in these proceedings. Mr. Hickman was not present.

Mr. Hickman's next knowledge of the Spangler guardianship matter was not until March, 2008, when he was contacted by the Geauga County MR/DD. The Board informed Mr. Hickman that Mr. and Mrs. Spangler had been removed as guardians, and were requesting assistance with an appeal. Thereafter, on April 16, 2008, Mr. Hickman filed a motion for leave to file a brief as *amicus curiae* on behalf of the Ohio Association of County Boards of MR/DD. Hickman Affidavit, ¶¶16-17. The Motion for leave to file the *amicus* brief was allowed on May 14, 2008, without objection from the Spanglers, their attorney, or any other party. Mr. Hickman participated in oral argument in the Eleventh Circuit Court of Appeals on October 17, 2008. No objections were filed or recorded. Hickman Affidavit, ¶¶20-21.

Mr. Hickman has not shared confidential information regarding the Spanglers with the Geauga County Assistant Prosecutor, J.A. Miedema or with the GCBDD. Miedema Affidavit ¶ 6, Rice Affidavit, ¶ 4. Superintendent Rice notes that “[a]t the time the Geauga Board decided to seek removal of Gabriele [sic] Spangler as guardian, we had no clue that Mr. Hickman had met with her. He never shared anything, and I trust him completely.” *Id.*

Mr. Hickman entered his appearance in this case on June 9, 2009. The Motion to Disqualify was filed a month later, on July 10, 2009, well after the briefing schedule had been established. As the Assistant Prosecutor, J.A. Miedema notes, “...removing Mr. Hickman from collaboration with the Geauga County Prosecutor’s office the at this juncture would be highly disruptive to our prosecution of the Appeal. Mr. Hickman and his colleagues’ collaboration and infinite resources are vital. They have begun assisting me in drafting Appellant’s Brief, which has a due date of August 4, 2009.” Miedema Affidavit, ¶ 7.

### **III. Burden of Proof**

A party seeking disqualification of an attorney “bears the burden of demonstrating the need to disqualify counsel.” *Lamson & Sessions Co. v. Mundinger* (N.D. Ohio), 2009 U.S. Dist. LEXIS 37197 at \*12, citing *Centimark Corp. v. Brown Sprinkler Serv. Inc.* (1993), 85 Ohio App.3d 485, 489, 620 N.E.2d 134. See also, *Dawn G. v. Michael L. G.*, 6th Dist. No. H-04-007, 2004-Ohio-4920 at ¶8. Disqualification is a “drastic measure” and it is not appropriate unless found to be “absolutely necessary,” even where there is a violation of the Code of Professional Responsibility: which does not exist in this case. *Centimark*, 85 Ohio App.3d at 488-489, 620 N.E.2d 134.

Standards for disqualification are high: “[a] mere allegation that allowing the representation presents the possibility of a breach of confidence or the appearance of impropriety is not enough.” *Skycasters LLC v. J. W. Didado Electric, Inc.*, Summit App. No. 23901, 2008-

Ohio-4849 at ¶ 21, citing *Kala v. Aluminum Smelting & Refining Co. Inc.*, (1998) 81 Ohio St. 3d 1, 6, 688 N.E. 2d 258. There must be a real need, and that need must be balanced against a consideration of equal significance: “the prerogative of a party to proceed with counsel of its choice.” *Spivey, Admr. v. Bender*, (1991) 77 Ohio App. 3d 17, 22, 601 N.E.2d 56.

While motions to disqualify may be appropriate under certain circumstances, the Court must view them with extreme caution because “they can be misused as techniques of harassment.” *Cliffs Sales Co. v. Am. Steamship Co.* (N.D. Ohio), 2007 LEXIS at \*7 (citations omitted). Where, as here, a formal attorney-client relationship is lacking, the client must “prove both that confidences were revealed and that these confidences will prejudice the client if the consulting attorney is permitted to represent an adverse interest.” *Janis v. Castle Apts., Inc.* (1993), 90 Ohio App.3d 224, 229, 628 N.E.2d 149.

As will be detailed below, the Spanglers have not met their burden of proof.

#### **IV. Argument**

##### **A. A reasonable person could not have concluded that an attorney-client relationship was formed under the circumstances of this case.**

The threshold requirement for disqualifying an attorney due to conflict of interest is the existence of an attorney-client relationship. *Skycasters LLC*, Summit App. No. 23901, 2008-Ohio-4849 at ¶18. Citing *Henry Filters, Inc. v. Peabody Barnes, Inc.* (1992), the Spanglers argue that the standard for determining whether an attorney client relationship exists is “whether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the client.” 82 Ohio App.3d 255, 260-261, 611 N.E. 2d 873.

When applying this standard, the Appellant’s argue that an attorney-client relationship was not created and could not have been found as created. This standard is objective, not subjective. The issue is not what Mrs. Spangler thought. The issue is what a “reasonable

person” would have thought. Under the circumstances of this case, a reasonable person could not have formed a belief that Mr. Hickman had undertaken to represent him/her and continue to advance his/her interests. Mr. Hickman informed Mrs. Spangler of a conflict that prohibited his representation, signed no retainer agreement, charged no fee, and had no continuing contact. Mrs. Spangler hired another attorney to represent her in the guardianship case—a *clear* indication that an attorney-client relationship with Mr. Hickman had not been established.

The brief contact between Mrs. Spangler and Mr. Hickman is markedly different from the attorney representation in *Henry Filters, Id.*, the case giving rise to the standard upon which the Spanglers rely. In *Henry Filters*, the attorneys who were ultimately disqualified prepared and prosecuted a joint patent application between appellant corporation and appellee corporation. The two companies agreed to split the attorneys’ fees. The attorneys engaged in ongoing consultation with engineers from both companies. Employees of the company seeking disqualification of the attorneys gave the attorneys “extensive” confidential information. *Id.* at 258, 259. The defendant company moved to disqualify the attorneys and the trial court held that the attorneys and the defendant company had formed an attorney-client relationship; thus, disqualifying the attorneys. The trial court’s ruling was upheld on appeal. *Id.* at 261.

The instant case is markedly different. There was a one-time meeting between Mrs. Spangler and Mr. Hickman, during which time Mr. Hickman clearly declined representation. Furthermore, this “fleeting” contact did not facilitate any exchange of confidential information. *Cliffs Sales Company*, 2007 U. S. Dist. LEXIS 74342 at \*17. Determining that there was an attorney-client relationship that warrants disqualification would be “too harsh a punishment.” *Id.*

**B. The Spanglers were, at best, prospective clients, thereby leaving Mr. Hickman free to represent the GCBDD in this matter.**

Rule 1.18(a) of the Ohio Rules of Professional Conduct states that “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” Prof.Cond.R. 1.18(a). This is the most that can be said of the meeting between Mrs. Spangler and Mr. Hickman on June 21, 2006. Mrs. Spangler came to see Mr. Hickman about representing her on a variety of claims (of which guardianship was not one), Mr. Hickman declined representation.

Mrs. Spangler could not have reasonably believed Mr. Hickman was her lawyer. She hired a different lawyer, Ms. Makowski, who first entered her appearance on the Spanglers’ behalf in October 2006. Ms. Makowski has represented them ever since. Even if Mrs. Spangler met with Mr. Hickman after his special education training in November 2006, and even if she revealed confidential information pertaining to this guardianship case, she could not have reasonably done so in the expectation that he was her attorney. She already had an attorney – Ms. Makowski. Additionally, it is immaterial whether revelations were made. Mr. Hickman has no recollection of any meeting.

**1. Mr. Hickman received no pertinent, confidential information from Mrs. Spangler. Mr. Hickman has revealed nothing of that fleeting conversation.**

Rule 1.18(b) informs that a lawyer may not reveal confidential information learned in a consultation with a prospective client. The Spanglers have offered no proof that Mr. Hickman has done so. Prof.Cond.R. 1.18(b). To the contrary: the Hickman, Rice and Miedema Affidavits all show that Mr. Hickman has shared nothing. Hickman Affidavit, ¶ 14, Rice Affidavit, ¶ 4, Miedema Affidavit ¶ 6. The record shows that the information shared with Mr. Hickman was not confidential. Hickman Affidavit ¶ 15.

Moreover, the consultation with Mr. Hickman took place on June 21, 2006. This was before the July 18, 2006 hearing at which the Spanglers were awarded guardianship of their son. A placement supported by the Geauga County MR/DD. The removal proceeding initiated by the Geauga County MR/DD in October 2006 was prompted by deteriorating events that occurred after July 2006, indeed well after June 2006, when Mr. Hickman met with Mrs. Spangler. Mr. Hickman could not have learned confidential information leading up to the removal. He did not speak with Mrs. Spangler during the pertinent time period. Rather, he spoke with Mrs. Spangler prior to the pertinent time period.

**2. Mr. Hickman may represent the GCBDD per Conduct Rule 1.18(c) as no significant harm can happen.**

Rule 1.18(c) allows a lawyer to represent a client with interests adverse to those of the prospective client in the same or a substantially related matter, unless the lawyer has received from the prospective client confidential information that could be significantly harmful if used in the matter. Prof.Cond.R. 1.18(c) (see Comment 6).

It is the Spangler's burden to show that they supplied Mr. Hickman with information that meets the criteria of the Rule. They have not met this burden. They have not shown that any pertinent confidential information was shared. They have not shown that such information could be significantly harmful if used for the appeal. The Court is reminded that this appeal is about the Board's authority under Ohio law to seek a guardianship and about the Probate Court's plenary jurisdiction over guardianship matters. The appeal is not about the merits of the Spanglers' claim to be a guardian. In order to support disqualification, there has to be a showing of significant harm. No such showing has been made.

**C. It is unnecessary to apply the drastic measure of disqualification. The pending appeal does not involve the issue of Mrs. Spangler's claim to be her son's guardian.**

When considering attorney disqualification, the court must strike a balance “between two competing considerations: the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in courts of law.” .” *Spivey*, 77 Ohio App. 3d at 22, 601 N.E. 2d 56 (citations omitted). In weighing these interests, the Court should look for a “showing of actual harm or prejudice” to the moving party. *Cliffs Sales Co.*, 2007 U.S. Dist. LEXIS 74342 at \*16. “Disqualification is improper when the moving party cannot demonstrate the need to disqualify counsel.” *Dawn G. v. Michael L. G.*, 6<sup>th</sup> Dist. No. H-04-007, 2004-Ohio-4920.

The Spanglers have made no showing of actual harm or prejudice in connection with Mr. Hickman's representation of the GCBDD in this appeal. The Spanglers have not shown the need to disqualify Mr. Hickman. To the extent that Mrs. Spangler's communications with Mr. Hickman related to her suitability to be her son's guardian, disqualification is an inappropriate remedy. This appeal does not involve the merits of Mrs. Spangler's claim to be her son's guardian. This appeal relates to the power and authority of the GCBDD to seek removal of a guardian and the authority of the Probate Court to act upon such a request.

Competing considerations weigh heavily in the GCBDDs favor. There is no evidence of unethical conduct in this case. The GCBDD has relied upon Mr. Hickman's legal expertise for years. The GCBDD depends on him for resolution of their legal issues. Rice Affidavit, ¶ 3. If Mr. Hickman is disqualified, the Board “will lose the benefit of his years of experience in the very system under scrutiny in the Court.” Rice Affidavit, ¶ 6.

Assistant Prosecutor Miedema notes that “Attorney Hickman and his colleagues are an essential component of the team now representing the GCBDD in the Ohio Supreme Court appeal.” Miedema Affidavit ¶5. Assistant Prosecuting Attorney Miedema further notes that he

“...has the unique experience of representing Ohio’s County BDDs in their litigation.” Miedema Affidavit ¶5. Finally, she states that Mr. Hickman is “uniquely suited to articulate the GCBDD’s position to the [Ohio] Supreme Court.” Miedema Affidavit, ¶ 5.

The GCBDD wishes to proceed with their co-counsel of record. The GCBDD respectfully requests that this Court not disqualify Mr. Hickman.

**D. The Spanglers waited too long to raise the disqualification claim thereby waiving the claim of disqualification.**

Motions to disqualify should be viewed with “extreme caution” because they can be used as “techniques of harassment.” *Cliff Sales Company*, 2007 U. S. Dist. LEXIS at 7 (citations omitted). “Courts have disallowed disqualification on the basis of waiver or estoppel where the moving party has failed to move for disqualification in a timely manner.” *Valley-Vulcan Mold Co. v. Ampco-Pittsburgh Corp.* (C.A.6, 2001), 5 Fed.Appx. 396, 401, 2001 U.S.App. LEXIS 3212. Generally, objections should be raised to the court “promptly after the onset of litigation or within a reasonable time once the pertinent facts are known.” *Barberton Rescue Mission, v. Hawthorn*, 9th Dist. No. 21220, 2003-Ohio-1135 at ¶5 (citations omitted). The finding of waiver depends upon the circumstances of the case, and must be based upon a failure to object after the passage of as few as ten days. *Id.* (see cases cited therein)

The Motion to Disqualify has been waived as Appellant asserts it has been filed too late. The Spanglers have been aware of Attorney Hickman’s participation in this case since April, 2008. Their attorney, Pamela Makowski, raised the issue of conflict of interest with Hickman in April, 2008, but took no action to prevent him from participating in the case. Hickman Affidavit, ¶ 19.

Thereafter on June 11, 2009, two days after Mr. Hickman's entry of appearance, Attorney Makowski again contacted Mr. Hickman and indicated that she believed that there was a conflict. She waited another month -- until July 10, 2009 -- to file the Motion to Disqualify with the Court. This late filing has disrupted Appellant's preparation of its merits brief, due on August 4, 2009. Finding an attorney to assist the Geauga County Prosecutor's office with comparable experience is a near impossibility. Appellant suggests the Motion to Disqualify is nothing more than a disruptive tactic.

The Court should not give credence to this disruptive effort, and should deny the Motion to Disqualify.

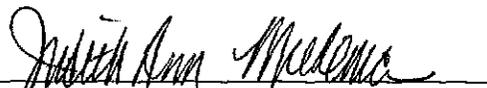
**V. Conclusion**

Appellees have not met their burden of demonstrating that the factors justifying disqualification under either Rule 1.9 or Rule 1.18 of the Ohio Rules of Professional Conduct are present. Nor have Appellee's shown that disqualification is necessary. Finally, Appellee's have waived the claim that significant harm could occur.

Appellant Geauga County Board of Developmental Disabilities respectfully requests that the Court deny the Motion to Disqualify Mr. Hickman and his firm from further work on this case.

Respectfully Submitted,

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Developmental Disabilities

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**AFFIDAVIT OF FRANKLIN J. HICKMAN**

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STATE OF OHIO :  
 : ss **AFFIDAVIT OF FRANKLIN J. HICKMAN**  
COUNTY OF CUYAHOGA :

FRANKLIN J. HICKMAN, being first duly sworn, deposes and says the following based on his personal knowledge:

**I. GENERAL BACKGROUND**

1. Affiant is an attorney licensed to practice law in Ohio since November, 1973. His bar registration number is 0006105.
2. Affiant's practice has been focused on issues related to mental disability since 1973. He has represented County Boards of Mental Retardation and Developmental Disabilities since approximately 1983. Recent legislation changed the name of these boards to County Boards of Developmental Disabilities, which will be referred to as "DD Boards".
3. At various times after 1983, Affiant has provided legal services to the Geauga County DD Board in several proceedings, either directly or by reason of their membership with the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities ("OACBMR/DD").

**II. MEETING WITH GABRIELE SPANGLER**

4. Affiant knew Mrs. Spangler because of her connection to the Ohio Coalition for Children with Disabilities, an advocacy group. Affiant had provided training to this group on a number of occasions and had met Mrs. Spangler during those trainings as well as other trainings related to legal issues concerning children with disabilities.
5. Affiant met with Mrs. Spangler at her request on June 21, 2006. The meeting lasted approximately two and one half hours.

6. During the meeting Mrs. Spangler described difficulties she had with her son John Spangler. She summarized his disabilities and his significant behavior problems. She asked about potential claims, including claims against the Warrensville Developmental Center, a state institution for individuals with developmental disabilities where he John been placed for a few days. She described the abuse that John had suffered while at Warrensville, including sexual abuse by his roommate. She described the steps that were taken by her husband and private care takers to remove John from Warrensville. She informed Affiant that she had obtained a 30 day guardianship over John from the Judge in Geauga County. She indicated that she was dissatisfied by the services she was receiving from the Geauga County DD Board. Affiant noted that Mrs. Spangler raised the following issues:
  - a. Lawsuit against Warrensville for sexual assault;
  - b. Actions against Warrensville because of verbal abuse of John by a Warrensville employee;
  - c. Actions against Warrensville because of physical abuse of John by a Warrensville employee;
  - d. Mrs. Spangler was unwilling to allow investigation by Warrensville staff of abuse issues;
  - e. Mrs. Spangler was concerned about Highway patrol investigation;
  - f. Concern about payment for care by the Geauga DD Board;
  - g. Appeal of Judge's statements made during guardianship hearing;
  - h. Action for Defamation by a Geauga DD Board employee and by Ravenwood employee in case notes (Ravenwood is an independent mental health agency which provided emergency services to John);
  - i. Conflict with Geauga DD Board employees about placement.
7. During the meeting, Affiant recalls that he told Mrs. Spangler that he could not represent her in any action involving the Geauga County DD Board because he represented the Geauga Board and other DD Boards throughout the state.

8. By the end of the meeting on June 21, 2006, there was no agreement, promise, suggestion or representation made by Affiant that Affiant would do any legal work for the Spanglers, and none was done.
9. Affiant does not recall any specific request by Mrs. Spangler for Affiant to represent her in guardianship proceedings that were pending. Affiant did not agree to represent Mrs. Spangler in any guardianship proceedings.
10. Based on review of transcripts in connection with the appeal to the Ohio Supreme Court, Affiant determined that, prior to the meeting on June 21, 2006, Geauga DD Board staff supported Mrs. Spangler in her application for emergency guardianship of John Spangler. During the guardianship hearing on July 18, 2006, Geauga DD Board staff supported Mrs. Spangler's application for guardianship of John.
11. There was no charge for the interview. The case was coded as an "MR placement" matter, and Mrs. Spangler did not retain Affiant. A retainer agreement was not executed.
12. Affiant did not bill Mrs. Spangler at any time for any contacts between Mrs. Spangler and Affiant.
13. Affiant does not recall meeting with Mrs. Spangler on November 13, 2006. Affiant recalls giving a training session, during the afternoon of that date, on disciplinary procedures for children receiving special education services. Affiant gives frequent talks and conducts frequent training programs. Affiant often talks with participants afterwards. Affiant has no notes, time records or other evidence that he met with Mrs. Spangler on that date. If Affiant did have a discussion with Mrs. Spangler on that date, Affiant has no recollection of what was said.

### **III. USE OF INFORMATION GATHERED DURING THE INTERVIEW**

14. Affiant did not use any information and will not use privileged or confidential information, if any, received during the interview with Mrs. Spangler on June 21, 2006 in the above captioned appeal on the merits.
15. Based on review of transcripts in connection with the appeal to the Ohio Supreme Court, Affiant determined Mrs. Spangler testified in open court on June 15<sup>th</sup> and June 19<sup>th</sup> on matters which she subsequently discussed with Affiant on June 21, 2006.

### **IV. ENTRY BY THE OACBMR/DD AS AMICUS**

16. Affiant met with staff from the Geauga County DD Board on March 25, 2008. Staff informed Affiant that that Mr. and Mrs. Spangler had been removed as guardians and that the matter had been appealed. Prior to the meeting on March 25, 2008, Affiant had no knowledge from any source of the developments in the Spangler guardianship after his meeting with Mrs. Spangler on June 21, 2006.
17. The Geauga County DD Board staff asked Affiant to take steps to assist in the appeal. Affiant contacted the Ohio Association of County Boards of MR/DD ("OACBMR/DD"), a trade association of DD Boards, which agreed to file a brief as *amicus curiae*.
18. Affiant filed a motion for leave to file an *amicus* brief on April 16, 2008.

### **V. CONTACTS WITH SPANGLER COUNSEL AFTER FILING AMICUS BRIEF**

19. On April 25, 2008, Affiant had a telephone discussion with Pamela Makowski, counsel for the Spanglers. Ms. Makowski advised Affiant that Gabriele Spangler was upset by Affiant's involvement in the case and that Mrs. Spangler believed there was a conflict of interest due to Affiant's prior contact with Mrs. Spangler. Affiant and Ms. Makowski discussed the matter for approximately one hour, during which time Affiant agreed to try to find a mediator who could assist in resolving the ongoing conflicts between the Geauga County DD Board

personnel and the Spanglers. On May 5, 2008 Ms. Makowski sent an e-mail inquiring about whether Affiant had any information. In that same e-mail, Ms. Makowski raised the possibility of mediation through the Court of Appeals. On May 12, 2008, Affiant and Ms. Makowski spoke again and Affiant referred Ms. Makowski to a staff person at the Ohio Department of Mental Retardation and Developmental Disabilities with experience in mediating conflict between parents and DD Boards.

20. The Motion for Leave to File the *Amicus* Brief was granted on May 14, 2008, without objection from the Spanglers or from any party. Counsel for the Spanglers and for John filed briefs opposing the arguments raised in the *amicus* brief, but neither counsel objected to Affiant's representation of the OACBMR/DD as *amicus*, nor to the motion of the OACBMR/DD to participate as *amicus*.

21. Affiant, without objection, participated in oral argument in the Eleventh Circuit Court of Appeals on October 17, 2008.

## **VI. PROCEEDINGS IN OHIO SUPREME COURT**

22. After the decision of the Eleventh District Court of Appeals, Affiant and Attorney Judith Saltzman consulted with the Assistant County Prosecutor for Geauga County. Affiant and Judith Saltzman provided draft pleadings for the appeal, Motion for Stay, Response to Motion to Vacate Stay and Memorandum in Support of Jurisdiction, which were finalized and filed by the Assistant County Prosecutor for Geauga County.

23. When the Ohio Supreme Court accepted jurisdiction on June 3, 2009, and when the Geauga County Prosecutor David P. Joyce gave his consent, Affiant and Judith C. Saltzman entered appearances in the above captioned action. The entry of appearance was filed on June 9, 2009.

## VII. CONTACTS WITH COUNSEL FOR SPANGLERS AFTER SUPREME COURT ACCEPTED JURISDICTION

24. On June 11, two days after the entry of appearance was filed, Ms. Makowski called Affiant and stated that she believed that there was a conflict in Affiant's representing the Geauga County DD Board. Affiant explained to Ms. Makowski that the issues before the Supreme Court were the same as in the *amicus* brief which he had filed in the Court of Appeals. Affiant explained further that that there was part of the decision of the Court of Appeals which addressed Mrs. Spangler's suitability as guardian. Affiant stated there was nothing in the prior contact with Mrs. Spangler that would be relevant to the issues before the Ohio Supreme Court. Ms. Makowski stated that she would give Affiant time to consider the issues and would file a motion to disqualify on June 17.

25. On June 15, 2009, there was a second discussion between Ms. Makowski and Affiant regarding the conflict issue. Affiant advised Ms. Makowski that Affiant had consulted with outside counsel, Mary Cibella, who confirmed that there was no conflict. Affiant advised Ms. Makowski that he would not withdraw from the case voluntarily. Ms. Makowski stated she would consult further with her client.

26. There were no contacts between Ms. Makowski and Affiant between June 15 and July 9, 2009.

27. On July 9, 2009, Ms. Makowski stated that she would be filing her motion to disqualify the next day. As a courtesy, she provided Affiant with a draft of the motion and affidavit of Mrs. Spangler. Affiant responded to Ms. Makowski with an e-mail which stated, *inter alia*:

The issues before the Supreme Court are identical to the issues we raised in the Amicus brief. The issue of Gabriele's (or Joe's) suitability is not before the Supreme Court. Nothing which Gabriele discussed with me is used directly or indirectly in the Amicus or Supreme Court brief – a brief which is more than half completed. All pertinent background facts come from the record and transcripts.

In my view and in the view of our outside counsel Mary Cibella, there is no conflict. Even if there were a conflict, the issue is not being raised in a timely manner. Whatever issue there may be was equally applicable when we filed the amicus brief. The fact that we represent the Board in the Supreme Court rather than a separate group does not alter the fact that we are dealing with different issues and have not used any confidential information

28. The Motion to Disqualify was filed on July 10, 2009.

#### **VIII. AFFIANT'S BACKGROUND WITH DD BOARDS**

29. Affiant has represented DD Boards since approximately 1983. Work with DD Boards has been a major part of his practice. He was a founding trustee of the Ohio Association of County Boards of MR/DD at its inception in 1983 and became counsel for the OACBMR/DD since approximately 1986. He is currently general counsel for the OACBMR/DD.

30. As counsel for MR/DD Boards, Affiant is involved in training of staff throughout the State and at conferences sponsored by the OACBMR/DD. He has conducted hundreds of seminars and training programs for staff of DD Boards. He developed a full day training program for Crisis Intervention Tools available for DD Board workers. This program has been presented throughout the state since the early 1990s.

31. Affiant has been counsel for various DD Boards in numerous court actions, including, without limitation:

- *Cuyahoga County MR/DD Board et al. v. Riley* (2005) U.S. District Court, Southern District Case No. 05-CV-12; action on behalf of DD Boards throughout the state requiring Ohio Department of Job and Family Services to complete audits which released over \$75 million to DD boards.
- *Zimmerman et al. v. Ohio Department of Job and Family Services* (2005) Franklin County Court of Common Pleas Case No. 04 CV 4541; prevented implementation of rules which would have imposed illegal rates for services for individuals with DD.
- *State ex. rel. Cottrill v. Meigs MR/DD Board* 86 Ohio App. 3d 596 (Meigs, 1993); State mandated to pay DD Board sufficient funds to meet minimum state requirements.

32. Throughout his work with OACBMR/DD, Affiant consulted and drafted legislation on matters affecting individuals with DD. He participated in drafting H.B. 403 passed in 1989 which provided for procedures for protection of individuals with DD as well as amendments to that legislation which were passed in 2004.

#### **IX. AFFIANT'S BACKGROUND IN GUARDIANSHIP ISSUES**

33. Affiant has represented individuals, families and DD Boards in guardianship proceedings throughout his career.

34. In Cuyahoga County, Affiant and attorneys from his firm regularly appear on behalf of the Cuyahoga County DD Board in guardianship matters, including emergency motions to appoint and remove guardians when the health, safety or welfare of individuals is at risk.

35. In 2008, Affiant appeared on behalf of the Putnam County DD Board Case No. 20052013 seeking an order requiring the guardian to take appropriate action to protect the ward who received services from the DD Board.

36. In 2006, Affiant appeared on behalf of Seneca County DD Board in the guardianship proceedings in Seneca County Probate Court Case No. 98-749. The DD Board was seeking orders from the Probate Court to change decisions of a guardian placing an individual in a potentially dangerous situation.

37. Affiant has been the contributing author for Guardianship and Civil Commitment sections in Merrick, Rippner *Ohio Probate Law: Practice and Procedure* since the early 1990's.

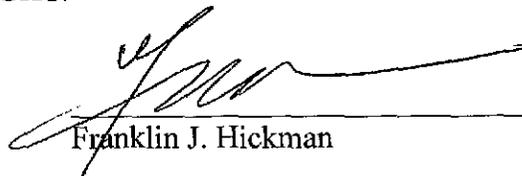
38. Affiant presents training programs on guardianship issues regularly to parents and staff members of DD Boards and has done so from the beginning of his practice.

39. Affiant has been on the faculty of the Case Western Reserve University School of Law since 1988 and on the faculty of the Case Western Reserve University School of Medicine since 1978. In both capacities he lectures and consults with other faculty on guardianship issues.

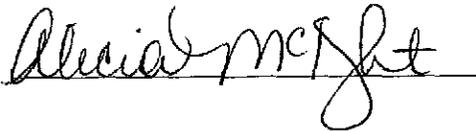
40. From 1978 to 1982, Affiant was Director of the Bar Advocacy Project for Mentally Disabled Persons. The Project was funded by the American Bar Association and Bar Association of Greater Cleveland to activate private bar in representing mentally disabled persons. Affiant presented numerous lectures and workshops on guardianship as part of that program.

FURTHER AFFIANT SAYETH NAUGHT.

7/15/09  
Date

  
Franklin J. Hickman

SWORN TO AND SUBSCRIBED BEFORE ME, a notary public, on this 15 day of July, 2009.



**ALICIA MCKNIGHT  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES MAY 10, 2014**

STATE OF OHIO :  
 : ss **AFFIDAVIT OF DONALD RICE**  
COUNTY OF CUYAHOGA : Superintendent, Geauga County Developmental Disabilities Board

I, Donald Rice, being duly sworn, state that:

1. I am Superintendent of the Geauga County Board of Mental Retardation and Developmental Disabilities (renamed Geauga County Board of Developmental Disabilities.) As Superintendent, I function as the chief executive of the Board, supervising all of its employees and administering a budget of approximately eighteen million dollars.
2. Prior to my current position I served as business manager of the Tuscarawas County Board of MR/DD (2005-2006) and as business manager of the Carroll County Board of MR/DD (2003-2005). From approximately 1995 until 2003 when I became business manager, I was coordinator of the Children and Family First Council of Carroll County, an agency that coordinates the resources of county agencies, including County Boards of MRDD in providing support to children with disabilities. Hence, I have been familiar with the County MRDD system for over 14 years.
3. Franklin Hickman's work with the Geauga County Board of DD pre-dates my tenure as Superintendent by many years. He has also represented the Ohio Association of County Boards and, as such, is viewed by everybody in the Geauga County Board of DD and the MRDD system as the expert on legal issues affecting our agencies. When the County Board superintendents meet and a legal issue arises, Franklin Hickman is viewed as the



person to go to. I could not imagine getting into a legal issue without Franklin Hickman's assistance.

4. Mr. Hickman has never revealed confidential information concerning the Spangler family to me, or, upon information and belief, to anyone at the Geauga County Board of DD. At the time that the Geauga Board decided to seek removal of Gabriele Spangler as guardian, we had no clue that Mr. Hickman had met with her. He never shared anything, and I trust him completely.
5. The pending appeal is about a legal interpretation of the Board's rights and authority to seek removal of a guardian – the very sort of issue that we have relied upon Mr. Hickman for resolution for years. I disagree with the Spanglers' assertions at page 10 of their Motion to Disqualify concerning how this case came about, but I will not go into details because it is not relevant to this appeal. The appeal is not about whether Gabriele Spangler is a suitable guardian.
6. It will be harmful to the Geauga DD Board's position in this case if Mr. Hickman is disqualified from representing us, because we will lose the benefit of his years of experience in the very system under scrutiny in the Court. It is very "late in the game" to be changing lawyers and if the Spanglers were truly concerned about Mr. Hickman's involvement, I think they would have raised this a long time ago.

Further Affiant Sayeth Naught

  
Donald Rice

Sworn to me and subscribed in my presence this 16<sup>th</sup> day of July, 2009.

  
Notary Public

CONSTANCE J. SCANLON  
Notary Public, State of Ohio  
My Commission Expires 12/26/2011  
Recorded in Geauga County

STATE OF OHIO :  
 : ss **AFFIDAVIT OF JUDITH A. MIEDEMA**  
COUNTY OF GEAUGA : Geauga County Assistant Prosecuting Attorney

I, Judith A. Miedema, being duly sworn, state that:

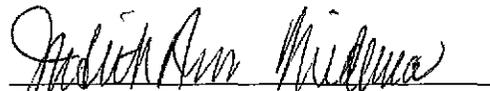
1. Geauga County Prosecutor David P. Joyce assigned me to represent the Geauga County Board of Mental Retardation and Developmental Disabilities (“GCMRDD”), now known as the Geauga County Board of Developmental Disabilities (“GCBDD”) in the Matter of the Guardianship of John Spangler at the Eleventh District Court of Appeals. Prior to my involvement in this matter, former Geauga County Assistant Prosecuting Attorney Brian M. Richter represented then GCMRDD (now GCBDD) at the trial court level.
2. The issues before the Ohio Supreme Court are statutory construction: the authority of any County BDD to request removal of a Guardian; the nature of a Probate Court’s plenary jurisdiction over guardianship matters; and standing requirements for guardianship cases.
3. Attorney Franklin J. Hickman filed an *amicus* brief on behalf of the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities (“MRDD”) Eleventh District Court of Appeals in April 2008. Attorney Hickman was granted time in the oral argument phase of the appeal and did indeed help clarify for the Appellate Court the issues presented in the case.
4. At the appellate level, the Eleventh District Court of Appeals, having initially decided that the GCBDD lacked authority to seek removal of a guardian, never reached the merits of the Probate Court’s decision to remove mother Gabrielle Spangler as guardian.



5. Attorney Hickman and his colleagues are an essential component of the team now representing the GCBDD in the Ohio Supreme Court Appeal. Mr. Hickman is Ohio's acknowledged expert on County BDD matters. Mr. Hickman has the unique experience of representing Ohio's County BDDs in their litigation; he has performed long-standing service as Counsel to the Ohio Association of County Boards of MRDD; he is an expert in representing individuals with mental health problems and developmental disabilities in diverse cases. Accordingly, Mr. Hickman is uniquely suited to articulate the GCBDD's position to the Supreme Court.
6. The Spangler's Motion to Disqualify was not filed until July 10, 2009 – long after the Spanglers were aware of Mr. Hickman's involvement in this case. Mr. Hickman had previously advised me that he had consulted with Gabrielle Spangler in the past. Mr. Hickman did not divulge the content of that consultation to me.
7. Granting the Motion to Disqualify and thereby removing Mr. Hickman from collaboration with the Geauga County Prosecutor's office at his juncture would be highly disruptive to our prosecution of the Appeal. Mr. Hickman and his colleagues' collaboration and infinite resources are vital. They have begun assisting me in drafting Appellant's Brief, which has a due date of **August 4, 2009**. The Motion to Disqualify is grounded in confidential information that Gabrielle Spangler allegedly disclosed to Mr. Hickman. Confidential information pertaining to the case at the Probate or Trial Court is neither relevant nor inflammatory.

8. If upheld, the decision of the Eleventh District Court of Appeals would substantially impair efforts of all County BDDs – not just Geauga County BDD – to ensure that their disabled clientele are safe and protected. Allowing Attorney Hickman and his colleagues to collaborate and assist the Assistant Prosecuting Attorney for Geauga County in unraveling the issues before this Honorable Court will ensure clarity and statewide wisdom.

FURTHER AFFIANT SAYETH NAUGHT

  
Judith Ann Miedema

Sworn to me and subscribed in my presence this 17<sup>th</sup> day to July, 2009.

  
Notary Public  
Laura A. LaChapelle, Attorney  
My Commission Does Not Expire

**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Opposition of the Geauga County Board of Developmental was served upon the following by ordinary U.S. Mail on this 17<sup>th</sup> day of July, 2009:

DEREK S HAMALIAN ESQ  
JASON C BOYLAN ESQ  
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50 WEST BROAD STREET – STE 1400  
COLUMBUS OH 43215

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CO-COUNSEL GEAUGA COUNTY  
BOARD OF DEVELOPMENTAL  
DISABILITIES

  
\_\_\_\_\_  
J.A. Miedema (#0076206)  
Assistant Prosecuting Attorney