

ORIGINAL

IN THE SUPREME COURT OF OHIO

Kristel Wilkins,

Plaintiff-Appellant,

v.

Sha'ste, Incorporated,

Defendant,

and

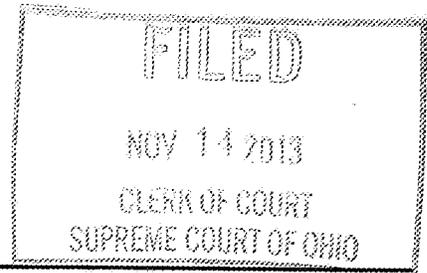
Process to Closing, LLC,

Defendant-Appellee.

SUPREME COURT NO. 2013-1794

On Appeal From The Eighth District
Court Of Appeals

Appellate Case No. CA-12-99167



AMICI CURIAE LEGAL AID SOCIETIES' MEMORANDUM IN SUPPORT OF
JURISDICTION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST	2
A. Disallowing Rule 37(A) Attorney Fees To Legal Aid Societies Is Contrary To Public And Court Policy To Promote Equal Access To Justice	3
B. To Disallow Fees To Unpaid Counsel Flies In The Face Of The Primary Purpose Of Rule 37(A): Deterrence	7
C. The Rule-Making Process That Proposes Changes To Rule 37 Will Not Correct This Problem And In Fact May Exacerbate It.....	9
STATEMENT OF THE CASE AND FACTS	10
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	10
PROPOSITION OF LAW NO. 1: A trial court may award reasonable attorney fees to a prevailing party under Civ.R. 37 regardless of the party’s fee arrangement with counsel. (<i>State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register</i> , 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, overruled.).....	10
A. The Use Of The Word “Incurred” Does Not Limit Attorney Fee Awards To Cases Where A Client “Actually Paid Or Was Obligated To Pay” Counsel Fees.....	10
B. Allowing The Award Of Attorney Fees Regardless Of A Party’s Fee Arrangement Supports The Deterrent Purposes Of Discovery Sanctions.....	13
C. Allowing The Award Of Attorney Fees Regardless Of A Party’s Fee Arrangement Is The Only Way To Ensure Consistency	13
CONCLUSION	14
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases

<i>Abbate v. Ahmetaj</i> , N.J.App. No. CV-02-1061-08, 2009 WL 222785 (Feb. 2, 2009)	6
<i>Altman v. Altman</i> , 873 So.2d 523 (Fla.App.2004)	6
<i>Amezcuca v. Amezcuca</i> , Tenn.App. No. M2011-00459-COA-R3-CV, 2012 WL 1049240 (Mar. 26, 2012).....	6
<i>Bank One Trust Co. v. Scherer</i> , 176 Ohio App.3d 694, 2008-Ohio-2952, 893 N.E.2d 542	7
<i>Benavides v. Benavides</i> , 11 Conn.App. 150, 526 A.2d 536 (1987)	8
<i>Black v. Brooks</i> , 285 Neb. 440, 827 N.W.2d 256 (2013).....	5, 6, 8
<i>Blanchard v. Burgeron</i> , 489 U.S. 87, 109 S.Ct. 939, 103 L.E.2d 67 (1989).....	12
<i>Centennial Archaeology, Inc. v. AECOM, Inc.</i> , 688 F.3d 673 (10th Cir.2012)	8, 12, 13
<i>Colby v. Gunson</i> , 349 Or. 1, 238 P.3d 374 (2010)	6
<i>Cullen v. State Farm Mut. Auto. Ins. Co.</i> , --- Ohio St.3d ---, 2013-Ohio-4733, --- N.E.2d ---	12
<i>Do v. Superior Court</i> , 109 Cal. App.4th 1210, 135 Cal.Rptr.2d 855 (2003)	6
<i>Entertainment Partners Group, Inc. v. Davis</i> , 155 Misc.2d 894, 590 N.Y.S.2d 979 (1992).....	6
<i>Ford Motor Co. v. Administrator, Ohio Bureau of Employee Servs.</i> , 59 Ohio St.3d 188, 571 N.E.2d 727 (1991)	14
<i>Gluck v. Hadlock</i> , Tex.App. No. 02-09-0041-CV, 2011 WL 944439 (Mar. 17, 2011)	6
<i>Gotro v. R&B Realty Group</i> , 69 F.3d 1485 (9th Cir.1995).....	12
<i>Hale v. Hale</i> , 772 S.W.2d 628 (Ky.1989)	6
<i>Henriquez v. Henriquez</i> , 185 Md.App. 465, 971 A.2d 345 (2009).....	6
<i>Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio Inc.</i> , 115 N.M. 152, 848 P.2d 1079 (1993)	6
<i>Human Rights Comm'n v. LaBrie, Inc.</i> , 164 Vt. 237, 668 A.2d 659 (1995).....	6
<i>Hussein v. Glisic</i> , Wash.App. No. 66656-8-I, 2012 WL 1920841 (May 29, 2012).....	6
<i>In re Cariaso</i> , Iowa App. No. 03-1174, 2004 WL 360546 (Feb. 27, 2004).....	6
<i>In re D.T.</i> , 292 P.3d 1120 (Colo.App.2012).....	6

TABLE OF AUTHORITIES
(continued)

	Page
<i>In re Marriage of Putzler</i> , 985 N.E.2d 602, 368 Ill.Dec. 795 (2013).....	6
<i>In re New Hampshire Dept. of Transportation</i> , 143 N.H. 358, 724 A.2d 1284 (1999)	6
<i>Jones v. Unified Government of Athens-Clarke County</i> , 312 Ga.App. 214, 718 S.E.2d 74 (2011)	6
<i>Kealamakia, Inc. v. Kealamakia</i> , 213 P.3d 13 (Utah App.2009)	6
<i>Krassnoski v. Rosey</i> , 454 Pa. Super. 78, 684 A.2d 635 (1996)	7, 8
<i>Krikorian v. Rhode Island Dept. of Human Servs.</i> , 606 A.2d 671 (R.I.1992).....	6
<i>Krone v. Dept. of Health and Social Services</i> , 222 P.3d 250 (Alaska 2009)	6
<i>Lee v. Green</i> , 574 A.2d 857 (Del.1990)	6
<i>Loney v. District of Columbia Rental Housing Com'n</i> , 11 A.3d 753 (D.C.2010).....	6
<i>Mendez v. Din</i> , Wis.App. No. 2009AP2344, 2010 WL 4151977 (Oct. 10, 2010).....	6
<i>Miller v. Wilfong</i> , 121 Nev. 619, 119 P.3d 727 (2005)	7
<i>Moody v. Lawson</i> , Mich.App. No. 287686, 2010 WL 989220 (Mar. 18, 2010)	6
<i>Moss v. Bush</i> , 105 Ohio St.3d 458, 2005-Ohio-2419, 828 N.E.2d 994.....	7
<i>Payday Today, Inc. v. Hamilton</i> , 911 N.E.2d 26 (Ind.App.2009).....	6, 9
<i>Pearson v. Pearson</i> , 200 W.Va. 139, 488 S.E.2d 414 (1997).....	6
<i>Pezold, Richey, Caruso and Barker v. Cherokee Nation Indus., Inc.</i> , 52 P.3d 430 (Okla.App. 2001).....	6
<i>Robbins v. Krock</i> , 73 Mass.App.Ct. 134, 896 N.E.2d 633 (2008)	6
<i>State v. Arnold</i> , 61 Ohio St.3d 175, 573 N.E.2d 1079 (1991).....	14
<i>Shands v. Castrovinci</i> , 115 Wis.2d 352, 340 N.W.2d 506 (1983)	5
<i>Southtown Furniture v. Miami Twp. Bd. of Zoning Appeals</i> , 2d Dist. Montgomery No. 25240, 2012-Ohio-6052	10
<i>State ex rel. Citizens for Open, Responsive & Accountable Government v. Register</i> , 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913.....	passim
<i>Thompson v. Corry</i> , 231 Ariz. 161, 291 P.3d 358 (1987)	6, 8

TABLE OF AUTHORITIES
(continued)

	Page
<i>Vinson v. Assoc. of Apt. Owners of Sands of Kahana</i> , Haw.App. No. 30696, 2013 WL 5847516 (Oct. 31, 2013).....	7
<i>Whalen v. Taylor</i> , 278 Mont. 293, 925 P.2d 462 (1996).....	6
<i>Wilkins v. Sha'ste Inc.</i> , 8th Dist. Cuyahoga No. 99167, 2013-Ohio-3527.....	2, 4, 10
<i>Worsham v. Greenfield</i> , Md.App. No. 139, 2013 WL 5731242 (Oct. 23, 2013).....	8
<i>Yeager v. Yeager</i> , N.C.App. No. COA12 1379, 2013 WL 3356794 (July 2, 2013)	7

Statutes

R.C. 149.43.....	11
R.C. 1331.16.....	14
R.C. 2307.70.....	5, 9
R.C. 2933.65.....	9

Rules

Civ.R. 11.....	5, 9
Civ.R. 30.....	5
Civ.R. 37.....	passim
Gov.Bar R. XI.....	3
Gov.Bar R. XVI.....	3
Prof.Cond.R. 6.2.....	3, 5

Other Authorities

ABA Chairs' Corners, available at http://www.americanbar.org/newsletter/publicationsb/gp_solo_magazine_home/gp_solo_magazine_index/2006_apr_may_chair.html	2
Mission, Legal Aid Society of Cleveland, available at http://laslev.org/about-us/overview/	2
Ohio Supreme Court Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers, available at http://www.supremecourt.ohio.gov/AttySvcs/officeAttySvcs/proBono.pdf	3, 4
Proposed Amendments to the Rules of Practice and Procedure in Ohio Courts.....	9

TABLE OF AUTHORITIES
(continued)

Page

Resolution from the Access to Justice Committee, Ohio State Bar Association Council of
Delegates Meeting, available at [https://www.ohiobar.org/General%20Resources/
pubs/councilfiles/2013/Full_Council_of_Delegates_Book_11_13.pdf](https://www.ohiobar.org/General%20Resources/pubs/councilfiles/2013/Full_Council_of_Delegates_Book_11_13.pdf) 1, 3

STATEMENT OF INTEREST OF AMICI CURIAE

The Bar of this State has long recognized “the principle that society must provide equal access to justice to all citizens, including those who cannot afford to pay a lawyer to represent them in civil matters.” Resolution from the Access to Justice Committee, Ohio State Bar Association Council of Delegates Meeting, available at https://www.ohiobar.org/General%20Resources/pubs/councilfiles/2013/Full_Council_of_Delegates_Book_11_13.pdf, p. 17, hereinafter “OSBA Resolution” (accessed Nov. 13, 2013). Amici curiae the Legal Aid Society of Cleveland, Legal Aid Society of Greater Cincinnati, Legal Aid Society of Southwest Ohio, LLC, Legal Aid Society of Columbus, Legal Aid of Western Ohio, Inc., Advocates for Basic Legal Equality, Inc., Ohio State Legal Services Association and Southeastern Ohio Legal Services (collectively, the “Legal Aid Societies”) have embraced that command, providing cost-free legal services to the citizens of Ohio for more than 100 years. Yet the Legal Aid Societies today face a funding crisis that threatens their ability to represent the legal needs of Ohio’s most vulnerable citizens, including thousands of children. The decision below exacerbates that crisis by prohibiting the Legal Aid Societies from recovering their own attorney fees should they be successful on discovery motions. Indeed, the decision below incents parties opposing the Legal Aid Societies to abuse discovery, making access to justice for low income Ohioans even more difficult.

The Legal Aid Societies’ interest in this case is thus twofold: (1) ensuring a level playing field for both legal aid organizations and their adversaries as it relates to attorney fees awards under the Ohio Rules of Civil Procedure and numerous fee-shifting statutes; and (2) protecting a source of funding in an era of disappearing resources for no-cost legal services. Consistent with their missions to “secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services,” *see, e.g.*, Mission, Legal Aid Society of

Cleveland, available at <http://lasclev.org/about-us/overview/> (accessed Nov. 13, 2013), the Legal Aid Societies respectfully submit this memorandum of amici curiae in support of jurisdiction.

WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The overriding goal of the American legal system is to provide justice for all. As Justice Lewis Powell observed, “[i]t is fundamental that justice should be the same in substance and availability, without regard to economic status.” ABA Chairs’ Corners, available at http://www.americanbar.org/newsletter/publicationsb/gp_solo_magazine_home/gp_solo_magazine_index/2006_apr_may_chair.html (accessed Nov. 13, 2013). Availability to the courts for low-income individuals is already threatened by decreasing funding sources. And now, the decision below affects the substance of those legal services. It puts the Legal Aid Societies in an uneven position in discovery, eliminating any financial risk to their litigation adversaries for discovery abuses. Indeed, following the maxim that no good deed—here pro bono legal service—goes unpunished, the divided Eighth District decision delivers a crushing blow to the Court’s long-standing policy to support pro bono service, providing disincentives to discovery abuses when opposing counsel is hourly, but no disincentives when opposing counsel is working pro bono. It does so by ignoring the primary purpose of Ohio’s discovery sanctions—deterrence—and acting contrary to the nearly-identical Federal Rules of Civil Procedure and at least 33 states and the District of Columbia that allow recovery of legal fees under circumstances like those in Ms. Wilkins’ case.

The Court of Appeals’ decision, moreover, “is in complete derogation of the Supreme Court Rules for the Government of the Bar of Ohio and bad public policy.” *Wilkins v. Sha’ste Inc.*, 8th Dist. Cuyahoga No. 99167, 2013-Ohio-3527, ¶ 17 (Stewart, J., dissenting). Allowing *Wilkins* to stand will result in unprecedented disincentives for those opposing Legal Aid Societies to comply with discovery obligations. It will take away a potential source of revenue

for already economically challenged providers of no-cost legal services. And it will make Ohio one of only three states to disallow legal fees to no-cost legal providers. Accordingly, the case is of high importance to the public and of great general interest.

A. DISALLOWING RULE 37(A) ATTORNEY FEES TO LEGAL AID SOCIETIES IS CONTRARY TO PUBLIC AND COURT POLICY TO PROMOTE EQUAL ACCESS TO JUSTICE.

This Court supports equal access to justice, regardless of economic standing. The Court has repeatedly emphasized the need for all lawyers to ensure the poor receive quality legal services:

- “All lawyers have a responsibility to assist in providing *pro bono publico* service. . . . A lawyer may . . . be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.” Prof.Cond.R. 6.2, cmt. 1.
- The Court created a commission to “[o]perate in the public interest for the purpose of referring prospective clients to lawyers . . . who can provide the assistance the clients need in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problem.” Gov.Bar R. XVI(1)(A)(1).
- The Court has encouraged lawyers to report pro bono efforts because such information “will not only underscore the commitment of the legal profession to serving the public good but also will serve as a constant reminder to the bar of the importance of pro bono service.” Ohio Supreme Court Statement Regarding the Provision of Pro Bono Legal Services by Ohio Lawyers, hereinafter “Pro Bono Statement,” available at <http://www.supremecourt.ohio.gov/AttySvcs/officeAttySvcs/proBono.pdf>, p. 15 (accessed Nov. 13, 2013).

One manner of supporting this policy is through the award of fees to no-cost service providers who employ law students. Gov.Bar R. XI(6).

Despite this Court’s worthy efforts, funding for legal aid in Ohio, including the Legal Aid Societies, has decreased nearly \$20 million since 2007, resulting in a 29% reduction in the number of legal aid attorneys available to help low-income Ohioans. OSBA Resolution, p. 19. “Civil legal aid faces a new and immediate funding crisis as a result of . . . reduced court filing fee income and interest rate declines on IOLTA and IOTA.” *Id.*, p. 17. At the same time, Ohio

has seen a dramatic increase in poverty, currently reaching 19.1% of the population, including 572,000 children. *Id.* While the Legal Aid Societies have continued to help Ohioans despite this decrease in funding—serving almost 15,000 seniors, more than 3,000 veterans, and saving almost 600 Ohio homes and supporting over 1,000 children in school in the last year—they are without sufficient funding to provide services to a considerable percentage of the in-need population. *Id.* Because there is only one civil legal aid lawyer for every 8,660 people who qualify for services, the Legal Aid Societies must turn away three in every four people who qualify. *Id.*, p. 18. “The result is that many Ohioans who are facing significant legal problems do not have access to affordable legal services.” Pro Bono Statement, p. 13.

And now, not only is access to legal services under siege, so is their efficacy. The decision below, if allowed to stand, will not only remove one of the Legal Aid Societies’ sources of funding, but will also make prosecuting and defending civil actions more difficult for legal aid clients. Under *Wilkins*, parties adverse to the Legal Aid Societies will have less incentive to comply with their discovery obligations. Rule 37(A) provides that, if a party is successful on a motion to compel, “the court shall . . . require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees.” Civ.R. 37(A)(4). At the same time, it requires a party who files an unsuccessful motion to compel to pay the attorney fees incurred by his or her adversary in defending against the motion. *Id.* Because cost-free service providers would not be able to recover those attorney fees should they win discovery motions or successfully oppose such motions, their adversaries will have less incentive to fear any consequences for failing to comply with discovery or filing frivolous motions to compel. Stated differently, the Legal Aid Societies will be without the key tool to ensure compliance with

discovery obligations—attorney fees. As a simple matter of fairness, the Legal Aid Societies should not be required to litigate without a full toolbox.

And this inequitable result will not be limited to Rule 37(A). After all, the same “incurred” language is used in other Civil Rules—Rule 11, for frivolous motions, Rule 30(G) for failure to appear at a deposition, Rule 37(C) for failure to admit—and statutes such as Revised Code 2307.70(A), which allows for the recovery of attorney fees incurred in bringing a vandalism action. In each of these many instances, cash-strapped legal aid organizations and their clients will be forced to litigate on an uneven playing field against their already better-funded opponents. Among other things, that practice would discourage legal aid organizations from bringing certain cases and motions on behalf of their indigent clients. *See, e.g.*, Prof.Cond.R. 6.2 (“A lawyer shall not seek to avoid appointment by a court to represent a person except for good cause, such as . . . representing the client is likely to result in an unreasonable financial burden on the lawyer.”).

Not surprisingly, the decision below is out of step with customary practice. Numerous other states recognize avoiding this disincentive as a reason to allow legal aid societies to recover attorney fees under similar rules and statutes. *Black v. Brooks*, 285 Neb. 440, 453, 827 N.W.2d 256 (2013) (“[I]f fees are not awarded for pro bono work, then the burden of costs is placed on the organization providing the services, and the organization correspondingly may decline to bring such suits and decide to concentrate its limited resources elsewhere.”); *Shands v. Castrovinci*, 115 Wis.2d 352, 360, 340 N.W.2d 506 (1983) (“When free legal services are provided there may be no direct barrier to the courtroom door, but if no fees are awarded, the burden of the costs is placed on the organization providing the services, and it correspondingly may decline to bring such suits”) (internal quotation marks and citation omitted). Indeed,

thirty-three other states, the District of Columbia and the federal courts all allow recovery of fees in cases where a party is represented by a no-fee legal service,¹ recognizing the important policy purposes served behind such allowances. *See, e.g., Hale v. Hale*, 772 S.W.2d 628, 630 (Ky.1989) (“The provision of legal services to the poor and indigent is to be encouraged as a matter of public policy.”); *Thompson v. Corry*, 231 Ariz. 161, 164, 291 P.3d 358 (1987) (“[P]ublic policies served by [the family court contempt rule]—assisting the party least able to pay to litigate and sanctioning parties who violate orders, respectively—are furthered by awarding fees for pro bono representation.”). As the Nevada Supreme Court stated, “pro bono counsel serve an important role in the legal system’s attempt to address the unmet needs of indigent and low-income litigants within our state. To impose the burden of the cost of litigation

¹ *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 680 (10th Cir.2012); *Krone v. Dept. of Health & Social Servs.*, 222 P.3d 250, 257-258 (Alaska 2009); *Do v. Super. Ct.*, 109 Cal. App.4th 1210, 1218, 135 Cal.Rptr.2d 855 (2003); *In re D.T.*, 292 P.3d 1120, 1124 (Colo.App.2012); *Loney v. District of Columbia Rental Housing Com'n*, 11 A.3d 753, 760 (D.C.2010); *Lee v. Green*, 574 A.2d 857, 860 (Del.1990); *Altman v. Altman*, 873 So.2d 523 (Fla.App.2004); *Jones v. Unified Government of Athens-Clarke County*, 312 Ga.App. 214, 221, 718 S.E.2d 74 (2011); *In re Marriage of Putzler*, 985 N.E.2d 602, 612-613, 368 Ill.Dec. 795 (2013); *Payday Today, Inc. v. Hamilton*, 911 N.E.2d 26, 35-36 (Ind.App.2009); *In re Cariaso*, Iowa App. No. 03-1174, 2004 WL 360546, *4 (Feb. 27, 2004); *Henriquez v. Henriquez*, 185 Md.App. 465, 971 A.2d 345 (2009); *Robbins v. Krock*, 73 Mass.App.Ct. 134, 136-137, 896 N.E.2d 633 (2008); *Moody v. Lawson*, Mich.App. No. 287686, 2010 WL 989220, *4 (Mar. 18, 2010); *Whalen v. Taylor*, 278 Mont. 293, 304, 925 P.2d 462 (1996); *Black*, 285 Neb. at 455, 827 N.W.2d 256; *In re New Hampshire Dept. of Transp.*, 143 N.H. 358, 360-361, 724 A.2d 1284 (1999); *Abbate v. Ahmetaj*, N.J.App. No. CV-02-1061-08, 2009 WL 222785, *5-6 (Feb. 2, 2009); *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio Inc.*, 115 N.M. 152, 158, 848 P.2d 1079 (1993); *Entertainment Partners Group, Inc. v. Davis*, 155 Misc.2d 894, 906-907, 590 N.Y.S.2d 979 (1992); *Pezold, Richey, Caruso & Barker v. Cherokee Nation Indus., Inc.*, 52 P.3d 430, 432 (Okla.App. 2001); *Colby v. Gunson*, 349 Or. 1, 5-6, 238 P.3d 374 (2010); *Krikorian v. Rhode Island Dept. of Human Servs.*, 606 A.2d 671, 674-675 (R.I.1992); *Amezcuca v. Amezcuca*, Tenn.App. No. M2011-00459-COA-R3-CV, 2012 WL 1049240, *5 (Mar. 26, 2012); *Gluck v. Hadlock*, Tex.App. No. 02-09-0041-CV, 2011 WL 944439, *5 (Mar. 17, 2011); *Kealamakia, Inc. v. Kealamakia*, 213 P.3d 13, 17 (Utah App.2009); *Human Rights Comm'n v. LaBrie, Inc.*, 164 Vt. 237, 249-250, 668 A.2d 659 (1995); *Hussein v. Glisic*, Wash.App. No. 66656-8-I, 2012 WL 1920841, *3 (May 29, 2012); *Pearson v. Pearson*, 200 W.Va. 139, 150-151, 488 S.E.2d 414 (1997); *Mendez v. Din*, Wis.App. No. 2009AP2344, 2010 WL 4151977, *3 (Oct. 10, 2010).

on those who volunteer their services, when the other party has the means to pay attorney fees, would be unjust.” *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727 (2005); *see also Krassnoski v. Rosey*, 454 Pa. Super. 78, 84, 684 A.2d 635 (1996) (“Awards of fees to counsel willing to prosecute protection from abuse actions without prior payment encourages private counsel to accept such cases and helps to support legal services agencies which are chronically short of funds.”).

On the other hand, only two states (and now possibly Ohio) disallow attorney fees to legal aid societies in circumstances such as these.² As a matter of public policy—to say nothing of fairness—no-cost service providers should be allowed to recover fees under the Civil Rules and other fee-shifting statutes. Allowing the decision below to stand would be a blow to equal access to justice in this state.

B. TO DISALLOW FEES TO UNPAID COUNSEL FLIES IN THE FACE OF THE PRIMARY PURPOSE OF RULE 37(A): DETERRENCE.

The failure to support legal aid and to level the playing field is not the only reason to reverse the Eighth District’s decision. The decision below, should it be allowed to stand, will undermine the primary purpose of sanctions for abuses of the court process: deterrence.

Sanctions, like those contained in Rule 37, are punitive in nature, aimed at deterring abuses of the court process. *See, e.g., Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419, 828 N.E.2d 994, ¶ 21 (“The power to sanction attorneys who file baseless actions is the power to punish and deter.”); *Bank One Trust Co. v. Scherer*, 176 Ohio App.3d 694, 2008-Ohio-2952, 893 N.E.2d 542, ¶ 23 (10th Dist.) (“While Civ.R. 37 is a civil rule, the sanctions under Civ.R. 37(B), in general, appear to be punitive.”). Notably, the only sanction available under Rule 37(A) is the

² Counsel for amici curiae has only identified Hawaii and North Carolina as states that disallow the recovery of such fees. *Vinson v. Assoc. of Apt. Owners of Sands of Kahana*, Haw.App. No. 30696, 2013 WL 5847516, *8-9 (Oct. 31, 2013); *Yeager v. Yeager*, N.C.App. No. COA12 1379, 2013 WL 3356794, *6 (July 2, 2013).

payment of expenses, including reasonable attorney fees. Civ.R. 37(A)(4). As expenses related to filing a motion to compel are generally limited to copying and mailing costs, the “meat” of any sanctions award will be attorney fees. And without facing a threat of paying attorney fees, there is little incentive for an opposing party to be cooperative in the discovery process.

The decision below wholly fails to recognize this fundamental underpinning of Rule 37. Rather, it focuses exclusively on whether a party actually paid fees, assuming that the purpose of Rule 37(A) is solely to compensate the moving party. Under this misguided approach, a party who abuses the discovery process will only face meaningful sanctions when the opposing party is represented by hourly counsel, not pro bono counsel or a legal aid service. Indeed, the same disparity will also apply to litigants represented on a flat or contingency fee basis and to government attorneys. In each of these settings, the abusive party “reaps the benefits of free representation to the other party.” (Internal citation omitted.) *Black*, 285 Neb. at 453-53, 827 N.W.2d 256.

But that was not how the system was designed. An abusing party is “not entitled to ‘free’ violations” of the Civil Rules because the opposing party is represented free of charge. *Worsham v. Greenfield*, Md.App. No. 139, 2013 WL 5731242, *5 (Oct. 23, 2013). Put differently, the “purpose of Rule 37 attorney-fee sanctions would be thwarted if a party could escape the sanction whenever opposing counsel’s compensation is unaffected by the abuse.” *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 680 (10th Cir.2012). *See also Thompson*, 231 Ariz. at 164, 291 P.3d 358 (“[A] realization that the opposing party, although poor, has access to an attorney and that an attorney’s fee may be awarded deters noncompliance with the law and encourages settlements.”), citing *Benavides v. Benavides*, 11 Conn.App. 150, 155, 526 A.2d 536 (1987); *Krassnoski*, 454 Pa. Super. at 84, 684 N.E.2d 635 (“[T]he potential deterrent effect of

counsel fee awards remains the same if awards are authorized in cases where the plaintiff has been represented free of charge.”); *Payday Today, Inc. v. Hamilton*, 911 N.E.2d at 35-36 (holding that awarding attorney’s fees to parties represented by pro bono counsel “deter[s] misconduct by imposing a monetary burden upon the wrongdoer”). The decision below will gut the deterrent nature of Rule 37 (and similar rules and statutes) for any party facing pro bono, legal aid, government or contingency or flat fee counsel. It should not be allowed to stand.

C. THE RULE-MAKING PROCESS THAT PROPOSES CHANGES TO RULE 37 WILL NOT CORRECT THIS PROBLEM AND IN FACT MAY EXACERBATE IT.

Amendments have been proposed to Rule 37 that seek to address this Court’s decision in *State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913. (See Proposed Amendments to the Rules of Practice and Procedure in Ohio Courts.) The proposed language includes in attorney fees “the reasonable value of the time spent by the attorney, whether or not the party actually paid or is obligated to pay the attorney for such time.” Proposed Rule 37(A)(5). While this amendment would address *Register’s* application to Rule 37 sanctions, the process does not address the important issues raised by this case.

Aside from the fact that the proposed amendments to Rule 37 are currently just proposals (and thus may be modified or rejected), the amendments, if adopted, only affect Rule 37. This leaves unchanged similar fee provisions in the Ohio Rules and various statutes. For instance, Rule 11 provides for the award of “expenses and reasonable attorney fees incurred in bringing any motion under this rule.” Civ.R. 11. Likewise, statutory provisions such as Revised Code sections 2307.70 and 2933.65 allow the award of expenses “incurred” by a party, including reasonable attorney fees. R.C. 2307.70(A) and 2933.65(A)(4). The proposed amendment to Rule 37 may allow recovery of fees by legal aid for discovery abuses, but will not address

recovery of fees by legal aid organizations when representing parties in Rule 11 motions or under other fee-shifting statutes. In fact, the change to Rule 37, without appropriate changes to every other rule or statute that uses similar language, will strengthen arguments in those other cases that fees are not recoverable by pro bono counsel because the same “reasonable value of the time spent by the attorney” language is not present. *See, e.g., Southtown Furniture v. Miami Twp. Bd. of Zoning Appeals*, 2d Dist. Montgomery No. 25240, 2012-Ohio-6052, ¶ 11 (using canon of interpretation *expressio unius* to find that exclusion of word from statute was intentional, when same word was included in related statute).

Thus, regardless of the proposed amendments to Rule 37, it is imperative that this Court revisit *Register* and reverse the decision below.

STATEMENT OF THE CASE AND FACTS

The Legal Aid Societies adopt the statement of the case and facts presented in Appellant Kristel Wilkins memorandum in support of jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: A trial court may award reasonable attorney fees to a prevailing party under Civ.R. 37 regardless of the party’s fee arrangement with counsel. (*State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, overruled.)

A. THE USE OF THE WORD “INCURRED” DOES NOT LIMIT ATTORNEY FEE AWARDS TO CASES WHERE A CLIENT “ACTUALLY PAID OR WAS OBLIGATED TO PAY” COUNSEL FEES.

The Eighth District relied on this Court’s decision in *Register* to find that an award of attorney fees is not permissible under Rule 37(A) absent proof that a party “actually paid or is obligated to pay” counsel. *Wilkins*, 2013-Ohio-3527, ¶ 12. *Register*, in turn, relied on this Court’s previous ruling in *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 62, to find that, before attorney fees may be awarded

under Rule 37(D), “an award of attorney fees as a sanction for a discovery violation must actually be incurred by the party seeking the award.” *Register* at ¶ 24. *Beacon Journal* does not stand for that proposition.

Beacon Journal, and all of the cases on which it relied, was decided on a motion for a writ of mandamus to seek compliance with R.C. 149.43, Ohio’s Public Records Act. *Beacon Journal* at ¶ 23. After being awarded a writ of mandamus, the relator sought attorney fees pursuant to R.C. 149.43(C)(2), which provides that a court shall award “reasonable attorney’s fees” when a writ of mandamus is issued. The Court denied the request, finding that “the vast majority of the requested fees related to the work done by Beacon Journal’s in-house counsel. There is no evidence or suggestion that the Beacon Journal either paid or was obligated to pay its in-house counsel attorney fees in addition to her regular salary.” *Id.* ¶ 62.

Under R.C. 149.43, this was precisely the correct outcome. R.C. 149.43(C)(2) states that “[c]ourt costs and reasonable attorney’s fees awarded under this section shall be construed as remedial and not punitive.” R.C. 149.43(C)(2)(c). Thus, with no expenditure of attorney fees by the Beacon Journal, there was no cost to remediate. Nothing in *Beacon Journal*, however, requires that *in all cases* an award of attorney fees requires expenditure by the party seeking the fees. The fees in *Beacon Journal* were not appropriate because of the *purpose* of the statute, not its use of any particular word. In fact, at no point does *Beacon Journal* focus on the words “incurred” or “caused by,” as was the case in *Register*. *Beacon Journal*, in other words, does not require any particular interpretation of the words “attorney fees,” “incurred” or “caused by.”

Instead, as long recognized by the federal courts under the nearly identical Federal Rules of Civil Procedure, “[i]n fee-shifting statutes the term *attorney fees* (or its equivalent) has become a term of art.” *Centennial Archaeology*, 688 F.3d at 678 (emphasis in original). While

in common usage a “fee” is considered to be the amount incurred by a client, *id.*, in fee-shifting rules and statutes actual payment by a client is not necessary. Rather, in that context, “a ‘reasonable attorney’s fee’ [is] reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the [party], no more and no less.” *Blanchard v. Burgeron*, 489 U.S. 87, 93, 109 S.Ct. 939, 103 L.E.2d 67 (1989). “In other words, an ‘attorney fee’ arises when a party uses an attorney, regardless of whether the attorney charges the party a fee; and the amount of the fee is the reasonable value of the attorney’s services.” *Centennial Archaeology* at 679; *see also Gotro v. R&B Realty Group*, 69 F.3d 1485, 1488 (9th Cir.1995) (finding that use of words “actual expenses incurred” did not limit district court’s discretion to award attorney fees to a contingency fee litigant). Notably, nothing in the Civil Rules suggests that the Ohio legislature’s use of “attorney fees” is any different than its use as a term of art by the Federal Rules and all of the other states to have adopted it. *See Cullen v. State Farm Mut. Auto. Ins. Co.*, --- Ohio St.3d ---, 2013-Ohio-4733, --- N.E.2d ---, ¶ 14 (“Because Civ.R. 23 is virtually identical to Fed.R.Civ.P. 23, we have recognized that federal authority is an appropriate aid to interpretation of the Ohio rule.”) (internal quotation marks and citation omitted); *Stammco, LLC v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 18 (“The Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure Consequently, federal law interpreting a federal rule, while not controlling, is persuasive authority in interpreting a similar Ohio rule.”).

Beacon Journal, in short, does not provide any basis for disallowing attorney fees to legal aid counsel, and the Federal Rules—on which this Court often relies—include in incurred attorney fees the value of pro bono counsel’s time.

B. ALLOWING THE AWARD OF ATTORNEY FEES REGARDLESS OF A PARTY'S FEE ARRANGEMENT SUPPORTS THE DETERRENT PURPOSES OF DISCOVERY SANCTIONS.

Because the use of the words “incurred” or “caused by” do not limit the ability to recover attorney fees, whether to allow fees should rest on the purpose of the rule or statute. In a case like *Beacon Journal*, where the purpose is remedial, an inquiry into whether a party has paid his or her attorney is appropriate. In a case like the one below, on the other hand, the primary purpose of the rule is deterrent or punitive. As the 1970 Advisory Committee to the nearly-identical Federal Rules stated regarding Rule 37 (a), “the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests or objections to discovery.” *Centennial Archaeology* at 680. Thus, absent allowing an award of attorney fees to counsel who is not owed a fee, “[t]he purpose of Rule 37 attorney-fee sanctions would be thwarted” in every case involving legal aid or pro bono counsel. *Id.* An award of fees under Rule 37(A) is, therefore, appropriate to pro bono counsel.

C. ALLOWING THE AWARD OF ATTORNEY FEES REGARDLESS OF A PARTY'S FEE ARRANGEMENT IS THE ONLY WAY TO ENSURE CONSISTENCY.

The purpose of Rule 37 and other fee-shifting rules and statutes is not the only reason to allow pro bono counsel to recover attorney fees. Any other reading of the language would lead to impermissible inconsistencies. In Rule 37 itself, for instance, there will be an internal inconsistency: unpaid counsel and their clients will be vulnerable to paying for their unsuccessful discovery motions but unable to recover for their successful motions. *See* Civ.R. 37(A) (allowing for recovery of fees for a successful motion to compel while requiring payment of fees for unsuccessful motions).

And the effect will not end there. The analysis in *Register* seemingly extends to any other rule or statute that uses the same “caused by” or “incurred” language. The result will be

incurable inconsistency. A particularly problematic example is R.C. 1331.16. That section requires a party who fails to comply with an investigative demand of the attorney general “to pay to the attorney general the reasonable expenses incurred in obtaining the order, including attorney’s fees” and allows the attorney general to “invoke the sanctions provided by Rule 37 of the Rules of Civil Procedure.” R.C. 1331.16(J). Under the rubric of *Register* and the decision below, before such an award can be made to the attorney general, a court must inquire into whether the attorney general actually paid or was obligated to pay fees to its counsel. *See Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 23. Because attorneys employed by the attorney general’s office are salaried, and entitled to pay and benefits regardless of the cases on which they work or their success on those cases, the attorney general will never be able to prove it “actually paid or is obligated to pay” fees unless it hired outside counsel. *Id.* R.C. 1331.16 will be rendered meaningless. Such a result is prohibited by this Court’s own rules of interpretation. *State v. Arnold*, 61 Ohio St.3d 175, 178, 573 N.E.2d 1079 (1991) (stating statutes must be interpreted, “if practicable, as to give some effect to every part of” them); *Ford Motor Co. v. Adm., Ohio Bur. of Empl. Servs.*, 59 Ohio St.3d 188, 190, 571 N.E.2d 727 (1991) (refusing to interpret statute in such a way as to make it meaningless).

Interpreting Rule 37 and similar fee-shifting rules and statutes to allow recovery of fees by unpaid counsel—a result that is consistent with the federal courts and nearly every state to have considered the issue—will remove the possibility of such inconsistencies in addition to deterring abuses of the court process and supporting public policy.

CONCLUSION

For the reasons set forth above, the Court should accept jurisdiction of this case.

Dated: November 14, 2013

Respectfully submitted,

Katie M. McVoy with her authority

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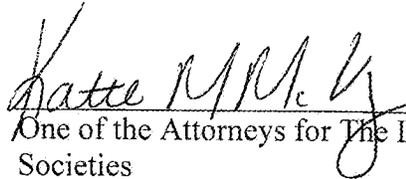
I hereby certify that a true and accurate copy of the foregoing Amici Curiae Legal Aid Societies' Memorandum in Support of Jurisdiction was served via regular U.S. Mail, postage prepaid, this 14th day of November, 2013, upon the following:

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