

IN THE SUPREME COURT OF OHIO

HON. MICHAEL J. SAGE, et al.,	:	Case No. 2013-0945
	:	
Appellants/Cross-Appellees	:	
	:	
v.	:	
	:	
STATE OF OHIO ex rel. THE	:	
CINCINNATI ENQUIRER,	:	
	:	
Appellee/Cross-Appellant.	:	

On Appeal from the Court of Appeals for the Twelfth District
Case No. CA2012-06-0122

 REPLY AND RESPONSE BRIEF OF APPELLANTS/CROSS-APPELLEES
 HON. MICHAEL J. SAGE, et al.

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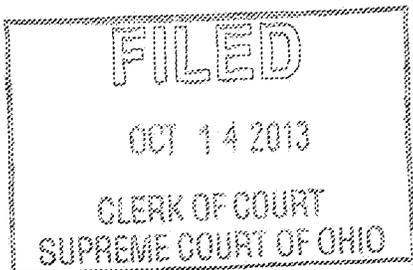


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**APPELLANTS/CROSS-APPELLEES' REPLY TO
THE ENQUIRER'S RESPONSE BRIEF**

PROPOSITION OF LAW NO. 1:

When a 9-1-1 dispatcher acts as an agent of a county's sheriff's office by initiating an Outbound Call to a residence for investigative purposes, the Outbound Call does not constitute a 9-1-1 call subject to disclosure under the Ohio Public Records Act.

In its response brief, the Appellee/Cross-Appellant the Cincinnati Enquirer (hereinafter "the Enquirer") manipulates three words in an effort to expand the legal holding of the 1996 *Hamilton County* case in a fashion that this Court has never condoned. The Enquirer does so solely to have an argument under the current facts. In so manipulating, the true weakness of the Enquirer's argument is obvious. Without expanding and altering this Court's past precedent, the Enquirer has no valid argument that the second Outbound Call was a 9-1-1 call.

There has never before been a case that has adopted a continuation theory of a 9-1-1 call, and this Court's 1996 *Hamilton County* case does not hold that a 9-1-1 call, and all other recordings ever made "as a result" of the initial 9-1-1 call, are per se public records. It is only under this brazen misstatement of the law that the Enquirer can even conjure an argument to support the fatally flawed decision of the Twelfth District Court of Appeals. Such fanciful legal fallacies and games of semantics should not be tolerated by this Court, much less be given consideration.

The Enquirer derives its unsupportable argument from this Court's descriptive word choice in the 1996 *Hamilton County* case. However, to understand the Enquirer's error in construction, not only must the 1996 *Hamilton County* case be reviewed, but this Court's subsequent decisions and interpretations of said case must also be reviewed. Beginning with the case itself, the context of the "as a result" language must be analyzed. The two paragraphs that immediately proceed these three

words give the proper contextual understanding of this Court's rationale:

Basic 911 systems, including the ones used by HCCC and CPCC, are systems “in which a caller provides information on the nature of and location of an emergency, and the personnel receiving the call must determine the appropriate emergency service provider to respond at that location.” R.C. 4931.40(B). For example, HCCC automatically records 911 calls, which do not include the personal opinions of its employees. HCCC employees do not act under the direction of the county prosecutor or law enforcement officials when receiving and responding to 911 calls. HCCC employees are not employees of any law enforcement agency and are not trained in criminal investigation. The HCCC 911 operators simply compile information and do not investigate. The 911 tapes are not made in order to preserve evidence for criminal prosecution. Nine-one-one calls that are received by HCCC are always initiated by the callers. According to CPCC Senior Police Sergeant Schrand, a 911 call involving criminal conduct is essentially a citizen's initial report of the criminal incident, which could typically trigger a police investigation.

From the foregoing, it is evident that 911 tapes are not prepared by attorneys or other law enforcement officials. Instead, 911 calls are routinely recorded without any specific investigatory purpose in mind. There is no expectation of privacy when a person makes a 911 call. Instead, there is an expectation that the information provided will be recorded and disclosed to the public. Moreover, because 911 calls generally precede offense or incident form reports completed by the police, they are even further removed from the initiation of the criminal investigation than the form reports themselves.

The moment the tapes were made as a result of the calls (in these cases-and in all other 911 call cases) to the 911 number, the tapes became public records. Obviously, at the time the tapes were made, they were not “confidential law enforcement investigatory records” (no investigation was underway), they were not “trial preparation records” (no trial was contemplated or underway), and neither state nor federal law prohibited their release. Thus, any inquiry as to the release of records should have been immediately at an end, and the tapes should have been, and should now and henceforth always be, released.

State ex rel. Cincinnati Enquirer v. Hamilton Cty, 75 Ohio St.3d 374, 377-378, 662 N.E.2d 334 (1996) (emphasis added) (referred to as “*Hamilton County*”).

What becomes clear when the full rationale, and not three words, is evaluated is that this Court used the “as a result” language because the “HCCC automatically records 911 calls.” *Id.* Thus, the tapes were made “as a result” of the automatic recording. The words “as a result” reflect

the way that tapes were automatically made by the HCCC, and not a new expansive causation test that the Enquirer now tries to assert.

This point is made all the more clear by subsequent decisions from this Court interpreting or citing to the *Hamilton County* case, which have never adopted the Enquirer's theory. For example, in 2001, this Court stated that "In *Cincinnati Enquirer*, decided in 1996, we had ruled that 911 tapes, which record emergency calls received by 911 operators, were public records, so the public agencies receiving and recording them must release them immediately upon request." *State ex rel. Beacon Journal Publishing Co. v. Maurer*, 91 Ohio St.3d 54, 57, 2001-Ohio-2827, 41 N.E.2d 511. What this Court did not say was that it had ruled that the 9-1-1 call, and all calls thereafter ever made "as a result of" the 9-1-1 call, were public records.

In 2004, this Court stated "In *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St.3d 374, 662 N.E.2d 334, we held that tapes of 911 calls were public records and were subject to release under the Ohio Public Records Act." *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 92, 2004-Ohio-4354, 814 N.E.2d 55. Again lacking in this statement is the causation theory asserted by the Enquirer. In 2005, this Court stated that "In *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St.3d 374, 662 N.E.2d 334, we held that tapes of 911 calls were public records and were subject to release under the Ohio Public Records Act." *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, ¶ 17, 824 N.E.2d 64. Again, no causation theory, no "as a result" language.

What is clear from these decisions is that this Court has never found the *Hamilton County* case to incorporate in its holding anything more than that the 9-1-1 tape, of the 9-1-1 call, that is received by a 9-1-1 operator, is itself a public record. There is no expansive "as a result" causation

theory, and the Enquirer's suggestions of such are unfounded.

Without such an expansive and never before held interpretation of the *Hamilton County* case's holding, the Enquirer herein does not seem to offer any valid argument as to why the second Outbound Call, dialed out on Channel 8 by Rednour (not on a 9-1-1 line), that is answered by a different person, who is unaware that he is being recorded, and who is unaware that his answers to questions might be fully released to the public, is a 9-1-1 call subject to per se release. Thus, without greatly expanding on an already per se rule, this Court should find that Appellant/Cross-Appellee prosecutor Gmoser ("Gmoser") was correct in his legal interpretation that the actual and specific holding of the *Hamilton County* case does not control this factual situation, and that the second Outbound Call was not a public record.

What is more, multiple other distinctions exist between the calls, people, and purposes of the calls in the present case as opposed to the calls involved in the *Hamilton County* case. In *Hamilton County*, the call center employees did not act under the direction of either the county prosecutor or a law enforcement official when responding to the 9-1-1 calls, the employees were not employed by any law enforcement agency, and they were not trained in criminal investigation. *See, Hamilton County*, 75 Ohio St.3d at 377.

However, in the present case, Rednour is an employee of the Butler County Sheriff's Office, with her ultimate supervisor being Lieutenant Carrie Shultheiss, a sworn deputy in the Sheriff's Department. (Tr. 25 at page 31.) At the outset of the Outbound Call, Rednour expressly informed Michael Ray that "this is the Butler County Sheriff's Office." (Id. at page 60.)¹ And in terms of

¹ By contrast, in the actual 9-1-1 call, Rednour identified herself as "Butler County 911." (Tr. 25 at page 41.)

being directed by law enforcement, Rednour admitted that she has “questions I am required to have answered,” when asked if she has any investigative duties. (Id. at page 70.) This requirement, combined with the duty to investigate a hang up from a 9-1-1 call, prompted the dispatcher to elicit through past tense questions information from the perpetrator about his past crime. Ray’s answers to Rednour’s past tense questions clearly described his past event of murder. The past tense questions were obviously intended to establish the past events of a crime. Objectively, this is a police investigation, through the use of questions designed to determine past events. *See, generally, Davis v. Washington*, 547 U.S. 813, 831, 126 S.Ct. 2266 (2006). This constitutes an investigatory call that is not a 9-1-1 call as contemplated by either the General Assembly or this Court. As such, the role of Rednour is very different than that of the HCCC employees in the *Hamilton County* case.

A. The 9-1-1 dispatcher's Outbound Call does not fall under the Ohio General Assembly's statutory definitions of a 9-1-1 call.

The Enquirer next argues that the definition of R.C. 5507.01(A) supports the continuation theory as espoused by the Twelfth District. The Enquirer based this entire argument on one word, “must.” However, the word “must” does not appear in R.C. 5507.01(A)². And even if it did, Rednour had already determined the appropriate emergency service providers to respond before she placed any outbound calls. Additionally, the Enquirer’s argument completely ignores the other two Revised Code sections previously cited to by Appellants/Cross-Appellees.

Under R.C. 5507.01, the Ohio General Assembly provided the bench, bar, and public with

² The Enquirer quotes the language of R.C. 5507.01(B) (Basic 9-1-1) while arguing that R.C. 5507.01(A) (9-1-1 system) required additional action by Rednour. This demonstrates the Enquirer’s confusion and improper mixing of statutory terms while engaging in a game of semantics.

multiple definitions of a “9-1-1 system.” Section A defines a “9-1-1 system” to mean “a system through which individuals can request emergency service using the telephone number 9-1-1.” R.C. 5507.01(A). In Section B, a “Basic 9-1-1” system is defined as one “in which a caller provides information on the nature of and the location of an emergency, and the personnel receiving the call *must* determine the appropriate emergency service provider to respond at that location.” R.C. 5507.01(B)(emphasis added). Thereafter, Section H defines a “Wireless 9-1-1” system to be one in which “the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireless service provider.” R.C. 5507.01(H).

What is critical in all of these definitions is that the Ohio General Assembly has defined each 9-1-1 system with language that clearly requires an individual caller to dial the telephone number 9-1-1, and then request emergency service using the telephone number 9-1-1.

In the present case, the Outbound Call was initiated by a Butler County Sheriff’s Office employee, by dialing a residential (513 area code) telephone number, to request investigatory information. Accordingly, the disputed Outbound Call has none of the features of a 9-1-1 call delineated in R.C. 5507.01, and therefore, it is not a 9-1-1 call. Any other finding would be contrary to the clear language of R.C. 5507.01. The Enquirer’s confusion, cross-contamination of terms, and plain ignoring of two of these definitional sections demonstrates the inherent weakness in its arguments. Simply, a 9-1-1 call is a telephone call placed by an individual by dialing 9-1-1. A call to a private residence is not a 9-1-1 call.

What is more, even if the Enquirer’s “must” argument is addressed, it too fails. The Enquirer claims that Rednour “must” determine the appropriate emergency service providers to respond to the original 9-1-1 call. The record demonstrates that Renour completed this task before making any

outbound calls. In the 9-1-1 call Rednour received (which was immediately disclosed to the Enquirer), Rednour was told that an ambulance was needed because a man had been hurt and was not breathing; she also obtained the address from which the call originated. (Tr. 25 at page 41-42.) Based on this information alone, Rednour determined that an emergency existed and dispatched the St. Clair Township Fire Department, Butler County Sheriff's deputies, and her supervisor to respond to the emergency. (Id. at page 46.) When Rednour called back, she immediately told the person who answered the phone that she already had help on the way. (Id. at page 60.) Thus, the basic purpose of the 9-1-1 system, to determine the appropriate emergency service provider to respond at the location of the emergency, as described in *Hamilton County*, was satisfied on the initial incoming call placed by the victim's wife to the 9-1-1 system. This initial incoming call on the 9-1-1 system was promptly released to the Enquirer. (Tr. 26 at Exh. C, ¶ 3.).

The Enquirer's arguments fail as the ever relevant sections of R.C. 5507.01 indicate that a 9-1-1 call is one made by a person needing assistance by dialing the 9-1-1 number. Any other interpretation is unsupportable under the plain wording of the statute.

B. A hang up call requires investigation by law enforcement.

The Enquirer next argues that Rednour had no investigatory duties. In making this argument, the Enquirer claims that "Appellants base this entire 'police investigation' argument on the Supreme Court of the United States' decision in *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224." (The Enquirer's brief, page 11) However, this is patently false. Rather, this argument is based not only upon the *Davis* case, but also on the four cases that the Enquirer has chosen to ignore: *Hodge*, *May*, *Myers*, and *Stricker*.

As stated in Appellants/Cross-Appellees' initial brief, case law makes clear that a hang up 9-1-1 call imposes a duty or requirement upon law enforcement to investigate. *See, State v. Hodge*, 2nd Dist. No. 23964, 2011-Ohio-633, ¶ 25 (“In our view, the 911 hang-up call created a reasonable belief that an emergency existed, requiring investigation by law enforcement officers.”)(emphasis added); *State v. May*, 4th Dist. No. 06CA10, 2007-Ohio-1428, ¶ 17 (“the 911 hang-up calls created sufficient exigent circumstances to impose a duty on police to investigate whether someone at the residence needed assistance and further negated any privilege on appellant's part to resist entry into the premises.”)(emphasis added); *State v. Myers*, 3rd Dist. Nos. 9-02-65, 9-02-66, 2003-Ohio-2936; *Stricker v. Twp. of Cambridge*, 710 F.3d 350, 2013 WL 141695, (6th Cir. 2013).

These four cases alone stand for the proposition that a hang up from a 9-1-1 call places a duty on police that requires investigation as to what is occurring. The Enquirer's ignoring of these cases is deafening. The message through omission is that the Enquirer has no sound argument against the clear and unambiguous language of *Hodge*, *May*, *Myers*, and *Stricker*.

Turning to the *Davis* case, the Enquirer first argues that “Appellant Gmoser assumes (without basis), that when the *Davis* Court used the term ‘interrogation,’ it also meant ‘investigation.’” (The Enquirer's brief, page 11). The Enquirer continues arguing that “although the *Davis* Court uses the term ‘interrogation,’ the Court's use of that term does not even remotely suggest that it meant ‘investigation.’ In fact, the opposite is true.” (The Enquirer's brief, page 12) However, this Court has specifically stated in *State v. Arnold*, 126 Ohio St.3d 290, 933 N.E.2d 775, 2010-Ohio-2742, ¶ 15, that:

In *Davis*, the court also considered a second case in which a domestic-violence complainant did not appear at trial. *Id.* at 819-820. The police officer who interviewed the victim at the scene of the incident and who witnessed her

complete and sign an affidavit concerning the abuse testified at trial in order to authenticate the affidavit. *Id.* at 820. The court determined (1) that the interrogation sought to determine what had happened, not what was happening, (2) that there was no ongoing emergency, (3) that the interrogation was not needed to resolve an emergency, and (4) that the interrogation was “formal enough” that it was conducted in a room separate from the complainant's husband. *Id.* at 830. The court concluded that “[i]t is entirely clear from the circumstances that the **interrogation was part of an investigation** into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged.” *Id.* at 829. Accordingly, the court concluded that the hearsay evidence was testimonial and, therefore, that it was barred by the Sixth Amendment. *Id.* at 834.

(Emphasis added).

As such, the United States Supreme Court, as acknowledged by this Court, has determined that an interrogation is part of an investigation. The terms are not mutually exclusive, but rather, one is a part of the other. Thus, Gmoser’s argument is in line with case law, has basis, and the Enquirer’s word play argument should be rejected.

The Enquirer next argues that the *Davis* case determined that a call back from a 9-1-1 hang up is still a 9-1-1 call. However, while the *Davis* court did use the nomenclature 9-1-1 to describe the call, this was simply a descriptive term, and in no way a legal determination. The *Davis* court was concerned with the Confrontation Clause, and not if the call back was an actual 9-1-1 call. Additionally, the call back in *Davis* was answered by the same individual that made the hang up call, and the 9-1-1 operator did not identify themselves as being a law enforcement employee, thus further distinguishing it from the present case. *See, State v. Davis*, 154 Wash.2d 291, 111 P.3d 844, (Wash., 2005); *see, also, Davis v. Washington*, 547 U.S. 813, 818-819, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Thus, the labeling of the call back as a 9-1-1 call was simply used colloquially, and was not formal or literal.

The actual legal determinations in *Davis* are what this Court should focus its eye upon. In

Davis, the Court continued to reject the “whole statement” approach to narratives, and found that even an actual 9-1-1 call can contain questions that are testimonial coupled with nontestimonial questions. *See, Davis*, 547 U.S. at 828-829 (“In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the ‘structured police questioning’ that occurred in *Crawford*, 541 U.S., at 53, n. 4, 124 S.Ct. 1354.”).³ This legal determination clearly directs courts throughout the United States not to take a “whole statement” approach to a narrative or a 9-1-1 call. This rejection of the “whole statement” approach is what undercuts this Court’s past precedent in the 1996 *Hamilton County* Case. Appellants/Cross-Appellees now merely ask this Court to recognize that forcing parties to disclose as a public record a “whole statement” (here a 9-1-1 call and two subsequent outbound calls) is contrary to the dictates of the United States Supreme Court.

Simply stated, a 9-1-1 call can contain structured police questioning, or interrogations, that are part of an investigation. *See, Davis*, 547 U.S. 813; *see, also, State v. Arnold*, 126 Ohio St.3d 290. This Court’s past precedent, that the entirety of a 9-1-1 call is a per se public record and cannot contain investigatory matters, must be reevaluated and put in line with the rejection of the “whole

³ The United States Supreme Court was only asked to determine if the early statements made were testimonial in *Davis*, although they appear to believe, without deciding, that some of the later statements were probably testimonial in nature. *See, Davis*, 547 U.S. at 829 (“Davis's jury did not hear the complete 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.”)

statement” approach. *Id.*; *see, also, Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994).

C. *The Appellate District’s characterization of the Outbound Call as a continuation of the actual 9-1-1 call has no support in fact, law, or theory.*

The Enquirer argues that common sense supports the argument that when person A calls and talks to person B, a later call from person B to person C is a continuation of the original conversation. This simply makes no sense, just like the Twelfth District’s decision to label such a second conversation a continuation in the present case.

While acknowledging that the Outbound Call was not made to the phone number 9-1-1, the Appellate Court declined a multitude of valid distinctions by holding that the call was a “continuation” of the actual 9-1-1 call. *See, Sage*, 2013-Ohio-2270, at ¶ 19. However, this categorization of the Outbound Call as a continuation does not survive logical scrutiny and has zero support in case law. Rather, the Twelfth District’s continuation theory is created from whole cloth. *See, generally, State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987) (finding procedures should not be created out of whole cloth)(overruled on other grounds). The supposed continuation theory is also squarely at odds with the Revised Code and this Court’s decision that defines a 9-1-1 call as one in which a citizen calls 9-1-1 asking for help. *See, R.C. 5507.01(A); Hamilton County*, 75 Ohio St.3d at 377-378. As such, the Twelfth District’s unprecedented continuation theory should be flatly rejected as an unportable judicial creation as has already previously been briefed in Appellants/Cross-Appellees’ initial merit brief.

PROPOSITION OF LAW NO. 2:

The Twelfth District Court of Appeals abused its discretion when it found the Protective Order prohibiting the release of the Outbound Call to the media failed to satisfy the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*.

In its response brief, the Enquirer argues that the Twelfth District did not err when it granted the writ of mandamus. (The Enquirer's brief, pages 15-20) In support of its argument, the Enquirer first cites to a 1976 United States Supreme Court decision, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 561, 96 S.Ct. 2791 (1976), for the proposition that trial courts are required to resolve conflicts between the First and Sixth Amendments in a reasonable and lawful way. Appellants/Cross-Appellees do not disagree with that statement of law. However, the Enquirer also cites to *Stuart* in a misguided attempt to have this Court believe that the Appellants/Cross-Appellees' arguments under this proposition of law are supported by misstated case law. (The Enquirer's brief, page 15) This claim cannot stand.

Contrary to the Enquirer's claim, the Sixth Amendment right to a fair trial can trump the First Amendment right to public access. The United States Supreme Court in *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 464 U.S. 501, 508, 104 S.Ct. 819 (1984) ("*Press-Enterprise I*"), a case that was decided after *Stuart*, declared that, "No right ranks higher than the right of the accused to a fair trial." Pursuant to *Press-Enterprise I*, the United States Supreme Court established a test for trial courts to use to determine if the accused's Sixth Amendment right to a fair trial has trumped the media's First Amendment right of public access. *See, Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 14, 106 S.Ct. 2735 (1986) ("*Press-Enterprise II*"). And this Court has adopted that test. *See, State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180. Thus, contrary to the Enquirer's

claim, when this test is satisfied, the Sixth Amendment will trump the First Amendment. Accordingly, the Appellants/Cross-Appellees have not “ignored” the prior *Stuart* decision as the Enquirer claims, but rather, has relied on Supreme Court precedent that sets forth the relevant standards that are applicable to the case at bar.⁴

Further, Appellants/Cross-Appellees cited to federal court decisions to merely illustrate that courts across the country recognize that the rights of criminal defendants and the privacy interests of third parties can (and have) overcome the First Amendment right of access to open court proceedings and public documents. *See, e.g., In re Globe Newspaper Co.*, 729 F.2d 47, 53, 59 (C.A. 1, 1984) (upheld the lower court’s finding that closure was necessary to protect the defendants’ privacy and fair trial rights); *United States v. McVeigh* 119 F.3d 806, 813 (C.A. 10 1997) (upholding the trial court’s order sealing evidence ruled to be inadmissible and stating that “disclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction”); *United States v. Carriles*, 654 F.Supp.2d 557, 566 (W.D.Tex. 2009) (granting the government’s protective order that sought to protect the privacy interests of a third party).

⁴ By contrast, it is the Enquirer’s reliance on case law like the *Stuart* decision and this Court’s decision in *State ex rel. Toledo Blade Company v. Henry County Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, 926 N.E.2d 634, that is misplaced as these cases involve the issue of prior restraint rather than the request for records in a criminal case. For prior restraint issues, the United States Supreme Court and this Court have adopted a different test from the one set forth in *Press-Enterprise II* and *Bond*. *See, Stuart*, 427 U.S. at 562; *Henry*, 2010-Ohio-1533, ¶¶ 27-30.

A. *The Twelfth District erred in law and fact when balancing Michael Ray's Sixth Amendment right to a fair criminal trial against the media's First Amendment right of access.*

In support of its argument that the Twelfth District did not abuse its discretion when it granted its request for a writ of mandamus, the Enquirer cites to the proper standard set forth by this Court in *Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, at ¶ 28-29, and states that the Twelfth District properly applied this test. (The Enquirer's brief, pages 16-17) However, the Enquirer then cites to this Court's decision in *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-328, for the proposition that the "government must show by clear and convincing evidence that 'the prejudicial effect of the publicity generated by public access to the [records]...would prevent [the defendant] from receiving a fair trial,'" and argues that the Twelfth District properly found "that Judge Sage's Protective Order did not rest on clear and convincing evidence." (The Enquirer's brief, pages 17, 19)

Once again the Enquirer demonstrates its confusion and improper mixing of legal standards that serve as the basis for its argument. The "clear and convincing evidence" standard that the Enquirer cites to applies only when a relator claims in his writ of mandamus that he is entitled to the restricted court records pursuant to the Ohio Rules of Superintendence. *Wolff*, 2012-Ohio-328, ¶ 22-23; Sup.R. 44-47. This Court granted the writ in *Wolff* based solely on these Rules. *Id.*, at ¶42. In the case at bar, however, the Enquirer did not base its claim for relief on these Rules, and the Twelfth District did not consider or decide the case on such grounds.⁵ Thus, neither Prosecutor Gmoser nor

⁵ Indeed, a claim under the Rules of Superintendence would have failed since granting relief from a violation of these rules requires that a court or clerk restrict a "case document" from public access. "Case document" as defined by Sup.R.44(C) is limited to "a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding." The Twelfth District properly found that the Outbound Call was not before Judge

Judge Sage were required to show prejudice by this “clear and convincing evidence” standard in order for the Protective Order to pass legal muster.

1. Evidence of a substantial probability of prejudice.

In its attempt to apply an improper (and higher) legal standard upon Prosecutor Gmoser and Judge Sage, the Enquirer ironically claims that the Appellants/Cross-Appellees have attempted to “mislead this Court” on the facts in this case; in particular, the facts as they relate to the hearing on Gmoser’s Motion for a Protective Order. (The Enquirer’s brief, page 17) This claim lacks merit.

The Appellants/Cross-Appellees argued in their merit brief that the trial court received and evaluated the expert input that the Twelfth District sought, but wrongly found absent. (Appellants/Cross-Appellees’ brief, page 20) And that is true, as the trial court was given the opinions of multiple experienced trial attorneys, with extensive legal training in criminal law, constitutional law, and media law. Simply because these opinions were provided to the trial court in the form of an argument do not make them any less valid; nor does the form in which they were delivered prohibit the trial judge from considering them, as the Enquirer would have it.

Rather, the hearing on the Motion for the Protective Order was akin to a side bar conference at trial where the trial court is faced with a legal issue, hears arguments from all sides, and it then issues a legal ruling. The hearing in this case served a similar function. The hearing involved a legal issue and Judge Sage provided an opportunity for attorneys on every side - the prosecution, the defense, and the media - to argue their respective positions before he rendered his ruling. And each side seized the given opportunity, citing to legal standards as well as case law. (Tr. 26 at Exh. D-A, pages 17-41) It is common knowledge that a trial judge not only considers these arguments when

Sage as a filed document or was otherwise offered into evidence. *Sage*, 2013-Ohio-2270, ¶ 37.

issuing a ruling, but depends upon them, and Judge Sage properly did so here.

Furthermore, contrary to the Enquirer's claim, judicial notice would not result from Judge Sage using his own expertise both as a trial attorney and as a judge of 21 years to determine the prejudicial nature of the Outbound Call. (The Enquirer's brief, page 18) It is common knowledge that a trial judge is permitted to use his own life experiences as both an attorney and trial judge as a guide in rendering a decision. *See generally, Csank v. Jay Homes, Inc.*, 8th Dist. Nos. 43121 & 43122, 1982 WL 2326 (Feb. 4, 1982), *7 ("It is true that a judge may not use his own experience as evidence. [internal citations omitted]. But he is not foreclosed from using his own life experience to aid him in evaluating the evidence. It would be a rare case indeed in which the experience of the judge added nothing to his understanding of the evidence.") Thus, a judge using his experience as a guide in rendering a decision does not result in judicial notice.

The Enquirer also argues that "Judge Sage could not presume or assume unfair prejudice would result from release of the Outbound Call simply because it contained admissions of guilt." (The Enquirer's brief, page 18) Yet, the Enquirer fails to address the fact that Ray's statements of "I'm a murderer" and "I stabbed him" are not just admissions to the crime, but constitutes the ultimate legal conclusion that jurors are responsible for determining through the use of precise legal definitions.⁶ (Tr. 25 at page 60-61.) Moreover, Ray's statement that he "just snapped" goes to the requisite mental state of the crime. (Id. at page 60, 62.) Thus, the Appellants/Cross-Appellees are not just assuming prejudice because of Ray's admissions, but are finding substantial probability of prejudice based upon the legal conclusions that are present in the recording.

⁶ At the deposition of Rednour, the Enquirer's legal counsel even acknowledged that Ray's "I'm a murderer" statement is "a legal conclusion." (Tr. 25 at page 72-73.)

2. *No reasonable alternatives to closure.*

The Enquirer also relies on this Court's *Wolff* decision to argue that in order for Judge Sage's Protective Order to withstand legal scrutiny, he had to consider and reject all of the alternatives to closure that this Court referenced in that decision. (The Enquirer's brief, pages 19-20) As previously stated, *Wolff* was not decided under the applicable standard set forth by the United States Supreme Court in *Press-Enterprise II* or by this Court in *Bond* but rather, was based on standards employed by the Rules of Superintendence.

Moreover, this Court simply stated in *Wolff* that "the constitutional right of the defendants to a fair trial *can* be protected by the traditional methods of voir dire, continuances, changes of venue, jury instructions, or sequestration of the jury." *Wolff*, 2012-Ohio-328, at ¶ 35 (emphasis added.) What is significant is what the *Wolff* Court did not hold, which is that trial courts must explicitly consider and reject on the record all of the alternatives it listed. By contrast, *Press-Enterprise II* and *Bond* require trial courts only to make findings on the record demonstrating that they considered "reasonable alternatives." *Press-Enterprise II*, 478 U.S. at 14; *Bond*, 2002-Ohio-7117, at ¶ 30. In a given case, some of the alternatives that this Court listed in *Wolff* may not be reasonable, and thus, need not be expressly considered and rejected by the trial court.

Furthermore, *Press-Enterprise II* and *Bond* did not mandate how many alternatives must be considered before closure is granted. This Court in *Bond* reversed the trial court's decision that granted closure of public access since the record was completely devoid of any consideration of less-restrictive alternatives. *Bond*, 2002-Ohio-7117, at ¶ 31. By contrast, Judge Sage properly considered the reasonable alternatives that existed in this case. Those reasonable alternatives included a transcript of the recording as well as redaction, and he specifically explained on the record

his reasoning for rejecting those alternatives. (Tr. 36 at Exh. 1, page 2-3; Appx. 31.) In addition, Judge Sage considered a change in venue as an alternative, but found that alternative not reasonable. (Id.) What is noteworthy is that Judge Sage actually considered and rejected alternatives that this Court did not list in *Wolff* as alternatives that could protect the defendant's right to a fair trial. The message is clear that there is no standardized list of alternatives that trial courts must consider and reject; the reasonable alternatives that exist will depend on the facts and circumstances of each case.

As illustrated above, the Enquirer's reliance on *Wolff* is once again misplaced. Judge Sage followed the mandates set forth by *Press-Enterprise II* and *Bond* when he considered the reasonable alternatives that balance the prejudicial effect of the tape with the media's right to have it, including limiting the emotional nature of the call through a transcript and limiting portions of the call through redaction, as well as a change in venue. Judge Sage on the record then rejected those alternatives prior to granting the Protective Order.

B. Any discovery labeled "counsel only" under Criminal Rule 16(C) or as "non-disclosed" under Criminal Rule 16(D) in accordance with the Ohio Rules of Criminal Procedure should be considered "state law" that is exempt from being released under the Ohio Public Records Act.

Contrary to the Enquirer's assertion, the Appellants/Cross-Appellees are not asking this Court to make new law. Rather, the Appellants/Cross-Appellees are asking this Court to recognize that a new state law was created when Criminal Rule 16 was rewritten. As rewritten, Crim.R. 16 created new implications for public records pursuant to the existing exception as set forth in R.C. 149.43(A)(1)(v). Specifically, R.C. 149.43(A)(1)(v), excludes "[r]ecords the release of which is prohibited by state or federal law." It is therefore the Appellants/Cross-Appellees' position that this

exemption applies to items that are labeled “counsel only” or that are “non-disclosed” under newly created Crim.R. 16 (C) and (D).

The 1996 *Hamilton County* case cannot control this issue because Crim.R. 16 (C) and (D) were not in place at that time. Further, the prosecutor would not be “defrocking” a record of its status. Rather, if labeled as protected under Crim.R. 16 (C) or (D), the exception in R.C. 149.43(A)(1)(v) would exclude the record from ever being a public record. Thus, there would never be a “defrocking.”

The underpinning of this argument remains the same. Criminal Rule 16 is clearly procedural in nature as it was promulgated into the Ohio Rules of Criminal Procedure. The Ohio General Assembly defined the applicability of these rules stating, “These rules prescribe the procedure to be followed in all courts of this state in the existence of criminal jurisdiction, with the exceptions stated in division (C) of this rule.” Crim.R. 1(A). Additionally, Crim.R. 16 is “procedural” in nature. This Court in *State v. Athon* recently recognized that “Crim.R.16 is specific to the procedure in criminal cases * * *.” *Athon*, 136 Ohio St.3d 43, 2013-Ohio-1956, ¶ 18.

Accordingly, as this Court has previously determined that Crim.R. 6(E) is a procedural rule that constitutes a “state law,” this Court should similarly hold that the newly amended Crim.R. 16 is procedural in nature and also constitutes a “state law.” *See, The State ex rel. Beacon Journal Publishing Company v. Waters*, 67 Ohio St.3d 321, 1993-Ohio-77, 617 N.E.2d 1110. As such, discovery that is designated “counsel only” or “non-disclosed” under Crim.R. 16(C) and (D) is specifically exempted from disclosure under the public records statute because it constitutes a state law that prohibits the release of the records. This Court should reject the Enquirer’s suggestion that a 1996 Supreme Court of Ohio decision, that had no ability to consider the new amendments to

Crim.R. 16, should control the present case. This Court must consider the new language in Crim. R. 16, and harmonize it with the Public Records Act and its already existing exceptions.

What is more, the Enquirer's contention that the Appellants/Cross-Appellees have waived this argument should also be rejected. As early as June 21, 2012 Gmoser filed a Motion for Protective Order under Crim.R. 16(C), which Judge Sage ultimately granted. This was the first, but not the last time that the Appellants/Cross-Appellees made this argument pursuant to Crim.R. 16. In their merit brief before the Twelfth District, the Appellants/Cross-Appellees raised and cited Crim.R. 16. Specifically, they placed the argument concerning Crim.R. 16 in sections of the brief that concerned the exceptions listed in R.C. 149.43, Gmoser's constitutional, procedural, and ethical duties to bring the issue before the trial court, and the trial court's ability to render decisions that regulate discovery. (See, Tr. 38, pages 6-7, 14-17, 17-19). As such, any notion that the Appellants/Cross-Appellees did not raise this issue or otherwise preserve it must be denied.

Moreover, R.C. 149.43(B)(3) states that although an explanation as to why a public records request is required of a public office, "The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section." Based upon all of the aforementioned, no waiver occurred, and this Court should harmonize the new Crim.R. 16 with R.C. 149.43 to find that a "non-disclosure" or "counsel only" labeling will make a record exempt from disclosure pursuant to R.C. 149.43(A)(1)(v).

The Enquirer also argues that this is a matter for the legislature to resolve. However, the per se rule concerning 9-1-1 calls was a judicially created rule. As such, "[i]nasmuch as it is a judicially created doctrine, it may be judicially abolished." *Enghauser Manufacturing Co. v. Eriksson*

Engineering, 6 Ohio St.3d 31, 33, 451 N.E.2d 228, 230 (1983)(superseded by statute); *see, also*, *Butler v. Jordan*, 92 Ohio St.3d 354, 366, 2001-Ohio-204, 750 N.E.2d 554, *quoting Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 30, 2 OBR 572, 442 N.E.2d 749 (1982) (“Stare decisis alone is not a sufficient reason to retain the doctrine which serves no purpose and produces such harsh results. Therefore, we join with the other states in abrogating the doctrine.”)

This position is followed in other jurisdictions as well. In *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 727 (Tex.,1990), the court utilized this power to protect the people of Texas in finding that “[t]he judiciary should not ignore those unscrupulous employers who wield the powerful weapon of the pink slip to intimidate workers into silence in order to conceal and perpetuate activities in the workplace that endanger the public. Fortunately, this court has recognized that waiting for the legislature is not the only alternative available, as it is highly appropriate “to judicially amend a judicially created doctrine.”” (Emphasis added).

This Court does not need to wait for the legislature to protect the people of Ohio from the judicially created per se rule surrounding 9-1-1 calls. This is especially true when the already existing legislatively passed exception in R.C. 149.43(A)(1)(v) can provide this protection when coupled with this Court’s enactment of Crim.R. 16(C) & (D). And such protection would be in line with the purpose of the newly amended Crim.R. 16, which is “to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large.” *See*, Crim.R. 16(A) (emphasis added). Therefore, this Court should harmonize the two acts of state law and provide a proper balance to the citizens of Ohio. This action is not only wholly appropriate, but needed by the citizenry.

PROPOSITION OF LAW NO. 3:

Even if this Court finds the Outbound Call to be a 9-1-1 call, this Court's outdated per se rule that all 9-1-1 calls are public records subject to disclosure frustrates the ends of justice, conflicts with the Ohio criminal rules, is disfavored and in direct contravention with the modern stance taken by other jurisdictions, and thus, should be revisited and reversed or modified.

A. As per se rules are disfavored, inflexible, and fail to preserve and promote justice, this Court should adopt a totality of the circumstances approach or balancing test to determine whether a 9-1-1 is a public record subject to disclosure.

R.C. 149.43 does not mandate that 9-1-1 calls are per se public records. The Ohio General Assembly has never mandated that 9-1-1 calls are per se public records. No body of the legislative branch in Ohio has ever mandated that 9-1-1 calls are public records. Yet, the Enquirer again argues that only the Legislature can amend or change the law in this regard. This argument is simply false.

This Court created the per se rule. As such, and as already has been stated “[i]nasmuch as it is a judicially created doctrine, it may be judicially abolished.” *Enghauser Manufacturing Co. v. Eriksson Engineering*, 6 Ohio St.3d 31, 33, 451 N.E.2d 228, 230 (1983)(superseded by statute). The Enquirer's arguments to the contrary should be simply ignored.

Further, the Enquirer argues that there are no problems with the per se rule, and that the rule does not cause the public any harm. Judges and Justices in Ohio disagree, as does the State. Specifically, Judge Piper in his concurring opinion noted that, “[t]he legislature continues to deny attention where needed. Justice Kennedy recently urged the Commission on Rules of Practice and Procedure to examine the dysfunction between Crim.R. 16 and R.C. 149.43. *State v. Athon*, Slip Opinion No. 2013-Ohio-1956.” *Sage*, 2013-Ohio-2270, at ¶ 67, (Piper, J., concurring) (internal footnote omitted)(emphasis added).

Judge Piper continued noting the extreme harm that can, and has, befallen the public in this

type of situation:

* * * [T]he per se rule of [*Hamilton County*] requires immediate release regardless of any intended uses or unintended consequences.FN8 There appears no room to balance fundamental principles.

FN8. For example, in *State v. Adams III*, 12th Dist. No. CA2009–11–293, 2011–Ohio–536, this court affirmed the defendant's conviction for aggravated murder after he was found guilty of killing a man labeled “a snitch.” The victim was riding in a car that was being pursued by the police, and the driver jumped from the car and was not apprehended. The victim surrendered to police, and while in the back of the police cruiser, was videotaped identifying the driver of the car to police officers. The videotape was copied and disseminated within the community, and the victim was murdered for talking to the officer.

* * *

Yet again, neither R.C. 149.43 nor the holding in [*Hamilton County*] permit room for deliberation or the weighing of competing interests. *Id.*, at ¶ 63-64.

Judge Piper concluded that under the current per se rule of law, “a prosecutor is forced to engage in conduct contrary to the real ethical concern for the preservation of individual rights by disseminating public records. If we expect prosecutors to fulfill ethical responsibilities beyond those of an advocate, we should empower them as well as the media.” *Id.*, at ¶ 67.

B. *The per se rule intolerably conflicts with the rules in criminal cases and with Ohio citizens’ constitutional right to privacy. This Court should modify its per se rule in favor of a balancing test employed by its sister states that weighs confidentiality issues, privacy issues, and state interests that are frequently involved in 9-1-1 calls.*

What is more, the Enquirer has completely ignored the citations to Ohio’s sister states, their creation of judicial remedies based upon the common law, and the more advantageous balancing approach to privacy. *See, generally, Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242 (1984); *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz. 297, 955 P.2d 534 (1998); *A.H. Belo Corp. v. Mesa Police Dep’t*, 202 Ariz. 184, 42 P.3d 615,

617 (2002), *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J.Super. 312, 320, 864 A.2d 446 (2004). This act of turning a blind eye towards these well reasoned opinions and instead trumpeting a per se rule that harms Ohio's citizens clearly indicates the Enquirer's lack of a reasoned argument.

The idea of balancing an Ohio citizen's privacy rights finds both its reason and authority through this Court's pronouncement in 1956 that Ohio's privacy right includes "the right of a person to be let alone * * * and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." *Housh v. Peth*, 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340, (1956), paragraph one of the syllabus. In *Peth*, this Court tracked the history of one's right to privacy, and stated:

The first recognition of the right by a court of dernier ressort apparently was in the case of *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St. Rep. 104, 2 Ann.Cas. 561. The syllabus in that case reads in part as follows:

2. A right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases.
3. The right of privacy is embraced within the absolute rights of personal security and personal liberty.
4. Personal security includes the right to exist, and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.
5. Personal liberty includes not only freedom from physical restraint, but also the right 'to be let alone'; to determine one's mode of life, whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him so long as he does not violate the rights of others or of the public.'

Since that decision by the Supreme Court of Georgia, the right of privacy has been recognized by the following jurisdictions: Alabama, Arizona, California, District of Columbia, Florida, Indiana, Kansas, Kentucky, Michigan, Missouri, New Jersey, North Carolina, Oregon, Pennsylvania and South Carolina.

* * *

In Ohio the lower courts have acknowledged the right, but counsel are agreed that it still is a matter of first impression in this court. However, since both reason and authority are convincingly in favor or recognition of the right, it would seem that Ohio, too, should not hesitate to take the definite step of approving this salutary and progressive principle of law.

Id., at 38-39 (emphasis added).

Not only is a balancing approach more in line with *Peth*, but the per se rule has also created friction amongst and between both Ohio's laws and its ethical rules. This friction has grown so noticeable that it is being not only recognized by lawyers and citizens, but there are calls for action to alleviate it from Judges and Justices of this State.

Other states are already providing the proper balancing approach to their citizens. As Ohio's per se rule was a judicially created doctrine, this Court in accordance with the reason and case authority should modify the per se rule and permit for a fair and balanced approach that protects the people, and not just the press.

PROPOSITION OF LAW NO. 4:

The Twelfth District abused its discretion when it awarded Appellee/Cross-Appellant statutory damages in the maximum amount allowable by law. No statutory damages should be awarded.

The Twelfth District abused its discretion when it awarded the Enquirer statutory damages in the maximum allotted amount of \$1,000 to be paid by Gmoser. *Sage*, 2013-Ohio-2270, at ¶ 57; *See, State ex. rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 950 N.E.2d 965, 2011-Ohio-3093 (this Court applies an abuse of discretion standard to review a court of appeals' decision awarding or denying statutory damages in a public records mandamus action).

A. *Waiver.*

First, the Enquirer argues that the statutory damages claim should not be waived because “The Enquirer requested statutory damages under R.C. 149.43(C)(1) in its Merit Brief at 18, and argued that such an award was justified because Appellant Gmoser violated the Public Records Act.” (The Enquirer’s brief, page 25) However, what the Enquirer fails to indicate is that this citation (at page 18) was simply the Enquirer’s prayer for relief to the Twelfth District. Thus, there was no assignment of error about statutory damages, there was no recitation of the standard or how such was violated, and there was no true argument of any kind as to their entitlement of statutory damages. Rather, there was a passing request made in the conclusion of the Enquirer’s merit brief. This is not enough to save the Enquirer from waiving this argument.

This Court has held that in mandamus actions, relators who request statutory damages and/or attorney fees in their complaints but who do not include any argument in support of this relief in their merit briefs waive these claims. *See, State ex. rel. Data Trace Information Services, L.L.C. et al. v. Cuyahoga County Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 69 (This Court held in a public records mandamus action that, “[a]lthough relators requested attorney fees and statutory damages in their amended complaint and reiterated their request in the conclusion of their merit briefs, they included no separate argument in either brief concerning their request. Relators thus waived this claim.”) (Emphasis added).

It is clear from the Enquirer’s merit brief to the Twelfth District, under its assignment of error number 4, that it was limiting its request for monetary damages in the form of attorney fees. By doing so, the Enquirer waived its claim and entitlement for statutory damages that it set forth in its complaint and amended complaint. (Tr. 22 at page 17-18.) This Court should find, as it did in *Data*

Trace Information Services, that the Enquirer waived this claim. Thus, the Twelfth District's decision awarding statutory damages should be reversed.

B. The initial request was made in a manner inconsistent with the mandatory requirements set forth in the Public Records Act.

In regards to the Enquirer also failing to transmit the public records request according to the proscribed statutory mandates, the Appellants/Cross-Appellees rely upon the previous articulated reasoning that where there is no evidence that the Enquirer has transmitted the *initial* public records request in writing by hand delivery or certified mail as prescribed by law, it is not entitled to statutory damages. *See, The State ex. rel. Mahajan v. State Medical Board of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 59 (This Court held that a relator is not entitled to statutory damages when his public records requests were not transmitted by hand delivery or certified mail as required by R.C. 149.43(C)(1)); *State ex. rel. Morabito v. City of Cleveland*, 8th Dist. No. 98829, 2012-Ohio-6012, ¶ 15 (“there is no evidence before this court that she transmitted her public records request by hand delivery or certified mail. R.C. 149.43(C)(1) conditions an award of statutory damages upon transmitting the request by hand delivery or certified mail”); *State ex. rel. DiFranco v. City of South Euclid*, 8th Dist. No. 97823, 2012-Ohio-5158, ¶ 3 (while the relator made her request for public record through email, “[e]mail does not constitute a written request or certified mail, and thus, [relator] has failed to comply with the mandatory requirements of R.C. 149.43(C)(1).”).

C. Gmoser sufficiently met the statutory criteria for denying statutory damages.

While not arguing one iota about the actual criteria that must be met in regards to statutory damages (R.C. 149.43(C)(1)(a)&(b)), the Enquirer merely argues that Gmoser's act in seeking a

protective order belies the contention that it was reasonable for him to believe that the Outbound Call was not a public record. However, this casting of aspersion cannot veil the truth that Gmoser acted reasonably.

The act of going to the court of common pleas for a protective order was not only a reasonable action for Gmoser, but an act bore directly from case law. When Gmoser went to the trial court, he did so knowing that the First District Court of Appeals (a case that involved the Enquirer) had stated, “As the court observed in *WHIO-TV-7 v. Lowe*, the release of records pertaining to an ongoing trial can affect the jury process by tainting the jury pool. The court also said that ‘a more serious issue which affects the integrity of the trial itself * * * is the tainting of witness testimony from witness exposure to the publicized information.’ These issues should be determined by the trial court, not merely by a custodian of the record, and the trial court should apply the balancing test of the interests involved. The court should make the proper factual determination of whether release of the material would affect the defendant's right to a fair trial.” *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 733, 761 N.E.2d 656 (1st Dist., 2001) (emphasis added).

Gmoser’s act of going to the trial court was not “improper” as the Enquirer claims. Rather, it was a reasonable, measured and guided approach that is fully endorsed by case law. R.C. 149.43(C)(1)(a)&(b)⁷ directs the courts to look at the “application of statutory and case law” and

⁷ R.C. 149.43(C)(1):

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records * * * , a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section

[and]

(b) That a well-informed public office or person responsible for the requested public records

what the law condones a “well informed public office” to believe is the proper conduct. In the present case, Gmoser applied the *Dinkelacker* case, which condoned that a trial court should determine these types of issues, and conducted himself in full accord. By being well informed and following legal mandates, Gmoser acted in good faith to the law and his conduct was exemplary to all concerned. Under R.C. 149.43(C)(1)(a)&(b), no statutory damages should be assessed in such a situation; especially not maximum damages.

It is also clear from the record that Gmoser sufficiently met the second criterion for reducing or eliminating an award of statutory damages. It was reasonable for Gmoser to believe that prohibiting the release of the recording would serve the public policy that he asserted to support his position, that is, to protect a criminal defendant’s constitutional right to a fair trial. The Twelfth District made this exact finding, noting in its decision that “Gmoser and Judge Sage reasonably believed that withholding the Outbound Call recording and issuing the protective order would promote the underlying public policy of preserving an accused’s right to a fair trial.” *Sage*, 2013-Ohio-2270, at ¶ 54. Based upon this finding, coupled with the reasonable and good faith actions of Gmoser in light of the *Dinkelacker* case, no statutory damages should have been assessed.

What is more, even if Gmoser had not followed the *Dinkelacker* case and had gone to the court for a protective order, his actions would have been reasonable given that the Outbound Call was not a 9-1-1 call for a multitude of reasons. First, the call at issue was an Outbound Call made by a Butler County Sheriff’s Office dispatcher. This call simply does not fit within the definition of a 9-1-1 call pursuant to this Court in *Hamilton County*, as this Court noted that “Nine-one-one

reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

calls that are received by HCCC are always initiated by the callers." *Hamilton Cty.*, 75 Ohio St.3d at 377-378 (emphasis added). Second, the Outbound Call does not meet the statutory definition contained in R.C. 5507.01(A). Third, courts throughout the country have recognized that 9-1-1 calls, and especially hangups from 9-1-1 calls, require investigation by law enforcement, thus invoking an exception to R.C. 149.43.

It was also reasonable for Gmoser to believe that the Outbound Call was exempt from disclosure under R.C. 149.43(A)(1)(v) as it constituted "a record, the release of which is prohibited by state or federal law." This call contained highly prejudicial statements made by Michael Ray after he murdered his father, including his admissions to the ultimate legal conclusions of murder. It was reasonable for Gmoser to believe that protecting Ray's Sixth Amendment constitutional right to a fair trial prohibited him from releasing the recording to the media under R.C. 149.43(A)(1)(v). Such reasonableness was even noted by the Twelfth District when it stated in its decision that, "The pretrial disclosure of a murder suspect's confession raises legitimate issues under the Sixth Amendment guarantee of a fair trial." *Sage*, 2013-Ohio-2270, at ¶ 54.

Additionally, it was also reasonable for Gmoser to believe that the release of the Outbound Call would have been done in direct contravention to Crim.R. 16, as well as the ethical rules that bind prosecutors. *See*, Prof.Cond.R. 3.6, 3.8. As such, both criterion for reducing or denying statutory damages were sufficiently met in the present case, and the Twelfth District's decision awarding maximum statutory damages must be reversed.

**APPELLANTS/CROSS-APPELLEES' RESPONSE TO
THE ENQUIRER'S MERIT BRIEF**

PROPOSITION OF LAW NO. 1:

The Twelfth District Court of Appeals properly denied the Enquirer's writ of prohibition that sought to vacate Judge Sage's Protective Order.

On appeal to this Court, the Enquirer argues in its merit brief that the Twelfth District Court of Appeals erred when it denied the Enquirer's request for a writ of prohibition. (The Enquirer's brief, pages 27-29) In support of its argument, the Enquirer claims that Gmoser's Motion for a Protective Order raised non-justiciable matters in which Judge Sage had no jurisdiction to rule. (Id.) Both arguments lack merit.

A. Gmoser's Motion for a Protective Order was within the bounds of the rules of criminal procedure, and his constitutional and ethical duties as prosecuting attorney required him to file such a motion.

The Enquirer argues that Gmoser's Motion for a Protective Order was not within the bounds of the Ohio Rules of Criminal Procedure, and argues that if a prosecutor wishes to withhold the disclosure of discovery, all that is required of him is to simply certify to the court that such discovery will not be disclosed pursuant to Crim.R. 16(D). (The Enquirer's brief, page 28) The Enquirer claims, without any factual support in the record, that "[w]hat Appellant Gmoser was really requesting was a protective order under Civ.R. 37," and that because Crim.R. 16(D) sets forth a procedure for when a prosecutor wishes to withhold information, Gmoser's motion was invalid under the criminal rules, "was really a complaint for declaratory relief," and the Twelfth District should have treated it as such. (The Enquirer's brief, page 28)

To the contrary, Gmoser predicated his Motion for a Protective Order on Crim.R. 16(C). (Tr.

26 at Exh. B, ¶ 5, Exh. B-2.) The Staff Notes to Crim.R. 16(C) provide that “[t]he State is empowered to limit the dissemination of sensitive materials to defense counsel and agents thereof in certain instances.” The reasons Gmoser cited in support of his motion related in part to the sensitive and prejudicial nature of the Outbound Call. (Tr. 26 at Exh. B, ¶ 5, Exh. B-2.)

It is true that Crim.R. 16(C) allows Gmoser to *sua sponte* designate discovery as “counsel only,” and that Crim.R.16(F) permits, upon motion by the defendant, that such a designation be reviewed by the trial court during an in camera hearing for an abuse of discretion. The Twelfth District even acknowledged that the Protective Order issued pursuant to Crim.R. 16(C) was “without question * * * not issued in strict compliance with the procedure contemplated by Crim.R. 16(C).” *Id.*, at ¶ 39.

However, the fact that Gmoser sought a more collaborative approach by requesting in his motion that the trial court conduct an in camera review to determine the prejudicial nature of the Outbound Call does not make his motion “invalid under the Criminal Rules,” or deprive Judge Sage of jurisdiction to make a ruling on the motion. (The Enquirer’s brief, page 28) The reasons in support of the motion and the remedy Gmoser sought in regulating the discovery to “counsel only” were consistent with the spirit of Crim.R. 16. A trial court “is entitled to rely on the caption of a motion when ruling on it, but also has the discretion to construe the motion based on the contents in the body of the motion, itself.” *Carter-Jones Lumber Co. v. JCA Rentals, LLC*, 7th Dist. No. 12 MA 56, 2013-Ohio-863, ¶ 19. In addition, Crim.R. 16(L) gives the trial court broad discretion to regulate discovery in order to protect the integrity of the criminal justice process and the rights of the parties involved. *See, State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 33 (staff note to Crim.R. 16(L) provides that “[t]he trial court continues to retain discretion to ensure that the

provisions of the rule are followed” and that such “discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.”)

Here, it was within Judge Sage’s discretion to construe Gmoser’s motion as a “counsel only” designation under Crim.R. 16(C) and to *sua sponte* hold an in camera hearing on the discovery matter under Crim.R.16(F), particularly where fair trial issues are brought to the court’s attention. *See, Dinkelacker*, 144 Ohio App.3d at 733, 761 N.E.2d 656 (1st Dist. 2001) (where the release of records during the pretrial discovery stage of a criminal defendant’s case can affect that defendant’s right to a fair trial, “[t]hese issues should be determined by the trial court, not merely by a custodian of the record, and the trial court should apply the balancing test of the interests involved”); *State ex. rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 138, 609 N.E.2d 551 (1993) (this Court has held that “[w]here a subsequent in camera inspection reveals that release of the records would prejudice the right of a criminal defendant to a fair trial, such information would be exempt from disclosure pursuant to R.C. 149.43(A)(1) during the pendency of the defendant’s criminal proceeding.”) Accordingly, Gmoser’s motion, which sought the regulation of discovery for the purpose of protecting the integrity and fairness of Ray’s criminal case, was within the bounds of the Crim.R. 16 and was not a complaint for declaratory relief. *See*, Crim.R. 16(A) & (L).

Further, Gmoser was required by his constitutional duty as prosecuting attorney to file such a motion to ensure that Ray’s fair trial rights were protected. *See, State v. Staten*, 14 Ohio App.3d 78, 83, 470 N.E.2d 249 (2nd Dist. 1984), citing *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S.Ct. 340 (1935) (“the prosecutor, as an agent of the state, has a constitutional duty to assure the defendant a fair trial”); *State v. Manns*, 5th Dist. No. 08 CA 101, 2009-Ohio-3262, ¶ 11 (“[T]he prosecutor is

responsible to ensure that an accused receives a fair trial. *Berger v. U.S.*, 295 U.S. 78; *State v. Staten*, 14 Ohio App.3d 197”). The criminal discovery rules also place a duty on the prosecuting attorney to protect the integrity of the justice system, which includes protecting the rights of defendants, and the well-being of witnesses, victims, and society at large. *See*, Crim.R. 16(A) (“This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal.”)

In addition to Gmoser’s constitutional duties and the duties imposed on him by the criminal rules, the ethical rules under the Ohio Rules of Professional Conduct also place special responsibilities upon him as prosecuting attorney to ensure that an accused is accorded justice. *See*, Comment [1] and [5(2)] of Prof.Cond.R. 3.6 (In regards to trial publicity, “[p]reserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved” and where criminal matters that involve confessions, admissions, or statements by a defendant “are more likely than not to have a material prejudicial effect on a proceeding”); Comment [1] of Prof.Cond.R. 3.8 (In regards to special responsibilities of a prosecutor, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice * * * . Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation” of the ethical rules.) (Emphasis added.) Clearly, Gmoser’s constitutional,

procedural, and ethical duties as prosecuting attorney required him to bring the matter to the trial court's attention, and he properly did so by filing a motion pursuant to Crim.R. 16.

The Enquirer also argues that "when a government office denies a public records request, nothing happens. The government office keeps the record, and need not produce it until the requestor obtains a writ commanding release. All such issues relating to that release should be resolved through the procedure set forth in the Public Records Act, not in parallel litigation." (The Enquirer's brief, page 28) The foundation for the Enquirer's position in this matter has been that public records requests trump Crim.R. 16 as well as a prosecuting attorney's constitutional, procedural, and ethical duties to protect an accused's constitutional right to a fair trial.

The Enquirer now also suggests that the Public Records Act trumps a criminal defendant's constitutional right to a speedy trial as well as the entire criminal justice process. When a public records request involving documents in a criminal case is denied, that criminal proceeding cannot be stalled, nor can the prosecuting attorney be precluded from acting in conformity with his professional and ethical duties in that criminal case, merely to await for a potential public records mandamus action to commence. The confounding argument that the Public Records Act trumps all constitutional rights, all statutory law, all ethical rules, and stalls the criminal proceeding should not be entertained by this Court.

B. Judge Sage had jurisdiction to render a ruling on Gmoser's motion to regulate discovery that threatened the integrity and fairness of Ray's criminal case.

The Enquirer also claims that Judge Sage exercised power unauthorized by law when he issued a Protective Order that prohibited the public dissemination of the Outbound Call. (The Enquirer's brief, page 27) In support of its argument, the Enquirer claims that "Judge Sage's

Protective Order targeted potential issues in an as-of-yet unfiled case, and made a declaration as to how those issues should be resolved.” (The Enquirer’s brief, page 27) This argument is without merit.

Judge Sage’s power to assume general subject matter jurisdiction over the dispute has been provided by the Ohio General Assembly in R.C. 2931.03, which states that “[t]he court of common pleas has original jurisdiction over ‘all crimes and offenses,’ except those minor offenses reserved to courts of lesser jurisdiction.” *See also*, Art. IV, Sec. 4(B) of the Ohio Constitution (“The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters * * * as may be provided by law.”) Common pleas courts have jurisdiction over a criminal case at the time the indictment is filed. *See, State v. Talbot*, 7th Dist. No. 12-MA-71, 2013-Ohio-534, ¶ 17 (“[a] validly filed indictment invokes subject-matter of the common pleas court pursuant to R.C. 2931.03. *See State v. Cubic*, 9th Dist. No. 10CA0082-M, 2011-Ohio-4990, ¶ 13; *State v. Turner*, 3rd Dist. No. 1-11-01, 2011-Ohio-4348, ¶ 21.”)

Further, the Criminal Rules of Procedure grant trial courts the discretion to render decisions that regulate discovery when presented by the parties. *See generally*, Crim.R. 16(L) (staff note to Crim.R. 16(L) provides that “[t]he trial court continues to retain discretion to ensure that the provisions of the rule are followed” and that such “discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.”)

Here, it is undisputed that Gmoser filed a Motion for a Protective Order pursuant to Crim.R. 16(C) in the Butler County Court of Common Pleas criminal case, *State v. Michael Ray*, which Judge Sage was presiding over. *Sage*, 2013-Ohio-2270, at ¶ 7, FN2. Judge Sage therefore had original

jurisdiction and authority over Ray's criminal case, including matters that involved discovery material. Accordingly, it was correct for the Twelfth District to find that while "the Outbound Call recording was not before Judge Sage in the sense it was not filed with the common pleas court or offered into evidence," the Outbound Call was nevertheless, "at the very least, * * * discovery material over which the trial judge assigned to the case has significant authority. *See* Crim.R. 16(C), (D), (F), and (L)." *Sage*, 2013-Ohio-2270, at ¶ 37.

The Twelfth District also correctly found that "separate and apart from Crim.R. 16, criminal courts have inherent authority to enter orders to preserve the integrity of their proceedings, including closure orders and orders restricting the litigants and their counsel from disclosing certain information relative to the litigation." *Id.*, at ¶ 40, citing *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046; *State v. Bush*, 76 Ohio St.3d 613 (1996) ("[t]rial judges are at the front lines of the administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings'"); *See, also, City of Toledo v. Spicuzza*, 6th Dist. No. L-05-1038, 2005-Ohio-4875, ¶ 6, citing *Svoboda v. Clear Channel Communs.*, 156 Ohio App.3d 307, 2004-Ohio-894, 805 N.E.2d 559 ("[t]rial courts enjoy considerable discretion when managing discovery proceedings.")

Trial courts have no greater responsibility in a criminal case than ensuring that an accused receives a fair trial, and thus, is given the inherent authority to render rulings that protect the integrity of the case. *See, Dinkelacker*, 144 Ohio App.3d at 733 (1st Dist. 2001) (it is proper for the trial court to be "involved in determining whether information subject to the control of the court or the litigants and their counsel should be disclosed where such disclosure may jeopardize the right of an accused

to a fair trial.”)

For the above reasons, Judge Sage had the jurisdiction under the Ohio Constitution, statutory law, the criminal rules, and by his inherent authority, to grant the Protective Order that prohibited the public dissemination of the Outbound Call in order to protect Ray’s right to a fair criminal trial.

C. *Gmoser’s motion and Judge Sage’s order do not constitute declaratory relief.*

It is clear by the incorporation of the Appellants/Cross-Appellees’ cited authority above that neither Gmoser’s motion nor Judge Sage’s order constituted a declaratory judgment action as the Enquirer contends. The Twelfth District correctly determined that Gmoser’s motion was a Crim.R. 16 motion within the context of Ray’s criminal case, stating, “it is clear Gmoser implicitly designated the Outbound Call recording as ‘counsel only,’ defense counsel did not object to that classification, Judge Sage further sanctioned that classification when he issued the protective order, and the designation means that the material is not to be disseminated to anyone other than defense counsel and his or her agents.” *Sage*, 2013-Ohio-2270, ¶ 39.

The Twelfth District also correctly found that Judge Sage’s Protective Order did not result in declaratory relief, stating that “the protective order was issued as an incident within the context of a separate and independent proceeding (i.e. the *State v. Ray* criminal case) that, in turn, was not commenced for the sole purpose of determining the availability of the record in dispute.” *Id.*, at ¶ 45. Thus, the Twelfth District did not err when it held that the such a motion was not a declaratory judgment action subject to a declaratory judgment analysis. *Id.*, at ¶ 47. For all of the foregoing reasons, this Court should affirm the Twelfth District’s decision to deny the writ of prohibition.

PROPOSITION OF LAW NO. 2:

The Twelfth District Court of Appeals did not abuse its discretion when it denied Appellee/Cross-Appellant's request for attorney's fees.

On appeal from a judgment granting or denying attorney's fees in a public records case, this Court reviews the court's decision under an abuse of discretion standard. *State ex. rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 17. "An abuse of discretion means an unreasonable, arbitrary, or unconscionable action." *Id.*, at ¶ 15, quoting *State ex. rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 59. The Twelfth District Court of Appeals' decision to deny the Enquirer attorney's fees was not unreasonable, arbitrary, or unconscionable.

R.C. 149.43(C) governs a court's decision to grant or deny attorney's fees in a public records mandamus action. *See*, R.C. 149.43(C)(2)(b) and (c). Pursuant to R.C. 149.43(C):

(2)(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

[or]

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

R.C. 149.43(C)(2)(b)(i)-(ii) (emphasis added).

The two instances that require the Twelfth District to award reasonable attorney's fees to the Enquirer are inapplicable to the case at bar, as Gmoser did not fail to respond to the Enquirer's public records request nor did he fail to fulfill any promise to permit the Enquirer to inspect or receive copies within a specified period of time. Thus, the Twelfth District's decision to award reasonable attorney's fees is discretionary, and is governed by R.C. 149.43(C)(2)(c), which provides:

(2)(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

[and]

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

Id. (Emphasis added).

This Court has found that in reducing, or denying all-together, a request for attorney's fees, courts are additionally permitted to consider the presence and the extent of the public benefit that

is derived from the release of the disclosure, as well as the reasonableness and good faith by the public office's failure to comply with the public records request. *Doe*, 2009-Ohio-4149, ¶¶ 32-34. The Enquirer's claim that the Twelfth District's consideration of Gmoser's good faith was an abuse of discretion is therefore without merit. (The Enquirer's brief, page 31-32)

The Twelfth District used its sound discretion when it properly applied R.C. 149.43(C)(2)(c) and determined, within the bounds of the law, that no attorney's fees should be awarded. *Sage*, 2013-Ohio-2270, at ¶ 57. In support of its decision, the Twelfth District made the following findings:

In the case at bar, Gmoser and Judge Sage acted in good faith to protect Ray's right to a fair trial. The pretrial disclosure of a murder suspect's confession raises legitimate issues under the Sixth Amendment guarantee of a fair trial. Gmoser further acted reasonably in promptly bringing the issue to the attention of the common pleas court by seeking the protection order. Additionally, Gmoser had ethical concerns pursuant to Prof.Cond.R. 3.6. The facts confronting Gmoser and Judge Sage were unusual in that a telephone call was placed by a 911 operator who was employed by a law enforcement agency, and who solicited incriminating statements from a murder suspect. Gmoser and Judge Sage reasonably believed that withholding the Outbound Call recording and issuing the protective order would promote the underlying public policy of preserving an accused's right to a fair trial.

Id., at ¶ 54.

It is clear the Twelfth District made the requisite findings under R.C. 149.43(C)(2)(c)(i) where it explicitly found that Gmoser acted in good faith and that he had a reasonable belief that the pretrial disclosure of the Outbound Call containing Ray's confession would legitimately interfere with his Sixth Amendment right to a fair trial.⁸ *Id.* The Twelfth District even noted that "[t]he facts confronting Gmoser and Judge Sage were unusual in that a telephone call was placed by a 911 operator who was employed by a law enforcement agency, and who solicited incriminating

⁸ At the deposition of Rednour, the Enquirer's legal counsel even acknowledged that Ray's defense counsel would object to Ray's "I'm a murderer" statement because "[i]t's a legal conclusion." (Tr. 25 at page 72-73.)

statements from a murder suspect.”⁹ *Id.*, at ¶ 54. Thus, it was reasonable for Gmoser to believe that his denial of the Outbound Call would not violate R.C. 149.43(B) because the Outbound Call was not a 9-1-1 and because it was also exempted from disclosure as a record “the release of which is prohibited by state or federal law” under R.C. 149.43(A)(1)(v).

Moreover, the Twelfth District noted Gmoser’s ethical duties under Prof.Cond.R. 3.6 that prohibit him from making extrajudicial statements that he “knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing” Ray’s right to a fair trial. Accordingly, it was reasonable for Gmoser to believe that providing the requested records would violate not only an accused constitutional rights but would also violate his own ethical and professional duties as Prosecuting Attorney that could subject him to potential disciplinary proceedings.

Twelfth District Judge Robin Piper even noted in his concurring opinion the incompatible duties a county prosecutor has in protecting an accused’s constitutional rights and complying with the media’s statutory of public access in an accused’s criminal case, stating:

Relator urges us to find Prosecutor Gmoser acted in “bad faith” and was deliberately attempting to sabotage the media’s request. The evidence suggests the contrary. As a minister of justice carrying the responsibility to see that each and every defendant is accorded justice, Prosecutor Gmoser is prohibited from contributing to even the appearance of impropriety in causing unfai[r] prejudice to a defendant. *See*, Prof.Cond.R. 3.8 comment. FN 9.

FN 9. It places a prosecutor between a rock and a hard place to

⁹ The finding that the Appellants/Cross-Appellees were presented with unusual facts support the Twelfth District’s decision not to award attorney’s fees where this Court has stated that “courts should not be in the practice of punishing parties for taking a rational stance on an unsettled legal issue.” *State ex. rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 50, quoting *State ex. rel. Olander v. French*, 79 Ohio St.3d 176, 179 (1997).

suggest public records should be released because a change of venue might fix the prejudice created by disseminating information into the media mainstream before trial. This, in essence, requires a prosecutor to engage in the misconduct of creating the prejudice only to force the defendant to give up his original, and proper, venue. If a prosecutor deliberately created prejudice to a defendant so that he would be forced to select a different venue, it would undoubtedly be labeled prosecutorial misconduct. *See State v. Depew*, 38 Ohio St.3d 275 (1988), wherein the dissent criticized the prosecutor for the misconduct of expressing a lack of concern for the defendant's fair trial during pretrial proceedings. A prosecutor's responsibilities in seeking that which is just are more than those of an advocate. Prof.Cond.R. 3.8 comment.

Id., at ¶ 64.

Judge Piper went on to say that Gmoser's conduct in this case was reasonable, stating:

In this case, Prosecutor Gmoser was not attempting to suppress information about the workings of government or otherwise defeat public awareness, but rather sought guidance from the court to determine the proper timing of such disclosure. The prosecutor, in a timely manner, sought a very brief delay in disclosure so that the trial court could determine if dissemination of records into the public domain would infringe upon the defendant's constitutional rights. Even when the concern is genuine, R.C. 149.43 and established precedent prevent a prosecutor from attempting to protect an individual's constitutional rights. This is inconsistent with a prosecutor's responsibilities in administering justice.

Id., at ¶ 66.

Furthermore, in regards to its analysis under R.C. 149.43(C)(2)(c)(ii), the Twelfth District explicitly found that Gmoser reasonably believed that withholding the Outbound Call and seeking a protective order would promote the underlying public policy of preserving a criminal defendant's right to a fair trial. *Id.* at ¶ 54.

The Twelfth District also properly considered the public benefit conferred by issuing the writ of mandamus, and found:

In the case at bar, there is certainly a public benefit from a disclosure of the Outbound Call recording as it will inform the public as to the functioning of both the 911 emergency system and the criminal justice system. It will also raise public

awareness of domestic violence and substance abuse.

On the other hand, in this domestic violence case, by the time the Outbound Call was disconnected, the perpetrator had been identified and was quickly apprehended shortly after. The immediate disclosure of the Outbound Call recording would not have enhanced public safety or public awareness of an ongoing threat. Further, this is not a case in which Gmoser was refusing to disclose the Outbound Call recording under all and any circumstances. Rather, Gmoser was delaying disclosure until completion of the criminal investigation and the commencement of Ray's trial. The public benefit from an immediate disclosure of the Outbound Call recording, as opposed to its delayed disclosure, is, at best, marginal.

Id., at ¶ 55-56.

As illustrated above, the Twelfth District properly made the requisite findings under R.C. 149.43(C)(2)(c)(i) and (ii) to support its decision to deny the Enquirer's request for attorney's fees. No abuse of discretion can be found.

Nevertheless, the Enquirer presents the illogical argument that because the Twelfth District ultimately found, after disagreeing with multiple legally supported arguments, that Gmoser had no "proper legal justification" for denying the requested public records, that this should equate to the finding that "no well-informed public servant would reasonably believe that Appellant Gmoser complied with his duties under the Public Records Act." (The Enquirer's brief, page 31) This argument fails to survive logical scrutiny. Courts do not conduct an attorney's fee analysis under R.C. 149.43(C) unless the court first renders a judgment that grants the relator a writ of mandamus that orders the public office responsible for the public record to comply with R.C. 149.43(B). *State ex. rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 36 ("Because Gambill's public-records mandamus claim lacks merit, he is not entitled to an award of attorney fees.")

Accordingly, the Twelfth District's ultimate judgment in the case was that the "disclosure of the Outbound Call recording was denied without a proper legal justification" under R.C.

149.43(B). *Sage*, 2013-Ohio-2270, ¶ 57. This finding, however, does not automatically grant a relator an award of attorney's fees. If that were the case, then every relator that wins a mandamus public records action would be guaranteed an award of attorney's fees. The law is clear that "[i]f the court renders a judgment that orders the public office or the person responsible for the public record to comply with [R.C. 149.43(B)]," the court has the discretion to award no attorney's fees provided that it analyzes the case under the elements set forth in R.C. 149.43(C)(2)(c). *See*, R.C. 149.43(C)(2)(b). The Twelfth District did so and found that no such award is warranted in this case. This Court should make that same finding and overrule the Enquirer's claim for attorney's fees.

CONCLUSION

This Court should reverse the Twelfth District Court of Appeals by denying the Writ of Mandamus and ordering no award of statutory damages.

Respectfully submitted,

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C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

Article IV. Judicial (Refs & Annos)

→→ O Const IV Sec. 4 Organization and jurisdiction of common pleas courts

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

CREDIT(S)

(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, adopted eff. 5-7-68)

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RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved when there is reason to *believe* that there exists the likelihood of *substantial* harm to an individual or to the public interest;

(7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest;

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding division (a) of this rule, a lawyer may make a statement that a *reasonable* lawyer would *believe* is required to protect a client from the *substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to information necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a *firm* or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, disciplinary, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules. The provisions of this rule do not supersede the confidentiality provisions of Rule 1.6.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Division (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of division (a). Division (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to division (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial;

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.6 reflects DR 7-107 in the Model Rule format. Ohio adopted Model Rule 3.6 in 1996.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.6 is identical to Model Rule 3.6 in format and substance, except for the addition to division (b) that makes clear a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6. Also, Comment [8] is stricken to reflect the deletion of Model Rule 3.8(f).

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall not do any of the following:

(a) pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause;

(b) [RESERVED]

(c) [RESERVED]

(d) fail to make timely disclosure to the defense of all evidence or information *known* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;

(e) subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor *reasonably believes* all of the following apply:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(3) there is no other feasible alternative to obtain the information.

(f) [RESERVED]

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

[2] [RESERVED]

[3] The exception in division (d) recognizes that a prosecutor may seek an appropriate order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Division (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] [RESERVED]

[6] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.8(a) corresponds to DR 7-103(A) (no charges without probable cause), and Rule 3.8(d) corresponds to DR 7-103(B) (disclose evidence that exonerates defendant or mitigates degree of offense or punishment).

EC 7-13 recognizes the distinctive role of prosecutors:

The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.8 modifies Model Rule 3.8 as follows:

- The introductory phrase of the rule is reworded to state a prohibition, consistent with other rules;
- Division (a) is expanded to prohibit either the pursuit or prosecution of unsupported charges and, thus, would include grand jury proceedings;
- Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;
- Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs;
- Division (d) is modified to comport with Ohio law;
- Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6.

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2931. Jurisdiction; Venue

Jurisdiction

→→ **2931.03 Jurisdiction of court of common pleas**

The court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas.

A judge of a court of common pleas does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney or other chief legal officer who is responsible for the prosecution of the case.

CREDIT(S)

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RULE 44. Court Records - Definitions.

In addition to the applicability of these rules as described in Sup. R. 1, Sup. R. 44 through 47 apply to the Supreme Court.

As used in Sup. R. 44 through 47:

(A) “Actual cost” means the cost of depleted supplies; records storage media costs; actual mailing and alternative delivery costs, or other transmitting costs; and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(B) “Court record” means both a case document and an administrative document, regardless of physical form or characteristic, manner of creation, or method of storage.

(C)(1) “Case document” means a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in division (C)(2) of this rule.

(2) The term “case document” does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document to which public access has been restricted pursuant to division (E) of Sup. R. 45;

(d) Except as relevant to the juvenile’s prosecution later as an adult, a juvenile’s previous disposition in abuse, neglect, and dependency cases, juvenile civil commitment files, post-adjudicatory residential treatment facility reports, and post-adjudicatory releases of a juvenile’s social history;

(e) Notes, drafts, recommendations, advice, and research of judicial officers and court staff;

(f) Forms containing personal identifiers, as defined in division (H) of this rule, submitted or filed pursuant to division (D)(2) of Sup. R. 45;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access.

(D) “Case file” means the compendium of case documents in a judicial action or proceeding.

(E) “File” means to deposit a document with a clerk of court, upon the occurrence of which the clerk time or date stamps and docket the document.

(F) “Submit” means to deliver a document to the custody of a court for consideration by the court.

(G)(1) “Administrative document” means a document and information in a document created, received, or maintained by a court that serves to record the administrative, fiscal, personnel, or management functions, policies, decisions, procedures, operations, organization, or other activities of the court, subject to the exclusions in division (G)(2) of this rule.

(2) The term “administrative document” does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law, or as set forth in the Rules for the Government of the Bar;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document describing the type or level of security in a court facility, including a court security plan and a court security review conducted by a local court, the local court’s designee, or the Supreme Court;

(d) An administrative or technical security record-keeping document or information;

(e) Test questions, scoring keys, and licensing, certification, or court-employment examination documents before the examination is administered or if the same examination is to be administered again;

(f) Computer programs, computer codes, computer filing systems, and other software owned by a court or entrusted to it;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;

(h) Data feeds by and between courts when using the Ohio Courts Network.

(H) “Personal identifiers” means social security numbers, except for the last four digits; financial account numbers, including but not limited to debit card, charge card, and credit card numbers; employer and employee identification numbers; and a juvenile’s name in an abuse, neglect, or dependency case, except for the juvenile’s initials or a generic abbreviation such as “CV” for “child victim.”

(I) “Public access” means both direct access and remote access.

(J) “Direct access” means the ability of any person to inspect and obtain a copy of a court record at all reasonable times during regular business hours at the place where the record is made available.

(K) “Remote access” means the ability of any person to electronically search, inspect, and copy a court record at a location other than the place where the record is made available.

(L) “Bulk distribution” means the distribution of a compilation of information from more than one court record.

(M)(1) “New compilation” means a collection of information obtained through the selection, aggregation, or reformulation of information from more than one court record.

(2) The term “new compilation” does not include a collection of information produced by a computer system that is already programmed to provide the requested output.

RULE 45. Court Records – Public Access.

(A) Presumption of public access

Court records are presumed open to public access.

(B) Direct access

(1) A court or clerk of court shall make a court record available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time.

(2) Except for a request for bulk distribution pursuant to Sup. R. 46, a court or clerk of court shall permit a requestor to have a court record duplicated upon paper, upon the same medium upon which the court or clerk keeps it, or upon any other medium the court or clerk determines it can be reasonably duplicated as an integral part of its normal operations.

(3) A court or clerk of court shall mail, transmit, or deliver copies of a requested court record to the requestor within a reasonable time from the request, provided the court or clerk may adopt a policy allowing it to limit the number of court records it will mail, transmit, or deliver per month, unless the requestor certifies in writing that the requestor does not intend to use or forward the records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include news reporting, the gathering of information to assist citizens in the understanding of court activities, or nonprofit educational research.

(4) A court or clerk of court may charge its actual costs incurred in responding to a request for direct access to a court record. The court or clerk may require a deposit of the estimated actual costs.

(C) Remote access

(1) A court or clerk of court may offer remote access to a court record. If a court or clerk offers remote access to a court record and the record is also available by direct access, the version of the record available through remote access shall be identical to the version of the record available by direct access, provided the court or clerk may exclude an exhibit or attachment that is part of the record if the court or clerk includes notice that the exhibit or attachment exists and is available by direct access.

(2) Nothing in division (C)(1) of this rule shall be interpreted as requiring a court or clerk of court offering remote access to a case document in a case file to offer remote access to other case documents in that case file.

(3) Nothing in division (C)(1) of this rule shall be interpreted as prohibiting a court or clerk of court from making available on a website any court record that exists only in electronic form, including an on-line journal or register of actions.

(D) Omission of personal identifiers prior to submission or filing

(1) When submitting a case document to a court or filing a case document with a clerk of court, a party to a judicial action or proceeding shall omit personal identifiers from the document.

(2) When personal identifiers are omitted from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule, the party shall submit or file that information on a separate form. The court or clerk may provide a standard form for parties to use. Redacted or omitted personal identifiers shall be provided to the court or clerk upon request of a party to the judicial action or proceeding upon motion.

(3) The responsibility for omitting personal identifiers from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule shall rest solely with the party. The court or clerk is not required to review the case document to confirm that the party has omitted personal identifiers, and shall not refuse to accept or file the document on that basis.

(E) Restricting public access to a case document

(1) Any party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document. Additionally, the court may restrict public access to the information in the case document or, if necessary, the entire document upon its own order. The court shall give notice of the motion or order to all parties in the case. The court may schedule a hearing on the motion.

(2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:

(a) Whether public policy is served by restricting public access;

(b) Whether any state, federal, or common law exempts the document or information from public access;

(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

(3) When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:

- (a) Redacting the information rather than limiting public access to the entire document;
- (b) Restricting remote access to either the document or the information while maintaining its direct access;
- (c) Restricting public access to either the document or the information for a specific period of time;
- (d) Using a generic title or description for the document or the information in a case management system or register of actions;
- (e) Using initials or other identifier for the parties' proper names.

(4) If a court orders the redaction of information in a case document pursuant to this division, a redacted version of the document shall be filed in the case file along with a copy of the court's order. If a court orders that the entire case document be restricted from public access, a copy of the court's order shall be filed in the case file. A journal entry shall reflect the court's order. Case documents ordered restricted from public access or information in documents ordered redacted shall not be available for public access and shall be maintained separately in the case file.

(F) Obtaining access to a case document that has been granted restricted public access

(1) Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion.

(2) A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

RULE 46. Court Records - Bulk Distribution.

(A) Requests for bulk distribution and new compilations

(1) Bulk distribution

(a) Any person, upon request, shall receive bulk distribution of information in court records, provided that the bulk distribution does not require creation of a new compilation. The court or clerk of court shall permit the requestor to choose that the bulk distribution be provided upon paper, upon the same medium upon which the court or clerk keeps the information, or upon any other medium the court or clerk determines it can be reasonably duplicated as an integral part of its normal operations, unless the choice requires a new compilation.

(b) The bulk distribution shall include a time or date stamp indicating the compilation date. A person who receives a bulk distribution of information in court records for redistribution shall keep the information current and delete inaccurate, sealed, or expunged information in accordance with Sup. R. 26.

(2) New compilation

(a) A court or clerk of court may create a new compilation customized for the convenience of a person who requests a bulk distribution of information in court records.

(b) In determining whether to create a new compilation, a court or clerk of court may consider if creating the new compilation is an appropriate use of its available resources and is consistent with the principles of public access.

(c) If a court or clerk of court chooses to create a new compilation, it may require personnel costs in addition to actual costs. The court or the clerk may require a deposit of the estimated actual and personnel costs to create the new compilation.

(d) A court or clerk of court shall maintain a copy and provide public access to any new compilation. After recouping the personnel costs to create the new compilation from the original requestor, the court or clerk may later assess only actual costs.

(B) Contracts with providers of information technology support

A court or clerk of court that contracts with a provider of information technology support to gather, store, or make accessible court records shall require the provider to comply with requirements of Sup. R. 44 through 47, agree to protect the confidentiality of the

records, notify the court or clerk of court of all bulk distribution and new compilation requests, including its own, and acknowledge that it has no ownership or proprietary rights to the records.

RULE 47. Court Records – Application, Remedies, and Liability.

(A) Application

(1) The provisions of Sup. R. 44 through 47 requiring redaction or omission of information in case documents or restricting public access to case documents shall apply only to case documents in actions commenced on or after the effective date of this rule. Access to case documents in actions commenced prior to the effective date of Sup. R. 44 through 47 shall be governed by federal and state law.

(2) The provisions of Sup. R. 44 through 47 requiring omission of information in administrative documents or restricting public access to administrative documents shall apply to all documents regardless of when created.

(B) Denial of public access - remedy

A person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731. of the Revised Code.

(C) Liability and immunity

Sup. R. 44 through 47 do not affect any immunity or defense to which a court, court agency, clerk of court, or their employees may be entitled under section 9.86 or Chapter 2744. of the Revised Code.

(D) Review

Sup. R. 44 through 47 shall be subject to periodic review by the Commission on the Rules of Superintendence.