

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:)
)
COMPLAINT AGAINST)
)
LARRY DEAN SHENISE)
)
RESPONDENT)
)
AKRON BAR ASSOCIATION)
)
RELATOR)
)

CASE NO. 13-1934
BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
CASE NO. 2013-037

FILED
DEC 12 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RELATOR'S MOTION TO HOLD
PHIL TREXLER
IN CONTEMPT OF COURT

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MOTION

Relator Akron Bar Association (“Relator”) respectfully moves the Court to hold Phil Trexler (“Trexler”) in contempt, pursuant to Gov Bar Rule V(11)(C) and Supreme Court Rules 4.01 and 13.02. Trexler failed without excuse to appear at the hearing on this matter at 9:00 a.m. on December 5, 2013, pursuant to subpoena, notwithstanding that the Panel Chair had overruled his motion to quash the subpoena on December 2, 2013.¹

GROUND FOR MOTION

STATEMENT OF FACTS

Trexler is a reporter for the Akron Beacon Journal. On February 1, 2012, the Beacon Journal published a lead front-page article by Trexler concerning the arrest and jailing for six hours of an 80-year old man, Leonard Little. (Relator’s Exhibit 1.) In the article, Respondent Larry D. Shenise (“Shenise”) was quoted and paraphrased making comments critical of Summit County Common Pleas Judge Paul L. Gallagher.

Judge Gallagher filed a grievance against Shenise because of the comments. The grievance resulted in the Complaint in the present matter.² (Relator’s Exhibit 2.) In his Answer, Shenise denied the accuracy of two of the comments quoted and paraphrased in the article. (Relator’s Exhibit 3.) From Relator’s investigation, it was

¹ Trexler and the Beacon Journal on December 9, 2013, filed an appeal from the denial of their motion to quash. The appeal is interlocutory and is accordingly prohibited under Gov Bar Rule V(6)(D)(3). It has not been withdrawn, as requested, so Relator is simultaneously with this motion filing a motion to dismiss the appeal.

² Judge Gallagher’s grievance is Count III of the Complaint. The other Counts are not relevant to the present issue.

known that Trexler would testify that the disputed comments were reported accurately in the article.³

However, Trexler would not testify voluntarily. A subpoena was accordingly issued at Relator's request by the Board of Commissioners on August 30, 2013, for Trexler to appear at the scheduled start of the hearing on December 5, 2013 at 9:00 a.m. at Relator's offices in downtown Akron (Relator's Exhibit 5.) Trexler did agree to accept informal service of the subpoena, which was done by regular mail on September 4, 2013.⁴

Discussions began soon thereafter with counsel for the Beacon Journal. Relator was willing to have Trexler's affidavit submitted, but Shenise would not agree to forego cross-examination, as was his right. Relator accordingly declined to withdraw the subpoena.

On November 8, 2013, Trexler and the Beacon Journal sent for filing and served a motion in the disciplinary proceedings to quash the subpoena. (Relator's Exhibit 6). Relator responded in opposition (Relator's Exhibit 7) and on December 2, 2013, the Panel Chair filed an Entry overruling the motion to quash. (Relator's Exhibit 8.) Trexler nevertheless failed to appear at the hearing.

The underlying facts are set forth in Relator's Complaint (Relator's Exhibit 2.) In summary, Mr. Little had been a defendant in a civil matter pending before Judge Gallagher. Mr. Little had been represented by Shenise. A judgment was entered against Mr. Little, as to which the creditor attempted to conduct discovery. No

³ Trexler submitted an affidavit in support of his motion to quash in which he stated that he "stand[s] by the accuracy of the entire story." (Relator's Exhibit 4.)

⁴ Trexler and the Beacon Journal have raised no issue about service of the subpoena.

response was made to the discovery, or to motions to compel made by the creditor concerning it.

An order compelling the discovery and awarding sanctions was entered by Judge Gallagher. When that was disregarded, a motion to show cause was filed, as to which Judge Gallagher set a hearing for March 30, 2011, at 1:30 p.m. There was evidence presented at the disciplinary hearing that the notice of the show cause hearing was mailed to Shenise in the ordinary course and was not returned.

Neither Shenise nor Mr. Little appeared at the March 30, 2011, hearing. There was evidence presented at the disciplinary hearing that Judge Gallagher's judicial assistant then called Shenise's office and left a message on his answering machine concerning the missed hearing. When there was no response after several days, Judge Gallagher issued an order for a *capias* (arrest warrant) against Mr. Little.

Mr. Little was in a minor traffic accident on January 31, 2012. The police saw the warrant when they ran a computer search and arrested Mr. Little. He was in the Summit County Jail for about six hours before Judge Gallagher was able to cause him to be released. While the experience was terrible for Mr. Little, as he testified, he fortunately suffered no physical consequences.

The Beacon Journal was contacted by Mr. Little's family and Trexler was assigned to the story that was investigated by him on January 31 and published on February 1, 2012. Trexler interviewed Shenise in the course of his reporting.

Shenise was quoted and paraphrased in the article by Trexler as saying that he had not received notice of the March 30, 2011 hearing from Judge Gallagher's Court, either by mail or by phone, nor of the subsequent arrest warrants. Shenise was

reported to have said that he would not miss a hearing of which he got notice. Of the Court he was quoted as saying, “they never bothered to call . . . I would have thought the court would have the courtesy to call to say, ‘Hey, you’re supposed to be here.’” (Complaint (Relator’s Exhibit 2), paragraphs 47 and 48.)

In his Answer (and testimony), Shenise denied the accuracy of two parts of Trexler’s story: he denied having said that he had not received the arrest warrants and he said that he had used the word “intentionally” either before or after the phrase “miss a hearing.” (Answer (Relator’s Exhibit 3), paragraphs 47 and 48.) There is no other evidence of what Shenise said to Trexler beyond the conflicting memories of the two of them.

The disciplinary hearing proceeded as scheduled at Relator’s office in downtown Akron, on December 5 and 6, 2013. All of the evidence for Relator’s case in chief was presented with the exception of Trexler’s testimony. The hearing was then adjourned pending resolution of the issue of whether Trexler would be compelled to testify.

ARGUMENT⁵

I. An order holding Trexler in contempt should be issued for his failure to obey a proper subpoena.

Contempt is the remedy this Court has established for failure to honor subpoenas

⁵ The Court will see that most of the present brief is copied from Relator’s recent brief in opposition to the motion to quash. There is no new authority or argument to add, so Relator is proceeding this way in the interest of efficiency. This brief necessarily anticipates arguments the Beacon Journal and Trexler are expected to make here, since in its original form it was an opposition brief. This brief does omit an argument for untimeliness of the motion to quash that Relator made to the Panel, since the Panel Chair did not make his ruling on that basis.

issued by the Board of Commissioners on Grievance and Discipline. Gov Bar Rule V, Section (11)(C) provides that, “The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be considered a contempt of the Supreme Court and shall be punishable accordingly.”

The present matter concerns civil contempt, since Relator seeks to coerce Trexler to comply with the subpoena and testify, rather than to punish him for his misconduct. The standard of proof is accordingly by clear and convincing evidence, *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 252-3 (1980). Proof of Trexler’s purpose in disobeying the subpoena is not required. *Pugh v. Pugh*, 15 Ohio St.3d 136, 140 (1984).

Here, there is no question but that the subpoena was properly issued and served and that Trexler refused to obey it, even after the motion to quash was denied. Nor is there any evidentiary question concerning what led to the issuance of the subpoena for Trexler’s testimony.

The only question presented, therefore, is whether Trexler is constitutionally excused from being compelled to testify, as he argued to the Panel. But as was demonstrated by Relator to the Panel, was found by the Panel Chair, and is argued to this Court in the next sections, Trexler enjoys no such protection.

II. All the state and federal case law strongly supports enforcement of the subpoena.

III. The subpoena does not call for the disclosure of sources, of information provided in confidence, or for evidence that is merely duplicative.

IV. There is no alternative to obtaining the reporter's testimony. Relator is not harassing the reporter.

V. Relator has not avoided investigation for which it seeks to substitute the reporter's work product.

The Panel Chair correctly overruled the motion to quash, since all of the federal authority and the precedents of this Court strongly support the legality of the subpoena. The subpoena should be enforced by the granting of this motion for contempt.

The brief submitted by Trexler and the Beacon Journal (hereafter jointly "the Newspaper" unless express reference is made to one or the other of them) in support of their motion to quash sounded a clarion call for First Amendment protection, but this case involves none of the First Amendment issues with which the Courts have been concerned. Relator does not seek the disclosure of confidential sources or of confidential information disclosed to the reporter. Those are the critical matters upon which the First Amendment protections of the press are typically weighed, not direct testimony from a reporter simply to corroborate the accuracy of disputed portions of his story.

Nor does Relator seek collateral evidence for which there are other sources. While, for the sake of completeness, the subpoena did seek notes or other records of Trexler's interview of Shenise, Relator accepted Trexler's word that there are no such documents now, so the *duces tecum* is moot.

The present issue is thus far more limited than the Newspaper depicted it to the Panel. None of the authority cited by the Newspaper accordingly supported its

position, indeed most of it runs directly counter to the Newspaper. The Newspaper relied heavily on *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), but that decision in fact supports Relator's position. *Branzburg* allowed a grand jury subpoena seeking reporter testimony about the criminal conduct of confidential sources.

Relator's position here is even stronger, since Relator seeks no such sensitive testimony. Shenise is not a confidential source of Trexler's. Relator does not seek to disrupt Trexler's relationships with his news sources. The core First Amendment protections that were balanced in *Branzburg* are absent here.

The decision in *Branzburg* was that the reporter *was compelled to testify*. The Newspaper accordingly attempted to distinguish these proceedings as "civil" and thus not worthy of the same public concern. But the Newspaper cited no authority in support of the distinction it attempted to draw and the distinction is in fact not as far-reaching as it contended.

This Court has emphasized the importance of attorney disciplinary proceedings for the protection of the public and has noted that they are more than civil matters:

"A disciplinary proceeding is instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed to practice law, and is neither a criminal nor a civil proceeding . . . Gov.Bar R. V and the regulations relating to investigation and proceedings involving complaints of misconduct are to be construed liberally for the protection of the public, the courts, and the legal profession."

Disciplinary Counsel v. Heiland (S.Ct.), 2008 Ohio 91, at ¶ 32 and ¶ 34}. The Newspaper's attempt to minimize the significance of these proceedings is thus in error.

The various balancing tests set out in Justice Powell's concurrence in *Branzburg*,⁶ by the U.S. Court of Appeals for the Sixth Circuit *In re Grand Jury Proceedings*, 810 F2d, 580, 586 (1987) and as adopted by this Court in *State, Ex. Rel. National Broadcasting Company, Inc. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d. 104, 111 (1990), *overruled in part on other grounds*, 2008 Ohio 545, all yield analysis favorable to Relator, even if confidential information were being sought, which it is not.

Thus, using Justice Powell's test, 1) the information sought is directly relevant; 2) the information cannot be obtained by any alternative means and 3) the information is essential to the administration of justice.

The first prong should not be in dispute, since the information is plainly relevant. The Newspaper concedes Relator's position that "[Shenise's] communication with the newspaper reporter *is* the violation." (Brief in support of motion to quash, p. 7.) Shenise did not say what he said about Judge Gallagher to anyone but Trexler. The Newspaper then published what Trexler reported that Shenise said – as to which Shenise denies Trexler's accuracy. (The Newspaper's contention that Shenise's disputed statements should not be considered violations at all because made to a reporter are discussed below.)

⁶ The three-prong test was *not* "effectively established" by *Branzburg* as the Newspaper stated at page 6 of its brief. But Relator will use it for the present analysis since the Newspaper relied on it.

The second prong should likewise not be in dispute, for much the same reason as the first prong. *There is simply no other source for the information.* Trexler is and was the only witness to what Shenise told him. There is no other record of the statements besides the memories of Trexler and Shenise.⁷ This is not a situation where Trexler is only one of a number of sources for the information, as for example if others had been present when Shenise spoke.

As to the third prong, the Newspaper apparently contends that Shenise ought to be exempt from discipline for anything he denies he told Trexler, simply because Trexler is a reporter. Thus, at page 8 of its Brief to the Panel, the Newspaper said that there is “no overwhelming or compelling societal interest involved . . . Respectfully, while we recognize that impugning a judge is a violation of the Ohio Rules of Professional Conduct, the rules should be subsumed by the constitution – in particular, in this case, the constitutional protections afforded journalists who report on a story of immense public interest even though it may also be personally hurtful to the bench.”

In other words, according to the Newspaper, a lawyer should be able to lie about a judge to a reporter – resulting in a widely published page one story – then avoid discipline simply by denying the truth of the story.⁸ That is exactly what will happen here if Trexler does not testify, since Relator has the burden of proof by clear and convincing evidence. Shenise’s un rebutted denial of key portions of the story

⁷ The duces tecum of the subpoena is moot, since Relator accepts Trexler’s statement that there is no relevant documentary evidence remaining in existence. There is thus no issue of obtaining notes, recordings, unpublished statements, outtakes, or the like.

⁸ Shenise never disputed the accuracy of the story until his Answer in these proceedings, over a year later.

will have to be accepted by the Panel and the charges will then inevitably be dismissed as to the disputed statements.

The Newspaper's astonishing position notwithstanding, that is not the law. The Constitution does not afford lawyers a shield to lie about judges to reporters with impunity if they merely lie further and deny they said what they said.

The attorney disciplinary system is critical to the protection of the public. The protection of judges from unjust allegations is fundamental, since the public's respect for them is a linchpin of the system of justice and judges cannot respond to public attacks themselves. This is not just a matter of personal hurtfulness; it goes to respect for the judiciary, not for the feelings of individuals. The ability of disciplinary prosecutors to prove the accuracy of disputed newspaper stories in which judges are attacked is thus essential to the administration of justice.

Analysis under the Sixth Circuit's alternative test in *Grand Jury* yields the same result.⁹ 1) Trexler is not being harassed at all, much less in any effort to disrupt his relationship with sources. There is no issue of any confidential source being disclosed. If the evidence could be obtained otherwise, Relator would have no interest whatsoever in pursuing the subpoena. The Newspaper offered no evidence of harassment beyond the fact that Relator persists in requiring Trexler's testimony. The suggestion of harassment by Relator's counsel was, frankly, outrageous and it was

⁹ The standard was adequately paraphrased by the Newspaper in its Brief to the Panel, but as stated exactly it is, "Whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship." *Grand Jury*, at 586.

properly found to be unfounded by the Panel Chair.

2) For the same reasons, the request is plainly made in complete good faith. To say it yet again, if Shenise did not dispute the accuracy of the article, or if there were some other way to rebut his denials, or if he would have been willing to stipulate to an affidavit from Trexler, the subpoena would have been withdrawn, if it had ever been issued in the first place.

3) The information bears a direct relationship to the proceedings. It is not for the Newspaper to determine that certain of the charges against the Shenise should be dropped, in effect, by Relator having to forego Trexler's testimony to support them.

4) There is a legitimate need for the information for all the reasons stated. This disciplinary proceeding serves an important public purpose.

This Court took a very narrow view of the protection to be afforded the press in *State ex rel NBC, supra*. The Court expressly noted that the U.S. Supreme Court had rejected the three-prong test advocated by Justice Stewart's dissent in *Branzburg*, at 110. The Court moreover adopted an even more restricted restatement of the position of the Sixth Circuit in *Grand Jury*, as set forth at page 111:

“Thus, a court may enforce a subpoena over a reporter's claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for a legitimate purpose, rather than for harassment.”

The Court went on to uphold an injunction requiring the preservation of the television station's tapes of the event that was the subject of the trial to come, thus strongly suggesting that their eventual disclosure would be required. The Court noted that there was no issue of the protection of confidential sources under R.C. 2739.12, nor is

there such an issue in the present case.

NBC continues to be the law of Ohio on this subject. *City of Akron v. Cripple*, 2003 Ohio 2930 (9th App. Dist., 2003); *In re April 7, 1999 Grand Jury Proceedings*, 2000 Ohio 2552 (7th App. Dist., 2000); *In re Grand Jury Witness Subpoena of Abraham*, 92 Ohio App.3d 186 (11th App. Dist., 1993).

Without repeating Relator's arguments at length, it is readily apparent that the present subpoena has been issued for a legitimate purpose and not for harassment. It is fully justified under the standard of *NBC* and the other authority.

The Newspaper has argued that this issue should be analyzed as if these proceedings were civil in nature, rather than by analogy to criminal proceedings. As noted above, this Court has held that disciplinary proceedings are a hybrid. The strong public policy interests involved, including the risk of public sanctions against Shenise, make them more like criminal proceedings, in Relator's view.

But even if the motion to quash should be analyzed under the law applicable to civil proceedings, the Newspaper's position must fail. Thus, the Newspaper urges the three-prong test used in *Fawley v. Quirk* (9th App. Dist., 1985), 11 Med.L.Rptr. 2336, 2337-2338, *cited unfavorably in NBC, supra*, at 110. That test is: "(1) is the information relevant, (2) can the information be obtained by alternative means and (3) is there a compelling interest in the information?"

While the Newspaper's Brief cited *Fawley* as if it supported the Newspaper's position, it does just the opposite. The Court in *Fawley* affirmed a finding of contempt against a Beacon Journal reporter who refused to disclose a confidential source in a defamation action brought by a former police chief against a city and its mayor.

As noted above, the present case does not involve the sensitive disclosure of a confidential source, simply verification of the accuracy of a disputed story. As in *Fawley*, the information is relevant, it cannot be obtained by alternative means and, if anything, there is an even more compelling interest in the information for purposes of these disciplinary proceedings. *Fawley* thus fully supports Relator's position, not that of the Newspaper.

The Newspaper also cited the Fourth Circuit decision in *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (1986), which applied essentially the same standard as that used in *Fawley*, but there affirmed denial of a motion to compel the reporter's evidence. But *LaRouche* is fully distinguishable from the present case. There, the movant had the names of all of the sources but had not sought depositions from them. Thus, the movant had not exhausted the alternative means of getting the information.

That is substantially the same fact pattern as *County of Summit v. Keith Heating & Cooling, Inc.*, Case No. CV 2012 10 5959 (Summit C.P., 2013), cited by the Newspaper but not copied to its Brief to the Panel (it is attached to this one). The Court there noted that the reporter's story was not the subject of the litigation and that the reporter was not himself a witness to any of the events at issue, at page 6, thus the testimony was not necessary.

By contrast, in the present case, the Beacon Journal story is at the heart of the proceedings and Trexler is the only witness who can rebut Shenise's denials. There is no alternative source for the information as to the disputed statements.

There is extensive other authority supporting the compulsion of reporter

testimony in cases like this one, even assuming that the present case is civil for the purpose of the motion to quash. *Hade v. City of Fremont*, 233 F.Supp.2d 884 (USDC NDOH 2002)(unpublished information); *Convertino v. U.S. Dept. of Justice*, 2008 WL 4104347 (USDC EDMI 2008)(source disclosure); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir., 2003)(non-confidential source who did not object to disclosure of information). Relator notes with interest that in *City of Akron v. Cripple, supra*, the Newspaper did not appeal from the trial court's denial of its motion to quash subpoenas to reporters who witnessed the events at issue and testified at trial.

VI. The ethical prohibition against impugning judges includes statements to reporters.

VII. There is no unreasonable burden imposed on the reporter.

The Newspaper suggested in the last section of its Brief to the Panel that the subpoena is unwarranted because Relator's Complaint is of too little significance. The Newspaper's counsel's research was said to have found no disciplinary cases in which statements to the press about judges were the "sole" basis for sanctions. But the Newspaper of course has no business deciding what allegations are and are not worthy of consideration. The Complaint, including the allegations concerning the impugning of Judge Gallagher's reputation, was certified for filing by a probable cause panel of the Board.

The disclaimer of "sole" basis also creates a meaningless distinction. Almost no disciplinary cases proceed on "sole" allegations, nor does this one. But the existence of other allegations does not mean that allegations requiring reporter testimony should be eliminated as superfluous. The allegations should not be

effectively dismissed because the Newspaper does not believe that it should have to be involved.

There have been several disciplinary cases involving statements to the media about judges or other court officers. They have not required many incidents to warrant sanctions and reporter testimony was involved in one of them. *Disciplinary Counsel v. Ferreri*, 85 Ohio St.3d 649 (1999) (three media statements; reporters testified); *Disciplinary Counsel v. Hoskins* (S.Ct.), 2008 Ohio 3194 (single press release); *Disciplinary Counsel v. Grimes*, 66 Ohio St.3d 607 (1993) (single comment to reporter and comments to another judge; facts stipulated).

The Newspaper further wrongly suggested that an unreasonable burden will be placed on Trexler, if not its reporters generally, if he must testify. This matter is being heard in downtown Akron, within a mile of the Beacon Journal offices. Trexler's testimony should not require more than an hour, if that. The burden on him will be minimal.

The suggestion that allowing such subpoenas will open the floodgates to constant reporter testimony is totally unfounded and, in any event, provides no basis for First Amendment protection. The Court in *Branzburg* noted the contention that subpoenas were proliferating, but rejected that as a reason to preclude reporter testimony even if true, 408 U.S., at 699. The Newspaper offered no evidence that even the local decisions compelling testimony in *Fawley* and *Cripple* have led to repeated subpoenas for its reporters, occupying their time unreasonably.

CONCLUSION

Relator hesitates to characterize the Newspaper's resistance to the subpoena as totally baseless, but that is objectively the truth of the matter. On these facts, that nothing more is sought from Trexler than a few minutes of his time to testify at the hearing that he stands behind the accuracy of his story, there is literally no authority that remotely supported the Newspaper's motion to quash.

The motion to quash was thus properly overruled. The subpoena should be enforced by this Court's granting the present motion for contempt.



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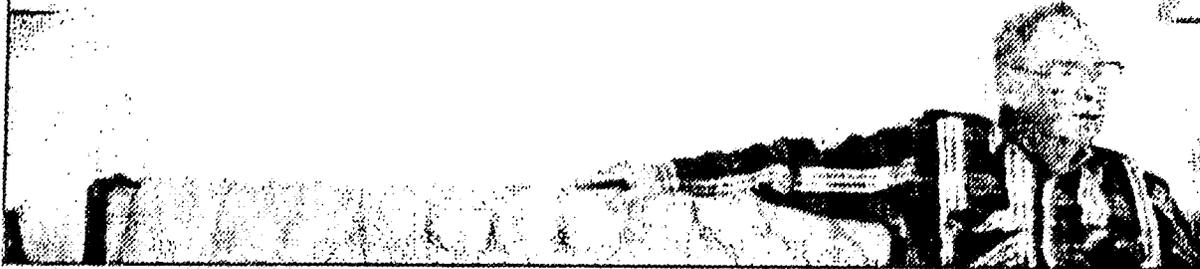
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Massillon man, 80, ends up in Summit County lockup after police find he was wanted for missing civil hearing he says he did not know was ordered



Leonard Little of Massillon talks about his arrest for failure to appear in Summit County court for a civil hearing he said he didn't know was ordered. PHOTO COURTESY OF AKRON BEACON JOURNAL

Senior gets surprise: jail

By Phil Traxler
Beacon Journal staff writer

A trip to the store for a bottle of glue turned into 80-year-old Leonard Little's first time in jail.

The Massillon retiree committed no crime to earn the time. But he was a wanted man for about nine months for his failure to appear in Summit County Common Pleas Court for a hearing in a civil lawsuit.

It was a hearing Judge Paul Gallagher ordered that neither Little nor his attorney say they knew about.

This breakdown in communication prompted the judge last spring to issue an arrest warrant for contempt of court. Once again, according to Little and his attorney, no one told them of the judge's order.

They only learned of its existence Monday, they said, when the grandfather was booked into the county jail.

"I was humiliated beyond belief," Little said Tuesday. "I have always tried to do the right thing, and then to wind up in jail? Murderers and rapists get treatment as good or better than I did."

Gallagher, who signed the arrest warrant April 13, said he cannot discuss the pending case. Nonetheless, on Monday he ordered Little released from the Summit County jail, about six hours after his booking. When Little left the jail, he said he didn't sign his \$20,000 signature bond nor did he receive a new court date.

Attorney Larry Shenise, who handled the civil lawsuit for Little and his son, William, said no one from Gallagher's court notified him by mail or a phone call of the March hearing the Littles missed.

No notice, he said, was sent by the court on the subsequent arrest warrants.

"I don't miss hearings if I get notice," Shenise said. "If we would have known, we would have been there. But they never bothered to call to say, 'Hey, you're supposed to be here for a hearing. We're going to issue warrants for your clients if you don't appear.'"

"They didn't do anything," he said. "I would have thought the court would have the courtesy to

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Jailed

Continued from Page A3.

say, 'Hey, you're supposed to be here.'

Shenise said it wasn't until Tuesday that Gallagher set a new hearing date of Feb. 8.

The missed March hearing date along with the arrest warrants are listed on the court's Internet docket. But because the suit was put on hold with the filing of Little's bankruptcy in May, Shenise said he had no need to view the case file.

The lawsuit stems from a family business deal that went awry. The attorney opposing Little in the lawsuit did not return a call Tuesday.

Warrant issued

Warrants generally are sent to the sheriff and entered into the law enforcement computer. Those wanted on warrants are not notified.

That apparently was the case with Little. He said he had no idea he was a wanted man for nearly a year. Little and his wife of 60 years, Barbara, on Tuesday recounted the events that led to his jail stint.

Little said he went out early Monday morning to buy glue for a woodworking project. He stopped at a gas station, where he had a collision with another car.

A Massillon officer arrived and checked Little's driving record. The warrant was



PHOTO BY PHIL TRENTER Leonard Little of Massillon sits with his dog C.C. and discusses his arrest and day's stay in Summit County Jail. A new hearing in the civil case that landed him in jail has been set for Feb. 8.

found and Little was taken by the officer into Summit County, where deputies met them in Green. Deputies handcuffed Little and took him to jail about 10 a.m.

Little said that during his stay, jailers never gave him his medication for high blood pressure and diabetes. He was fingerprinted, photographed and placed in a cell.

"They booked me like a common criminal," Little said.

Sheriff's spokesman Bill Holland said inmates on medication must have their prescriptions and dosage verified.

Once that occurs, the jail's 600-plus inmates are given their meds at the same time two to three times a day. In Little's case, he came after the first medication distribution and was released before the next rotation, Holland said.

Little, who has no criminal record, remains baffled at how he wound up jailed for a day.

"If I knew I was supposed to have appeared in court, I would have been there," he said. "I always take my civic duties seriously."

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Massillon man, 80, ends up in Summit County lockup after police find he was wanted for missing civil hearing he says he did not know was ordered

Man, 80, jailed on Summit County judge's order

By Phil Trexler
Beacon Journal staff writer

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A trip to the store for a bottle of glue turned into 80-year-old Leonard Little's first time in jail.

The Massillon retiree committed no crime to earn the time. But he was a wanted man for about nine months for his failure to appear in Summit County Common Pleas Court for a hearing in a civil lawsuit.

It was a hearing Judge Paul Gallagher ordered that neither Little nor his attorney say they knew about.

This breakdown in communication prompted the judge last spring to issue an arrest warrant for contempt of court. Once again, according to Little and his attorney, no one told them of the judge's order.

They only learned of its existence Monday, they said, when the grandfather was booked into the county jail.

"I was humiliated beyond belief," Little said Tuesday. "I have always tried to do the right thing, and then to wind up in jail? Murderers and rapists got treatment as good or better than I did."

Gallagher, who signed the arrest warrant April 13, said he cannot discuss the pending case. Nonetheless, on Monday he ordered Little released from the Summit County Jail, about six hours after his booking. When Little left the jail, he said he didn't sign his \$20,000 signature bond nor did he receive a new court date.

Attorney Larry Shenise, who handled the civil lawsuit for Little and his son, William, said no one from Gallagher's court notified him by mail or a phone call of the March hearing the Littles missed.

No notice, he said, was sent by the court on the subsequent arrest warrants.

"I don't miss hearings if I get notice," Shenise said. "If we would have known, we would have been there. But they never bothered to call to say, 'Hey, you're supposed to be here for a hearing. We're going to issue warrants for your clients if you don't appear.'"

"They didn't do anything," he said. "I would have thought the court would have the courtesy to say, 'Hey, you're supposed to be here.'"

Shenise said it wasn't until Tuesday that Gallagher set a new hearing date of Feb. 8.

The missed March hearing date along with the arrest warrants are listed on the court's Internet docket. But because the suit was put on hold with the filing of Little's bankruptcy in May, Shenise said he had no need to view the case file.

The lawsuit stems from a family business deal that went awry. The attorney opposing Little in the lawsuit did not return a call Tuesday.

Warrant issued

Warrants generally are sent to the sheriff and entered into the law enforcement computer. Those wanted on warrants are not notified.

That apparently was the case with Little. He said he had no idea he was a wanted man for nearly a year. Little and his wife of 60 years, Barbara, on Tuesday recounted the events that led to his jail stint.

Little said he went out early Monday morning to buy glue for a woodworking project. He stopped at a gas station, where he had a collision with another car.

A Massillon officer arrived and checked Little's driving record. The warrant was found and Little was taken by the officer into Summit County, where deputies met them in Green. Deputies handcuffed Little and took him to jail about 10 a.m.

Little said that during his stay, jailers never gave him his medication for high blood pressure and diabetes. He was fingerprinted, photographed and placed in a cell.

"They booked me like a common criminal," Little said.

Sheriff's spokesman Bill Holland said inmates on medication must have their prescriptions and dosage verified. Once that occurs, the jail's 600-plus inmates are given their meds at the same time two to three times a day. In Little's case, he came after the first medication distribution and was released before the next rotation, Holland said.

Little, who has no criminal record, remains baffled at how he wound up jailed for a day.

"If I knew I was supposed to have appeared in court, I would have been there," he said. "I always take my civic duties seriously."

Phil Trexler can be reached at 330-996-3717 or ptrexler@thebeaconjournal.com.

Find this article at:

<http://www.ohio.com/news/local/man-80-jailed-on-summit-county-judge-s-order-1.257964>

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**BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO**

IN RE:
COMPLAINT AGAINST
LARRY D. SHENISE
Registration No. 0068461
P.O. Box 471
Tallmadge, OH 44278

*

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RESPONDENT

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AKRON BAR ASSOCIATION
57 South Broadway Street
Akron, Ohio 44308

*

RELATOR

* * *

**COMPLAINT AND
CERTIFICATE**

(Rule V of The Supreme Court
Rules for the Government of The
Bar of Ohio)

Now comes the Relator, Akron Bar Association, and alleges that Larry D. Shenise, duly admitted to the practice of law in the State of Ohio, has been engaged in misconduct in violation of the Ohio Rules of Professional Conduct.

INTRODUCTION & PARTIES

1. The Akron Bar Association ("Relator") is a Certified Grievance Committee under Gov.Bar R.V(3)(C). Relator has been authorized by the Board of Commissioners on Grievances and Discipline for the Supreme Court of the State of Ohio to investigate allegations of misconduct by attorneys and initiate complaints as a result of investigations under the provisions of the Rules for the Government of the Bar as promulgated in the State of Ohio.
2. Larry D. Shenise ("Respondent") is an attorney at law licensed to practice in Ohio since November 1997, Registration No. 0068461, with his business address registered with the Supreme Court of Ohio as P.O. Box 471, Tallmadge, Ohio, 44278.



3. Honorable Paul A. Gallagher (“ Judge Gallagher”) was the presiding judge in the matter of *Lake Family Properties Ltd. v. William Little*, Summit County of Common Pleas Court Case No. CV-2008-08-5640 and is an original witness herein.
4. William Little (“William Little”) is a former client of Respondent and an original witness herein.
5. Leonard Little (“Leonard Little”) is a former client of Respondent and an original witness herein.

COUNT I

Now comes Relator, and for Count I against Respondent states as follows:

6. On or about June 30, 2008, Lake Properties, Ltd. brought an eviction and damages action in the Akron Municipal Court against William and Leonard Little (“the Lawsuit”). The property involved was an auto repair shop, occupied under a lease/option by William, with Leonard as co-signer.
7. On or about July 17, 2008, Respondent answered and counterclaimed against Lake Properties, Ltd on behalf of both William and Leonard Little and had the Lawsuit transferred to the Summit County Common Pleas Court.
8. On or about August 11, 2008, the Lawsuit, as Case No. CV 2008-08-5640, was assigned to Judge Paul Gallagher.
9. Respondent ceased to maintain professional liability insurance during his representation of the Littles in connection with the Lawsuit, having let it lapse in March of 2010.
10. Respondent did not notify the Littles or his other clients of the lapse of professional liability insurance or have the Littles or his other clients sign a written acknowledgement of his lack of professional liability insurance.
11. As of the time of the conclusion of the investigation of this matter on March 28, 2013, there was no evidence that Respondent had obtained malpractice insurance.
12. Relator alleges that as a result of the information set forth in Count I, Respondent has violated Ohio Rule of Professional Conduct Rule 1.4(c).

COUNT II

Now comes Relator, and for Count II against Respondent states as follows:

13. On October 1, 2008, a company named Run Down Ghost Town ("Ghost Town") moved to intervene in the Lawsuit, claiming to be the assignee of the rents to be paid to Lake Properties, Ltd. under the lease. Ghost Town further moved for an order for the rents to be paid in to the Clerk of Courts during the pendency of the litigation.
14. The motion was not opposed by Respondent and was granted on January 20, 2009. The Respondent did not file a counterclaim against Ghost Town on behalf of the Littles, and in fact, subsequently dismissed the counterclaim against Lake Properties, Ltd.
15. Respondent did not inform the Littles of the Motion or the Order for the rents to be paid during the pendency of the litigation. The Littles were not advised of the potential consequences of not complying with the Order and thus were not given the option to comply with it.
16. On August 11, 2009, Ghost Town moved for summary judgment against the Littles.
17. Respondent filed a brief in opposition on behalf of both Littles, but on May 21, 2010, summary judgment was granted to Ghost Town for judgment in excess of \$114,000 against both defendants. The judgment was based, in part, on the failure of the Littles to obey the Court's Order to deposit rents.
18. On July 22, 2010, Ghost Town moved to have the summary judgment certified as a Final Order for Appeal.
19. Respondent did not oppose said motion and Final Judgment was entered on September 28, 2010.
20. Respondent filed a Notice of Appeal on October 29, 2010, thirty-one days later.
21. Ghost Town filed a motion to dismiss the appeal as late, which was not opposed by Respondent, and the motion was granted on December 22, 2010.
22. On February 2, 2011, the Littles, through their Family Trust, consummated the sale of property at 1382 Hightower Dr., Uniontown, Ohio, which brought net proceeds of \$68, 686.74, which was put into Escrow.
23. On February 11, 2011, Respondent filed a Motion to return the Escrowed Funds to

- the Littles.
24. On March 1, 2011, the Court ordered that the proceeds were to be given to Ghost Town in partial satisfaction of its judgment lien. The Court noted in its Order that Defendant Little had misstated the law and misrepresented to the Court, by omission of relevant Trust documents, that Ghost Town is only entitled to one-half the proceeds.
 25. On July 22, 2010, at the same time it filed its Motion to Convert the Summary Judgment into Final Judgment, Ghost Town commenced discovery against the Littles for Production of Documents and Depositions where were scheduled for August, 27, 2010.
 26. Respondent neither advised the Littles of the deposition notices, nor produced the documents requested in discovery.
 27. Ghost Town moved to compel discovery and for sanctions on September 9, 2010.
 28. On October 4, 2010, Shenise filed a motion for extension of the time to respond to the Motion to Compel, which was granted on November 8, 2010.
 29. However, Respondent never filed a response to the Motion to Compel, which was then granted on January 11, 2011, and included an Order to pay attorney fees and costs as well as to immediately respond to discovery and to reset the depositions.
 30. Respondent failed to notify the Littles of the discovery Order or to do anything to bring the Littles into compliance with it. Ghost Town moved for contempt on February 14, 2011.
 31. No opposition was filed by Respondent.
 32. On March 17, 2011, the Court issued to Respondent and the Littles an Order for a Show Cause Hearing scheduled for March 30, 2011 at 1:30 p.m. as to why they should not be held in contempt for failing to comply with the January 11, 2011 Order. The Order was sent by the Court to Respondent and the two other attorneys on the case.
 33. Neither Respondent nor either of the Littles appeared at the show cause hearing on March 30, 2011. While counsel for Ghost Town was still in Chambers, the Court's staff telephoned Respondent's office number and left a message about the missed hearing. Respondent never called back or otherwise communicated to the Court

about the missed hearing.

34. On April 13, 2011, the Court ordered a *capias* to be issued for the Littles' arrest. The Order stated that it was to be sent directly to William and Leonard Little, as well as to Respondent and other counsel.
35. The notice to Leonard was returned as not deliverable. On April 27, 2011, the Court issued a *nunc pro tunc* Order specifying addresses to be used for William and Leonard Little. The address for Leonard was 520 Sheri Avenue in Massillon. That was Leonard's address at the time, as it is now.
36. Leonard Little hired other counsel in early March of 2011 to file for Chapter 7 bankruptcy. That petition was filed on March 21, 2011.
37. Respondent stated to Relator's investigators that he ignored the *capias* notices, as well as the discovery request and deposition notices, because of the bankruptcies filed or to be filed by William Little and Leonard Little.
38. However, the Common Pleas Court record reflects that Leonard Little's Notice of Bankruptcy was not filed in the Common Pleas Court case until May 3, 2011, after the *capias* was issued.
39. The court records reflect that Respondent filed a bankruptcy petition on behalf of William Little on August 11, 2011, but that the notice of the bankruptcy to the Common Pleas Court was not filed until January 31, 2012 at 9:54 a.m.
40. Earlier that same morning of January 31, 2012, Leonard Little had been arrested on the *capias* after he was involved in a minor automobile accident.
41. Relator alleges that as a result of the information set forth in Count II, Respondent has violated the Ohio Rules of Professional Conduct Rules:
 - 1.1 Competence;
 - 1.2 Scope of Representation & Allocation of Authority
Between Client & Lawyer;
 - 1.3 Diligence;
 - 1.4(a)(1), (a)(3), & (b) Communication;
 - 3.4(c) & (d) Fairness to Opposing Party and Counsel;
 - 8.4(c) & (d) Misconduct

COUNT III

Now comes Relator, and for Count III against Respondent states as follows:

42. There were no further proceedings in the Common Pleas Court until Leonard Little was involved in a traffic accident in Stark County on January 31, 2012.
43. The police ran a computer check and the warrant came up. He was arrested, handcuffed, transferred to the Summit County Sheriff and put in the Summit County Jail at 10:00 a.m.
44. He remained there for about six hours until Judge Gallagher ordered his release on a signature bond. Leonard was by then eighty years old, with medical conditions.
45. At a subsequent hearing on March 28, 2012, Judge Gallagher vacated the contempt, finding that the Littles had not received notice of the March 30, 2011 hearing from their attorney.
46. The Akron Beacon Journal learned of Leonard Little's arrest and ran an extensive story about it on February 1, 2012.
47. In the article, Respondent was quoted and paraphrased as saying that he had not received notice of the March 30, 2011 hearing from the Court, either by mail or by phone, nor of the subsequent arrest warrants.
48. Respondent said that he would not miss a hearing of which he got notice. Of the Court he said, in part, "they never bothered to call . . . I would have thought the court would have the courtesy to call to say, 'Hey, you're supposed to be here.'"
49. Judge Gallagher filed a grievance that Respondent lied and impugned the Judge's reputation in his statements to the Akron Beacon Journal that he had not been notified by the Court of the hearing and the issuance of the *capias*.
50. Relator alleges that as a result of the information set forth in Count III, Respondent has violated the Ohio Rules of Professional Conduct Rules:
 - 3.5(a)(6) Conduct degrading to a tribunal;
 - 4.1(a) False statement to third person;
 - 8.2(a) False statement concerning integrity of judicial officer;
 - 8.4(c) Dishonesty, deceit or misrepresentation;
 - 8.4(d) Conduct prejudicial to administration of justice;
 - 8.4(h) Conduct reflecting adversely on fitness to practice.

REQUEST FOR RELIEF

Relator asks that such discipline be administered to Respondent as may be deemed appropriate following a hearing on the merits.

Respectfully submitted,



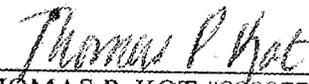
ROBERT M. GIPPIN #0023478

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(330) 929-0507
Fax: (330) 929-6605
sharylesq@aol.com



THOMAS P. KOT #0000770

Bar Counsel
Akron Bar Association
57 S. Broadway St.
Akron, OH 44308
(330) 253-5007
Fax: (330) 253-2140
tpkot@neohio.twcbc.com

CERTIFICATE

The undersigned, Thomas P. Kot, Bar Counsel of the Akron Bar Association, hereby certifies that Robert M. Gippin and Sharyl W. Ginther are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated: May 21, 2013



Thomas P. Kot, Bar Counsel

Gov. Bar R. V, §4(I) Requirements for Filing a Complaint.

(1) **Definition.** "Complaint" means a formal written allegation of misconduct or mental illness of a person designated as the respondent.

* * *

(7) **Complaint Filed by Certified Grievance Committee.** Six copies of all complaints shall be filed with the Secretary of the Board. Complaints filed by a Certified Grievance Committee shall be filed in the name of the committee as relator. The complaint shall not be accepted for filing unless signed by one or more attorneys admitted to the practice of law in Ohio, who shall be counsel for the relator. The complaint shall be accompanied by a written certification, signed by the president, secretary, or chair of the Certified Grievance Committee, that the counsel are authorized to represent the relator in the action and have accepted the responsibility of prosecuting the complaint to conclusion. The certification shall constitute the authorization of the counsel to represent the relator in the action as fully and completely as if designated and appointed by order of the Supreme Court with all the privileges and immunities of an officer of the Supreme Court. The complaint also may be signed by the grievant.

(8) **Complaint Filed by Disciplinary Counsel.** Six copies of all complaints shall be filed with the Secretary of the Board. Complaints filed by the Disciplinary Counsel shall be filed in the name of the Disciplinary Counsel as relator.

(9) **Service.** Upon the filing of a complaint with the Secretary of the Board, the relator shall forward a copy of the complaint to the Disciplinary Counsel, the Certified Grievance Committee of the Ohio State Bar Association, the local bar association, and any Certified Grievance Committee serving the county or counties in which the respondent resides and maintains an office and for the county from which the complaint arose.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Complaint and Certificate was sent by Certified & Regular U.S. Mail, postage prepaid, the 21 day of May, 2013 to:

ATTORNEY LARRY D. SHENISE
P.O. Box 471
Tallmadge, OH 44278

Thomas P. Kot

THOMAS P. KOT #0000770

Bar Counsel

Akron Bar Association

57 S. Broadway St.

Akron, OH 44308

(330) 253-5007

Fax: (330) 253-2140

tpkot@ncohio.twcbc.com

**BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO**

IN RE:)	CASE NO. 2013 - 037
COMPLAINT AGAINST:)	
)	
LARRY D. SHENISE)	
Registration No. 0068461)	
P.O. Box 471)	
Tallmadge, Ohio 44278)	
)	
RESPONDENT)	ANSWER TO COMPLAINT
)	(Rule V of the Supreme Court Rules for
AKRON BAR ASSOCIATION)	the Government of the Bar of Ohio)
57 South Broadway Street)	
Akron, Ohio 44308)	
)	
REALTOR)	
)	

Respondent, LARRY D. SHENISE, for his response to Realtor's Complaint states as follows:

1. Respondent admits the averments contained in paragraph 1.
2. Respondent admits the averments contained in paragraph 2.
3. Respondent admits the averments contained in paragraph 3.
4. Respondent admits that William Little is a former client of Respondent, but is without knowledge or information sufficient to form a belief as to William Little's status as an original witness as contained in paragraph 4.
5. Respondent admits that Leonard Little is a former client of Respondent, but is without knowledge or information sufficient to form a belief as to Leonard Little's status as an original witness as contained in paragraph 5.
6. Respondent admits the averments contained in paragraph 6.



7. Respondent admits the averments contained in paragraph 7.
8. Respondent admits the averments contained in paragraph 8.
9. Respondent admits in part and denies in part that his professional liability insurance lapsed in March of 2010. as contained in paragraph 9.
10. Respondent admits the allegations contained in paragraph 10.
11. Respondent denies the allegations contained in paragraph 11 and further states Respondent's liability insurance became effective March 15, 2013 to coincide with termination of Respondent's error and omissions insurance policy from his closed title agency.
12. Respondent denies the allegations contained in paragraph 12.
13. Respondent admits the allegations contained in paragraph 13.
14. Respondent admits the allegations contained in paragraph 14.
15. Respondent denies the allegations contained in paragraph 15.
16. Respondent admits the allegations contained in paragraph 16.
17. Respondent admits that a brief was filed in opposition to a motion for summary judgment, but denies other than the value of the judgment, that the judgment was based on the failure to obey the Court's Order to deposit rents as contained in paragraph 17.
18. Respondent admits the allegations contained in paragraph 18.
19. Respondent admits the allegations contained in paragraph 19.
20. Respondent admits the allegations contained in paragraph 20.
21. Respondent admits the allegations contained in paragraph 21.

22. Respondent is without t knowledge or information sufficient to form a belief as to the truth of the averment as contained in paragraph 22.

23. Respondent admits the allegations contained in paragraph 23.

24. Respondent admits the allegations contained in paragraph 24.

25. Respondent admits the allegations contained in paragraph 25.

26. Respondent admits not producing the documents requested in discovery, but denies not advising the Littles of the deposition notices as alleged in paragraph 26.

27. Respondent admits the allegations contained in paragraph 27.

28. Respondent admits the allegations contained in paragraph 28.

29. Respondent admits the allegations contained in paragraph 29.

30. Respondent admits that Ghost Town moved for contempt on February 14, 2011, but Respondent denies that he failed to notify the Little's as alleged in paragraph 30.

31. Respondent admits the allegations contained in paragraph 31.

32. Respondent admits that the Court issued the Order setting hearing as stated on March 17, 2011, but Respondent who was out of state at the time denies ever having received the notice as alleged in paragraph 32.

33. Respondent admits that neither he nor the Littles appeared for hearing on March 30, 2011, but Respondent denies ever having received a call or message from the Court with regards to the hearing as alleged in paragraph 33.

34. Respondent admits the allegations contained in paragraph 34.

35. Respondent is without t knowledge or information sufficient to form a belief as to the truth of the averment as contained in paragraph 35.

36. Respondent admits the allegations contained in paragraph 36.

37. Respondent denies the allegations contained in paragraph 37.

38. Respondent admits the averments contained in paragraph 38 as to the Court record, but further states that he did not represent Leonard Little at the time of filing but did receive notice of the filing from the United States Bankruptcy Court on March 21, 2011 which by law placed an automatic stay on any proceedings.

39. Respondent admits the allegations contained in paragraph 39, but further states notice of the filing of bankruptcy of behalf of William Little was filed on August 11, 2011 in the Akron Municipal Court where action was pending against assets of William Little.

40. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averment as contained in paragraph 40.

41. Respondent denies the allegations as contained in paragraph 41.

42. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averment as contained in paragraph 42.

43. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averment as contained in paragraph 43.

44. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averment as contained in paragraph 44.

45. Respondent admits the averments as contained in paragraph 45.

46. Respondent admits the Akron Beacon Journal ran a story with regards to the arrest as alleged in paragraph 46.

47. Respondent admits stating that he had not received notice of the hearing, but denies having stated that he had not received notice of the warrants as alleged in paragraph 47.

48. Respondent admits the allegations as contained in paragraph 48 to the extent that Respondent stated that he never *intentionally* missed a hearing that he received notice of and further Respondent admits to the general context of the remainder of the statements as contained in paragraph 48.

49. Respondent admits that Judge Gallagher filed a complaint as stated in paragraph 49 of the complaint.

50. Respondent denies the allegations contained in paragraph 50 of the complaint.

FIRST AFFIRMATIVE DEFENSE

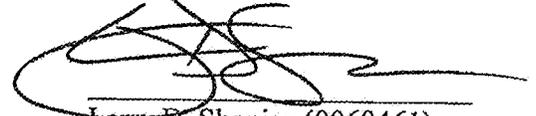
A. To the extent that the complaint fails to particularize the specific conduct and/or the specific date on which each alleged rule violation cited occurred, the claims should be dismissed

B. To the extent that complaint fails to particularize specific factual allegations to support each specific alleged rule violation, such alleged rule violations and claims should be dismissed.

C. To the extent that any of the alleged rule violations or claims involve Leonard Little on or after March 15, 2011, such alleged rule violations and claims should be dismissed as Respondent did not represent Leonard Little who had obtained new counsel as stated in the complaint.

WHEREFORE, having fully answered, Respondent requests that such action be taken in this case as is fair, just and equitable.

Respectfully submitted,



Larry D. Shenise (0068461)

P.O. Box 471

Tallmadge, Ohio 44312

(330) 472-5622

Fax 330-294-0044

ldsheniselaw@gmail.com

Pro Se

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Answer of Respondent to File was served by regular U.S. Mail postage prepaid this 2nd day of July 2013 upon:

Robert M. Gippin, Esq.
Roderick Linton Belfance, LLP
1 Cascade Plaza, 15th Floor
Akron, Ohio 44308

Counsel for Realtor

and

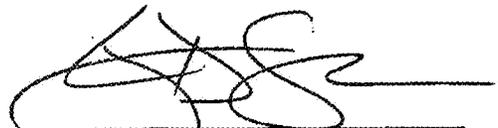
Sharyl W. Ginther, Esq.
Gibson & Lowry, LLC
234 Portage Trail
P.O. Box 535
Cuyahoga falls, Ohio 44222

Counsel for Realtor

and

Thomas P. Kot, Esq.
Akron Bar Association
57 S. Broadway St.
Akron, Ohio 44308

Bar Counsel



Larry D. Shenise

AFFIDAVIT OF PHIL TREXLER

State of Ohio)
)
County of Summit)

Before me, the undersigned authority, on this day personally appeared PHIL TREXLER, who being by me first duly sworn did depose and state as follows:

1. I, Phil Trexler, am over the age of 18 and am competent to make this affidavit. The facts stated herein are within my personal knowledge true and correct.

2. I am currently a reporter for the Akron Beacon Journal, and I have been a reporter for the Beacon Journal since Dec. 8, 1998.

3. On January 31, 2012, I heard a news story on the radio about an elderly man who was jailed for missing a court date. I thought it would make a good story for the Beacon Journal, so I proceeded to gather information and interview sources for the story.

4. I interviewed Leonard Little with his wife, Barbara, and his attorney, Larry Shenise. I also interviewed Bill Holland, a sheriff's spokesman. I attempted to interview Judge Paul Gallagher, but Judge Gallagher declined to comment because it was a pending case. I also attempted to interview Shenise's opposing counsel in the underlying litigation, but that attorney did not return my call.

5. I wrote the story that appeared on Page A1 of the Akron Beacon Journal on February 1, 2012. A true, accurate and complete copy of that story is attached hereto as Exhibit 1.

6. After publication, I did not receive any complaints about that story, or any calls about any inaccuracies in it. There were no requests for corrections or clarifications. No one complained to me or to any editors about the story or its accuracy.

7. Every item in the story that is in quotation marks is a direct quote from the person to whom it is attributed. If something is stated, but not in quotations, it is my paraphrase of the facts.

8. I stand by the accuracy of the entire story, both the specific quotations and the general gist of the paraphrased portions.

9. There are no notes or recordings of any interviews from that story.

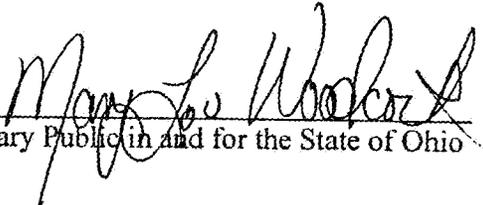
Further Affiant sayeth not.




PHIL TREXLER



Sworn and signed before the undersigned Notary Public on the 5 day of November, 2013.


Notary Public in and for the State of Ohio

871373



MARY LOU WOODCOCK, Notary Public
Residence - Summit County
State Wide Jurisdiction, Ohio
My Commission Expires Sept. 29, 2015

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

Subpoena Duces Tecum

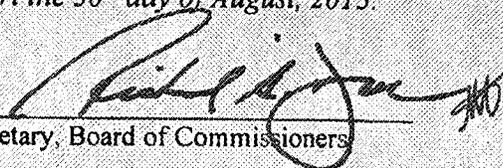
To: Phil Trexler : Akron Bar Association
Akron Bar Association :
44 East Exchange Street : vs.
Akron, OH 44308 :
 : Larry D. Shenise
 :
 : Case No. 2013-037
 :

You are hereby required to be and appear before The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio at Akron Bar Association, 57 S. Broadway St., Akron, OH 44308 on the 5th day of December, 2013, at 10:00 a.m., to testify in a certain matter pending before said Board and also that you bring with you and produce:

THE FOLLOWING DOCUMENTATION IS REQUIRED:

BRING WITH YOU THE FOLLOWING DOCUMENTS, AS THAT TERM IS USED IN OHIO RULE OF CIVIL PROCEDURE 34(A), IN YOUR POSSESSION, CUSTODY OR CONTROL, PERTAINING TO THE STORY ABOUT LEONARD LITTLE APPEARING IN THE AKRON BEACON JOURNAL ON FEBRUARY 1, 2012, INCLUDING BUT NOT LIMITED TO NOTES AND RECORDINGS.

Witness my name and the seal of said Court the 30th day of August, 2013.


Secretary, Board of Commissioners



This Subpoena Duces Tecum is to be served in accord with Rule 45(B) Ohio Rules of Civil Procedure.

Effect of Refusal to Testify. The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be considered a contempt of the Supreme Court and shall be punishable accordingly. See Gov. Bar R. V(11)(C).

Protections and Duties of Persons Subject to Subpoena: See reverse side for Civ. R. 45(C) and (D).

CIVIL RULE 45(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2) (a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing, or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

CIVIL RULE 45(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents or electronically stored information pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) If a request does not specify the form or forms for producing electronically stored information, a person responding to a subpoena may produce the information in a form or forms in which the information is ordinarily maintained if that form is reasonably useable, or in any form that is reasonably useable. Unless ordered by the court or agreed to by the person subpoenaed, a person responding to a subpoena need not produce the same electronically stored information in more than one form.

(3) A person need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the person from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the factors in Civ. R. 26(B)(4) when determining if good cause exists. In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(4) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(5) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial-preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

* * * * *

RETURN OF SERVICE

I received this subpoena on _____, 2013, and served the person named by _____ personal service, _____ leaving a copy at their usual place of residence, or (other) _____, on the _____ day of _____, 2013.

I was unable to complete service for the following reason: _____

Fees
Service _____
Mileage _____
Copy _____
Total _____

(Signature of Serving Party)

Circle One: Deputy Sheriff Attorney
 Process Server Deputy Clerk
 Other _____

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November 8, 2013

Via Electronic (bocfilings@sc.ohio.gov)
and Regular U.S. Mail

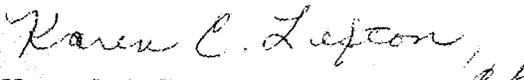
Board of Commissioners on Grievances and Discipline
Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431

Re: Case No. 2013-037
Grievance of Larry D. Shenise

Dear Sir/Madam:

Enclosed please find an original and five (5) copies of a *Motion to Quash Subpoena to Phil Trexler*, and a *Memorandum in Support* with regard to the above-referenced matter. Please file the original and return a time-stamped copy to my attention in the self-addressed stamped envelope provided.

Very truly yours,


Karen C. Lefton

KCL/cag

Enclosures

cc: Robert M. Gippin, Esq. (all w/enclosure)
Sharyl W. Ginther, Esq.
Larry D. Shenise, Esq.
Thomas P. Kot, Esq.

871948.1



330-535-5711 – phone

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Attorney for The Beacon Journal Publishing Co.,
Inc. and Phil Trexler

869918

MEMORANDUM IN SUPPORT

STATEMENT OF FACTS

A. The News Story:

On February 1, 2012, the Beacon Journal published a news story headlined “Senior gets surprise: jail / Massillon man, 80, ends up in Summit County lockup after police find he was wanted for missing civil hearing he says he did not know was ordered.”¹ The story reported on the travails of Leonard Little, an 80-year-old who discovered he had been a wanted man for about nine months due to his failure to appear in Summit County Common Pleas Court for a hearing in a civil lawsuit. Mr. Little was involved in a fender bender on January 30², which led police to do a routine check, which led them to discover that a warrant, signed by Judge Paul Gallagher, had been issued on April 13, 2011, for Mr. Little’s arrest. They booked Mr. Little into the Summit County Jail, where he cooled his heels for about six hours before being released.

Phil Trexler, a reporter for the Beacon Journal heard about it and wrote the story, which was published on page A1 on February 1, 2012. Mr. Trexler interviewed Mr. Little as well as his attorney, Larry Shenise. He tried to interview Judge Gallagher, who declined to comment. The Court’s public docket shows a number of communications regarding the warrant for Mr. Little’s arrest and indicates that they were sent to Attorney Shenise, among others. Still, both Mr. Little and Attorney Shenise denied being aware of the missed hearing until Mr. Little was arrested. Specifically, in pertinent part, Attorney Shenise was quoted in Trexler’s article as saying:

“I don’t miss hearings if I get notice. If we would have known, we would have been there. But they never bothered to call to say, ‘Hey, you’re supposed to be here for a hearing. We’re going to issue warrants for your clients if you don’t appear.’”

¹ February 1, 2012, news story, attached as Exhibit A.

² All dates 2012 unless specified otherwise.

“They didn’t do anything. I would have thought the court would have the courtesy to say, ‘Hey, you’re supposed to be here.’ ”

No one ever called Mr. Trexler or any other journalist at the Beacon Journal to complain about the accuracy of the story or to request a correction.³ In fact, he heard nothing more about it until a year and a half after publication, when the Bar Association subpoenaed him to testify at a Board of Commissioners on Grievances and Discipline hearing on December 5, 2013.

B. The Complaint:

The Bar Association had filed a Complaint against Attorney Shenise⁴, Count III of which alleges a violation of the Ohio Rules of Professional Conduct for his quotations in the newspaper story. Judge Gallagher filed a grievance based on the story, alleging that Attorney Shenise “lied and impugned the Judge’s reputation in his statements to the Akron Beacon Journal that he has not been notified by the Court of the hearing and the issuance of the *capias*.”⁵

Due to the quotation mentioned above,⁶ Attorney Shenise is charged with violating Ohio Rules of Professional Conduct:

- 3.5(a)(6) Conduct degrading to a tribunal;
- 4.1(a) False statement to a third person;
- 8.2(a) False statement concerning integrity of judicial officer;
- 8.4(c) Dishonesty, deceit or misrepresentation;
- 8.4(d) Conduct prejudicial to administration of justice;
- 8.4(h) Conduct reflecting adversely on fitness to practice.⁷

³ Affidavit of Phil Trexler attached as Exhibit B.

⁴ Complaint attached as Exhibit C.

⁵ Complaint at paragraph 49.

⁶ Also found in **boldfaced** type on page 3 of Exhibit A.

⁷ Complaint at paragraph 50.

The Beacon Journal, as the community's newspaper, takes great pains to maintain independence, neutrality and objectivity in its news pages.⁸ It strives to record the important workings of government and the courts, and to relay that information to its readers. As such, it does not embroil itself in others' dust-ups, which would diminish its role in the community and its effectiveness as a news organ and as an independent observer.

However, in keeping with its obligation to attempt to resolve discovery disputes, the Beacon Journal tried to compromise by offering an Affidavit from Mr. Trexler, which states, in part:

1. The Akron Beacon Journal and Phil Trexler stand by the accuracy of their story about Leonard Little that was published on page A1 of the newspaper on February 1, 2012.
2. After publication, neither Attorney Shenise nor anyone else contacted Mr. Trexler nor anyone else at the Beacon Journal to complain about any inaccuracy or any misquotes. There were no complaints about that news story, period.
3. No notes or recordings pertaining to that news story, or of any interviews used in that story, exist.⁹

The compromise was rejected, with Bar Association Attorney Robert M. Gippin writing: "What he (Shenise) said is a central issue in the grievance proceedings. Indeed, what Shenise said to Phil *is* the violation of the Rules."¹⁰ (Emphasis included.)

Respectfully, such a violation – if it is one – may not be proven by trampling the constitutional protections afforded to the press. In reporting and publishing this story, the Beacon

⁸ Not to be confused with its editorial or opinion pages.

⁹ Exhibit B, Trexler Affidavit.

¹⁰ Gippin e-mail attached as Exhibit D.

Journal did a public service for the community. This public service can be done only by a Newspaper that is free to gather and report the news without fear of being dragged into the middle of attorney disciplinary proceedings, as the Bar Association seeks to do here. But for the constitutional protections afforded the free press, journalists would find themselves spending more time on the witness stand than on their beats.

C. The Rule:

Civ. R. 45(C)(3) states that “[o]n timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following: . . . (b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; . . . (d) Subjects a person to undue burden.”

The well-established qualified privilege against compelling journalists to testify in cases like this requires the quashing of the Trexler subpoena, as requiring Mr. Trexler to testify and to provide all notes and recordings regarding his story violates both the United States and Ohio Constitutions, as will be discussed more fully below. The subpoena is vague, all-encompassing, overly broad and designed merely to harass. Neither the United States nor Ohio Constitutions nor applicable rules of civil procedure permit such an intrusion upon the fundamental newsgathering rights of the press. For the reasons set out below, the subpoena must be quashed.

Further, pursuant to Evid. R. 902(6), printed material purporting to be a newspaper or periodical is self-authenticating and requires no extrinsic evidence of authenticity in order to be admitted.¹¹

¹¹ A true, accurate and complete copy of the February 1, 2012, news story is attached hereto as Exhibit A and to Phil Trexler’s Affidavit, Exhibit B, at Appendix 1.

LAW AND ARGUMENT

I. Journalists have a Constitutional Qualified Privilege against compelled testimony in cases like this.

The First Amendment of the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” The Ohio Constitution, in Section 11 of Article I, goes even further, stating that “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. . . .” The concept of freedom of the press includes virtually all activities necessary for the press to perform its duties and fulfill its function, including newsgathering activities. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Branzburg v. Hayes*, 408 U.S. 665 (1972). A free and independent press occupies a preferred position in our judicial system, and any attempted infringement thereof is subject to close scrutiny. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971). There is no doubt that compulsory process has a chilling effect on the exercise of First Amendment freedoms. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

The United States Supreme Court addressed the limited question of whether the compelled appearance and testimony of a reporter before a federal or state grand jury violates the First Amendment’s guarantee of freedom of speech and of the press in *Branzburg, supra*. The Court specifically held that there is no privilege to refuse to appear before a grand jury until the government demonstrates a compelling need for the testimony. However, in light of the restrictive language of the majority opinion, most federal circuit courts considering the First Amendment reporter’s privilege have concluded that *Branzburg* does not preclude recognition of a privilege where the need for the information is less compelling, and many courts have

extrapolated *Branzburg* to recognize a qualified privilege in civil proceedings. Just this summer, the Fourth Circuit Court of Appeals expounded on the difference in *U.S. v. Sterling*, 2013 U.S. App. LEXIS 14646, 2013 WL 3770692 (4th Cir., July 19, 2013). The Court took great pains – as many other circuits have done in the wake of *Branzburg* – to distinguish between reporters who “were subpoenaed to testify regarding their personal knowledge of criminal activity” and those who were merely fulfilling their work obligations as members of the press protected by the First Amendment.

[N]ews gathering is not without its First Amendment protections. . . . Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification. *Sterling* at 21, citing *Branzburg* at 707-708.

The Fourth Circuit’s recent decision explicitly distinguished between required testimony in civil and criminal contexts, faulting the District Court for relying on *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir., 1986) – a civil case, rather than *Branzburg* – a criminal case with a virtually identical fact pattern.¹² Justice Powell, who filed a concurring opinion in *Branzburg*, was the fifth vote for the majority. *Branzburg* effectively established a three-part balancing test that recognizes a reporter’s qualified privilege where the party seeking to compel testimony or records from a member of the press is first required to demonstrate: (1) That the information sought is *relevant*; (2) That *all alternative sources* for the information have been *exhausted* and that the information *cannot be obtained by any alternative means*; and (3)

¹² See also *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *Gonzales v. National Broad. Co., Inc.*, 194 F.3d 29 (2nd Cir. 1999); *Riley v. Chester*, 612 F.2d 708 (3rd Cir. 1979); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *Zirelli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

That the information is *essential* to the administration of justice. (Emphasis added.) *Ashcraft*, 218 F.3d at 287; *Miller*, 621 F. 2d at 726.

The Sixth Circuit – the only one not to expressly adopt the *Branzburg* standard – articulated its own balancing test in *In re Grand Jury Proceedings*, 810 F2d. 580, 586 (6th Cir. 1987). The considerations for compelling testimony or documents from a news reporter are: (1) Whether the news reporter is merely being harassed in order to disrupt his relationship with confidential sources; (2) Whether the request is made in good faith; (3) Whether the information sought bears more than a remote and tenuous relationship to the litigation; and (4) Whether there is a legitimate need for disclosure. [See also *Hade v. City of Fremont*, 233 F. Supp. 2d. 884, 889 (2002). In order to compel a non-party Newspaper to disclose this information, the requesting party must demonstrate that the information is relevant to a significant issue in the litigation, the information is not available from anyone or anywhere else, and all other avenues have been exhausted.]

With all due respect to the Bar Association and to the Judge, the suggestion that Attorney Shenise’s communication with the newspaper reporter *is* the violation confirms that the subpoena is over reaching and harassing. It fails on the second prong of the *In re Grand Jury Proceedings, supra*, test by its vague and burdensome request that Trexler:

“Bring with you and produce: **THE FOLLOWING DOCUMENTATION IS REQUIRED:** BRING WITH YOU THE FOLLOWING DOCUMENTS, AS THAT TERM IS USED IN OHIO RULES OF CIVIL PROCEDURE 34(A), IN YOUR POSSESSION, CUSTODY OR CONTROL, PERTAINING TO THE STORY ABOUT LEONARD LITTLE APPEARING IN THE AKRON BEACON JOURNAL ON FEBRUARY 1, 2012, INCLUDING BUT NOT LIMITED TO NOTES AND RECORDINGS.”¹³

¹³ Subpoena of Phil Trexler, attached as Exhibit E.

The Bar Association fails to meet the requirements of the third prong of the test set out by the Sixth Circuit in *In Re Grand Jury Proceedings, supra*, as well, in that it is unable to demonstrate that Trexler's testimony bears more than a remote and tenuous relationship to any litigation. It can demonstrate no overwhelming or compelling societal interest that would help it overcome the presumption favoring First Amendment protections for the Newspaper. A judge's assertion that a lawyer "lied" and "impugned the judge's reputation" when the lawyer claimed that the judge's office "never bothered to call" to tell him about a hearing or the *capias*, fails to meet the standard. Respectfully, while we realize that impugning a judge is a violation of the Ohio Rules of Professional Conduct, the rules should be subsumed by the constitution – in particular, in this case, the constitutional protections afforded journalists who report on a story of immense public interest even though it may also be personally hurtful to the bench.

Mr. Trexler's role was solely to gather and report the news. He should be allowed to do so without being dragged into the middle of attorney disciplinary proceedings, especially where the statements published seem to be such an insignificant part of the overall complaint.

II. The Ohio Constitution provides a journalist's privilege against compelled testimony.

The Ohio Supreme Court has been willing to extend state constitutional protections to the media greater than those recognized under the federal constitution, though it has not addressed the existence of a qualified reporter's privilege head-on except to suggest that overbroad subpoenas or those issued to harass rather than for a legitimate purpose should be quashed. *State ex rel. National Broadcasting Co. v. Court of Common Pleas*, 52 Ohio St. 3d 104, 111 (1990). The Ninth District Court of Appeals did recognize a reporter's privilege in *Fawley v. Quirk*

(Summit App. 1985) unreported 85- LW -3678 (9th).¹⁴ In *Fawley*, the Court “approved the extension of a qualified First Amendment privilege to non-confidential sources and materials.” Such a qualified privilege balances the interests of the media, the state and the criminal defendant. The Court reiterated the three-prong test that considered the *relevancy* of the information, whether the information could be obtained by *alternative means* less invasive of the Constitutional protections, and whether there is a *compelling interest* in the information. Once the qualified privilege is raised, the party seeking the information must overcome the privilege by meeting the three-prong test.

In *Fawley*, Judge George’s concurring opinion stated:

The First Amendment to the Constitution guarantees a free press and the process of newsgathering is an essential part of that free press. The public has a strong interest in the maintenance of a vigorous, aggressive and independent press capable of participating in unfettered debate over controversial matters. (Citation omitted.) Public policy favors the free flow of information and the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

See also *County of Summit v. Keith Heating and Cooling, Inc.*, Summit County Case No. CV 2012 10 5959, Order Granting Motion to Quash subpoena dated September 11, 2013, (“Upon due consideration, the Court agrees with the Beacon Journal and finds that (reporter’s) journalistic work is protected from compelled disclosure by the First Amendment of the U.S. Constitution.”)

¹⁴ *Fawley v. Quirk*, (Summit App. 1985) unreported 85- LW - 3678 (9th), copy attached as Exhibit F. *Fawley* is treated cautiously in *State ex rel. National Broadcasting Co. v. Court of Common Pleas*, 52 Ohio St. 3d 104, 111 (1990); however, it is important to note that *NBC* deals with a criminal proceeding and *Fawley* a civil proceeding. The undersigned was unable to find any cases addressing the issue of a qualified privilege for journalists in bar disciplinary proceedings or other quasi-judicial proceedings.

There is a dearth of case law in Ohio on subpoenas to reporters in routine civil cases where one party is attempting to use the reporter's investigatory work product instead of conducting a *bona fide* investigation itself. Indeed, the undersigned was able to find no cases where news reporters were compelled to testify in bar disciplinary hearings.

III. Standard for subpoenaing a journalist to testify in a disciplinary hearing.

The historical standard to determine whether a journalist may be compelled to testify before the Board of Commissioners on Grievances is unclear because such motions are not publicly accessible in matters before the Board, as they are in litigation. A review of the cases in Disciplinary Handbook Volume IV (Cases 2003-2007) and Disciplinary Handbook Volume V (Cases 2008 -2010)¹⁵, in which the Respondent was accused of violating the rules at issue here,¹⁶ failed to disclose a single case in which the sole factor being charged revolved around the accused's quotation in a newspaper. The overwhelming theme of all the cases before the Board in the last decade involved complaints from clients regarding statements made (or not made) to the client, misappropriation of clients' funds, misrepresentation of work done or status of the case. The undersigned found no case in which a single quotation in a newspaper rose to the level of a disciplinary complaint and no cases where it appeared that a journalist was compelled to testify over his assertion of a qualified privilege.

¹⁵ Prepared by the staff of the Board of Commissioners on Grievances and Discipline.

¹⁶ 3.5(a)(6) Conduct degrading to a tribunal; 4.1(a) False statement to a third person; 8.2(a) False statement concerning the integrity of a judicial officer; 8.4(c) Dishonesty, deceit or misrepresentation; 8.4(d) Conduct prejudicial to the administration of justice; 8.4(h) Conduct reflecting adversely on fitness to practice.

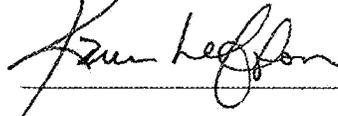
Conclusion:

Mr. Trexler merely did what he does every day: Interviewed sources and wrote a news story. That is the nature of his job. To compel his testimony at a disciplinary hearing would chill the press and propel the news media down the slippery slope of advocacy rather than neutrality. The qualified privilege against compelled testimony manifests itself as a sliding scale of protections, with the protections being practically absolute in civil cases where the testimony is not essential to the administration of justice or where it is available through other sources, and non-existent where the news reporter is an eyewitness to a crime.

In this quasi-judicial setting, where the Bar Association is pursuing disciplinary charges against an attorney, the standard to infringe upon a news reporter's qualified privilege against compelled testimony should be even greater. Respectfully, the Bar Association cannot demonstrate that the facts of this case overcome the clear preference for First Amendment protections.

For all the above-stated reasons, the public interest is best served by ensuring that the community continues to be well-informed by protecting the journalist from this overly burdensome and harassing subpoena. While the Beacon Journal recognizes that there are times where it is appropriate and necessary to compel the testimony of a news reporter, this is not that time. The Beacon Journal respectfully requests that this Board find that the subpoena issued to the Beacon Journal's reporter infringes upon the newspaper's U.S. and Ohio Constitutional rights to gather and report the news. The Beacon Journal prays for an Order quashing the subpoena or other relief as deemed appropriate by this Court, and for reasonable attorneys' fees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karen Lefton", written over a horizontal dotted line.

Karen C. Lefton (0024522)

BROUSE McDOWELL

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Akron, OH 44311-4407

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Attorney for The Beacon Journal Publishing
Co., Inc. and Phil Trexler

CERTIFICATE OF SERVICE

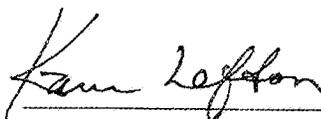
A copy of the foregoing Motion to Quash Subpoena and Memorandum in Support was sent via regular mail on this 8th day of November, 2013, to:

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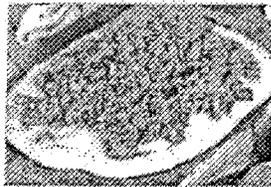


Karen C. Lefton (0024522)
Attorney for The Beacon Journal Publishing
Company, Inc. and Phil Trexler

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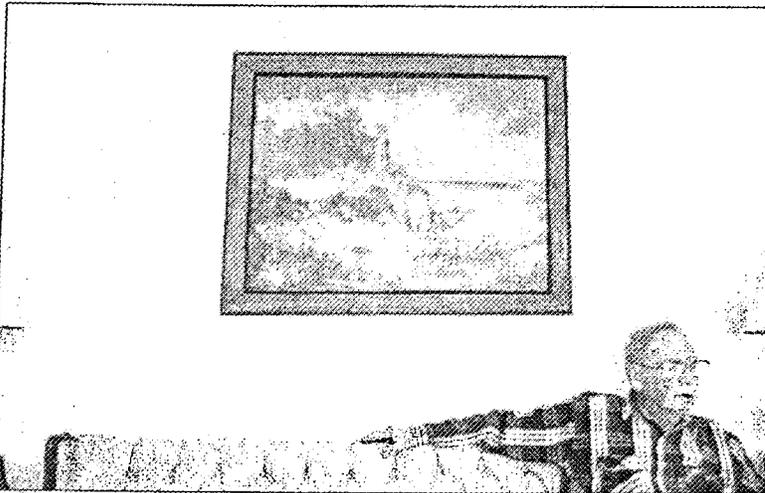
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Massillon man, 80, ends up in Summit County lockup after police find he was wanted for missing civil hearing he says he did not know was ordered



Leonard Little of Massillon talks about his arrest for failure to appear in Summit County court for a civil hearing he said he didn't know was ordered.

Senior gets surprise: jail

By Phil Traxler
Beacon Journal staff writer

A trip to the store for a bottle of glue turned into 80-year-old Leonard Little's first time in jail.

The Massillon retiree committed no crime to earn the time. But he was a wanted man for about nine months for his failure to appear in Summit County Common Pleas Court for a hearing in a civil lawsuit.

It was a hearing Judge Paul Gallagher ordered that center Little nor his attorney say they know about.

This breakdown in communication prompted the judge last spring to issue an arrest warrant for contempt of court. Once again, according to Little and his attorney, no one told them of the judge's order.

They only learned of its existence Monday, they said, when the grandfather was booked into the county jail.

"I was humiliated beyond belief," Little said Tuesday. "I have always tried to do the right thing, and then to wind up in jail. Murderers and rapists got treatment as good or better than I did."

Gallagher, who signed the arrest warrant April 13, said he cannot discuss the pending case. Nonetheless, on Monday he ordered Little released from the Summit County jail, about six hours after his booking.

When Little left the jail, he said he didn't sign his \$50,000 signature bond nor did he receive a new court date.

Attorney Larry Shenise, who handled the civil lawsuit for Little and his son, William, said no one from Gallagher's court notified him by mail or a phone call of the March hearing the Little missed.

No notice, he said, was sent by the court on the subsequent arrest warrants.

"I don't miss hearings if I get notice," Shenise said. "If we would have known, we would have been there. But they never bothered to call to say, 'Hey, you're supposed to be here for a hearing. We're going to issue warrants for your clients if you don't appear.'"

"They didn't do anything," he said. "I would have thought the court would have the courtesy to

Please see Jailed, A4

ELECTION 2012



FORMER MASSACHUSETTS GOV. MITT ROMNEY GREETED SUPPORTERS TUESDAY AT HIS FLORIDA PRIMARY NIGHT RALLY IN TAMPA, Fla.

Romney trounces Gingrich in Florida

Ex-Massachusetts governor beats former House speaker by double digits in primary

By David Ezzo and Steve Peoples
Associated Press

TAMPA, Fla. — Mitt Romney routed Newt Gingrich in the Florida primary Tuesday night, rebounding smartly from an earlier defeat and taking a major step toward the Republican presidential nomination. Despite the one-sided setback, the former House speaker vowed to press on.

Romney, talking unity like a nominee, said he was ready "to lead this party and our nation." In remarks to cheering supporters, the former Massachusetts governor unleashed a strong attack on President Barack Obama and said the conservative Tuesday night primary "does not divide us, it prepares us" for the fall.

"Mr. President, you were elected to lead, you chose to follow, and now it's time to get out of the way," he said.

Returns from 98 percent of Florida precincts showed Romney with 46 percent of the vote to 32 percent for Gingrich, the former House speaker.

Former Pennsylvania Sen. Rick Santorum had 13 percent and Texas Rep. Ron Paul 7 percent. Neither mounted a substantial effort in the state.

For the first time in the campaign, exit polls showed a gender gap, and it worked in Romney's advantage.

He was leading Gingrich 51-29 among women voters, and was winning men by a smaller margin of 41-36.

Please see Romney, A4

LEBRON

LeBron moves camp from Akron to Vegas

LeBron James is moving his Nike basketball camp from the University of Akron to Las Vegas this summer so he can participate at the camp while training for the Olympic basketball team.

Nike announced the camp's move Tuesday as part of its monochromatic basketball events scheduled for this year.

The LeBron James Skills Academy, which annually features some of the nation's top high school talent, will run July 6-9. Past participants include John Wall, Anthony Davis and Cavs rookie Tristan Thompson.

The U.S. Olympic basketball team will hold a week-long training camp beginning July 1 in Las Vegas in preparation for the 2012 London Games.

Summer camps info

On Feb. 26, the Beacon Journal will publish its annual guide to summer camps in Summit, Stark, Medina, Wayne and Portage counties. If you run a summer camp and would like to be included in the section, fax information to Camp Guide at 330-296-3033 or email it to camp@beaconjournal.com by Feb. 15. Advertisers may call 330-296-3410.

Art colors kids' world a bit brighter

Children's displays work of young patients at show

By Cheryl Powell
Beacon Journal medical writer

The courageous lion has nothing on Ethan Puhalsky.

The 7-year-old from Norron heavily endures countless tests, treatments and lengthy hospital stays as he battles leukemia.

So when he had the chance to work with an artist during one of his many stays at Akron Children's Hospital, it's only fitting that he decided to paint a portrait of his favorite stuffed lion.

Ethan's piece is one of 34 works of art on display from 4 to 7 p.m. today in the Gallery of Strength art show at Akron Children's Hospital's Emily Cooper Welby Expressive Therapy Center.

Each painting, drawing and digital artwork in the one-day art show was made by a patient at Children's.

For Ethan, painting allows him to be a normal kid, not a cancer patient who's often trapped in a hospital room.



Emily Daniels, artist-in-residence at Akron Children's Hospital, chats with patient/artist Ethan Puhalsky, 7, of Norron, about the portrait of his favorite stuffed lion he created for the hospital's show, Gallery of Strength.

"Maybe next time I'm in the hospital we can do a puppy or panda," Ethan said enthusiastically. "Maybe I might bring both of them when I come into the hospital."

"He has no problems coming to the hospital because of things like this," added his father, Brian Puhalsky. "It's really a great program for them, just to break the days up."

The Gallery of Strength is the culmination of a year-long, \$16,000 grant from the Livingston Foun-

Please see Art, A4

Bill would restrict use of left lane

Drivers would have to keep right unless passing or exiting

Associated Press

COLUMBUS: Ohio would make it illegal to stay in a highway's left lane if not passing or exiting under a bill that previously drew criticism for another provision that would raise the speed limit on the state's interstates.

Left-lane restrictions could make Ohio roads safer, this bill's sponsor said.

"If someone's in the left-hand lane and someone's trying to pass them on the right, that's dangerous," State Rep. Ron Mass, R-Lebanon, said.

His measure would bar drivers from traveling in the left lane of a highway except when getting by a slower vehicle, using an exit on the left, allow other motorists to enter the right or when more or other road conditions would make it unsafe to use the lane.

Ohio troopers questioned how proposed left-lane limitations would work and would be enforced.

"We believe both lanes are needed to maintain the traffic flow well."

Please see L

BeaconFirst

Stories labeled "Beacon First" are published in the newspaper before appearing online. Breaking news still appears first on Ohio.com.

Today's weather

53° High 33° Low
Forecast, Page B10

Dear Abby B6
Katie Couric B6
Classified C4
Comics B2,9
Community B1
Deaths B3-5

Editorial A6
Lentary B2
Movies C2
Sports C1
Sudoku B8
TV Listings B10



Ohio.com

Exhibit
A

Pilot does not have authority to go solo

N.H. man also is not allowed to fly at night

CONCORD, N.H. — Transcendental records show the flight instructor for a New Hampshire pilot charged with killing his daughter in a Massachusetts plane crash repeatedly denied his requests to fly solo.

Instructor Michael Freeman told federal investigators 57-year-old Steven Fay of Hillsborough should not have been flying his twin-engine Cessna without an instructor on board and that he was "risky" to be flying the plane at night.

Massachusetts prosecutors are charging Fay with involuntary manslaughter in the crash at Orange Municipal Airport that killed 13-year-old Jessica Fay on New Year's Day 2011. The crash occurred 90 minutes after sunset, after the plane clipped trees on descent.

Fay told the Associated Press he loved his daughter and has been grief-stricken since her death.

He is scheduled to be arraigned today in Greenfield, Mass. Involuntary manslaughter is a felony punishable by up to 20 years in prison.

Fay did have a license to pilot single-engine planes, but the Federal Aviation Administration issued a cease-and-desist order revoking that license two months after the crash. He had obtained the license in 1989.

That emergency order, dated March 22, states that Fay lacked the "care, judgment, responsibility and compliant attitude" required of a licensed pilot.

The order notes that Fay was not authorized to fly solo, carry passengers and was not current on flying at night. It notes his last night flight was 1000.



Emily Dennis has spent a year helping young patients at Akron Children's Hospital such as Ethan Puhalsky, 7, of Norton express themselves by drawing, painting and creating artwork on iPads.

Art

Continued from Page A1

drawing, painting and creating artwork on iPads.

The goal was to bring the art to health care and introduce the art," she said.

Dennis became interested in art therapy nine years ago when her father was battling cancer.

"I was coping with that by drawing," she said. "There's how I expressed myself. It was an outlet for me. It was taking all that anxiety and putting it into a visual form and getting it out of my head."

Her personal experience encouraged her to earn a master's degree in art therapy. She's

now pursuing a doctoral degree in counseling.

Although the goal of the yearlong art program at Children's wasn't necessarily therapeutic, "it's hard to deny there's therapy going on," she said.

At first classes, for instance, the whimsical creatures with hooded eyes in one of the paintings displayed in the Gallery of Strength appear lighthearted and fun.

But for the artist who created the piece, Dennis said, the colorful beast represents personal creative nervous, frightening medical procedures.

"These were her monsters and these were when she was dealing with," Dennis said. "The artwork was her way of externalizing those internal fears."

As Dennis' year at the hospital comes to an end, she wanted to share the young artists' creations by organizing a show.

"I was overwhelmed by the talent and creativity of the kids here and wanted to celebrate them," she said.

The show has received support from the Stranghan Family Foundation and Pat Carter's Craft Creators, which provided frames.

The Livermore Foundation has requested several pieces from the Gallery of Strength to display at the nonprofit's headquarters in Austin, Texas, Dennis said. The rest of the framed pieces will be returned to the young artists or their families.

The show can be reached at 330-888-9822 or www.stranghanfamilyfoundation.com.

Romney

Continued from Page A1

Continuity for the three-married Gingrich, only about half of women voters said they had a favorable view of him as a person, compared to about eight in 10 for Romney.

As in Iowa, New Hampshire and South Carolina, about half of Florida primary voters said the most important factor for them was backing a candidate who could defeat Obama in November, according to exit poll results conducted for the Associated Press and the television networks.

Most strikingly, in a state with an unemployment rate hovering around 10 percent, about two-thirds of voters said the economy was their top issue. More than eight in 10 said they were falling behind or just keeping up. And half said that issue foreclosures have been a major problem in their communities.

The winner-take-all primary was worth 30 Republican National Convention delegates, by far the most of any primary state so far. That gave Romney a total of 87, to 26 for Gingrich, 14 for Santorum and four for Paul, with 144 required to clinch the nomination.

Womontism grows
But the bigger prize was precious political momentum in the race to pick an opponent for Obama in a nation struggling to recover from the deepest recession in decades.

That belonged to Romney when he captured the New Hampshire primary three weeks ago, then swung stunningly to Gingrich when he countered with a South Carolina upset 11 days later.

Now it was back with the former Massachusetts governor, after a 10-day comeback marked by a change in more aggressive tactics, coupled with an efficient use of an overwhelming financial advantage to batter Gingrich in television commercials.

Gingrich brushed aside any talk of quitting the race. "We are going to continue everywhere," he said, standing in front of a sign that read "46 states to go."

It is now clear that this will be a two-person race between the conservative leader, Newt Gingrich, and the Massachusetts moderate, he said.

The race now turns to Ne-

vada, where Romney won the state's caucuses four years ago and is favored to repeat his triumph this Saturday. Caucuses in Colorado, Minnesota and Maine follow, with primaries in Wisconsin on Feb. 2 and in Michigan and Arizona at the end of the month.

Gingrich, from neighboring Georgia, swept into Florida from South Carolina, only to run headlong into a different Romney from the one he had left in his wake in South Carolina.

Romney shed his reluctance to attack Gingrich, unleashing a hard-hitting ad on television, sharpening his performance in two debates and employing surrogates to Gingrich's campaign stops, all in hopes of unseating him.

Advertising blitz

Restore our Future, an outside group supporting Romney, accounts for about 60 percent of the ad war, and the candidate and the major PAC combined outspent Gingrich and Winning The Future, the organization backing him, by about \$1.5 million to \$1.3 million, an advantage of nearly 1-1.

Gingrich responded by attacking Romney as a man incapable of calling the weak and vowed to remain in the race until the Republican National Convention next summer.

It was the endorsement of campaign dropout Herman Cain and increasingly sought the support of evangelicals and its party advocates, a former House speaker railing as the re-establishment instrument of the party he once helped lead.

Boomeraged by harsh TV ads, some Floridians said they were on the fence about the two candidates.

"The dirty cut really turned me off on Mitt Romney," said Dorothy Anderson of Pinellas Park, adding she was voting for Gingrich. "In fact if he gets the nomination, I probably won't vote for him."

At the same polling place, Romney supporter Dennis Dempsey expressed similar feelings, but about Gingrich. "The only thing Newt Gingrich has to offer is a big mouth," he said.

Voters frequently say they are offended or appalled by negative ads. But polls show consistently that the commercials are able to sway the opinions of large numbers of voters, and they are a staple of nearly all campaigns.

Left

Continued from Page A1

amount of traffic on a four-lane, divided interstate," said Lt. Anne Haldeman, a spokeswoman for the State Highway Patrol.

The patrol wondered how troopers would be able to catch up, for example, someone enjoying life in the fast lane was trying to get ahead of another vehicle or simply taking advantage of unoccupied pavement.

"I don't know of any law that is easy to enforce," Mag responded. "There are laws against bank robbing, and people still rob banks."

The law in effect in Ohio requires drivers to use the right or center lanes, but there are a number of exceptions.

A stricter left-lane law could be beneficial if motorists were educated about why it's important to keep slower drivers from clogging the left sides of highways and backing up traffic, said John Bowman, a spokesman for the National

Motorists Association. "Other cars have to slow down suddenly or speed up suddenly or make sudden changes back and forth. You're introducing uncertainty and unpredictability into traffic flow," said Bowman, whose group was formed in 1982 to fight back when the national speed limit was lowered to 55 mph.

Mag's measure also would raise the speed limit on Ohio's interstate highways from 65 mph to 70 mph to be consistent with the speed limit on Ohio Turnpike and in neighboring states.

Jailed

Continued from Page A1

say, "Hey, you're supposed to be here."

Stedje said it wasn't until Tuesday that Gallagher set a new hearing date of Feb. 6.

The missed March hearing date with the arrest warrants are listed on the court's Internet docket. But because the suit was put on hold with the filing of Little's bankruptcy in May, Stedje said he had no need to view the case file.

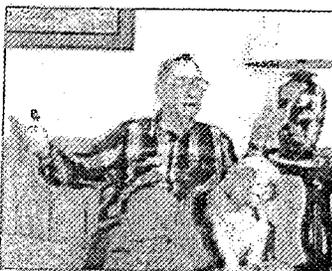
The lawsuit stems from a family business deal that went awry. The attorney opposing Little in the lawsuit did not return a call Tuesday.

Warrant issued
Warrant generally are sent to the sheriff to be served into the law enforcement computer. Those wanted on warrants are not notified.

That apparently was the case with Little. He said he had no idea he was a wanted man for nearly a year. Little and his wife of 40 years, Barbara, on Tuesday recounted the events that led to his jail stint.

Little said he went out early Monday morning to buy glue for a woodworking project. He stopped at a gas station, where he had a collision with another car.

A Massillon officer arrived and checked Little's driving record. The warrant was



Leonard Little of Massillon sits with his attorney, David C. C. and discusses his arrest and day's stay in Summit County Jail. A new hearing in the civil case that landed him in jail has been set for Feb. 6.

found and Little was taken by the officer into Summit County, where deputies met them in Green. Deputies handcuffed Little and took him to jail about 10 a.m.

Little said that during his stay, jailers never gave him his medication for high blood pressure and diabetes. He was photographed and placed in a cell.

"They booked me like a common criminal," Little said. Sheriff's spokesman Bill Rofstad said inmates on medication must have their prescriptions and dosage verified.

Once that occurs, the jail's 600-plus inmates are given their meds at the same time two to three times a day. In Little's case, he came after the first medication distribution and was released before the next round, Rofstad said.

Little, who has no criminal record, remains baffled as to how he wound up jailed for a day.

"If I knew I was supposed to have appeared in court, I would have been there," he said. "I always take my civic duties seriously."

PHOTO COURTESY OF SUMMIT COUNTY SHERIFF'S OFFICE

65% of homes are at risk; Don't let your home become one of them



Don't depend on ordinary insulation to give you the protection you need.

The experts say that if your home was built before 1985 you may find that it has very little or no insulation at all. Recent studies from the Harvard University School of Public Health estimated that 65% of American homes are under insulated. With USA Insulation homeowners are realizing up to 20% savings off their heating and cooling bills. "Insulation is an extremely wise investment as it will pay for itself in the matter of a few years," says Mike Carey of USA Insulation. Proper insulation is important to ensure that your house remains warm during the winters and cool during the summers. This temperature stability will maximize your use of heating and cooling equipment, thereby saving on your energy bills. Call 330-923-5388 today to schedule your free in-home energy evaluation.

"Our patented USA Premium Foam insulation protects homes in ways ordinary insulation can't!"
-Mike Carey of USA Insulation.

mentally friendly." Saunders was impressed with the installation as well as the installers. "They were straightforward and honest," she explained. "They drilled holes through the ceiling, but you can't see where the holes were when they were finished!" Saunders has noticed some distinct improvements in her indoor environment. "Before my house was insulated my furnace would work constantly to keep my house warm. Now my furnace runs less often and I've seen a dramatic difference in my heating bills. There is an openness of temperature throughout the house, which is very pleasant," she said. "One of the most important things is that my house is much quieter than it used to be. I can't hear the outside traffic or the noisy crickets anymore. It's a great product, and it will also be good for the resale value of my home."

"I'm so surprised by her comments," Carey said. "We have thousands of satisfied customers just like her that we've heard from over the years." USA Insulation's product is rated at R-20, the highest rating of any insulation on the market today. The company can complete an installation in most homes in one day. USA is currently offering \$250 off any whole-house insulation job. Call 330-923-5388 or visit the website at www.usainsulation.net to schedule an appointment.

USA Premium Foam insulation has up to a 15% higher R-Value than the competition. USA Premium Foam won't settle or deteriorate over time and gets into tight spaces other insulation can't. This foam can be used on all types of structures such as basements that are wood, steel, stiplated or even brick. The foam goes in like shaving cream and sets up similar to styrofoam, stopping drafts and loss of energy. USA Insulation has been in business for over 25 years and has insulated over 25,000 homes in Ohio.

Diana Saunders had noticed several drafts areas in her 16-year-old Cape Cod home. "There were certain areas of the house where the heat was being sucked out," she recalled. Saunders had some areas of her home insulated with fiberglass several years ago, but she decided she needed to get the entire house insulated with a better product. She saw USA Insulation at a home and garden show and liked what she saw in the demonstration. "They were the only ones that installed the foam insulation," she said. "And the foam is environ-

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Karen, the bar complaint v. Shenise deals with his **bolded** quote in the story below. I believe it was accurate. Shenise never complained when it came out. Now, he says I misquoted him. There are no notes or recordings. Thanks, Phil

1 / 5 - Wednesday, February 1, 2012

Edition: 1 STAR

Section: A

Page: A1

Source: By Phil Trexler, Beacon Journal staff writer

Type: Metro

Illustration: PHOTO: (2) Phil Masturzo / Akron Beacon Journal photos

Memo: Phil Trexler can be reached at 330-996-3717 or ptrexler@thebeaconjournal.com.

File Name: 4057515.xml

SENIOR GETS SURPRISE: JAIL

MASSILLON MAN, 80, ENDS UP IN SUMMIT COUNTY LOCKUP AFTER POLICE FIND HE WAS WANTED FOR MISSING CIVIL HEARING HE SAYS HE DID NOT KNOW WAS ORDERED

A trip to the store for a bottle of glue turned into 80-year-old Leonard Little's first time in jail.

The Massillon retiree committed no crime to earn the time. But he was a wanted man for about nine months for his failure to appear in Summit County Common Pleas Court for a hearing in a civil lawsuit.

It was a hearing Judge Paul Gallagher ordered that neither Little nor his attorney say they knew about.

This breakdown in communication prompted the judge last spring to issue an arrest warrant for contempt of court. Once again, according to Little and his attorney, no one told them of the judge's order.

They only learned of its existence Monday, they said, when the grandfather was booked into the county jail.

"I was humiliated beyond belief," Little said Tuesday. "I have always tried to do the right thing, and then to wind up in jail? Murderers and rapists got treatment as good or better than I did."

Gallagher, who signed the arrest warrant April 13, said he cannot discuss the pending case. Nonetheless, on Monday he ordered Little released from the Summit County Jail, about six hours after his booking. When Little left the jail, he said he didn't sign his \$20,000 signature bond nor did he receive a new court date.

Attorney Larry Shenise, who handled the civil lawsuit for Little and his son, William, said no one from Gallagher's court notified him by mail or a phone call of the March hearing the Littles missed.

No notice, he said, was sent by the court on the subsequent arrest warrants.

"I don't miss hearings if I get notice," Shenise said. "If we would have known, we would have been there. But they never bothered to call to say, 'Hey, you're supposed to be here for a hearing. We're going to issue warrants for your clients if you don't appear.'

"They didn't do anything," he said. "I would have thought the court would have the courtesy to say, 'Hey, you're supposed to be here.' "

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The missed March hearing date along with the arrest warrants are listed on the court's Internet docket. But because the suit was put on hold with the filing of Little's bankruptcy in May, Shenise said he had no need to view the case file.

The lawsuit stems from a family business deal that went awry. The attorney opposing Little in the lawsuit did

not return a call Tuesday.

WARRANT ISSUED

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A Massillon officer arrived and checked Little's driving record. The warrant was found and Little was taken by the officer into Summit County, where deputies met them in Green. Deputies handcuffed Little and took him to jail about 10 a.m.

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Little, who has no criminal record, remains baffled at how he wound up jailed for a day.

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Caption: 1) Leonard Little of Massillon talks about his arrest for failure to appear in Summit County court for a civil hearing he said he didn't know was ordered. 2) Leonard Little of Massillon sits with his dog C.C. and discusses his arrest and day's stay in Summit County Jail. A new hearing in the civil case that landed him in jail has been set for Feb. 8.

Keywords: Jail Prisoner Senior Citizen

ID: 29033360

AFFIDAVIT OF PHIL TREXLER

State of Ohio)
)
County of Summit)

Before me, the undersigned authority, on this day personally appeared PHIL TREXLER, who being by me first duly sworn did depose and state as follows:

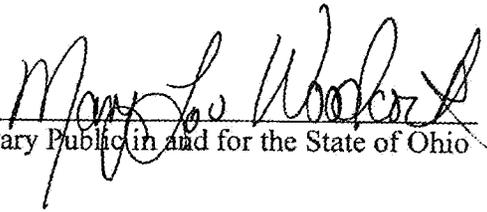
1. I, Phil Trexler, am over the age of 18 and am competent to make this affidavit. The facts stated herein are within my personal knowledge true and correct.
2. I am currently a reporter for the Akron Beacon Journal, and I have been a reporter for the Beacon Journal since Dec. 8, 1998.
3. On January 31, 2012, I heard a news story on the radio about an elderly man who was jailed for missing a court date. I thought it would make a good story for the Beacon Journal, so I proceeded to gather information and interview sources for the story.
4. I interviewed Leonard Little with his wife, Barbara, and his attorney, Larry Shenise. I also interviewed Bill Holland, a sheriff's spokesman. I attempted to interview Judge Paul Gallagher, but Judge Gallagher declined to comment because it was a pending case. I also attempted to interview Shenise's opposing counsel in the underlying litigation, but that attorney did not return my call.
5. I wrote the story that appeared on Page A1 of the Akron Beacon Journal on February 1, 2012. A true, accurate and complete copy of that story is attached hereto as Exhibit 1.
6. After publication, I did not receive any complaints about that story, or any calls about any inaccuracies in it. There were no requests for corrections or clarifications. No one complained to me or to any editors about the story or its accuracy.
7. Every item in the story that is in quotation marks is a direct quote from the person to whom it is attributed. If something is stated, but not in quotations, it is my paraphrase of the facts.
8. I stand by the accuracy of the entire story, both the specific quotations and the general gist of the paraphrased portions.
9. There are no notes or recordings of any interviews from that story.

Further Affiant sayeth not.

**Exhibit
B**


PHIL TREXLER

Sworn and signed before the undersigned Notary Public on the 5 day of November, 2013.


Notary Public in and for the State of Ohio

871373

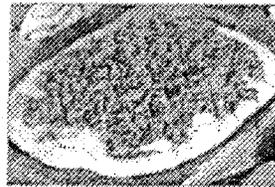


MARY LOU WOODCOCK, Notary Public
Residence - Summit County
State Wide Jurisdiction, Ohio
My Commission Expires Sept. 29, 2015

Akron to offer amnesty for tax-delinquent firms

COMMUNITY, B1

IRVING-LED RALLY FALLS SHORT FOR CAVALIERS. SPORTS, C1



FIRM OR CREAMY, POLENTA PLEASES

The HeldenFiles: William Shatner to take one-man show to Cleveland.

FOOD, D1,3

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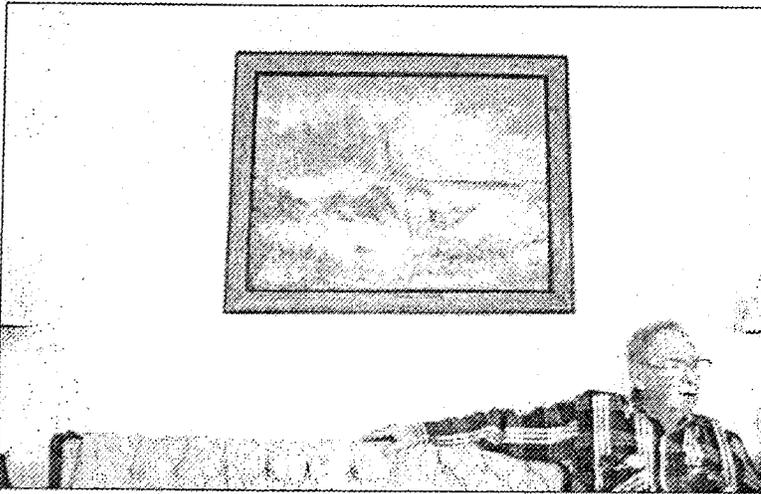
Wednesday, February 1, 2012

A B C M O

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Massillon man, 80, ends up in Summit County lockup after police find he was wanted for missing civil hearing he says he did not know was ordered



Leonard Little of Massillon talks about his arrest for failure to appear in Summit County court for a civil hearing he said he didn't know was ordered. PHIL HALL/STAFF PHOTO BY AP/WIDE WORLD

Senior gets surprise: jail

By Phil Traxler
Beacon Journal staff writer

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Please see Jailed, A4

INSIDEWORD

LeBron moves camp from Akron to Vegas

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Art colors kids' world a bit brighter

Children's displays work of young patients at show

By Cheryl Powell
Beacon Journal medical writer

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Each painting, drawing and digital artwork in the one-day art show was made by a patient at Children's.

For Ethan, painting allows him to be a normal kid, one a cancer patient who's often trapped in a hospital room.



Emily Dennis, artist-in-residence at Akron Children's Hospital, chats with patient/artist Ethan Puhalsky, 7, of Norton, about the portrait of his favorite stuffed lion he created for the hospital's show, Gallery of Strength.

"Maybe next time I'm in the hospital we can do a puppy or panda," Ethan said enthusiastically. "Maybe I might bring both of them when I come into the hospital."

"He has no problems coming to the hospital because of things like this," added his father, Brian Puhalsky. "It's really a great program for them, just to break the days up."

The Gallery of Strength is the culmination of a yearlong, \$16,000 grant from the Livingstone Founda-

tion that allowed Kent State University doctoral student Emily Dennis, 27, of Akron, to serve as the hospital's artist-in-residence.

The hospital competed in a national online voting contest to earn the financial support from the nonprofit group, created by the Lance Armstrong Foundation to help people affected by cancer.

During the past year, Dennis spent nine hours a week helping patients express themselves by

Please see Art, A4

ELECTION 2012



ROMNEY (R-REPT) addresses the former Massachusetts Gov. Mitt Romney greets supporters Tuesday at his Florida primary night rally in Tampa, Fla.

Romney trounces Gingrich in Florida

Ex-Massachusetts governor beats former House speaker by double digits in primary

By David Egan and Steve Peoples
Associated Press

TAMPA, Fla. — Mitt Romney trounced Newt Gingrich in the Florida primary Tuesday night, rebounding securely from an earlier defeat and taking a major step toward the Republican presidential nomination. Despite the one-sided setback, the former House speaker vowed to press on.

Romney, talking unity like a nominee, said he was ready "to lead this party and our nation." In remarks to cheering supporters, the former Massachusetts governor unleashed a strong attack on President Barack Obama and said the competitive fight for the GOP nomination "does not divide us, it prepares us" for the fall.

"Mr. President, you were elected to lead, you chose to follow, and now it's time to get out of the way," he said. Returns from 98 percent of Florida's precincts showed Romney with 46 percent of the vote to 21 percent for Gingrich, the former House speaker. Former Pennsylvania Sen. Rick Santorum had 13 percent, and Texas Rep. Ron Paul 7 percent. Neither mounted a substantial effort in the state.

For the first time in the campaign, exit polls showed a gender gap, and it worked to Romney's advantage.

He was leading Gingrich 51-29 among women voters, and was winning men by a smaller margin of 41-36.

Please see Romney, A4

Bill would restrict use of left lane

Drivers would have to keep right unless passing or exiting

Associated Press

COLUMBUS: Ohio would make it illegal to stay in a highway's left lane if not passing or exiting under a bill that previously drew attention for another provision that would raise the speed limit on the state's interstates.

Left-lane restrictions could make Ohio roads safer, this bill's sponsor said.

"If someone's in the left-hand lane and someone's trying to pass them on the right, that is dangerous," state Rep. Ron Mass, R-Lebanon, said.

His measure would bar drivers from traveling in the left lane of a 300-foot-wide, using an exit on the left, and other motorists to enter the lane or when snow or other road conditions would make it unsafe to use the lane.

Ohio troopers questioned proposed left-lane restrictions on work and would be enforced.

"We believe both lanes are to maintain the traffic flow

Please see

Today's weather

56° High 33° Low
Forecast Page B10

Dear Abby B6
Shelene B6
Classified B4
Dunkin' B6,8
Community B2
Deaths B2-5

Editorial A8
Lobbying B2
Movies C9
Sports C1
Sudoku B6
TV Listings B10



Ohio.com

Appendix

1

Pilot does not have authority to go solo

N.H. man also is not allowed to fly at night

Associated Press

CONCORD, N.H. Transportation records show the flight instructor for a New Hampshire plane crash with killing his daughter in a Massachusetts plane crash repeatedly denied his requests to fly solo.

Instructor Michael Truman told federal investigators 57-year-old Steven Fay of Hillsborough should not have been flying his twin-engine Cessna without an instructor on board and that he was "crazy" to be flying the plane at night.

Massachusetts prosecutors are charging Fay with involuntary manslaughter in the crash at Orange Municipal Airport that killed 35-year-old Jessica Fay on New Year's Day 2010. The crash occurred 90 minutes after sunset, after the plane clipped treetops on descent.

Fay told the Associated Press he loved his daughter and has been grief-stricken since her death.

He is scheduled to be arraigned today in Greenfield, Mass. Involuntary manslaughter is a felony punishable by up to 20 years in prison.

Fay did have a license to pilot single-engine planes, but the Federal Aviation Administration issued an emergency order revoking that license two months after the crash. He had obtained the license in 1989.

That emergency order, dated March 22, states that Fay lacked the "care, judgment, responsibility and complying attitude" required of a licensed pilot. The order notes that he was not authorized to fly solo, carry passengers and was not current on flying at night. It notes his last night flight was 2000.



Evelyn Dennis has spent a year having young patients at Akron Children's Hospital such as Ethan Pulavsky, 7, of Boston express themselves by drawing, painting and creating artwork on iPads.

Art

Continued from Page A1

drawing, painting and creating artwork on iPads.

"The goal was to bring the arts to health care and introduce the arts," she said.

Dennis became interested in art therapy nine years ago when her father was battling cancer.

"I was coping with that by drawing," she said. "That's how I expressed myself. It was an outlet for me. It was taking all that anxiety and putting it into a visual form and getting it out of my head."

Her personal experience encouraged her to earn a master's degree in art therapy. She's

now pursuing a doctoral degree in counseling. Although the goal of the yearlong art program at Children's wasn't necessarily therapeutic, "it's hard to deny there's therapy going on," she said.

At first glance, for instance, the whimsical creatures with toothy grins in one of the paintings displayed in the Gallery of Strength appear lighthearted and fun.

But for the artist who created the piece, Dennis said, the colorful bosses represent personal monsters: serious, frightening medical problems.

"These were her monsters and these were what she was dealing with," Dennis said. "The artwork was her way of externalizing these internal fears."

At Dennis' year at the hospital came to an end, she wanted to share the young artists' creations by organizing a show.

"I was overwhelmed by the talent and creativity of the kids here and wanted to celebrate them," she said.

The show has received support from the Soughan Family Foundation and Pat Canon's Craft Centers, which provided frames.

The Livestrong Foundation has requested several pieces from the Gallery of Strength to display at the nonprofit's headquarters in Austin, Texas. Dennis said. The rest of the framed pieces will be returned to the young artists or their families.

Overhead can be reached at 330-568-3022 or overhead@akronchildrens.org. Follow Facebook at facebook.com/akronchildrens.

Romney

Continued from Page A1

Obviously for the thrice-married Gingrich, only about half of women voters said they had a favorable view of him as a person, compared to about eight in 10 for Romney.

As in Iowa, New Hampshire and South Carolina, about half of Florida primary voters said the most important factor for them was lacking a candidate who could defeat Obama in November, according to exit poll results conducted for the Associated Press and the television network.

Not surprisingly, in a state with an unemployment rate hovering around 10 percent, about two-thirds of voters said the economy was their top issue. More than eight in 10 said they were falling behind or just keeping up. And half said that home foreclosures have been a major problem in their communities.

The winner-take-all primary was the 30 Republican National Convention delegates, by far the most of any primary state so far. That gave Romney a total of 82 to 26 for Gingrich, 14 for Santorum and four for Paul, with 144 required to clinch the nomination.

Momentous grows

But the bigger prize was precise political momentum in the race to pick an opponent for Obama to a nation struggling to recover from the deepest recession in decades.

That belonged to Romney when he captured the New Hampshire primary three weeks ago, then swung convincingly to Gingrich when he captured a South Carolina upset 10 days later.

Now it was back with the former Massachusetts governor after a 10-day comeback marked by a change to more aggressive tactics, coupled with an efficient use of an overwhelming financial advantage to better Gingrich in television commercials.

Gingrich brushed aside any talk of quiting the race. "We are going to contest every place," he said, standing in front of a sign that read "I'm not going."

It is now clear that this will be a long race between the conservative leader, Newt Gingrich, and Massachusetts moderate, he said. The race now turns to Ne-

vada, where Romney won the state's caucuses four years ago and is favored to repeat his triumph this Saturday. Caucuses in Colorado, Minnesota and Maine follow, with primaries in Wisconsin on Feb. 21 and in Michigan and Arizona at the end of the month.

Gingrich, from neighboring Georgia, swept into Florida from South Carolina, only to run headlong into a different Romney from the one he had led in his weak South Carolina.

Romney shed his reluctance to attack Gingrich, unleashing hard-hitting ads on television, sharpening his performance in two debates and deploying surrogates to Gingrich's campaign stops, all in hopes of concealing him.

Advertising blitz

Restored out Parson, an outside group favoring Romney, accounted for about \$5.9 million in the ad work, and the candidates and the "Super PAC" combined outspent Gingrich and Clinton. The Future.org organization backing him, by about \$15.5 million to \$3.3 million, an advantage of nearly 5-1.

Gingrich responded by assailing Romney as a man incapable of telling the truth and vowed to remain in the race until the Republican National Convention next summer. He was the endorsement of campaign dropout Herman Cain and increasingly sought the support of evangelicals and tea party advocates, a former House speaker running as the anti-establishment insurgent of the party he once helped lead.

Remembered by harsh TV ads, some Florida said they snored on both candidates.

"The dirty ads really turned me off on Mitt Romney," said Dorothy Anderson of Fossilton Park, adding she was voting for Gingrich. She said of Romney, "in fact if he were the nominee, I probably won't vote for him."

At the same polling place, Romney supporter Curtis Demsey expressed similar feelings, but about Gingrich. "The only thing Newt Gingrich has to offer is a big mouth," he said.

Voters frequently say they are offended or appalled by negative ads. But polls show consistently that the commercials are able to sway the opinions of large numbers of voters, and they are a staple of nearly all campaigns.

Left

Continued from Page A1

amount of traffic on a four-lane, divided interstate," said Lt. Anne Ralston, a spokeswoman for the State Highway Patrol.

The patrol wondered how troopers would be able to tell if, for example, someone enjoying life in the fast lane was trying to get ahead of another vehicle or simply taking advantage of unbacked weaving.

ment. "I don't know of any law that is easy to enforce," Meag responded. "There are laws against lane robbing, and people still rob lanes."

The law in effect in Ohio requires drivers to use the right or center lanes, but there are a number of exceptions.

Stricter left-lane law could be beneficial if motorists were educated about why it's important to keep slower drivers from clogging the left sides of highways and backing up traffic, said John Bowman, a spokesman for the National

Motorists Association. "Other cars have to slow down suddenly or speed up suddenly or make sudden changes back and forth. You're introducing uncertainty and unpredictability into traffic flow," said Bowman, whose group was formed in 1982 to fight back when the national speed limit was lowered to 55 mph.

Meag's measure also would raise the speed limit on Ohio's interstate highways from 65 mph to 70 mph to be consistent with the speed limit on the Ohio Turnpike and in neighboring states.

Jailed

Continued from Page A1

say, "Hey, you're supposed to be here."

Shenise said it wasn't until Tuesday that Gallagher set a new hearing date of Feb. 8.

The missed March hearing date along with the arrest warrants are listed on the court's Internet docket. But because the suit was put on hold with the filing of Little's bankruptcy in May, Shenise said he had no need to view the case file.

The lawsuit stems from a family business deal that went sour. The attorney opposing Little in the lawsuit did not return a call Tuesday.

Warrant issued

Warrants generally are sent to the sheriff and entered into the law enforcement computer. Those warrants on warrants are not notified.

That apparently was the case with Little. He had the bar on his back as a wanted man for nearly a year. Little and his wife of 60 years, Barbara, on Tuesday recounted the events that led to his jail stint.

Little said he went out early Monday morning to buy glue for a woodworking project. He stopped at a gas station, where he had a collision with another car.

A Mission officer arrived and checked Little's driving record. The warrant was



Leonard Little of Massillon sits with his dog C.C. and discusses his arrest and day's stay in Summit County Jail. A new hearing in the civil case that landed him in jail has been set for Feb. 8.

found and Little was taken by the officer into Summit County, where deputies met them in Green. Deputies handcuffed Little and took him to jail about 10 a.m.

Little said that during his stay, jailers never gave him his medication for high blood pressure and diabetes. He was fingerprinted, photographed and placed in a cell.

"They booked me like a common criminal," Little said. Sheriff's spokesman Bill Hollock said inmates on medication must have their prescriptions and dosage verified.

Once that occurs, the jail's 600-plus inmates are given their meals at the same time two to three times a day. In Little's case, he came after the first medication distribution and was released before the next rotation, Hollock said.

Little, who has no criminal record, remains jailed at how he wound up jailed for a day. "If I knew I was supposed to have appeared in court, I would have been there," he said. "I always take my civic duties seriously."

Phil Taylor can be reached at 330-944-2171 or ptaylor@akronbeaconjournal.com.

65% of homes are at risk; Don't let your home become one of them



Don't depend on ordinary insulation to give you the protection you need.

The experts say that if your home was built before 1985 you may find that it has very little or no insulation at all. Recent studies from the Harvard University School of Public Health estimated that 65% of American homes are under insulated. With USA Insulation homeowners are realizing up to 50% savings off their heating and cooling bills.

"Insulation is an extremely wise investment as it will pay for itself in the matter of a few years," says Mike Carey of USA Insulation. Proper insulation is important to ensure that your home remains warm during the winters and cool during the summers. The temperature stability will minimize your use of heating and cooling equipment, thereby saving on your energy bills. Call 330-922-3368 today to schedule your free in-home energy evaluation.

USA Premium Foam insulation has up to a 35% higher R-Value than the competition. USA Premium Foam won't settle or deteriorate over time and gets into tight spaces other insulation can't. This foam can be used in all types of structures such as homes that are wood, stucco, shingled or even brick. The foam goes in like shaving cream and sets up insulating in tight spaces, stopping drafts and loss of energy. USA Insulation has been in business for over 25 years and has installed over 15,000 homes in Ohio.

Diana Saunders had noticed several drafty areas in her 67-year-old Cape Cod home. "There were certain areas of the house where the heat was being sucked out," she recalled. Saunders had some areas of her house insulated with R6's (last several years ago, but she decided she needed to get the entire house insulated with a better product. She saw USA Insulation at a home and garden show and liked what she saw in the demonstration. "They were the only ones that installed the foam insulation," she said, "and the foam is extremely

"Our patented USA Premium Foam insulation protects homes in ways ordinary insulation can't!"

Mike Carey of USA Insulation.

mentally friendly." Saunders was impressed with the insulation as well as the installers. "They were straightforward and honest," she explained. "They drilled holes through the wood siding, but you can't see where the holes were when they were finished." Saunders has noticed some definite temperature in her indoor environment. "Before my house was insulated my furnace would work constantly to keep my house warm. Now my furnace runs less often, and I've seen a dramatic difference in my heating bills.

There is an excess of temperature throughout the house, which is very significant," she added. "One of the most important things is that my house is much quieter than it used to be. I can't hear the outside traffic or the noisy crickets any more. It's a great product, and it will also be good for the resale value of my home."

"I'm not surprised by her comments," Carey said. "We have thousands of new customers that like her that we've heard from over the years." USA Insulation's product is rated at R-20, the highest rating of any insulation on the market today. The company can complete an installation in most homes in one day. USA is currently offering \$250 off any whole-house insulation job. Call 330-922-3368 or visit the website at www.usainsulation.net to schedule an appointment.

USAinsulation.net

Publish Your Pet Story Today! pets.ohio.com

Karen, the bar complaint v. Shenise deals with his **bolded** quote in the story below. I believe it was accurate. Shenise never complained when it came out. Now, he says I misquoted him. There are no notes or recordings. Thanks, Phil

1 / 5 - Wednesday, February 1, 2012

Edition: 1 STAR

Section: A

Page: A1

Source: By Phil Trexler, Beacon Journal staff writer

Type: Metro

Illustration: PHOTO: (2) Phil Masturzo / Akron Beacon Journal photos

Memo: Phil Trexler can be reached at 330-996-3717 or ptrexler@thebeaconjournal.com.

File Name: 4057515.xml

SENIOR GETS SURPRISE: JAIL

MASSILLON MAN, 80, ENDS UP IN SUMMIT COUNTY LOCKUP AFTER POLICE FIND HE WAS WANTED FOR MISSING CIVIL HEARING HE SAYS HE DID NOT KNOW WAS ORDERED

A trip to the store for a bottle of glue turned into 80-year-old Leonard Little's first time in jail. The Massillon retiree committed no crime to earn the time. But he was a wanted man for about nine months for his failure to appear in Summit County Common Pleas Court for a hearing in a civil lawsuit. It was a hearing Judge Paul Gallagher ordered that neither Little nor his attorney say they knew about. This breakdown in communication prompted the judge last spring to issue an arrest warrant for contempt of court. Once again, according to Little and his attorney, no one told them of the judge's order. They only learned of its existence Monday, they said, when the grandfather was booked into the county jail. "I was humiliated beyond belief," Little said Tuesday. "I have always tried to do the right thing, and then to wind up in jail? Murderers and rapists got treatment as good or better than I did." Gallagher, who signed the arrest warrant April 13, said he cannot discuss the pending case. Nonetheless, on Monday he ordered Little released from the Summit County Jail, about six hours after his booking. When Little left the jail, he said he didn't sign his \$20,000 signature bond nor did he receive a new court date. Attorney Larry Shenise, who handled the civil lawsuit for Little and his son, William, said no one from Gallagher's court notified him by mail or a phone call of the March hearing the Littles missed. No notice, he said, was sent by the court on the subsequent arrest warrants. "I don't miss hearings if I get notice," Shenise said. "If we would have known, we would have been there. But they never bothered to call to say, 'Hey, you're supposed to be here for a hearing. We're going to issue warrants for your clients if you don't appear.' " "They didn't do anything," he said. "I would have thought the court would have the courtesy to say, 'Hey, you're supposed to be here.' " Shenise said it wasn't until Tuesday that Gallagher set a new hearing date of Feb. 8. The missed March hearing date along with the arrest warrants are listed on the court's Internet docket. But because the suit was put on hold with the filing of Little's bankruptcy in May, Shenise said he had no need to view the case file. The lawsuit stems from a family business deal that went awry. The attorney opposing Little in the lawsuit did

not return a call Tuesday.

WARRANT ISSUED

Warrants generally are sent to the sheriff and entered into the law enforcement computer. Those wanted on warrants are not notified.

That apparently was the case with Little. He said he had no idea he was a wanted man for nearly a year. Little and his wife of 60 years, Barbara, on Tuesday recounted the events that led to his jail stint.

Little said he went out early Monday morning to buy glue for a woodworking project. He stopped at a gas station, where he had a collision with another car.

A Massillon officer arrived and checked Little's driving record. The warrant was found and Little was taken by the officer into Summit County, where deputies met them in Green. Deputies handcuffed Little and took him to jail about 10 a.m.

Little said that during his stay, jailers never gave him his medication for high blood pressure and diabetes. He was fingerprinted, photographed and placed in a cell.

"They booked me like a common criminal," Little said.

Sheriff's spokesman Bill Holland said inmates on medication must have their prescriptions and dosage verified. Once that occurs, the jail's 600-plus inmates are given their meds at the same time two to three times a day. In Little's case, he came after the first medication distribution and was released before the next rotation, Holland said.

Little, who has no criminal record, remains baffled at how he wound up jailed for a day.

"If I knew I was supposed to have appeared in court, I would have been there," he said. "I always take my civic duties seriously."

Caption: 1) Leonard Little of Massillon talks about his arrest for failure to appear in Summit County court for a civil hearing he said he didn't know was ordered. 2) Leonard Little of Massillon sits with his dog C.C. and discusses his arrest and day's stay in Summit County Jail. A new hearing in the civil case that landed him in jail has been set for Feb. 8.

Keywords: Jail Prisoner Senior Citizen

ID: 29033360

**BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO**

IN RE:
COMPLAINT AGAINST
LARRY D. SHENISE
Registration No. 0068461
P.O. Box 471
Tallmadge, OH 44278

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RESPONDENT

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AKRON BAR ASSOCIATION
57 South Broadway Street
Akron, Ohio 44308

**COMPLAINT AND
CERTIFICATE**

(Rule V of The Supreme Court
Rules for the Government of The
Bar of Ohio)

RELATOR

* * *

Now comes the Relator, Akron Bar Association, and alleges that Larry D. Shenise, duly admitted to the practice of law in the State of Ohio, has been engaged in misconduct in violation of the Ohio Rules of Professional Conduct.

INTRODUCTION & PARTIES

1. The Akron Bar Association ("Relator") is a Certified Grievance Committee under Gov.Bar R.V(3)(C). Relator has been authorized by the Board of Commissioners on Grievances and Discipline for the Supreme Court of the State of Ohio to investigate allegations of misconduct by attorneys and initiate complaints as a result of investigations under the provisions of the Rules for the Government of the Bar as promulgated in the State of Ohio.
2. Larry D. Shenise ("Respondent") is an attorney at law licensed to practice in Ohio since November 1997, Registration No. 0068461, with his business address registered with the Supreme Court of Ohio as P.O. Box 471, Tallmadge, Ohio, 44278.

**Exhibit
C**

3. Honorable Paul A. Gallagher (" Judge Gallagher") was the presiding judge in the matter of *Lake Family Properties Ltd. v. William Little*, Summit County of Common Pleas Court Case No. CV-2008-08-5640 and is an original witness herein.
4. William Little ("William Little") is a former client of Respondent and an original witness herein.
5. Leonard Little ("Leonard Little") is a former client of Respondent and an original witness herein.

COUNT I

Now comes Relator, and for Count I against Respondent states as follows:

6. On or about June 30, 2008, Lake Properties, Ltd. brought an eviction and damages action in the Akron Municipal Court against William and Leonard Little ("the Lawsuit"). The property involved was an auto repair shop, occupied under a lease/option by William, with Leonard as co-signer.
7. On or about July 17, 2008, Respondent answered and counterclaimed against Lake Properties, Ltd on behalf of both William and Leonard Little and had the Lawsuit transferred to the Summit County Common Pleas Court.
8. On or about August 11, 2008, the Lawsuit, as Case No. CV 2008-08-5640, was assigned to Judge Paul Gallagher.
9. Respondent ceased to maintain professional liability insurance during his representation of the Littles in connection with the Lawsuit, having let it lapse in March of 2010.
10. Respondent did not notify the Littles or his other clients of the lapse of professional liability insurance or have the Littles or his other clients sign a written acknowledgement of his lack of professional liability insurance.
11. As of the time of the conclusion of the investigation of this matter on March 28, 2013, there was no evidence that Respondent had obtained malpractice insurance.
12. Relator alleges that as a result of the information set forth in Count I, Respondent has violated Ohio Rule of Professional Conduct Rule 1.4(c).

COUNT II

Now comes Relator, and for Count II against Respondent states as follows:

13. On October 1, 2008, a company named Run Down Ghost Town ("Ghost Town") moved to intervene in the Lawsuit, claiming to be the assignee of the rents to be paid to Lake Properties, Ltd. under the lease. Ghost Town further moved for an order for the rents to be paid in to the Clerk of Courts during the pendency of the litigation.
14. The motion was not opposed by Respondent and was granted on January 20, 2009. The Respondent did not file a counterclaim against Ghost Town on behalf of the Littles, and in fact, subsequently dismissed the counterclaim against Lake Properties, Ltd.
15. Respondent did not inform the Littles of the Motion or the Order for the rents to be paid during the pendency of the litigation. The Littles were not advised of the potential consequences of not complying with the Order and thus were not given the option to comply with it.
16. On August 11, 2009, Ghost Town moved for summary judgment against the Littles.
17. Respondent filed a brief in opposition on behalf of both Littles, but on May 21, 2010, summary judgment was granted to Ghost Town for judgment in excess of \$114,000 against both defendants. The judgment was based, in part, on the failure of the Littles to obey the Court's Order to deposit rents.
18. On July 22, 2010, Ghost Town moved to have the summary judgment certified as a Final Order for Appeal.
19. Respondent did not oppose said motion and Final Judgment was entered on September 28, 2010.
20. Respondent filed a Notice of Appeal on October 29, 2010, thirty-one days later.
21. Ghost Town filed a motion to dismiss the appeal as late, which was not opposed by Respondent, and the motion was granted on December 22, 2010.
22. On February 2, 2011, the Littles, through their Family Trust, consummated the sale of property at 1382 Hightower Dr., Uniontown, Ohio, which brought net proceeds of \$68, 686.74, which was put into Escrow.
23. On February 11, 2011, Respondent filed a Motion to return the Escrowed Funds to

the Littles.

24. On March 1, 2011, the Court ordered that the proceeds were to be given to Ghost Town in partial satisfaction of its judgment lien. The Court noted in its Order that Defendant Little had misstated the law and misrepresented to the Court, by omission of relevant Trust documents, that Ghost Town is only entitled to one-half the proceeds.
25. On July 22, 2010, at the same time it filed its Motion to Convert the Summary Judgment into Final Judgment, Ghost Town commenced discovery against the Littles for Production of Documents and Depositions where were scheduled for August, 27, 2010.
26. Respondent neither advised the Littles of the deposition notices, nor produced the documents requested in discovery.
27. Ghost Town moved to compel discovery and for sanctions on September 9, 2010.
28. On October 4, 2010, Shenise filed a motion for extension of the time to respond to the Motion to Compel, which was granted to November 8, 2010.
29. However, Respondent never filed a response to the Motion to Compel, which was then granted on January 11, 2011, and included an Order to pay attorney fees and costs as well as to immediately respond to discovery and to reset the depositions.
30. Respondent failed to notify the Littles of the discovery Order or to do anything to bring the Littles into compliance with it. Ghost Town moved for contempt on February 14, 2011.
31. No opposition was filed by Respondent.
32. On March 17, 2011, the Court issued to Respondent and the Littles an Order for a Show Cause Hearing scheduled for March 30, 2011 at 1:30 p.m. as to why they should not be held in contempt for failing to comply with the January 11, 2011 Order. The Order was sent by the Court to Respondent and the two other attorneys on the case.
33. Neither Respondent nor either of the Littles appeared at the show cause hearing on March 30, 2011. While counsel for Ghost Town was still in Chambers, the Court's staff telephoned Respondent's office number and left a message about the missed hearing. Respondent never called back or otherwise communicated to the Court

- about the missed hearing.
34. On April 13, 2011, the Court ordered a capias to be issued for the Littles' arrest. The Order stated that it was to be sent directly to William and Leonard Little, as well as to Respondent and other counsel.
 35. The notice to Leonard was returned as not deliverable. On April 27, 2011, the Court issued a nunc pro tunc Order specifying addresses to be used for William and Leonard Little. The address for Leonard was 520 Sheri Avenue in Massillon. That was Leonard's address at the time, as it is now.
 36. Leonard Little hired other counsel in early March of 2011 to file for Chapter 7 bankruptcy. That petition was filed on March 21, 2011.
 37. Respondent stated to Relator's investigators that he ignored the capias notices, as well as the discovery request and deposition notices, because of the bankruptcies filed or to be filed by William Little and Leonard Little.
 38. However, the Common Pleas Court record reflects that Leonard Little's Notice of Bankruptcy was not filed in the Common Pleas Court case until May 3, 2011, after the capias was issued.
 39. The court records reflect that Respondent filed a bankruptcy petition on behalf of William Little on August 11, 2011, but that the notice of the bankruptcy to the Common Pleas Court was not filed until January 31, 2012 at 9:54 a.m.
 40. Earlier that same morning of January 31, 2012, Leonard Little had been arrested on the capias after he was involved in a minor automobile accident.
 41. Relator alleges that as a result of the information set forth in Count II, Respondent has violated the Ohio Rules of Professional Conduct Rules:
 - 1.1 Competence;
 - 1.2 Scope of Representation & Allocation of Authority Between Client & Lawyer;
 - 1.3 Diligence;
 - 1.4(a)(1), (a)(3), & (b) Communication;
 - 3.4(c) & (d) Fairness to Opposing Party and Counsel;
 - 8.4(c) & (d) Misconduct

COUNT III

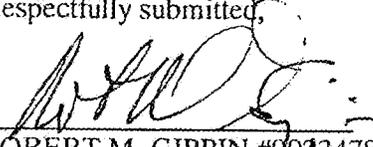
Now comes Relator, and for Count III against Respondent states as follows:

42. There were no further proceedings in the Common Pleas Court until Leonard Little was involved in a traffic accident in Stark County on January 31, 2012.
43. The police ran a computer check and the warrant came up. He was arrested, handcuffed, transferred to the Summit County Sheriff and put in the Summit County Jail at 10:00 a.m.
44. He remained there for about six hours until Judge Gallagher ordered his release on a signature bond. Leonard was by then eighty years old, with medical conditions.
45. At a subsequent hearing on March 28, 2012, Judge Gallagher vacated the contempt, finding that the Littles had not received notice of the March 30, 2011 hearing from their attorney.
46. The Akron Beacon Journal learned of Leonard Little's arrest and ran an extensive story about it on February 1, 2012.
47. In the article, Respondent was quoted and paraphrased as saying that he had not received notice of the March 30, 2011 hearing from the Court, either by mail or by phone, nor of the subsequent arrest warrants.
48. Respondent said that he would not miss a hearing of which he got notice. Of the Court he said, in part, "they never bothered to call . . . I would have thought the court would have the courtesy to call to say, 'Hey, you're supposed to be here.'"
49. Judge Gallagher filed a grievance that Respondent lied and impugned the Judge's reputation in his statements to the Akron Beacon Journal that he had not been notified by the Court of the hearing and the issuance of the capias.
50. Relator alleges that as a result of the information set forth in Count III, Respondent has violated the Ohio Rules of Professional Conduct Rules:
 - 3.5(a)(6) Conduct degrading to a tribunal;
 - 4.1(a) False statement to third person;
 - 8.2(a) False statement concerning integrity of judicial officer;
 - 8.4(c) Dishonesty, deceit or misrepresentation;
 - 8.4(d) Conduct prejudicial to administration of justice;
 - 8.4(h) Conduct reflecting adversely on fitness to practice.

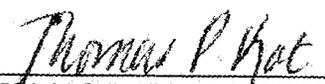
REQUEST FOR RELIEF

Relator asks that such discipline be administered to Respondent as may be deemed appropriate following a hearing on the merits.

Respectfully submitted,


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CERTIFICATE

The undersigned, Thomas P. Kot, Bar Counsel of the Akron Bar Association, hereby certifies that Robert M. Gippin and Sharyl W. Ginther are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated: May 21, 2013

Thomas P. Kot

Thomas P. Kot, Bar Counsel

Gov. Bar R. V, §4(I) Requirements for Filing a Complaint.

- (1) **Definition.** "Complaint" means a formal written allegation of misconduct or mental illness of a person designated as the respondent.
* * *
- (7) **Complaint Filed by Certified Grievance Committee.** Six copies of all complaints shall be filed with the Secretary of the Board. Complaints filed by a Certified Grievance Committee shall be filed in the name of the committee as relator. The complaint shall not be accepted for filing unless signed by one or more attorneys admitted to the practice of law in Ohio, who shall be counsel for the relator. The complaint shall be accompanied by a written certification, signed by the president, secretary, or chair of the Certified Grievance Committee, that the counsel are authorized to represent the relator in the action and have accepted the responsibility of prosecuting the complaint to conclusion. The certification shall constitute the authorization of the counsel to represent the relator in the action as fully and completely as if designated and appointed by order of the Supreme Court with all the privileges and immunities of an officer of the Supreme Court. The complaint also may be signed by the grievant.
- (8) **Complaint Filed by Disciplinary Counsel.** Six copies of all complaints shall be filed with the Secretary of the Board. Complaints filed by the Disciplinary Counsel shall be filed in the name of the Disciplinary Counsel as relator.
- (9) **Service.** Upon the filing of a complaint with the Secretary of the Board, the relator shall forward a copy of the complaint to the Disciplinary Counsel, the Certified Grievance Committee of the Ohio State Bar Association, the local bar association, and any Certified Grievance Committee serving the county or counties in which the respondent resides and maintains an office and for the county from which the complaint arose.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Complaint and Certificate was sent by Certified & Regular U.S. Mail, postage prepaid, the 21 day of May, 2013 to:

ATTORNEY LARRY D. SHENISE
P.O. Box 471
Tallmadge, OH 44278

Thomas P. Kot

THOMAS P. KOT #0000770
Bar Counsel
Akron Bar Association
57 S. Broadway St.
Akron, OH 44308
(330) 253-5007
Fax: (330) 253-2140
tpkot@neohio.twcbc.com

Lefton, Karen C.

From: Robert Gippin <RGippin@rlblp.com>
Sent: Friday, October 04, 2013 9:53 AM
To: Lefton, Karen C.
Cc: Sharylesq@aol.com; tpkot@neohio.twcbc.com
Subject: ABA v Shenise, Trexler subpoena

Hi, Karen, Larry Shenise has informed us that he will not agree to the admission of an affidavit from Phil Trexler unless there is also a tape of his interview. Since we understand that there is no such tape, we cannot withdraw the subpoena. Please confer again with your clients, we hope that they will decide in this instance not to contest the subpoena.

As we discussed, Phil's testimony is the only available source of evidence to rebut Shenise's contention that he was misquoted. What he said is a central issue in the grievance proceedings. Indeed, what Shenise said to Phil *is* the violation of the Rules. That is a significant distinction from situations in which the reporter's testimony is only collateral to the issues being litigated or is only supplemental.

If you must contest the subpoena, however, please do so promptly. We issued it when we did in order to allow ample time for an objection to be determined if necessary.

Thanks.

Bob

Robert M. Gippin
Roderick Linton Belfance LLP
1500 One Cascade Plaza
Akron, Ohio 44308
330-315-3400
330-434-9220 fax

This message is being sent by an attorney at law and may contain privileged or otherwise legally protected confidential information. If you have received this message in error, please delete it completely and notify the sender.

**Exhibit
D**

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

Subpoena Duces Tecum

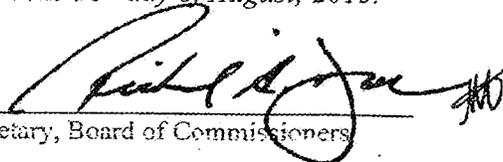
To: Phil Trexler	:	Akron Bar Association
Akron Bar Association	:	
44 East Exchange Street	:	vs.
Akron, OH 44308	:	
	:	Larry D. Shenise
	:	
	:	Case No. 2013-037
	:	

*You are hereby required to be and appear before The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio at Akron Bar Association, 57 S. Broadway St., Akron, OH 44308 on the 5th day of **December, 2013**, at **10:00 a.m.**, to testify in a certain matter pending before said Board and also that you bring with you and produce:*

THE FOLLOWING DOCUMENTATION IS REQUIRED:

BRING WITH YOU THE FOLLOWING DOCUMENTS, AS THAT TERM IS USED IN OHIO RULE OF CIVIL PROCEDURE 34(A), IN YOUR POSSESSION, CUSTODY OR CONTROL, PERTAINING TO THE STORY ABOUT LEONARD LITTLE APPEARING IN THE AKRON BEACON JOURNAL ON FEBRUARY 1, 2012, INCLUDING BUT NOT LIMITED TO NOTES AND RECORDINGS.

Witness my name and the seal of said Court the 30th day of August, 2013.



Secretary, Board of Commissioners

**Exhibit
E**

This Subpoena Duces Tecum is to be served in accord with Rule 45(B) Ohio Rules of Civil Procedure.

Effect of Refusal to Testify. The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be considered a contempt of the Supreme Court and shall be punishable accordingly. See Gov. Bar R. V(11)(C).

Protections and Duties of Persons Subject to Subpoena: See reverse side for Civ. R. 45(C) and (D).

CIVIL RULE 45(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2) (a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing, or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; #

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

CIVIL RULE 45(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents or electronically stored information pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) If a request does not specify the form or forms for producing electronically stored information, a person responding to a subpoena may produce the information in a form or forms in which the information is ordinarily maintained if that form is reasonably useable, or in any form that is reasonably useable. Unless ordered by the court or agreed to by the person subpoenaed, a person responding to a subpoena need not produce the same electronically stored information in more than one form.

(3) A person need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the person from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the factors in Civ. R. 26(B)(4) when determining if good cause exists. In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(4) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(5) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial-preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

* * * * *

RETURN OF SERVICE

I received this subpoena on _____, 2013, and served the person named by ____ personal service, ____ leaving a copy at their usual place of residence, or (other) _____, on the ____ day of _____, 2013.

I was unable to complete service for the following reason: _____

Fees
Service _____
Mileage _____
Copy _____
Total _____

(Signature of Serving Party)

Circle One: Deputy Sheriff Attorney
 Process Server Deputy Clerk
 Other _____

Gene P. Fawley v. Robert J. Quirk, 071785 OHCA9, 11822

GENE P. FAWLEY, Plaintiff,

v.

**ROBERT J. QUIRK, et al., Defendants and IN THE MATTER OF THE CONTEMPT
CONVICTION OF MARY GRACE POIDOMANI, Defendant-Appellant.**

No. 11822.

85-LW-3679 (9th)

Court of Appeals of Ohio, Ninth District, Summit

July 17, 1985

**Exhibit
F**

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF
SUMMIT, OHIO CASE NO. CV 83 2 0644.

KENNETH L. GIBSON, Attorney at Law, 234 W. Portage Trail, P. O. Box 535, Cuyahoga
Falls, OH 44221 for Plaintiff.

NORMAN S. CARR, Attorney at Law, 75 E. Market St., Akron, OH 44308 for Defendants.

WILLIAM E. SCHULTZ, Asst. Prosecutor, City-County Safety Bldg., Akron, OH 44308 for
Defendants.

DECISION AND JOURNAL ENTRY

QUILLIN, J.

This cause was heard upon the record in the trial court. Each error assigned has been
reviewed and the following disposition is made:

Mary Grace Poidomani, a newswoman employed by the Akron Beacon Journal Co., appeals
her conviction for contempt in violation of R.C. 2705.02. She refused to reveal the identity of a
non-confidential news source when ordered to do so by a Summit County Common Pleas Court.
We affirm.

Plaintiff-appellee, Police Chief Gene Fawley, sued Mayor Robert Quirk and the City of
Cuyahoga Falls claiming, inter alia, that Quirk and the city had defamed him and injured his
professional reputation by publishing false charges concerning his conduct as police chief. The
counts in the complaint stem from Quirk's firing of Fawley in January, 1982.

On January 5, 1982, Quirk filed charges against Fawley with the City Civil Service
Commission. A few hours before the charges were filed and before Fawley had received notice, a
city employee gave a copy of the charging document with attached memoranda supporting the
charges to Mary Grace Poidomani, a reporter for the Akron Beacon Journal. The city employee
quickly reviewed the material and referred Poidomani to Quirk for further information. Poidomani
contacted Quirk but did not remember learning anything more from him at that time.

Fawley subpoenaed Poidomani to testify. She asked for a protective order and/or an order
quashing the subpoena. The trial court held that, unless Poidomani could claim shield law
protection, she would have to testify. Her attorney informed the court that the shield law did not
apply but still claimed a constitutional privilege not to reveal the identity of the source, the city
employee.

Upon learning that Poidomani would not disclose her source, the trial court found her in
contempt and fined her \$100. The court specifically found that the identity of the source was

critical to plaintiff's cause of action and that plaintiff had exhausted all reasonable means available to obtain the information. She then related the facts set forth above and named the source.

ASSIGNMENT OF ERROR

"1. The Court of Common Pleas of Summit County, Ohio erred in finding Mary Grace Poidomani guilty of summary contempt of court and in levying a fine against her."2. The court of common pleas erred in determining that the plaintiff in the action below, Gene P. Fawley, had satisfied the appropriate Ohio qualified privilege standard; i.e., that Ms. Poidomani's source was critical to the plaintiff below."

Poidomani admits that she does not come within the protections of R.C. 2739.12, the so-called shield law. However, she argues that the First Amendment of the United States Constitution and/or Section II, Article 1, Ohio Constitution provide a qualified privilege to refuse to reveal the identity of the non-confidential source.

Analysis in this area must begin with the principle that freedom of the press occupies a preferred position among the rights conferred by both state and federal constitutions. "****Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. ***." *Garland v. Torre* (C.A. 2, 1958), 259 F. 2d 545, cert. denied (1958), 358 U.S. 910. Thus, any infringements on this freedom are strictly limited and closely scrutinized. *Branzburg v. Hayes* (1972), 408 U.S. 665.

The United States Supreme Court has recognized that compulsory process has a chilling effect on First Amendment freedoms.

****It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of political association, and freedom of communication of ideas, ***." *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 245.

The court in *Florida v. Silbur* (1979), 5 Med. L. Rptr. 1188, 1189, reasoned:

****."To protect against the chilling effect of compulsory process, the press has been afforded a broad privilege under the First Amendment against compelled testimony and production of documents. *Branzburg v. Hayes*, 408 U.S. 665, 707 [1 Med. L. Rptr. 2617] (1972); *Morgan v. State*, 337 So. 2d 951, 955-956 [1 Med. L. Rptr. 2589] (Fla. 1976). This privilege is necessary to insure the free flow of information to the public by protecting the newsgathering process as well as the exercise of editorial judgment. See: *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 [1 Med. L. Rptr. 1898] (1974)."Therefore, when a reporter under subpoena, asserts his or her First Amendment privilege, the burden shifts to the party seeking compelled testimony to demonstrate and prove that there is a compelling interest in requiring such testimony, which interest is sufficient to override First Amendment considerations. ***."

The court in *North Carolina v. Haganan* (1983), 9 Med. L. Rptr. 2525, 2526-2527, agreed saying:

****."The First and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution, afford reporters a qualified privilege to refuse to give testimony or to produce documents in criminal and civil actions. ***The reporter's qualified privilege applies to all information acquired by a reporter in gathering the news, regardless of

whether the information is confidential, because the purpose of the privilege is to assure, to the fullest extent possible, the free flow of information to the public."*****."

See also, *Palandjian v. Pahlavi* (D.C. D.C. 1984), 11 Med. L. Rptr. 1028; *Florida v. Reid* (1982), 8 Med. L. Rptr. 1249; *Florida v. Morel* (1979), 4 Med. L. Rptr. 2309; *Altemose Constr. Co. v. Bldg. and Constr. Trades Council* (E.D. Pa. 1977), 443 F. Supp. 489; *Loadholtz v. Fields* (M.D. Fla. 1975), 389 F. Supp. 1299; *Apicella v. McNeil Laboratories, Inc.* (E.D.N.Y. 1975), 66 F.R.D. 78; and *Democratic Nat'l. Commit. v. McCord* (D.C. Dist. Col. 1973), 356 F. Supp. 1394. *Chasteen v. Force* (July 12, 1978), Summit Common Pleas No. 77-5-1309, unreported.

However, this privilege is not absolute. The extent of the privilege must be balanced against other important interest such as the state's ability to investigate crime, a criminal defendant's right to a fair trial, and a civil litigant's right to discovery evidence or to compel testimony.

When balancing these competing interests, the following factors should be considered: "****(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?*****." *Miller v. Transamerican Press, Inc.* (C.A. 5, 1980), 621 F. 2d 721, 726.

Thus, once the qualified privilege is raised, the party seeking the information must overcome the privilege by meeting the three-prong test. After considering all the evidence and arguments, it is within the sound discretion of the trial court to determine whether the privilege has been overcome. On appeal, the party challenging the trial court's order must show an abuse of that discretion.

In the instant case, all three criteria were met. The name of the source was relevant to show publication by the defendant mayor. Three people, the mayor, the source and Poidomani, knew the identity of the source. Neither the mayor nor the presumed source remembered who gave the information to Poidomani. Thus, the information could not be obtained by alternative means. Finally, plaintiff had a compelling interest in showing that the mayor published the statements through his agent.

Appellant's assignments of error are overruled. The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

MAHONEY, P. J. CONCURS IN JUDGMENT SAYING

We perhaps should make it clear in the courts opinion that we have a fact situation before us which is contrived by stipulation of the parties so that we might address the qualified privilege issue but without reference to the Ohio Shield Law. (R.C. 2739.12). I concur in the opinion only because I feel the conduct of Poidomani was contumacious.

In *Branzburg v. Hayes*, *supra*, the United States Supreme court by a five-four vote refused to recognize an absolute privilege for newsmen guaranteed by the First Amendment to the Federal Constitution. It did, however, say that the court lacks power to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsmen's privilege either qualified or absolute. The court further inferred that a legislature could determine if such a privilege was necessary, desirable and within appropriate standards and rules.

In Ohio, our legislature did so in 1941, when they adopted a "Shield Law." R.C. 2739.12. That statute as adopted in my opinion granted an absolute privilege to newsmen. As such, it had constitutional infirmities. Ohio courts that have construed the statute have found it to be a qualified privilege as to non-confidential sources only, and one in which the trial court must balance the newsmen's First Amendment right against the defendant's Sixth Amendment right to a fair trial and compulsory process. *In Re McAuley* (1979), 63 Ohio App. 2d 5.

In *State v. The Lorain Journal Co.* (1970), 26 Ohio Misc. 219, Cuyahoga Common Pleas Judge George McMonagle required three newspaper editor witnesses to answer questions in depositions wherein they claimed a privilege as to information gleaned by them in their newsgathering work. The privilege was claimed under the shield law statute as well as both constitutions. Judge McMonagle in ordering the witnesses to answer said:

****Should it be now ruled that these witnesses are immune from responding in the respects indicated in this action, it could then be held that any person who is in the process of gathering news as a newspaper reporter and observes the commission of a crime or the occurrence of an act that gives rise to an action in negligence, could not be required to disclose what he saw or heard.***** "

In another common pleas case, Judge Allen of Licking County held in *Forest Hills Utility Co. v. Heath* (1973), 37 Ohio Misc. 30, that the shield law protected the reporter as to her confidential sources but not the records and documents she had gathered during the investigation.

Our Supreme Court has never ruled upon or interpreted the statutory privilege. Today, this court's opinion creates a judicial privilege that grants a newsreporter a qualified privilege against revealing non-confidential sources and information. In doing so, the court has engrafted the test which has arisen in confidentiality cases and extended it to any non-confidential sources and information obtained in the newsgathering process. That test is taken from *Miller v. Transamerican*, *supra*. The three pronged test had its genesis in *Garland v. Torea*, *supra*. Both of those cases involved a claim of privilege against revealing the name of a confidential informant.

I would join my colleagues in finding a qualified privilege for newspaper persons as to non-disclosure of confidential sources. However, I would first require one claiming the privilege to bear the burden by a preponderance of the evidence to establish that a confidential relationship exists. (See, *Andrews v. Andreoli* (1977), 400 N.Y.S. 2d 442). Once the relationship is established, the burden would shift to the person seeking the disclosure to meet the three-pronged test of *Miller*, *supra*. However, I would except from the privilege as to confidential sources or information, instances where the movant establishes unique circumstances reflecting matters of great public importance, i.e. threats to human life, national security, espionage or foreign aggression. See,

Democratic National Committee v. McCord (1973), 356 F. Supp. 1394.

I do not join my colleagues in extending the qualified privilege to non-confidential sources and information. Such an extension raises a multitude of problems. For example: Who is a newsperson? To whom does the privilege extend? What is its scope? Does it extend to unpublished materials, notes, outtakes, films, thoughts, opinions, conclusions, photos, drafts, tapes, sketches, etc? (See, *Herbert v. Lando* (1979), 441 U.S. 153). Should we distinguish between civil and criminal cases? Are the rules to be the same for parties as for witnesses? Should there be a privilege for those events witnessed in public? Or witnessed in private? What about those cases where a journalist participates on the periphery of criminal activity? Even if I favored the court's extension of the privilege to non-confidential sources, I would require the claimant to prove the chilling effect by a preponderance of the evidence. This might tend to deter abuses of the privilege by the press.

Subpoenaes which do involve disclosure of non-confidential sources or information can best be handled through our discovery rules and protective order. This would prevent inconvenience, harassment or bad faith. Additionally, news media are certainly allowed to make reasonable rules regarding information retrieval so as not to unduly disrupt their daily business operations. Likewise, I fail to see how disclosing the identity of a non-confidential source will have a "chilling effect" on newsgathering. Breaching a confidence or telling a secret may have some effect on the ability to collect and publish information. The shield law as interpreted in *McAuley, supra*, protects that anonymity. Absent that protection, I do not believe that a newsperson can abrogate his or her public duty merely because of his or her profession. I am mindful of the importance of a free press but:

"***basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press."It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion or testimony were recognized as incidents of the judicial power of the United States."***." *Garland v. Torre, supra*, at 548, 549.

GEORGE, J. CONCURS IN JUDGMENT SAYING

The court's opinion here approved the extension of a qualified First Amendment privilege to non-confidential sources and materials. I agree with that extension, but I feel it is necessary to explain the reason for including non-confidential sources and materials within that protection.

At the outset, it should be noted that the court's opinion is in accord with a line of cases that began to develop in the early 1970's. After an initial reluctance to permit any kind of privilege, even to confidential sources, courts are now willing to consider arguments that media interests may under proper circumstances outweigh a party's interest in cases involving disclosure of a reporters' non-confidential sources, as well as confidential sources.

The First Amendment to the Constitution guarantees a free press and the process of newsgathering is an essential part of that free press. The public has a strong interest in the maintenance of a vigorous, aggressive and independent press capable of participating in

unfettered debate over controversial matters. *United States v. Burke* (C.A. 2, 1971), 700 F. 2d 70, 77. Public policy favors the free flow of information and the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.

When the source is confidential, one can readily see how forced disclosure would tend to "chill" the free flow of information, because a source who wants to remain anonymous will not talk when there is a chance the reporter may have to reveal his identity. Admittedly, that argument is not as persuasive where the source is non-confidential and there is no expectation of anonymity. But there are situations in which discovery of non-confidential materials also may impinge on the ability of the news media to gather and disseminate news-not perhaps by "chilling" the source, but by interfering with the ability of the media to do its job. Why should a party to a suit be allowed to tap into the hard-earned knowledge of a reporter whose whole career is based on his ability to gather information? Why should the media be required to interrupt its newsgathering and disseminating activities to assume the burden of providing what is in essence its work product to litigants, except upon the most compelling reasons? The opportunity for exploitation is great. Clearly, there is a need to protect non-confidential, as well as confidential, sources and materials.

At the same time, the Miller test outlined in the court's opinion provides safeguards for the party seeking the information. Problems in determining what non-confidential information may be protected are not insurmountable. Courts make similar determinations regularly when confidential sources or materials are involved.

The fact that the material is non-confidential may be a consideration in balancing the media's interests against those of the other party. Perhaps a lesser showing of need and materiality may be required where the source is non-confidential. But the question that must always be asked is: How great is the intrusion into the ability of the media to gather and disseminate news?

FILED

NOV 25 2013

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

IN RE: COMPLAINT AGAINST *
LARRY D. SHENISE * CASE NO. 2013-037
RESPONDENT * RELATOR'S OPPOSITION
AKRON BAR ASSOCIATION * TO MOTION TO QUASH
RELATOR * TREXLER SUBPOENA

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INTRODUCTION

Count III of the Complaint alleges that statements by Respondent to Phil Trexler, an Akron Beacon Journal reporter, concerning Judge Paul Gallagher violated various ethical rules. The statements were quoted and paraphrased in a newspaper story. Respondent denies the accuracy of some of the quotations and paraphrases. Further, he has declined to agree to the admission of an affidavit from the reporter.

Relator accordingly had no alternative but to subpoena the reporter to testify at trial. Respondent's denials would otherwise go unrebutted and the allegations concerning those contested statements would necessarily then fail.

The Commission issued the subpoena on August 30, 2013, and it was served soon after. Yet, the Newspaper waited over two months, to just four weeks before trial, to file its motion to quash. The motion should be barred as untimely, even apart from its lack of merit.

The Newspaper's disparagement of these proceedings as a mere "dust-up" and its suggestion that the subpoena was requested by Relator in order to harass the



reporter are both inappropriate and unfounded. Relator cannot prove its allegations as to the disputed quotations and paraphrases without the reporter's testimony. That is literally the only available evidence and that is the only reason for the subpoena.

There is no issue of confidential source protection, which is the primary reason to protect against compelled reporter testimony, nor is the evidence merely collateral. This a public matter, not a private civil dispute. That tips the balance of the First Amendment strongly towards enforcement, consistent with all the Federal and Ohio case law on the subject.

These proceedings are of great public importance, the Newspaper's view notwithstanding, and the reporter should be required to give his evidence at trial.

STATEMENT OF FACTS

The Newspaper has omitted and misstated several key facts that have a bearing on this issue. (Relator will refer to the Beacon Journal and Phil Trexler together as "the Newspaper" except when reference is made expressly to one or the other of them.)

Most important, the Newspaper nowhere acknowledges that Respondent disputes the accuracy of some of the quotations and paraphrases in the story, which it was told from the outset. That is central to the present issue. If there were no dispute about the accuracy of the Newspaper story, there would have been no subpoena. To suggest that Relator has a purpose to harass Trexler is without any foundation whatsoever.

In Paragraph 47 of his Answer, Respondent denies having told Trexler that he did not receive notice of the warrants. In Paragraph 48, he says that he told Trexler

that he never “intentionally” missed a hearing of which he had notice. The disputed statements are highly material to the charges against Respondent.

It is inaccurate to say that Trexler did not hear about the story involving Judge Gallagher from when it was published until he was subpoenaed. He and then his editor were contacted by counsel for Relator during the investigation phase, but since they would not agree to confidentiality (thus, that there would not be a further Newspaper story while Respondent was still entitled to confidentiality), the matter could not be discussed with Trexler beyond the bare outline of the issue, with identifying information omitted.

After the Complaint was filed, Relator’s counsel spoke fully with Trexler about the case. Trexler said that he would stand behind the accuracy of the story. But Trexler said that he could not testify voluntarily and that a subpoena would be needed. The subpoena was then issued very promptly, on August 30, 2013. Trexler accepted service without formality, which was done a few days later.

Relator was quite willing to have Trexler’s evidence submitted by Affidavit, which the Newspaper misleadingly omits to say in the body of its Brief. But as is clear from another portion of the partially-quoted email from Relator’s counsel to the Newspaper’s counsel (Exhibit D to the Brief), “Larry Shenise has informed us that he will not agree to the admission of an affidavit from Phil Trexler unless there is also a tape of his interview. Since we understand that there is no such tape, we cannot withdraw the subpoena.”

To say that the Newspaper “does not embroil itself in others’ dust-ups” not only belittles these proceedings, it misstates the Newspaper’s role in the community.

As it should, the Newspaper reports on controversies and sometimes takes positions on them. Indeed, it recently did extensive reporting and expressed itself editorially concerning a grievance against an Akron Municipal Court Judge. (Trexler was the reporter.) A recent story was also written about a grievance dismissed against the Summit County Probate Judge. Presumably, those grievances were not mere “dust-ups” and there is no reason why this matter should be disparaged in that way.

Nor is there any evidence that by compelling testimony in such situations as these, “journalists would spend more time testifying on witness stands than on their beats.” The statement is nothing more than unsupported hyperbole.

SUMMARY

- I. The motion to quash is time-barred.**
- II. All the state and federal case law strongly supports enforcement of the subpoena.**
- III. The subpoena does not call for the disclosure of sources, of information provided in confidence, or for evidence that is merely duplicative.**
- IV. There is no alternative to obtaining the reporter’s testimony. Relator is not harassing the reporter.**
- V. Relator has not avoided investigation for which it seeks to substitute the reporter’s work product.**
- VI. The ethical prohibition against impugning judges includes making statements to reporters.**
- VII. There is no unreasonable burden imposed on the reporter.**

DISCUSSION

I. The motion to quash is time-barred.

The subpoena was issued on August 30, 2013, and was mailed to Trexler on September 4, 2013. He had agreed to accept informal service and the Newspaper does not raise any issue about that, nor does it suggest that the subpoena was received more than one or two days after it was mailed.

The motion to quash was not served by mail until November 8, 2013, thus at least two months after the subpoena was received. Since this matter is set for trial on December 5, 2013, the return date of the subpoena, the motion was filed less than one month before trial.

The motion is accordingly untimely. Civil Rule 45(C)(3) provides that a subpoena may be quashed “on timely motion.” While an objection to the production of documents pursuant to subpoena must be made with fourteen days, pursuant to Division (C)(2)(b) of the Rule, “timely” is not further defined.

Relator’s counsel have found no Ohio cases and only one non-Ohio federal case involving the timeliness of a motion to quash a trial subpoena under the present Rule.¹ In that case, the Court noted that it had found no previous cases directly on point.

Iorio v. Allianz Life Insurance Co., 2009 WL 3415689 (USDC SDCA, 2009), applied FRCP 45(c)(3)(A)², which uses the same “timely motion” language as the Ohio Rule. The Court allowed the motion as timely after “look[ing] at the circumstances of the case.” *Id.*, at *4. The Court in *Iorio* thus found the timeliness

¹ A motion to quash made at trial was untimely under the previous formulation of the Rule, “promptly and in any event at or before the time specified in the subpoena for compliance therewith.” *Lamberjack v. Gyde*, 1993 WL 476313 (6th App. Dist., 1993)

² The subsection will be redesignated “(d)” effective December 1, 2013.

issue to be significant and conducted an analysis, even though it was not under the time pressure that exists in the present case, as discussed below.

The motion in *Iorio* was filed six to eight weeks after service of the subpoenas and six weeks before the then-scheduled trial date.³ Because the trial was continued in the meantime, potential effect on the proceedings was not an issue. The subpoenas were for distant non-party witnesses who would have been significantly burdened. They were moreover available to be deposed where they resided for presentation of their testimony at trial, had the proponent of the subpoenas chosen to do so, and the motion to quash was accordingly granted.

By contrast, in the present matter trial remains scheduled imminently and the rights of the parties will be affected significantly if there must be a continuance for the Panel to determine this issue (or if there is an appeal that stays the proceedings).⁴ Relator issued its subpoena as soon as it knew it would be required, for that very reason. There is no explanation offered by the Newspaper for its long delay in filing its motion, nor is any such explanation at all apparent. Further, unlike the situation in *Iorio*, there is no alternative to Trexler's live testimony, providing far less opportunity for flexibility.

Analogous authority as to deposition subpoenas supports the conclusion that the present motion to quash is untimely. Relator's counsel found no Ohio authority under the present Rule. Federal and other state cases have found that only a few months or less of delay render a motion to quash untimely, especially when there is an impact on

³ The Court decided the motion five months after the trial date that had been scheduled when the subpoenas were issued and by then the trial date had been re-scheduled to five months after the decision. The Court does not say whether the continuance was a result of the motion.

⁴ There is a right of appeal to the Ohio Supreme Court. *Cincinnati Bar Assn. v. Adjustment Service Corp.*, 89 Ohio St. 3d 385 (2000).

the proceedings comparable to a late motion to quash a trial subpoena. *CCB LLC v. Banktrust*, 2010 WL 4038740 (USDC NDFL, 2010) (more than ten day delay); *Hendry v. Hendry*, 2005 WL 3359078, *6 (Del. Chancery, 2005) (more than two month delay); *Sterling Merchandising, Inc. v. Nestle, S.A.*, 470 F.Supp.2d 77, 85 (USDC DPR, 2006) (more than three month delay); *U.S. ex rel. Pogue v. Diabetes Treatment Centers*, 238 F.Supp.2d 270, 278 (USDC DC, 2006) (three month delay). See also, *U.S. v. Winemiller*, 2011 WL 4755778, *1 (USDC NDMS) (one month delay, to within two weeks of trial, in filing motion to quash criminal trial subpoena untimely).

The Newspaper need not have put the Panel and the parties in this position. That is the very reason for the “timeliness” requirement and it should be enforced here to bar consideration of the motion to quash.

II. All the state and federal case law strongly supports enforcement of the subpoena.

III. The subpoena does not call for the disclosure of sources, of information provided in confidence, or for evidence that is merely duplicative.

IV. There is no alternative to obtaining the reporter’s testimony. Relator is not harassing the reporter.

V. Relator has not avoided investigation for which it seeks to substitute the reporter’s work product.

The Newspaper’s brief sounds a clarion call for First Amendment protection, but this case involves none of the First Amendment issues with which the Courts have been concerned. Relator does not seek the disclosure of confidential sources or of

confidential information disclosed to the reporter. Those are the critical matters upon which the First Amendment protections of the press are typically weighed, not direct testimony from a reporter simply to corroborate the accuracy of disputed portions of his story.

Nor does Relator seek collateral evidence for which there are other sources. While, for the sake of completeness, the subpoena did seek notes or other records of Trexler's interview of Respondent, Relator accepts Trexler's word that there are no such documents now, so the *duces tecum* is moot.

The present issue is thus far more limited than the Newspaper depicts it. None of the authority cited by the Newspaper accordingly supports its position, indeed most of it runs directly counter to the Newspaper. The Newspaper relies heavily on *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), but that decision in fact supports Relator's position. *Branzburg* allowed a grand jury subpoena seeking reporter testimony about the criminal conduct of confidential sources.

Relator's position here is even stronger, since Relator seeks no such sensitive testimony. Respondent is not a confidential source of Trexler's. Relator does not seek to disrupt Trexler's relationships with his news sources. The core First Amendment protections that were balanced in *Branzburg* are absent here.

The decision in *Branzburg* was that the reporter *was compelled to testify*. The Newspaper accordingly attempts to distinguish these proceedings as "civil" and thus not worthy of the same public concern. But the newspaper cites no authority in support of the distinction it attempts to draw and the distinction is in fact not as far-

reaching as it contends.

The Ohio Supreme Court has emphasized the importance of attorney disciplinary proceedings for the protection of the public and has noted that they are more than civil matters:

“A disciplinary proceeding is instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed to practice law, and is neither a criminal nor a civil proceeding . . . Gov.Bar R. V and the regulations relating to investigation and proceedings involving complaints of misconduct are to be construed liberally for the protection of the public, the courts, and the legal profession.”

Disciplinary Counsel v. Heiland (S.Ct.), 2008 Ohio 91, at ¶ 32 and ¶ 34. The Newspaper’s attempt to minimize the significance of these proceedings is thus in error.

The various balancing tests set out in Justice Powell’s concurrence in *Branzburg*,⁵ by the U.S. Court of Appeals for the Sixth Circuit *In re Grand Jury Proceedings*, 810 F2d, 580, 586 (1987) and as adopted by the Ohio Supreme Court in *State, Ex. Rel. National Broadcasting Company, Inc. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d. 104, 111 (1990), *overruled in part on other grounds*, 2008 Ohio 545, all yield analysis favorable to Relator, even if confidential information were being sought, which it is not.

Thus, using Justice Powell’s test, 1) the information sought is directly

⁵ The three-prong test was *not* “effectively established” by *Branzburg* as the Newspaper states at page 6 of its brief. But Relator will use it for the present analysis since the Newspaper relies on it.

relevant; 2) the information cannot be obtained by any alternative means and 3) the information is essential to the administration of justice.

The first prong should not be in dispute, since the information is plainly relevant. The Newspaper concedes Relator's position that "[Respondent's] communication with the newspaper reporter *is* the violation." (Brief, p. 7.) Respondent did not say what he said about Judge Gallagher to anyone but Trexler. The Newspaper then published what Trexler reported that Respondent said – as to which Respondent denies Trexler's accuracy. (The Newspaper's contention that Respondent's disputed statements should not be considered violations at all because made to a reporter are discussed below.)

The second prong should likewise not be in dispute, for much the same reason as the first prong. *There is simply no other source for the information.* Trexler is and was the only witness to what Respondent told him. There is no other record of the statements besides the memories of Trexler and Respondent.⁶ This is not a situation where Trexler is only one of a number of sources for the information, as for example if others had been present when Respondent spoke.

As to the third prong, the Newspaper apparently contends that Respondent ought to be exempt from discipline for anything he denies he told Trexler, simply because Trexler is a reporter. Thus, at page 8 of its Brief, the Newspaper says that there is "no overwhelming or compelling societal interest involved . . . Respectfully, while we recognize that impugning a judge is a violation of the Ohio Rules of

⁶ The duces tecum of the subpoena is moot, since Relator accepts Trexler's statement that there is no relevant documentary evidence remaining in existence. There is thus no issue of obtaining notes, recordings, unpublished statements, outtakes, or the like.

Professional Conduct, the rules should be subsumed by the constitution – in particular, in this case, the constitutional protections afforded journalists who report on a story of immense public interest even though it may also be personally hurtful to the bench.”

In other words, according to the Newspaper, a lawyer should be able to lie about a judge to a reporter – resulting in a widely published page one story – then avoid discipline simply by denying the truth of the story.⁷ That is exactly what will happen here if Trexler does not testify, since Relator has the burden of proof by clear and convincing evidence. Respondent’s un rebutted denial of key portions of the story will have to be accepted by the Panel and the charges will then inevitably be dismissed as to the disputed statements.

The Newspaper’s astonishing position notwithstanding, that is not the law. The Constitution does not afford lawyers a shield to lie about judges to reporters with impunity if they merely lie further and deny they said what they said.

The attorney disciplinary system is critical to the protection of the public. The protection of judges from unjust allegations is fundamental, since the public’s respect for them is a linchpin of the system of justice and judges cannot respond to public attacks themselves. This is not just a matter of personal hurtfulness; it goes to respect for the judiciary, not for the feelings of individuals. The ability of disciplinary prosecutors to prove the accuracy of disputed newspaper stories in which judges are attacked is thus essential to the administration of justice.

Analysis under the Sixth Circuit’s alternative test in *Grand Jury* yields the

⁷ Respondent never disputed the accuracy of the story until his Answer in these proceedings, over a year later.

same result.⁸ 1) Trexler is not being harassed at all, much less in any effort to disrupt his relationship with sources. There is no issue of any confidential source being disclosed. If the evidence could be obtained otherwise, Relator would have no interest whatsoever in pursuing the subpoena. The Newspaper offers no evidence of harassment beyond the fact that Relator persists in requiring Trexler's testimony. The suggestion of harassment by Relator's counsel is, frankly, outrageous.

2) For the same reasons, the request is plainly made in complete good faith. To say it yet again, if Respondent did not dispute the accuracy of the article, or if there were some other way to rebut his denials, or if he would have been willing to stipulate to an affidavit from Trexler, the subpoena would have been withdrawn, if it had ever been issued in the first place.

3) The information bears a direct relationship to the proceedings. It is not for the Newspaper to determine that certain of the charges against the Respondent should be dropped, in effect, by Relator having to forego Trexler's testimony to support them.

Finally, 4) there is a legitimate need for the information for all the reasons stated. This disciplinary proceeding serves an important public purpose.

The Ohio Supreme Court took a very narrow view of the protection to be afforded the press in *State ex rel NBC, supra*. The Court expressly noted that the U.S.

⁸ The standard is adequately paraphrased by the Newspaper, but as stated exactly it is, "Whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship." *Grand Jury*, at 586.

Supreme Court had rejected the three-prong test advocated by Justice Stewart in *Branzburg*, at 110. The Ohio Supreme Court moreover adopted an even more restricted restatement of the position of the Sixth Circuit in *Grand Jury*, as set forth at page 111:

“Thus, a court may enforce a subpoena over a reporter’s claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for a legitimate purpose, rather than for harassment.”

The Court went on to uphold an injunction requiring the preservation of the television station’s tapes of the event that was the subject of the trial to come, thus strongly suggesting that their eventual disclosure would be required. The Court noted that there was no issue of the protection of confidential sources under R.C. 2739.12, nor is there such an issue in the present case.

NBC continues to be the law of Ohio on this subject. *City of Akron v. Cripple*, 2003 Ohio 2930 (9th App. Dist., 2003); *In re April 7, 1999 Grand Jury Proceedings*, 2000 Ohio 2552 (7th App. Dist., 2000); *In re Grand Jury Witness Subpoena of Abraham*, 92 Ohio App.3d 186 (11th App. Dist., 1993).

Without repeating Relator’s arguments at length, it is readily apparent that the present subpoena has been issued for a legitimate purpose and not for harassment. It is fully justified under the standard of *NBC* and the other authority.

The Newspaper has argued that this issue should be analyzed as if these proceedings were civil in nature, rather than by analogy to criminal proceedings. As noted above, the Ohio Supreme Court has held that disciplinary proceedings are a hybrid. The strong public policy interests involved, including the risk of public

sanctions against Respondent, make them more like criminal proceedings, in Relator's view.

But even if the motion to quash should be analyzed under the law applicable to civil proceedings, the Newspaper's position must fail. Thus, the Newspaper urges the three-prong test used in *Fawley v. Quirk* (9th App. Dist., 1985), 11 Med.L.Rptr. 2336, 2337–2338, cited unfavorably in *NBC, supra*, at 110. That test is: “(1) is the information relevant, (2) can the information be obtained by alternative means and (3) is there a compelling interest in the information?”

While the Newspaper's Brief cites *Fawley* as if it supports the Newspaper's position, it does just the opposite. The Court in *Fawley* affirmed a finding of contempt against a Beacon Journal reporter who refused to disclose a confidential source in a defamation action brought by a former police chief against a city and its mayor.

As noted above, the present case does not involve the sensitive disclosure of a confidential source, simply verification of the accuracy of a disputed story. As in *Fawley*, the information is relevant, it cannot be obtained by alternative means and, if anything, there is an even more compelling interest in the information for purposes of these disciplinary proceedings. *Fawley* thus fully supports Relator's position, not that of the Newspaper.

The Newspaper also cites the Fourth Circuit decision in *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (1986), which applied essentially the same standard as that used in *Fawley*, but there affirmed denial of a motion to compel the reporter's evidence. But *LaRouche* is fully distinguishable from the present case. There, the movant had the names of all of the sources but had not sought depositions

from them. Thus, the movant had not exhausted the alternative means of getting the information.

That is substantially the same fact pattern as *County of Summit v. Keith Heating & Cooling, Inc.*, Case No. CV 2012 10 5959 (Summit C.P., 2013), cited by the Newspaper but not copied to its Brief (it is attached to this one). The Court there noted that the reporter's story was not the subject of the litigation and that the reporter was not himself a witness to any of the events at issue, at page 6, thus the testimony was not necessary.

By contrast, in the present case, the newspaper story is at the heart of the proceedings and the reporter is the only witness who can rebut Respondent's denials. There is no alternative source for the information as to the disputed statements.

There is extensive other authority supporting the compulsion of reporter testimony in cases like this one, even assuming that the present case is civil for the purpose of the motion to quash. *Hade v. City of Fremont*, 233 F.Supp.2d 884 (USDC NDOH 2002)(unpublished information); *Convertino v. U.S. Dept. of Justice*, 2008 WL 4104347 (USDC EDMI 2008)(source disclosure); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir., 2003)(non-confidential source who did not object to disclosure of information). Relator notes with interest that in *City of Akron v. Cripple, supra*, the Newspaper did not appeal from the trial court's denial of its motion to quash subpoenas to reporters who witnessed the events at issue and testified at trial.

V. The ethical prohibition against impugning judges includes statements to reporters.

VI. There is no unreasonable burden imposed on the reporter.

The Newspaper suggests in the last section of its Brief that the subpoena is unwarranted because Relator's Complaint is of too little significance. The Newspaper's counsel's research was said to have found no disciplinary cases in which statements to the press about judges were the "sole" basis for sanctions. But the Newspaper of course has no business deciding what allegations are and are not worthy of consideration. The Complaint, including the allegations concerning the impugning of Judge Gallagher's reputation, was certified for filing by a probable cause panel of this Board.

The disclaimer of "sole" basis also creates a meaningless distinction. Almost no disciplinary cases proceed on "sole" allegations, nor does this one. But the existence of other allegations does not mean that allegations requiring reporter testimony should be eliminated as superfluous. The allegations should not be effectively dismissed because the Newspaper does not believe that it should have to be involved.

There have been several disciplinary cases involving statements to the media about judges or other court officers. They have not required many incidents to warrant sanctions and reporter testimony was involved in one of them. *Disciplinary Counsel v. Ferreri*, 85 Ohio St.3d 649 (1999) (three media statements; reporters testified); *Disciplinary Counsel v. Hoskins* (S.Ct.), 2008 Ohio 3194 (single press release); *Disciplinary Counsel v. Grimes*, 66 Ohio St.3d 607 (1993) (single comment to reporter and comments to another judge; facts stipulated).

The Newspaper further wrongly suggests that an unreasonable burden will be placed on Trexler, if not its reporters generally, if he must testify. This matter is to be

heard in downtown Akron, within a mile of the Beacon Journal offices. Trexler's testimony should not require more than an hour, if that. The burden on him will be minimal.

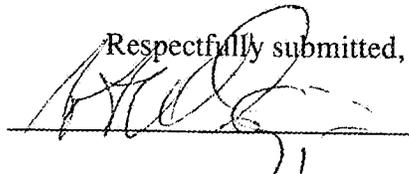
The suggestion that allowing such subpoenas will open the floodgates to constant reporter testimony is totally unfounded and, in any event, provides no basis for First Amendment protection. The Court in *Branzburg* noted the contention that subpoenas were proliferating, but rejected that as a reason to preclude reporter testimony even if true, 408 U.S., at 699. The Newspaper offers no evidence that even the local decisions compelling testimony in *Fawley* and *Cripple* have led to repeated subpoenas for its reporters, occupying their time unreasonably.

CONCLUSION

Relator hesitates to characterize the Newspaper's motion as totally baseless, but that is objectively the truth of the matter. On these facts, that nothing more is sought from Trexler than a few minutes of his time to testify at trial that he stands behind the accuracy of his story, there is literally no authority that remotely supports the Newspaper's motion to quash.

The motion is moreover untimely. It should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Opposition was sent by U.S. Mail the 22nd day of November, 2013 to:

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United States District Court,
S.D. California.

Anthony J. IORIO, Max Freifield, Ruth Scheffer,
on behalf of themselves and all other similarly
situated, Plaintiff,

v.

ALLIANZ LIFE INSURANCE COMPANY OF
NORTH AMERICA, Defendant.

No. 05cv633 JLS (CAB). | Oct. 21, 2009.

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Opinion

ORDER (1) GRANTING MOVANTS' MOTION TO QUASH SUBPOENAS; (2) DENYING REQUEST FOR SANCTIONS; (3) DENYING AS MOOT PLAINTIFFS' EX PARTE APPLICATION

JANIS L. SAMMARTINO, District Judge.

*1 Presently before the Court are Plaintiffs' ex parte application to resolve issues regarding trial subpoenas (Doc. No. 313) and eight current or former employees of Defendant's (collectively, "movants") motion to quash subpoenas served on them and for sanctions. (Doc. No. 328). For the reasons stated below, the Court **GRANTS** eight movants' motion to quash the subpoenas. Accordingly, the Court **DENIES AS MOOT** Plaintiffs' ex parte application. The Court further **DENIES** movants'

motion for sanctions.

RELEVANT BACKGROUND

This class action suit commenced on March 30, 2005 and is currently set for a jury trial beginning March 29, 2010. The action arises out of Defendant's alleged misrepresentations in connection with an annuities plan offered by Defendant and purchased by Plaintiffs. In late March and April 2009, Plaintiffs subpoenaed several witnesses to appear at trial, eight of which are movants in the present action.¹ A dispute between the parties arose over the validity of the subpoenas.² Plaintiffs thus filed the present ex parte application for the court to resolve the dispute on April 24, 2009. (Doc. No. 313.) Before responding to the ex parte application, Defendant's counsel filed the present motion to quash the subpoenas and a motion for sanctions on behalf of all eight movants on May 5, 2009. (Doc. No. 328.) On May 8, 2009, Defendant filed its opposition to Plaintiffs' ex parte application. (Doc. No. 331.)

Plaintiffs filed their opposition to the motion to quash and sanctions on May 21, 2009. (Doc. No. 334.) Movants filed their reply to the opposition on May 28, 2009. (Doc. No. 336.) A hearing was scheduled for October 29, 2009. The Court hereby vacates that date and takes the matter under submission without oral argument.

LEGAL STANDARD

Federal Rule of Civil Procedure 45 governs the issuance and service of subpoenas in federal civil actions. A subpoena issued for attendance at a trial must be issued "from the court for the district where the hearing or trial is to be held." Fed.R.Civ.P. 45(a)(2)(A). For service in the United States, "[s]ubject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: (A) within the district of the issuing court; [or] (B) outside that district but within 100 miles of the place specified for the ... trial ..." Fed.R.Civ.P. 45(b)(2). Rule 45(c)(3)(A)(ii) states that "[o]n timely motion, the issuing court must quash or modify a subpoena that: ... (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that ... the person may be commanded to attend a trial by traveling from any such place within the state where the trial is

held.” Fed.R.Civ.P. 45(c)(3)(A)(ii). A court is “permitted” to quash or modify the subpoena if the subpoena requires “a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.” Fed.R.Civ.P. 45(c)(3)(B)(iii). However, a court may order appearance in situations where it would otherwise be permitted to modify or quash the subpoena “if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated.” Fed.R.Civ.P. 45(c)(3)(C).

MOTION TO QUASH SUBPOENAS

*2 Eight current employees or former employees of Defendant, Renee West, Diane Gate, Krista Storkamp (Wall), John Helguson, Patrick Foley, Carolyn Cosgrove, Robert MacDonald, and Charles Field (collectively, “movants”) move the Court to quash subpoenas to appear at trial served on them by Plaintiffs. Because the issues regarding the service of subpoenas on current employees is different than serving former employees, the Court will first discuss the three movants who are current employees of Defendant.

A. Current Employees

The three movants who are current employees of Defendant are Krista Storkamp, Renee West and Diane Gates. All three work at Defendant’s office located in Minnesota, where they were served with the subpoenas issued on behalf of this Court. (Mem. ISO Mot. to Quash at 2.) Because the subpoenas are for the witnesses to attend trial in this district, a valid subpoena must be issued on behalf of this Court. Fed.R.Civ.P. 45(a)(2)(A). In order for the subpoena to be valid, it must fall within this Court’s subpoena power pursuant to Rule 45(b)(2).

These three movants were served in Minnesota, and thus fall outside 100 miles of this district. Despite this, Plaintiffs contend that this Court has subpoena power over these employees because “the 100-mile limitation [set forth in Rule 45] does not apply to parties or their officers, which includes higher-level employees.” (Opp. to Mot. to Quash at 4.) Plaintiffs cite *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D.La.2006), which is the case often cited for this interpretation of Rule 45:

Rule 45(b) (2), which imposes the 100 mile rule, is

expressly limited by Rule 45(c)(3)(A)(ii). Rule 45(c)(3)(A)(ii) mandates that a district court must quash a subpoena if it requires “a person who is *not a party or an officer of a party*” to travel more than 100 miles from his residence or place of employment. (emphasis added).... Accordingly, Rule 45(c)(3)(A)(ii) does not require the Court to quash the subpoena [of an officer]. Instead, Rule 45(c)(3)(A)(ii) support the inverse inference that Rule 45(b)(2) empowers the Court with the authority to subpoena ... an officer of a party, to attend a trial beyond the 100 mile limit.

438 F.Supp.2d at 667. The *In re Vioxx* court found that this interpretation arose from the “plain and ambiguous language” of Rule 45, but acknowledging that “nothing in the history or adoption of current Rule 45(b)(2) ... or Rule 45(c)(3)(A)(ii) ... conveys any intention to alter the 100 mile rule.” *Id.* Though the parties do not cite, nor has the Court found, any Federal Court of Appeals or California district court decisions that have addressed this issue, Plaintiff contends this interpretation is the majority position amongst the district courts. (Opp. to Mot. to Quash at 4.) Thus, Plaintiffs urge this Court to also find that, because these three movants are officers or high-level employees, they too are under this Court’s subpoena power despite being outside the 100-mile radius.

*3 On the other hand, the movants contend that the opposite conclusion—that party officers are also limited by the 100-mile radius clause—is gaining more acceptance by the district courts. (Mem. ISO Mot. to Quash at 8.) Defendant relies on *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D.La.2008), which was decided two years after *In re Vioxx* by a different court within the same district. The court in *Johnson* found that Rule 45(b) (2)’s reference to Rule 45(c)(3)(A)(ii) limited the Court’s subpoena power, not expanded it: “To read the ‘subject to Rule 45(c)(3)(A) ii’ clause as *expanding* the territorial reach of where a party or party officer may be served with a trial subpoena ignores the ordinary meaning of the phrase ‘subject to.’ ” 251 F.R.D. at 216. The court further explained:

Nothing in the language of Rule 45(b)(2) itself provides for service at any *place* other than those locations specified in the rule itself.... Rule 45(b)(2) ‘states only that a subpoena may be served at *any place listed* in subdivisions (b)(2)(A)-(D). The provisions concerning the *possibilities* for *proper service*’ are listed in 45(b)(2). The terms of Rule 45(b)(2) themselves do not provide for nationwide service of a subpoena.

Id. Thus, “[r]eading Rule 45(c)(A)(3)(ii) as creating a scheme of nationwide subpoena service, if only on

parties, would have the effect of rendering Rule 45(b)(2) pointless with respect to parties and party officers.” *Id.* at 217.

The movants also cite several cases adopting the position stated in *Johnson*, some explicitly finding the reasoning set forth in *Johnson* more persuasive than the reasoning in *In re Vioxx*. See, e.g., *Dolezal v. Fritch*, 2009 WL 764542, at *2 (D.Ariz. Mar.24, 2009) (“The Courts has read *Vioxx*, *Johnson*, and related cases, and finds *Johnson* to be persuasive.”); *Chao v. Tyson Foods, Inc.*, 255 F.R.D. 556, 559 (N.D.Ala.2009) (“The Court finds that the minority interpretation of Rule 45 described in *Big Lots [v. Johnson]* and other similar cases is correct.”); see also *Maryland Marine, Inc. v. United States*, 2008 WL 2944877, at *6 (S.D.Tex. July 23, 2008); *Mazloum v. Dist. of Columbia Metro. Police Dept.*, 248 F.R.D. 725, 728 (D.D.C.2008); *Lyman v. St. Jude Med. S. C., Inc.*, 580 F.Supp.2d 719, 734 (E.D.Wis.2008).

The Court agrees and finds that Rule 45 does not expand the Court’s subpoena power beyond the 100-mile radius for party officers. The use of the phrase “subject to” has routinely been used by Congress to limit the scope of legislation, not expand it. There is no persuasive rationale for why “subject to” would be used differently in this context and inversely serve to expand the court’s subpoena power.

Plaintiffs contend, however, that the legislative history, specifically the amendments in 1991, signify Congress’ intent to expand the scope of the subpoena power.³ But, the courts in both *Vioxx* and *Johnson* explicitly state that the legislative history does not “convey an intention to alter the 100 mile rule.” *In re Vioxx*, 438 F.Supp.2d at 667; *Johnson*, 251 F.R.D. at 219 (finding “it prudent to address why the 1991 amendments to the rule did not create a system of nationwide subpoena service”).

*4 Moreover, if the Court were to use any guidance from the legislative history, it would advise against expanding the 100-mile radius rule, despite Plaintiffs’ contention otherwise. Specifically, in the 1991 amendment’s advisory committee notes, the committee clarified the amendments in subdivision (c) and stated that the only expansion of subpoena power was that the court may now subpoena a witness outside the 100 mile radius so long as the witness was located within the State of the district.⁴ Fed.R.Civ.P. advisory committee notes (1991). There is no such case here, as the three movants are located within Minnesota, not California.

Accordingly, the Court finds that Rule 45 does not give the Court the power to serve subpoenas to appear at trial

on party officers outside the 100-mile radius, absent any other state or federal law providing otherwise (there is no such law in this case). Thus, Krista Storkamp (Wall), Renee West, and Diane Gates were not properly served in this matter. The Court therefore grants the motion to quash as it pertains to these three movants.⁵

B. Former Employees

The remaining five movants are former employees of Defendant: Carolyn Cosgrove, Charles Field, Patrick Foley, John Helgerson, and Robert MacDonald.⁶ (Ex Parte App. at 3.) Mr. Foley was served at his home in Minnesota only with a subpoena issued on behalf of the District of Minnesota, but never by one issued on behalf of this Court. Mr. Helgerson was served at his home in Minnesota with a subpoena served on behalf of this Court. Ms. Cosgrove resides in Florida and was served with two subpoenas issued on behalf of District of Minnesota and the Middle District of Florida, but not one issued on behalf of this Court. Mr. Field resides in Michigan and was served with a subpoena on behalf of this Court, as well as one on behalf of the Western District of Michigan. (Mem. ISO Mot. to Quash at 3.)

Plaintiffs contends that the subpoenas were properly served on these witnesses on behalf of this Court for several reasons. First, Plaintiffs contend that the motion to quash the subpoenas was not timely filed and therefore Rule 45(c)(3)(A)(ii), which requires the court to quash on “timely” motion, does not apply. Instead, Plaintiffs argue that Rule 45(c)(3)(B), which sets forth when a court is “permitted” to quash the subpoenas, would apply. If Rule 45(c)(3)(B) is applicable, the Court may, instead of quashing or modifying the subpoenas, “order appearance ... if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated.” Fed.R.Civ.P. 45(c)(3)(C).

Plaintiffs admit that “no court has addressed the issue of what constitutes a ‘timely’ motion to quash a subpoena commanding appearance at trial.” (Opp. to Mot. to Quash at 8.) Thus, the Court must look at the circumstances of the case and determine if the motion was indeed timely. Plaintiffs contend that “[t]he former employees have long had notice that they are going to be called as fact witnesses at trial” because they were on both Defendant’s and Plaintiffs’ witness list lodged with the Court in October 2008. However, the Court does not find the witnesses notice dispositive, as the subpoenas were not actually served until late March–April 2009. Thus, it is understandable that the movants would wait until after

service of the subpoenas, not just after they received notice that they might be served, to file the motion to quash.

*5 Furthermore, the fact that the motion to quash was not filed until after Plaintiffs' ex parte application for the Court to decide this issue regarding the validity of the subpoenas is likewise not dispositive. To the contrary, the ex parte application was filed prematurely. While the Court appreciates Plaintiffs' need to decide the dispute, Plaintiffs were aware that Defendant was barred by the Court's previous Order from filing any further motions prior to the Trial Management Conference scheduled for June 4, 2009.⁷ (Doc. No. 306.) Furthermore, the motion to quash was filed 6 weeks before the date of compliance—the trial set for June 15, 2009. Given these circumstances, therefore, the Court finds that the motion to quash filed by Defendant's counsel on behalf of the movants was timely. Accordingly, Rule 45(c)(3)(A)(ii), which states when the "issuing court must quash or modify the subpoena" is the applicable provision. Because the subpoenas at issue in this case require the movants to travel more than 100 miles to attend trial, and none of them are traveling from within California, the movants were not properly served, and, therefore, pursuant to Rule 45(c)(3)(A)(ii), the Court must grant the movants' motion to quash.

C. Preclusion of Witnesses' Live Testimony

Plaintiffs assert that, if the Court grants the movants' motion to quash and Defendants refuse to produce the current and former employees as witnesses at trial, Defendants should not be permitted to produce the same witnesses for live testimony during their case or on cross examination. Plaintiffs contend that the inherent disparity between depositions and live testimony, especially when credibility is at issue as in the case of fraud allegations, would result in inequitable treatment. However, this inequity can be mollified by requiring Defendants to either produce the witnesses for both parties, or to not have live testimony from these witnesses at all. The Court agrees with Plaintiffs, and the Ninth Circuit has upheld this approach.

In *R.B. Matthews, Inc. v. Transamerica Transportation Services, Inc.*, the Ninth Circuit held that it was not an abuse of the trial court's discretion to preclude live testimony of two of defendant's employees who plaintiff attempted to call as witnesses but the defendant "refused to produce them or bring them within the subpoena range of the court." 945 F.2d 269, 272 (9th Cir.1991). Thus, plaintiffs had to read the depositions of the witnesses into the record during its case. *Id.* When defendant then

attempted to call the witnesses in person, the trial judge forbade them from doing so and further "ruled that no other witnesses could testify in person if portions of their deposition testimony were read into the record prior to an offer of their live testimony." *Id.* In upholding this order, the Ninth Circuit found that, though live testimony is preferred, in these circumstances there was no abuse of discretion. The court explained: "[E]quity does not favor the defendants. By denying [plaintiff's] requests to produce [the employees] as live witnesses, [defendant] engaged in gamesmanship, forcing [defendant] to rely on depositions ... If [defendant] had truly wished to present the live testimony of [the employees], it could have done so by making those witnesses available when [plaintiff] requested that they be produced." *Id.* at 273.

*6 The Court today finds that Defendants are on the brink of engaging in such gamesmanship. All movants are listed on both Plaintiffs and Defendant's witness lists lodged with the Court. Defendants are well aware that Plaintiffs intend to call these witnesses at trial, and Defendants would not commit to Plaintiffs request to have them produced.⁸ The Court acknowledges that Defendant is not required to call all the witnesses on its list, and thus the live testimony of some witnesses may be a moot point. However, in the event Defendant does decide to produce one or more of the movants in its case for live testimony, an inequitable result will occur given the Court's holding that all eight movants are outside this Court's subpoena power. Accordingly, the Court now holds that, if Plaintiffs are forced to show the videotaped depositions or read the transcript into the record of any of the movants in this action because Defendants have failed to produce them, Defendants will thereafter be precluded from producing the same witnesses in person.

D. Defendant's Request for Sanctions

The movants, through Defendant's counsel, also move the Court for sanctions against Plaintiffs' counsel pursuant to Rule 45(c)(1), which reads: "A party or attorney responsible for issuing and serving a subpoena must take reasonable step to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply." Fed.R.Civ.P. 45(c)(1).

While the Court does not condone the behavior of Plaintiffs' counsel and the issuance of multiple subpoenas on the movants, the Court denies the movants' request to sanction Plaintiffs' counsel. The movants point to the subpoenas issued on behalf of other districts in support of

its position that Plaintiffs' counsel acted unreasonably and imposed an undue burden or expense on the movants. However, this Court was not the "issuing court" as to those subpoenas. By its terms, Rule 45 requires this Court to enforce the duties and impose sanctions as they pertain to subpoenas for which this Court was the "issuing court," not those subpoenas issued on behalf of another court. Further, the Court acknowledges the fact that filing the motion to quash necessarily resulted in attorneys fees and a diversion of Defendant's counsel from trial. The Court's granting the motion to quash, however, is not enough to establish unreasonableness in serving the subpoena's or the imposition of an undue burden, especially given the split of authority and other arguments set forth by Plaintiffs regarding the subpoena power of this Court over employees of Defendants, as discussed above. Accordingly, the Court declines to sanction Plaintiffs' counsel for the issuance of the invalid subpoenas on the movants in this case.

CONCLUSION

For the reasons stated above, the Court **GRANTS** the movants' motion to quash the trial subpoenas issued on behalf of this Court and **DENIES** the request for sanctions. Because this Order resolves the issues regarding the subpoenas, the Court **DENIES AS MOOT** Plaintiffs' ex parte application for an order shortening time to hear motion for an order to resolve the issues regarding service of trial subpoenas.

***7 IT IS SO ORDERED.**

Footnotes

- 1 At the time the subpoenas were served, trial was set to begin on June 15, 2009.
- 2 Though various subpoenas were caused to be served on behalf of several districts, those at issue before this Court are the subpoenas that were issued on behalf of this district.
- 3 Plaintiffs note that the pre-1991 rule, then Rule 45(e)(1), stated: "A subpoena requiring the attendance of *a witness* at trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial ..." Fed.R.Civ.P. 45(e)(1), *as amended* Fed.R.Civ.P. 45(b)(2). In the current Rule 45(b)(2), however, any reference to "a witness" is "conspicuously absent" and "was replaced with the 'subject to Rule 45(c)(3)(A)(ii)' clause." (Opp. to Mot. to Quash at 5.) Thus, Plaintiffs argue, because Rule 45(c)(3)(A)(ii) identifies which specific witnesses may be served, and differentiates party officers, this clause "can mean only one thing—the 100-mile limitation does not apply to parties or their officers." (Opp. to Mot. to Quash at 5-6.)
- 4 Referring to Rule 45(c)(3)(A)(ii) which dictates that a court must quash a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—*except that ... the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held.*" Fed.R.Civ.P. 45(c)(3) (A)(ii) (emphasis added). Otherwise, the advisory committee stated that the amended rule "restates the former provisions with respect to the limits of mandatory travel." Fed.R.Civ.P. advisory committee notes (1991).
- 5 Plaintiff cites several cases in support of his contention that "high-level employees" are included under the umbrella of "officers." (Opp. to Mot. to Quash at 6-7.) However, this becomes irrelevant given the Court's current interpretation of Rule 45. Thus, the Court declines to address this contention.
- 6 Furthermore, because the Court found that the three current employees were not properly served as party officers, the discussion below is applicable to them, as well.
- 7 In fact, the Court noted that the motions to quash were filed prior to the lifting of this bar, finding that it "violated the spirit of the Court's bar" by filing the motion to quash and for sanctions on behalf of the third party movants. (Doc. No. 333, at 3 n. 1.)
- 8 Defendant asserts that it told Plaintiffs they would revisit the issue of producing witnesses "[w]hen it is determined who, if any, among these individuals [it] will call to testify at trial." (Reply to Opp. at 9.)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, N.D. Florida,
Pensacola Division.

CCB LLC, et al., Plaintiffs,
v.
BANKTRUST, Defendant.

No. 3:10cv228/LAC/EMT. | Oct. 14, 2010.

Attorneys and Law Firms

Charles S. Liberis, Richard Michael Beckish, Jr., Liberis Law Firm, Pensacola, FL, for Plaintiffs.

M. Walker, Paul Thomas Beckmann, Hand Arendall LLC, Mobile, AL, for Defendant.

Opinion

ORDER

ELIZABETH M. TIMOTHY, United States Magistrate Judge.

*1 This cause is before the court upon an "Objection and Motion by Non-Party [David E. Fleisher] to Quash or Modify Subpoena Seeking Deposition and Production of Documents" (Doc. 34). In the motion non-party Fleisher (hereafter "Fleisher") seeks an order quashing a subpoena issued by Plaintiff CCB LLC, which was served upon Fleisher on September 30, 2010, and which requires Fleisher to appear for a deposition and produce certain documents at a stated location on October 11, 2010, at 9:30 a.m. (*see* Doc. 34 & Ex. A).¹

Footnotes

- ¹ The subpoena reflects that Fleisher's address is in Destin, Florida and that the deposition was scheduled to take place in Fort Walton Beach, Florida (*see* Doc. 34, Ex. A).
- ² In some circumstances failure to attend a deposition may be excused, even in the absence of a motion for a protective order. *See, e.g., International Business Machines Corp.*, 79 F.R.D. at 414 (timeliness rule may not apply if there has been no opportunity to file a motion for protective order) (citing 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2035). Courts have also found

The court notes that Fleisher's motion to quash (Doc. 34) was filed on October 11, 2010, at 9:03 a.m., a mere twenty-seven minutes before the time Fleisher was required to appear for his deposition and produce documents. Initially, such a small amount of time is clearly insufficient for any court to issue a meaningful and timely order, especially considering that it provides no time for the filing of a response to the motion by the party issuing the subpoena. Moreover, with regard to the subpoena at issue here, there was absolutely no time to take any action on Fleisher's motion, as the United States Courthouse for the Northern District of Florida was closed in observance of the Columbus Day Holiday on October 11, 2010, the day Plaintiff's motion was filed. Thus, for all intents and purposes, Fleisher's motion was not filed until the day *after* he was scheduled to appear for deposition (that is, on October 12, 2010, the first day of business following the federal holiday, and the day on which the instant motion was brought to the attention of the undersigned).

Fleisher's motion, therefore, is due to be denied as untimely. *See, e.g., U.S. v. Portland Cement Co. of Utah*, 338 F.2d 798, 803 (10th Cir.1964) (protective orders must be obtained prior to taking of depositions); *United States v. Int'l Business Machines Corp.*, 70 F.R.D. 700, 701 (S.D.N.Y.1976) (same); *Mitsui & Co. v. Puerto Rico Water Resource Authority*, 93 F.R.D. 62, 67 (D.P.R.1981) (failure to timely move for protective order precludes objection later); *see also Truxes v. Rolan Elec. Corp.*, 314 F.Supp. 752, 759 (D.P.R.1970); *Wong Ho v. Dulles*, 261 F.2d 456, 460 (9th Cir.1958); *Marriott Homes, Inc. v. Hanson*, 50 F.R.D. 396, 400 (W.D.Mo.1970); 8A C. Wright & A. Miller, Federal Practice, § 2035 (2010).²

Accordingly, it is **ORDERED**:

The "Objection and Motion by Non-Party to Quash or Modify Subpoena Seeking Deposition and Production of Documents" (Doc. 34) is **DENIED** as untimely.

DONE AND ORDERED.

“substantial justification” for nonattendance on the basis of the deponent’s serious illness, *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171–72 (9th Cir.1994), and inconvenience and expense of traveling. *Speidel v. Bryan*, 164 F.R.D. 241, 244 (D.Or.1996). On the other hand, courts have rejected excuses such as withdrawal of local counsel, *Lew v. Kona Hospital*, 754 F.2d 1420, 1426–27 (9th Cir.1985), a deponent’s discharge of counsel, *East Boston Ecumenical Community v. Mastroiello*, 133 F.R.D. 2, 3–4 (D.Mass.1990), and inadvertence, *T.B.I. Industrial Corp. v. Emery Worldwide*, 900 F.Supp. 687, 694 (S.D.N.Y.1995).

The court finds no circumstances here that would excuse the late filing of Fleisher’s motion. As previously noted, Fleisher was served with the subpoena approximately eleven days before the scheduled date of the deposition and thus had an opportunity to timely file a motion to quash; he has not asserted that he was ill or otherwise unable to attend the deposition (rather, his objections are based on claims that Plaintiff’s subpoena failed to provide a reasonable time to comply with that part of the subpoena commanding the production of documents, called for the production of “privileged or other protected matter,” or otherwise subjected Fleisher to undue burden (*see* Doc. 34 at 2)); and Fleisher’s deposition was scheduled in a neighboring town, so it would not have been inconvenient or expensive to attend the deposition. While the court appreciates Fleisher’s efforts to resolve the disputed matters with Plaintiff prior to filing the instant motion (*see, e.g.,* Doc. 34, Exs.), Fleisher was nevertheless obligated to bring the dispute before the court in a timely matter.

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2005 WL 3359078

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Chancery of Delaware.

Marie S. HENDRY

v.

Gordon G. HENDRY, et al.

No. Civ.A. 18625-NC. | Submitted Sept. 29, 2005. |
Decided Dec. 1, 2005.

Dear Counsel and Mr. Hendry:

Opinion

PARSONS, Vice Chancellor.

*1 Presently before the Court are three motions, two by Defendant and the third by Plaintiff. Defendant Gordon Hendry, who is proceeding pro se, first requests the Court to remove Jason Powell from representing Plaintiff, Marie Hendry, Administratrix of the Estate of David J. Hendry, in this action. The Court will treat that request as a motion to disqualify Plaintiff's counsel. Defendant's second motion challenges the format of Plaintiff's subpoenas for the depositions of various witnesses, pursuant to Court of Chancery Rule 45. For the reasons stated below, the Court denies Defendant's motions.

Plaintiff Marie Hendry has moved for leave to file a second amended complaint. She filed the first amended complaint in 2001. Plaintiff now seeks to add Gordon Hendry's wife, Maryann Hendry as a defendant. For the reasons stated below, the Court grants that motion.

A. Background

This litigation is one of at least two cases in this Court stemming from a long-standing dispute over the respective parties' interests in a parcel of land located at the intersection of Telegraph Road and Old Capital Trail in New Castle County, Delaware. The first such case, C.A. No. 12236, involved a dispute over land that was

initially owned by David J. Hendry, Gordon Hendry's father. In 1985, David J. Hendry purportedly executed a deed that conveyed the property to himself and Gordon Hendry. In 1991, David J. Hendry instituted an action to challenge the validity of that deed. Although trial was scheduled, the parties avoided it by entering into a settlement agreement.¹ The parties agreed that the land would be partitioned: David J. Hendry would retain Parcel A and Gordon Hendry would retain Parcel B. Neither party had signed the settlement agreement, however, before David J. Hendry died in 1996. Marie Hendry then filed a motion in C.A. No. 12236 to enforce the settlement agreement, which was granted by the Court of Chancery.² The Delaware Supreme Court affirmed that decision on December 27, 1999.³

In 2001, Marie Hendry, as Administratrix of the Estate of David J. Hendry, filed this action (C.A. No. 18625). The complaint asserts numerous claims against Gordon Hendry including misappropriation of funds, interference with contracts and unjust enrichment. Gordon filed a number of counterclaims alleging, among other things, that a 1986 lease agreement that he, David J. Hendry and D. Hendry (Gordon's son who is now deceased) entered into with Dave's Shopping Center is still valid.⁴ Plaintiff's first amended complaint in this action also names as Defendants "Dave's Shopping Center", "DSC", and STS Services, Inc.

Defendant Gordon Hendry seeks an order disqualifying Jason Powell and his law firm from representing Plaintiff in this litigation. Gordon Hendry alleges that Ferry, Joseph & Pearce, Powell's firm, represented his son D. Hendry and that Powell "could have obtained information from old files."⁵ Powell has confirmed that a former attorney of Ferry, Joseph & Pearce, Kenneth Fink, did represent D. Hendry or his estate in a previous matter.

*2 Gordon Hendry is still involved in a business known as Dave's Shopping Center.⁶ In 1985, David J. Hendry, Gordon Hendry and D. Hendry formed a corporation known as Dave's Shopping Center, Inc.⁷ In 1986, they entered into an agreement to lease part of the disputed property to Dave's Shopping Center, Inc.⁸ Thereafter, the corporation was converted into a partnership (the "Partnership").⁹ D. Hendry passed away in 1989 and the Partnership dissolved.¹⁰ Gordon Hendry, David J. Hendry and the estate of D. Hendry then began maintaining the Partnership assets as tenants in common.¹¹ Gordon Hendry and his wife, Maryann Hendry, are the sole beneficiaries of D. Hendry's estate.¹²

In a September 29, 2005 status conference, the Court

requested supplemental information regarding the nature of any relationship Ferry, Joseph & Pearce had with Gordon Hendry's deceased son, D. Hendry. In a letter dated October 17, 2005, Powell reported that Fink left the firm of Ferry, Joseph & Pearce in January 1997. Although Fink recalled being contacted by an attorney to open the estate of D. Hendry and thought he had minimal contact with D. Hendry's widow, Fink did not recall doing any other work for the Hendry family. Gordon Hendry questioned Fink's memory of the representation of D. Hendry or his estate, noting that D. Hendry was single at the time of his death.¹³

B. Defendant's Motion to Disqualify Plaintiff's Attorney

The Court has the power to supervise the conduct of a party or counsel that appears before it, including the power to disqualify an attorney.¹⁴ In general, courts disfavor disqualification motions because they often are filed for tactical reasons rather than to ensure the integrity of the proceedings.¹⁵ Nevertheless, a court may disqualify an attorney if the representation frustrates the fairness of the proceedings.¹⁶

The party moving for disqualification bears the burden of proof.¹⁷ "A movant for disqualification must have evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice."¹⁸

The rules of professional responsibility guide the Court's analysis of a disqualification motion. The Court first must determine if a conflict of interest exists under the Delaware Lawyer's Rules of Professional Conduct ("DLRPC"). If a conflict is identified, the Court then must determine whether continued representation by the conflicted attorney would so undermine the integrity of the proceedings that the attorney must be disqualified.¹⁹

1. Is there a conflict of interest?

Gordon Hendry urges disqualification of Powell because Powell's firm formerly represented Gordon's son D. Hendry. It is unclear what precise relationship Gordon contends creates a conflict. He appears to question Powell's representation based on Dave's Shopping Center's involvement in this litigation and the fact that at one time D. Hendry was a partner in the Partnership that

held an interest in Dave's Shopping Center.

*3 The rules of professional conduct require continued loyalty to a former client.²⁰ Rule 1.9(a) of the DLRPC states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

As a threshold matter, the Court must determine whether Powell's firm's representation of Marie Hendry in this case can be said to be materially adverse to the interests of a former client. The only former clients alleged are D. Hendry and his estate. As discussed *infra*, it is not clear whether Powell's firm ever represented D. Hendry himself, as opposed to his estate. Gordon Hendry suggests that because D. Hendry was a member of the now dissolved Partnership, Marie Hendry's interests are materially adverse to the interests of a former client whether that client was D. Hendry or his estate or both.

Powell's firm apparently did represent the estate of D. Hendry at some point. Because the evidence presented is very limited, the Court is not convinced that Gordon Hendry has established that an attorney-client relationship also existed between Powell's firm and D. Hendry that would create a potential conflict in this litigation. The Court need not decide that issue, however, because the motion to disqualify can be resolved on other grounds. Thus, I will assume, without deciding, that Powell's participation in this litigation could be materially adverse to his firm's former client. The issue remains whether the matter in which Powell's firm represented D. Hendry or his estate is "substantially related" to the current litigation, such that it would give rise to a conflict of interest.

To determine whether matters are "substantially related" for purposes of a conflict of interest with a former client the Court must evaluate: the nature and scope of the prior representation at issue; the nature and scope of the present lawsuit against the former client; and whether during the course of the previous representation the client may have disclosed confidential information that could be used against the former client in the current lawsuit.²¹ Matters may be substantially related if they involve the same transaction or legal dispute or there is substantial risk that confidential information obtained in the former representation could materially advance the client's position in the current matter.²² The former client is not required to reveal specific details of the information

shared with the attorney, rather the Court may determine whether information regularly shared in that type of representation creates an unavoidable conflict with the current case.²³

A former attorney at the firm of Ferry, Joseph & Pearce, Kenneth Fink, represented the estate of D. Hendry in a prior matter. D. Hendry died in 1989, and there is no indication in the record that Fink had any involvement with D. Hendry before that time. Therefore, the Court assumes that a representative for D. Hendry's estate provided Fink with information of the type regularly shared in estate matters. To the extent Fink also may have represented D. Hendry before he passed away, there is no evidence of the nature of any such representation. Therefore, it cannot provide a basis for disqualification.

*4 In these circumstances, it is unlikely that Powell could have obtained confidential information that materially could advance Marie Hendry's position in the current litigation. Fink left Ferry, Joseph & Pearce in January 1997. The information that Powell and Fink provided regarding the representation of D. Hendry's estate indicates that the firm has few, if any, records on file for D. Hendry's estate. Thus, I find it highly unlikely that any information Powell's firm obtained during the representation of D. Hendry's estate or D. Hendry could be "substantially related to" or "materially advance" Marie's claims in this litigation.

Dave's Shopping Center became a party to the current litigation when Plaintiff filed an amended complaint in 2001. In the amended complaint, Plaintiff asserted claims based on actions Dave's Shopping Center took during the period from March 25, 1996 to the present, years after D. Hendry passed away. Gordon Hendry has failed to produce sufficient evidence to support a reasonable inference that D. Hendry's previous role in Dave's Shopping Center and the relationship he or his estate had with Fink are such that they would cause a conflict of interest for Powell in this litigation.

Similarly, there is no evidence that Fink's prior representation and the current litigation involve the same transactions or legal disputes. Without any common issues, there is no basis to conclude that D. Hendry, who died in 1989, or his estate could have disclosed information that could be used against Gordon Hendry or Dave's Shopping Center in the current litigation.²⁴ Thus, the Court concludes that there is no conflict of interest in violation of Rule 1.9 arising from Powell's representation of Marie Hendry in this case.

2. The integrity and fairness of this proceeding

Even if Powell's representation of Marie Hendry did violate Rule 1.9, disqualification would not be warranted. A violation of Rule 1.9 does not necessarily require disqualification as a remedy.²⁵ The Court must "weigh the effect of any conflict on the fairness and integrity of the proceedings before disqualifying the challenged counsel."²⁶

The limited evidence available suggests that the relationship between the matters handled by Ferry, Joseph & Pearce for D. Hendry or his estate and the current litigation were, at most, incidental. Given the nature of advising an estate in comparison to litigating the disputed issues here, it is doubtful that any significant information obtained in the representation of D. Hendry or his estate would be relevant to this litigation involving Gordon Hendry and Dave's Shopping Center. The representation of D. Hendry's estate occurred years before the pending litigation and it has not been shown that D. Hendry or the representatives of his estate had knowledge of any issues relevant to this litigation.

The disqualification of Powell could adversely affect the fairness of this proceeding, however. In particular, disqualifying Powell would prejudice Plaintiff by denying Marie Hendry her choice of counsel and delaying the adjudication of this matter. Accordingly, the Court denies Defendant's motion to disqualify and will permit Powell to continue his representation of Marie Hendry.

C. Defendant's Motion to Quash Plaintiff's Subpoenas

*5 Gordon Hendry also contends that a number of subpoenas issued at the request of Plaintiff are invalid. He argues that the format of the subpoenas did not meet the requirements of Court of Chancery Rule 45. Specifically, Defendant alleges that Plaintiff's subpoenas were not properly signed or sealed and that Plaintiff's counsel defrauded the Court of the processing fee.²⁷

Court of Chancery Rule 45 addresses the form and issuance of subpoenas. The rule states: "[E]very subpoena shall be issued by the Register in Chancery under the seal of the Court."²⁸ A subpoena must state the name of the court and the title of the action.²⁹ The Register in Chancery may issue a subpoena to a party that requests it and the party may complete the subpoena before service.³⁰ Delivering a copy of a subpoena to a person named therein constitutes service of the subpoena.³¹

In appropriate circumstances, the Court has the discretion to quash or modify a subpoena.³¹ For example, the Court may quash or modify a subpoena if it does not provide a reasonable time for compliance or imposes an undue burden.³² The party or attorney issuing and serving a subpoena shall take reasonable care to avoid undue burden or expense on the persons subject to the subpoena.³³ The Court may impose sanctions upon a party or attorney that breaches this duty.³⁵

A subpoena must provide notice to the individual to whom it is directed and be properly served.³⁶ "A subpoena is not rendered ineffective merely because of a technical error or irregularity in the form of the subpoena which does not prevent adequate notice and which does not prejudice, mislead, or deceive a party to whom it is directed."³⁷

Gordon Hendry has not demonstrated any basis for quashing Plaintiff's subpoenas under Court of Chancery Rule 45. The form Plaintiff used was proper, except that the subpoenas bore the signature of the previous Register in Chancery, who left office in December 2004. Plaintiff's counsel mistakenly used the subpoenas with the former Register's signature on them in July 2005. Rule 45 authorizes the Register in Chancery to issue blank subpoenas to a requesting party, who then may fill out the subpoena before service. Technically, the subpoenas at issue here were defective in that they were not signed by the current Register in Chancery.

Absent a showing of bad faith or prejudice, however, technical errors do not justify quashing a subpoena. Defendant has not shown that Marie Hendry or her attorney acted in bad faith or deceptively in issuing the subpoenas or that he was prejudiced in any way. The Court examined by way of example a subpoena Plaintiff served on Gordon Hendry. Except for the technical deficiency noted above, it appeared to satisfy Rule 45 and provided appropriate notice of the deposition date. Although Gordon Hendry's name was misspelled on the proof of service for the subpoena, it was issued to him properly.

*6 Further, Rule 45 authorizes the Court to quash or modify a subpoena upon a *timely* motion by the objecting party.³⁸ Although Plaintiff served the subpoenas in late July and August 2005, Defendant did not object to the use of those subpoenas until October. It is not timely to file a motion to quash a subpoena more than two months after the subpoena has been served.

Having considered all the circumstances, I conclude that the technical and somewhat belated objections Defendant

has raised do not justify quashing the subpoenas in question. Accordingly, Defendant's motion to invalidate the subpoenas is denied.

D. Plaintiff's Motion to File a Second Amended Complaint

On November 1, 2005, Plaintiff filed a motion for leave to file a second amended complaint pursuant to Court of Chancery Rule 15(a). Rule 15(a) provides that a party may amend their pleading once as a matter of course in the early stages of an action subject to conditions that no longer exist in this case. Otherwise, a party may amend only by leave of the Court, but leave is to be freely given.³⁹ Motions to amend often are granted at the discretion of the court unless there is serious prejudice to a party opposing the motion.⁴⁰

Marie Hendry filed the first amended complaint in May 2001. Plaintiff moved for leave to file a second amended complaint in November 2005. Plaintiff seeks to add Gordon Hendry's wife, Maryann Hendry, as a Defendant. The proposed second amended complaint asserts that certain assets that are part of this litigation may have been misappropriated into accounts held by Maryann Hendry.

Defendant Gordon Hendry did not object to Plaintiff's motion to amend. He did state, however, that the amendment could cause a delay in this litigation, which currently is scheduled for a two (2) day trial beginning on January 17, 2006. Defendant's wife, Maryann Hendry, does oppose becoming a party to this litigation. She submitted a letter stating that she has no knowledge of the business dealings that occurred between family members.⁴¹

The Court recognizes that this motion, filed four and a half years after the first amended complaint, is untimely. Other considerations, however, support granting the motion. The amended complaint alleged that Defendant Gordon Hendry misappropriated certain assets from the estate of David J. Hendry for his own benefit. Plaintiff claims to have learned in discovery that some of those assets were deposited into accounts owned by not only Gordon Hendry, but also his wife, Maryann Hendry. By her motion to file a second amended complaint, Marie Hendry seeks to add Maryann Hendry as a defendant and to assert an unjust enrichment claim against her.

The proposed amendment would not materially change the nature or scope of this litigation. Furthermore, neither Maryann Hendry nor her husband have identified any

undue prejudice they would suffer as a result of the amendment. If, as the proposed second amended complaint alleges, certain assets in dispute are held by both Gordon and Maryann Hendry, or by Maryann Hendry alone, the Court concludes that it would promote fairness and judicial economy to allow the amendment. The convoluted procedural history of this action and the related action C.A. No. 12236, for which both sides have some responsibility, has contributed to the delay in bringing this matter to trial. This fact does not absolve the belatedness of the motion to amend, but does lessen its importance. Accordingly, the Court will grant Plaintiff's motion for leave to file a second amended complaint.

E. Conclusion

*7 For the reasons stated, the Court denies Defendant's motion to disqualify Plaintiff's attorney and Defendant's motion to quash Plaintiff's subpoenas, and grants Plaintiff's motion for leave to file a second amended complaint. Plaintiff shall file and serve the amended complaint. After all Defendants have responded to the second amended complaint, the Court will schedule a conference to determine whether any changes need to be made to the case schedule.

IT IS SO ORDERED.

Footnotes

¹ See generally *Hendry v. Hendry*, 1998 WL 294009 (Del. Ch. June 3, 1998).

² *Id.*

³ *Hendry v. Hendry*, 1999 WL 1425004 (Del. Dec. 27, 1999).

⁴ Defs.' Answer ¶ 78.

⁵ Letter from Gordon Hendry to Court dated August 28, 2005.

⁶ Defs.' Answer ¶ 3. The source of some of the background information recited in this letter opinion is Defendants' Answer. To the extent that Plaintiff denies certain allegations in Defendants' Answer, the Court assumes the truth of those allegations solely for purposes of the pending motions.

⁷ *Id.* ¶ 67.

⁸ *Id.* ¶ 69.

⁹ *Id.* ¶ 71.

¹⁰ Defs.' Answer ¶ 74.

¹¹ *Id.*

¹² *Id.* ¶ 75.

¹³ Letter from Gordon Hendry to Court dated October 23, 2005.

¹⁴ *Aciermo v. Hayward*, C.A. No. 19729, mem. op. at 10 (Del. Ch. July 1, 2004) (Parsons, V.C.).

¹⁵ *Id.*

Hendry v. Hendry, Not Reported in A.2d (2005)

- 16 *Sanchez-Caza ex rel. Sanchez v. Estate of Whetstone*, 2004 WL 2087922 (Del.Super.Sept. 16, 2004).
- 17 *Kanaga v. Gannett Co.*, 1993 WL 485926, at *2 (Del.Super.Oct. 21, 1993).
- 18 *Acierno*, C.A. No. 19729, mem. op. at 9; *see also Kanaga*, 1993 WL 485926, at *2.
- 19 *Acierno*, C.A. No. 19729, mem. op. at 11; *see also In re Infotechnology, Inc.*; 582 A.2d 215, 216-17 (Del.1990).
- 20 *Sanchez-Caza*, 2004 WL 2087922, at *2.
- 21 *Sanchez-Caza*, 2004 WL 2087922, at *3; *see also DLRPC 1.9 cmt. 3*.
- 22 DLRPC 1.9 cmt. 3.
- 23 *Id.*; *see also Sanchez-Caza*, 2004 WL 2087922, at *3.
- 24 The fact that none of the parties to this litigation was ever a client of Powell or his firm undermines Gordon Hendry's argument. As a principal beneficiary of D. Hendry's estate, however, Gordon Hendry arguably might stand in D. Hendry's or the Estate's shoes for purposes of a conflicts analysis. For purposes of the pending motions, I have assumed that Gordon Hendry and Dave's Shopping Center have a sufficient commonality of interest with D. Hendry's estate to assert their conflict argument.
- 25 *Sanchez-Caza*, 2004 WL 2087922, at *4.
- 26 *Id.*
- 27 Letter from Gordon Hendry to the Court dated October 5, 2005.
- 28 Ch. Ct. R. 45(a).
- 29 *Id.*
- 30 Ch. Ct. Rule 45(a)(1)(D).
- 31 Ch. Ct. Rule 45(b).
- 32 Ch. Ct. Rule 45(c)(3)(A).
- 33 *Id.*
- 34 Ch. Ct. R. 45(c)(1).
- 35 *Id.*
- 36 *Bob's Discount Adult Books v. Attorney General*, 1983 WL 471443, at *1 (Del.Super. May 24, 1983).
- 37 *Id.*

Hendry v. Hendry, Not Reported in A.2d (2005)

38 Ch. Cl. R. 45(c)(3)(A)(emphasis added).

39 *Id.*

40 *Brunswick Corp. v. Colt Realty, Inc.*, 253 A.2d 216, 219 (Del. Ch.1969).

41 Letter from Maryann Hendry to the Court and Jason Powell dated November 12, 2005.

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United States District Court,
N.D. Mississippi,
Greenville Division.

UNITED STATES of America
v.
Jimmy WINEMILLER.

No. 4:06CR124-WAP-JMV. | Oct. 7, 2011.

Attorneys and Law Firms

Robert N. Habans, Jr., Habans & Carriere, Baton Rouge, LA, Grady F. Tollison, Jr., Tollison Law Firm, P.A., Oxford, MS, for Jimmy Winemiller.

Opinion

ORDER

JANE M. VIRDEN, United States Magistrate Judge.

*1 This matter is before the court on the motion of the Government to quash a subpoena served by Defendant Jimmy Winemiller (# 368).¹ On September 12, 2001, the United States Department of Agriculture ("USDA") received a subpoena duces tecum which commands the appearance of Thomas J. Vilsack, Secretary of the USDA, or his duly appointed representative/custodian of records for the USDA and the production of documents at the trial of this case set for October 12, 2011.² This subpoena requires the production of five (5) categories of relevant and admissible documents that are in the possession, custody, or control of the USDA. For the reasons set out below, the court finds that the motion is not well-taken:

To begin, the Government's motion to quash is not timely. The Government waited a month to file objections to the September 12, 2011 subpoena. Trial is less than two weeks away, and the court is in an untenable position. The Government has offered no excuse for the dilatory nature of this motion. Additionally, Local Uniform Criminal Rule 47 requires that all motions be accompanied by a Certificate of Conference that must state that counsel has conferred with opposing counsel in a good faith attempt to resolve the matter without court intervention, and failure to file an accompanying certificate of conference may be deemed sufficient grounds for denying the

motion. L.U.Crim. R. 47(A). The Government not only failed to attach a good faith certificate to the subject motion, but indeed failed to contact defense counsel regarding the subpoena.³

In addition to the timeliness issue and procedural defectiveness of the motion, the Government has failed substantively to justify why this court should quash the subject subpoena. The Government first makes the argument that the court had previously denied Defendant's motion to compel these documents, stating, "that the government is not obliged to investigate the defendant's case for him particularly with regard to documents that are of little or no relevance to the case or defense. The government will not be required to obtain these materials for the defendant." However, the court's Order (# 204) relieved the prosecution of the obligation of providing these documents. The subpoena requires the USDA, not the prosecution, to provide documents within its control. This is the logical way for the Defendant to obtain documents if the prosecution is not required to provide the documents for them. For this reason the Government's reliance on the Order denying the motion to compel is without merit.

Next, the Government argues that the majority of the documents have already been produced through discovery.⁴ The court will not require the USDA to produce records that have already been produced. Nevertheless, it is obligated to search its records and determine whether it has any responsive documents that have not been produced.

The Government's next argument is that the documents are prohibited from disclosure by the Privacy Act, 5 U.S.C. § 552a. However, the Government fails to justify its reliance on this statute in a criminal matter. Moreover, beyond a conclusory allegation, the government has not provided the court with any facts or proof supporting this argument.

*2 Lastly, the court recognizes the Government's position that the United States Supreme Court has recognized the need to restrict the use of subpoenas against high-ranking government officials such as the Secretary of Agriculture. *United States v. Morgan*, 313 U.S. 409, 421-22 (1941), and that the Fifth Circuit has stated that if other persons can provide the information requested, discovery will not be permitted against such an official. *In re F.D.I.C.*, 58 F.3d 1055, 1062 (5th Cir.1995). However, defense counsel's September 12 letter to prosecution counsel and the subpoena, itself, clearly explain that either the Secretary or his duly appointed representative/custodian

of records could appear and give testimony. In addition, Defendant provided the Government with a proposed certification that the USDA's custodian of records could sign and return with the requested documents. As with any other subpoena duces tecum, if the USDA representative were to elect to appear at trial with the responsive documents, any testimony that might be required would be related to the authentication of the responsive documents as the business records of the USDA so that Defendant could then seek to admit them into evidence.

In the present case, the Government has filed a procedurally flawed motion to quash a subpoena on the eve of trial that substantively fails to justify why the court should quash a subpoena served on the USDA almost a month ago. Accordingly,

IT IS, THEREFORE, ORDERED that the Government's motion to quash the subpoena duces tecum (# 368) is hereby DENIED.

IT IS FURTHER ORDERED that the Defendant's motion (# 373) confirming the validity and effect of previously served trial subpoenas is hereby GRANTED, in light of the continued trial date of October 17, 2011. Defendant's motion is granted with the understanding that defense counsel is charged with personally contacting each witness confirming the date on which they are to appear.

SO ORDERED.

Footnotes

- 1 The court notes that the motion was incorrectly docketed as being related to all defendants; however, the government's brief in support of the motion clearly indicates that Defendant Jimmy Winemiller issued the subject subpoena. Accordingly, the instant motion relates to Defendant Jimmy Winemiller only.
- 2 The trial has been since reset to begin on October 17, 2011.
- 3 By letter dated September 12, 2011, defense counsel explained that the Secretary of the USDA could send a duly authorized representative to testify at trial in his stead and invited prosecution counsel to contact him to resolve any issues with the scope of the subpoena prior to filing any motion to quash.
- 4 The government also argues that producing the documents would be unduly burdensome and oppressive because they span a period of 15 years. The court finds it hard to accept this contention, however, if the majority of the documents have already been produced.

DANIEL M. HERRIGAN

2013 SEP 11 AM 11:11

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

COUNTY OF SUMMIT,)	CASE NO. CV 2012 10 5959
)	
Plaintiff,)	JUDGE TAMMY O'BRIEN
)	
VS.)	
)	
KEITH HEATING AND COOLING, INC.,)	<u>ORDER</u>
<i>et al.</i> ,)	
)	
Defendants.)	
)	

This matter comes before the Court on the Motion to Quash Subpoena filed by Petitioners The Beacon Journal Publishing Company, Inc. and its reporter, Bob Dyer (*collectively referred to as "the Beacon Journal"*), and the Motion for Sanctions Against Counsel for Mr. Bob Dyer filed by Defendants Keith Heating & Cooling, Inc. and Keith Goodwin (*collectively referred to as "Keith Heating"*). The Court has considered the aforementioned Motions, the responses thereto, the underlying facts, and applicable law. Upon due consideration, the Court GRANTS the Beacon Journal's Motion to Quash Subpoena and DENIES Keith Heating's Motion for Sanctions Against Counsel for Mr. Bob Dyer.

ANALYSIS

1. Factual Background.

The Beacon Journal published a news story on December 14, 2011 headlined "Heating Company May Face Permit Penalties/Summit threatening to ban Keith from doing any work in area, prosecute if owner can't prove paperwork filed." See December 14, 2011 news story, attached to the Beacon Journal's Motion to Quash Subpoena as Exhibit A. This story reported that Keith Heating had received a letter from Summit County's Division of Building Standards saying that it could only find forty-five (45) permits taken out by the Company since 1996. The story reported that this was a problem considering that a permit is needed whenever a new furnace or whole-house air-conditioning unit is installed. The fact that Keith Heating had only forty-five (45) permits over a fifteen (15) year period raised a red flag with County regulators.

The December 14, 2011 story quoted two former Keith Heating employees as saying that permits were rarely obtained. The story identified the Keith Heating employees by name.

The Beacon Journal published a second news story about Keith Heating on December 26, 2011. The December 26, 2011 story was headlined "Heating Company in More Hot Water/Local Contractor Association Files Complaint Against Keith." See December 26, 2011 news story, *attached to* the Beacon Journal's Motion to Quash Subpoena as Exhibit B. This second story reported that Keith Goodwin went to the Summit County Division of Building Standards and paid for 62 permits that were not taken out on previous jobs. This story also quotes a dissatisfied customer and representatives of professional groups, such as the contractor's association and the consumer affairs office. The December 26, 2011 story quoted everyone by name.

A third story was published by the Beacon Journal on February 16, 2012. The February 16, 2012 story was headlined "Keith Heating Investigation Continues/Prosecutor gathers information in case against Tallmadge Company." See February 16, 2012 news story, *attached to* the Beacon Journal's Motion to Quash Subpoena as Exhibit C. This third story updates readers on the status of the County's investigation into Keith Heating and quotes a County investigator and attorney as well as Mr. Goodwin's attorney. As in the previous news stories, the February 16, 2012 news story quoted everyone by name.

The Beacon Journal published a fourth story on March 4, 2012, headlined "Heating Company Allegedly Boastful on Flier/Ad shows Keith Goodwin bragging how much money Tallmadge Company makes." See March 4, 2012 news story, *attached to* the Beacon Journal's Motion to Quash Subpoena as Exhibit D. The March 4, 2012 story reported that Keith Goodwin appeared in an advertising flier where he was quoted as saying: "we use a tool from Profit Day that guarantees us an additional \$7,000 a month without having to do anything! It just shows up in our bank accounts!" *Id.* This story also quotes Mr. Goodwin's attorney, Adam Van Ho, the flier, a Direct Energy spokeswoman, and an investigator for the Summit County Office of Consumer Affairs. Everyone who is quoted is identified by name, no one is anonymous.

A fifth story was published in the Beacon Journal on October 25, 2012. See October 25, 2012 news story, *attached to* the Beacon Journal's Motion to Quash Subpoena as Exhibit E. The October 25, 2012 news story, headlined "County Goes After Keith Heating/Prosecutor accuses company of deceptive sales practices, asks the court to freeze assets," reported that the Summit County Prosecutor's Office had filed a lawsuit seeking to shut down Keith Heating. Once again, all sources are named in this news story, no one is anonymous.

The lawsuit referenced in the Beacon Journal's October 25, 2012 news story is this litigation, *i.e. County of Summit v. Keith Heating & Cooling, Inc., et al.*, Summit County Court of Common Pleas Case No. CV 2012 10 5959. As part of discovery in this case, Keith Heating has subpoenaed Bob Dyer, author of the December 14, 2011, December 26, 2011, February 16, 2012, March 4, 2012, and October 25, 2012 news stories. The Subpoena served upon Mr. Dyer asks him to bring the following to his deposition:

1. All documents referring to, relating to, or evidencing any communications between Mr. Bob Dyer and any agent, employee, or representative of the Summit County Building Department or Division, that concerns, refers to, or relates to Keith Heating & Cooling, Inc. or any of its agents, employees, or representatives, including without limitations Mr. Keith Goodwin.
2. All documents referring to, relating to, or evidencing any communications between Mr. Bob Dyer and Ms. Lynne Black (Air Conditioning Contractors of America Akron Canton Chapter) or any of its agents, employees, or representatives, that concerns, refers to, or relates to Keith Heating & Cooling, Inc. or any of its agents, employees, or representatives, including without limitation Mr. Keith Goodwin.
3. All documents relating to, referring to, or evidencing any consumer complaints against Keith Heating & Cooling, Inc., or any of its agents, employees, or representatives, including without limitation Mr. Keith Goodwin, for the time period January 1, 2010 to the present.
4. All documents referring to, relating to, or evidencing and any communications had by Mr. Bob Dyer and any other person or persons, that concern, refer to, or relate to Summit County Case No. 2012-10-5959, *County of Summit v. Keith Heating & Cooling, Inc., et al.*
5. All documents referring to, relating to, or evidencing any training or education had or possessed by Mr. Bob Dyer that concerns, relates to, or refers to cracked or holed heat exchangers in HVAC units.
6. All documents referring to, relating to, or evidencing any communications had by Mr. Bob Dyer and any labor organization (union) that referred to, related to, or concerned Keith Heating & Cooling, Inc., or any of its agents, employees or representatives, including without limitation Mr. Keith Goodwin, for the time period January 1, 2010 to the present.

See July 12, 2013 Subpoena issued to Bob Dyer and attachment thereto.

The Beacon Journal moves the Court for an Order quashing the July 12, 2013 Subpoena. It is the Beacon Journal's position that Mr. Dyer's journalistic work is protected from compelled disclosure. The Beacon Journal emphasizes in its Motion that all of Mr. Dyer's quoted sources are specifically identified by name and that Keith Heating can conduct its own discovery in this matter. In addition to arguing that Mr. Dyer's journalistic work is constitutionally protected, the Beacon Journal asserts that "[a]ny information favorable to Keith Heating that was accessible to Dyer is equally accessible to Keith Heading's defense counsel. Counsel should not be allowed to require Dyer to do their work for them." *See* Motion to Quash at 6. Among other cases, the Beacon Journal cites *Braznburg v. Hayes*, 208 U.S. 665, 92 S.Ct.2646, 33 L.Ed.2d 626 (1972) to

support its position that Mr. Dyer's journalistic work is subject to a qualified privilege. The Beacon Journal also cites *Fawley v. Quirk*, 9th Dist.No. 11822 (July 17, 1985)

Keith Heating opposes the Beacon Journal's Motion to Quash. Keith Heating asserts that it was purposely targeted and singled out by the Beacon Journal. Keith Heating finds it interesting that Mr. Dyer's articles were assembled and published "in the very year that Keith Heating & Cooling, Inc. chose to cease advertising in the ABJ." See Keith Heating's Opposition to Motion to Quash at 6. Keith Heating further asserts that the Beacon Journal's reliance upon *Fawley*, 9th Dist.No. 11822, is misplaced and an attempt to mislead the Court. It is emphasized that *Fawley* was overruled in *State, ex rel. National Broadcasting Co. v. Court of Common Pleas of Lake County*, 52 Ohio St.3d 104, 110-112, 556 N.E.2d 1120 (1990) and that, as set forth by the Supreme Court of Ohio, "a court may enforce a subpoena over a reporter's claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for legitimate purpose, rather than for harassment." Keith Heating argues:

The scant legal authorities trotted out by Dyer and his counsels in an effort to create some sort of blanket reporter's privilege against civil litigation subpoenas have either been expressly overturned by the Ohio Supreme Court, or involve efforts to have disclosed confidential reporter sources. At bottom, then, what Dyer and his counsels want is judicial legislation covering that which Ohio's Reporter Shield Law (R.C. § 2739.12) does not currently reach.

Id. at 9.

The Beacon Journal filed a Response to Keith Heating's Opposition on August 7, 2013. The Beacon Journal maintains in its Response that Keith Heating's "subpoena is overbroad and was issued in bad faith for the purpose of harassing Dyer and the Beacon Journal." See Beacon Journal's Response to Defendants' Opposition at 1. It is asserted that, when addressing case law and the relevance thereof, Keith Heating fails to recognize "[t]he difference between compelled testimony in a criminal trial versus a civil trial." *Id.* The Beacon Journal cites the recent decision in *U.S. v. Sterling*, 4th Cir.No. 11-5028, 2013 WL 3770692 (July 19, 2013) to support its position that there is a significant difference between reporter information in criminal versus civil matters. It is the Beacon Journal's position that "[t]he failure to distinguish between criminal and civil processes and the failure to distinguish between a reporter as witness to criminal activity and as independent recorder of information are fatal flaws in Keith Heating's argument." *Id.* at 3-4. Among its arguments, the Beacon Journal emphasizes that:

Neither the Beacon Journal nor Bob Dyer is a party to this litigation. No story written by Dyer or published by the Beacon Journal has been the subject of any litigation. Dyer did not witness criminal activity being committed by Keith Heating, and did not write any news articles purporting to claim that he witnessed such activity. Indeed, Dyer did what reporters do every day: He interviewed sources and published their accounts. (Two named sources were attorneys representing Keith Heating.)

Id. at 4.

In addition to opposing the Beacon Journal's Motion to Quash, Keith Heating filed a Motion for Sanctions Against Counsel for Mr. Bob Dyer. Keith Heating argues its Motion for Sanctions that Mr. Dyer's counsel has breached her ethical duty set forth in the Ohio Rules of Professional Conduct and, additionally, that counsel made deliberate misrepresentations to the Court in an effort to harass Defendants and to cause Defendants unnecessary delay and expense. Keith Heating maintains that sanctions are appropriate as Attorney Karen Lefton knowingly made false representations of law and filed the Motion to Quash simply as a means to harass and cause unnecessary delay and expense.

The Beacon Journal responded to Keith Heating's Motion to Compel on August 15, 2013. The Beacon Journal asserts that the latest Motion for Sanctions, which was filed "on the heels of threatening to sue Counsel and her law firm for filing a lawful Motion to Quash * * * and leaving a hostile voicemail on her telephone * * * is yet more *prima facie* evidence that Defendants' purpose is solely to harass Dyer and the Beacon Journal, blaming Dyer for Keith Heating's position in the underlying litigation." See Beacon Journal's Response to Keith Heating's Motion for Sanctions against Counsel at 1. The Beacon Journal further argues:

while the undersigned understands that Defendants object to the citation of *Fawley v. Quirk* * * * in the Motion to Quash, it is important to note that Defendants cited *no* cases providing for the subpoenaing of journalists in a civil lawsuit in which the journalist was not a party. In fact, there is a dearth of case law on point because there are no few attempts by litigators to (1) use the journalist's work product as their own or (2) blame the journalist's work for the underlying lawsuit. In any event, the impact of *Fawley*, a civil lawsuit in which a non-party journalist's subpoena was quashed, should be assessed by this Court in context with *State, ex rel. National Broadcasting Company v. Court of Common Pleas of Lake County*, a criminal case with a far different fact pattern. If the Beacon Journal were aware of any other more applicable case, where a subpoena was issued to a non-party journalist in civil litigation, the Beacon Journal would bring it to the attention of this Court. Notably, of course, the Defendants have cited *no* cases that given them the authority to compel the testimony of Bob Dyer at a deposition at this stage of discovery.

Id. at 2.

2. Standard of Review – Motion to Quash.

Civ.R. 45 pertains to the issuance of subpoenas and, pursuant to Civ.R. 45(C)(3), the Court may quash a subpoena that "does any of the following":

- (a) Fails to allow reasonable time to comply;
- (b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specifically employed by any party in anticipation of litigation or preparation for trial as described by Civ.R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

Whether to quash a subpoena, and the Court's disposition of discovery matters, is reviewed under an abuse of discretion standard. *See State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998). An abuse of discretion connotes that a trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983). *See also State v. Daniel*, 9th Dist.No. 26670, 2013-Ohio-3510.

3. Analysis.

The Court has reviewed the parties' briefs and responses, the alleged facts of this matter, and applicable law. As set forth in the Beacon Journal's Motion to Quash and August 7, 2013 Response, case law is clear that there is a difference between compelled testimony in a criminal trial versus a civil trial. In the cited criminal cases, *i.e. Branzburg v. Hayes*, 208 U.S. 665, 92 S.Ct.2646, 33 L.Ed.2d 626, and *Sterling*, 4th Cir.No. 11-5028, 2013 WL 3770692, the reporters witnessed or participated in the crimes for which the defendant was being prosecuted. The Courts found that, under those circumstances, the reporters did not have a constitutional privilege to avoid testifying. The parties do not cite, and the Court was unable to find, a relevant case regarding the Constitutional protections of non-party journalists in a civil proceeding.

Neither the Beacon Journal nor Bob Dyer are parties to this litigation. The stories written by Mr. Dyer and published by the Beacon Journal are not the subject of any litigation. Every single source in every single story written by Mr. Dyer about Keith Heating is identified and specifically named. If it so chooses, Keith Heating can do the same thing that Mr. Dyer did - - *i.e.* interview the identified sources.

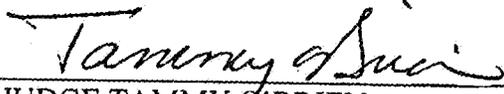
Upon due consideration, the Court agrees with the Beacon Journal and finds that Mr. Dyer's journalistic work is protected from compelled disclosure by the First Amendment of the U.S. Constitution. Even if not constitutionally protected, considering the circumstances and the fact that all sources were identified and specifically named, the Court finds that the Subpoena served upon Mr. Dyer is overly broad and is intended to merely harass the Beacon Journal. The Court notes that Mr. Dyer did not personally witness any crime or wrongdoing. Mr. Dyer investigated complaints and identified all individuals to which he spoke. Keith Heating is entitled to do the same. ACCORDINGLY, the Court GRANTS the Beacon Journal's Motion to Quash.

Keith Heating's Motion for Sanctions Against Counsel for Mr. Bob Dyer is DENIED. The Court finds that counsel did not mislead or make misrepresentations to the Court. Sanctions are not warranted in this matter.

CONCLUSION

WHEREFORE, for the reasons set forth above and upon due consideration, the Court GRANTS the Beacon Journal's Motion to Quash and DENIES Keith Heating's Motion for Sanctions Against Counsel for Mr. Bob Dyer.

IT IS SO ORDERED.


JUDGE TAMMY O'BRIEN

Assistant Prosecuting Attorney Leslie Anne Walter
Attorneys Jaime Kolligian/Keith Pryatel
Attorney Karen C. Lefton

2008 WL 4104347

Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Richard G. CONVERTINO, Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant.

No. 07-CV-13842. | Aug. 28, 2008.

Attorneys and Law Firms

Lenore M. Ferber, Convertino Assoc., Robert S. Mullen, Progressive Legal Services, Plymouth, MI, Stephen M. Kohn, Kohn, Kohn, Washington, DC, for Plaintiff.

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Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL AND CLOSING CASE

ROBERT H. CLELAND, District Judge.

*1 Pending before the court is Plaintiff Richard Convertino's motion to compel production from non-party reporter David Ashenfelter and the Detroit Free Press ("Free Press") filed on July 6, 2007. A hearing on the motion was held before the court on June 2, 2008. Because the court concludes that the information sought is neither privileged nor beyond the scope of discovery set forth in Federal Rule of Civil Procedure 26, the court will grant the motion with respect to Ashenfelter. But because Convertino's subpoena of the Free Press should be limited under Rule 26's mandate against cumulative or duplicative discovery, the court will deny the motion as to the Free Press.

I. BACKGROUND

Plaintiff Richard Convertino is a former assistant United

States attorney ("AUSA") who worked in the Detroit United States Attorney's office. (Redacted OIG Report at 2, Ashenfelter's Ex. E.) As an AUSA, Convertino led the Government's prosecution of four terrorism suspects in the 2003 trial *United States v. Koubriti*. (*Id.*) In November 2003, the Department of Justice Office of Professional Responsibility ("OPR") began an internal investigation of possible ethics violations by Convertino in connection with the trial. (*Id.* at 1.) Some of the details of this investigation were described in a January 17, 2004 article "Terror Case Prosecutor is Probed on Conduct" (the "Article"), printed in the Free Press under the byline of David Ashenfelter. (Article at 1, Ashenfelter's Ex. C.) Ashenfelter reported that "[U.S. Justice] Department officials, who spoke on condition of anonymity, fearing repercussions" divulged that the OPR was investigating Convertino for several alleged misdeeds related to the *Koubriti* prosecution.¹ (*Id.*) Convertino responded on February 13, 2004 by filing suit against the Department of Justice ("DOJ") in the United States District Court for the District of Columbia, claiming the Department had violated the federal Privacy Act, 5 U.S.C. § 552a, by publicizing confidential information about the OPR investigation. (*See* Complaint at 2, Pl.'s Ex. 3.)

During discovery, Convertino attempted to learn the identity of the Department of Justice officials responsible for revealing his confidential information to the Free Press by noticing the DOJ for deposition testimony and the production of relevant documents about the persons mentioned in the Article. (4/25/2007 Letter at 3, Pl.'s Ex. 2.) DOJ representatives responded by claiming that they could not name Ashenfelter's sources because the Department's Office of the Inspector General's ("OIG's") exhaustive investigation into the matter did not reveal the source. (*Id.*) The OIG investigation focused on the approximately thirty DOJ employees² who had knowledge of, or access to, the only documents that contained all of the information reported in the Article. All of these individuals were interviewed by the OIG and provided affidavits stating that they had not revealed the information. (*Id.*) OIG also reviewed the relevant correspondence between the Detroit United States Attorney's Office ("USAO") and the OPR and all the documents associated with the OPR's allegations in its investigation. (*Id.* at 6.) Despite these efforts, OIG was "unable to determine by a preponderance of the evidence" the identity of Ashenfelter's sources. (*Id.* at 16.) After obtaining and reviewing OIG's report on the investigation, Convertino served subpoenas upon Ashenfelter and the Free Press, demanding that they disclose the identity of the anonymous DOJ officials cited in the Article. (Subpoena, Pl.'s Ex. 1.)

II. STANDARD

*2 The scope of discovery available to parties in a civil action is outlined in Federal Rule of Civil Procedure 26. As a general matter, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed.R.Civ.P. 26(b)(1). Discovery privileges, like the evidentiary privileges used at trial, are determined by the Federal Rules of Evidence. Fed.R.Evid. 1101(c) (“The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.”). Rule 501 specifies:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed.R.Evid. 501. However, federal courts are required to apply state privilege law “with respect to an element of a claim or defense as to which State law supplies the rule of decision.” *Id.*

Even if a party’s discovery request is non-privileged and relevant, it will not be granted if it constitutes discovery abuse. The court must limit discovery, either on motion or of its own accord, in a number of circumstances. Fed.R.Civ.P. 26(b)(2)(C). Discovery cannot be had if it is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed.R.Civ.P. 26(b)(2)(C)(i). A court will likewise deny discovery if “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action.” Fed.R.Civ.P. 26(b)(2)(C)(ii). Finally, discovery is not permitted when its “burden or expense ... outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Fed.R.Civ.P. 26(b)(2)(C)(iii).

Additionally, a party confronted with a potentially harmful discovery request may move the court for a

protective order. Fed.R.Civ.P. 26(c)(1). The court may issue such an order, for good cause, “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.*

III. DISCUSSION

In his response to Convertino’s motion to compel, Ashenfelter asserts that the identity of his sources is shielded by a qualified reporter’s privilege. Such a privilege has been applied in civil actions by some federal circuit courts, which have concluded that the First Amendment’s protection of news-gathering activities mandates the extension, under certain circumstances, of a conditional privilege over the identity of reporters’ confidential sources. *E.g., Zerilli v. Smith*, 656 F.2d 705, 710-12 (D.C.Cir.1981). However, the Sixth Circuit has explicitly declined to recognize a qualified First Amendment privilege for reporters. *Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir.1987). For this reason, Convertino’s motion to compel may be blocked only if it constitutes discovery abuse under Federal Rule of Civil Procedure 26.

A. The Reporter’s Privilege

*3 The foundation of the modern reporter’s privilege³ rests on the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). In *Branzburg*, the Court held that the First Amendment does not relieve a reporter from the obligation to appear before a grand jury and respond to relevant questions, even if this requires the reporter to divulge confidential information. *Id.* at 690-91. In the five-Justice majority opinion authored by Justice White, the Court declined to recognize a First Amendment testimonial privilege for reporters:

Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.
Id. at 689-90.

Yet despite its disavowal of a general reporter’s privilege, the Court made several statements that suggested the First

Amendment may extend to reporters a more limited protection from compelled disclosure. The *Branzburg* Court restricted its consideration to the “sole issue” of “the obligation of reporters to respond to grand jury subpoenas.” *Id.* at 682. The Court’s reasoning depended heavily on the history and importance of grand jury proceedings within our constitutional structure, *see id.* at 686-88, which make “the longstanding principle that ‘the public ... has a right to every man’s evidence’ ... particularly applicable.” *Id.* at 688 (alteration in original) (citations omitted) (quoting 8 John Wigmore, *A Treatise on the Anglo-American System of Evidence* § 2192 (J. McNaughton rev. ed.1961)). And the *Branzburg* majority indicated that “news gathering is not without its First Amendment protections.” *Id.* at 707. Further, a concurring opinion by Justice Powell-whose vote was decisive in the outcome of the case-stressed the “limited nature of the Court’s holding.” *Id.* at 709 (Powell, J., concurring). He asserted that reporters can be protected from harmful disclosures by a protective order or motion to quash, which should be decided on a case-by-case basis by balancing “freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* at 710 (Powell, J., concurring).

In the wake of *Branzburg*, federal appellate courts have grappled with the extent to which reporters enjoy a First Amendment testimonial privilege. Specifically, courts are divided on to what extent *Branzburg*’s holding, made in the context of a grand jury proceeding, applies to civil cases. The majority of circuit courts have established a conditional privilege for reporters from whom civil litigants request discovery.⁴ In so holding, these courts have taken a variety of approaches when considering *Branzburg*. *See Bruno*, 633 F.2d at 594 (treating Justice Powell’s concurrence as the controlling opinion because his vote was needed to make the majority); *Riley*, 612 F.2d at 714-15 (relying heavily on those parts of *Branzburg* acknowledging the First Amendment’s protection of news gathering); *Farr*, 522 F.2d at 467 (considering Justice White’s opinion a plurality and not a majority); *Silkwood*, 563 F.2d at 437 (reading *Branzburg* to itself establish a qualified First Amendment privilege); *Zerilli*, 656 F.2d at 711-12 (distinguishing *Branzburg* as applicable only to criminal cases). The contours of the reporters’ privilege vary somewhat between those jurisdictions that recognize it, but all treat it as a qualified privilege that may be dispelled by a balancing test.⁵

^{*4} The Sixth Circuit addressed the reporters’ privilege in *Grand Jury*, when it considered whether to grant a writ of habeas corpus to a reporter detained by a state court for refusing to comply with a county grand jury subpoena. 810 F.2d at 581. Relying on the opinions of the other

circuit courts, which had already accepted a qualified reporters’ privilege, the petitioner claimed that a “reading of Justice Powell’s concurring opinion is superimposed upon Justice White’s majority decision” and entitled him to a First Amendment privilege suspended only upon “a clear and convincing showing of relevancy, essentiality, and exhaustion of non-media sources’ for obtaining information.” *Id.* at 583-84.

The Sixth Circuit’s interpretation of *Branzburg*, however, led it to reject the petitioner’s arguments. Noting that “acceptance of the position urged upon us by the [petitioner] would be tantamount to our substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart ... for the majority opinion,” *id.* at 584, the *Grand Jury* court pointed out that the *Branzburg* majority had considered and rejected “a testimonial privilege conditioned upon the inability of prosecutors to establish relevancy, unavailability from other sources, and a need so compelling as to override invasion of first amendment interests occasioned by disclosure,” *id.* (citing *Branzburg*, 408 U.S. at 680). Recognizing the *Branzburg* majority’s reference to Professor John Henry Wigmore’s warning against “obstructing the search for truth by the creation of additional testimonial privileges,” *id.* (citing *Branzburg*, 408 U.S. at 690 n. 29), the Sixth Circuit determined that “[i]t is apparent, from the extensive discussion in the majority opinion of policy reasons urged upon it as supporting adoption of a reporter’s testimonial privilege, that, in the judgment of the majority, the last three of Professor Wigmore’s predicates [to recognizing any privilege against disclosure] are lacking,” *id.*⁶ *Grand Jury* also limited the broadly-sweeping language in Justice Powell’s concurrence. The Sixth Circuit considered his endorsement of a case-specific balancing test merely an elaboration of the majority’s admonition that the First Amendment protects reporters from bad faith grand jury investigations. *Id.* at 585-86. The Sixth Circuit explicitly “declin[ed] to join some other circuit courts, to the extent that they have ... adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority.” *Id.* at 584.⁷

The Sixth Circuit, then, has adopted a view opposite from most other circuit courts by declining to recognize *any* reporters’ privilege, qualified or absolute, in civil cases. This understanding of *Grand Jury* is made clear by two of the three district courts in the Sixth Circuit that have considered claims of a reporters’ privilege after the Court of Appeals issued its opinion. Indeed, it is the position taken by two opinions of judicial officers of this district.⁸ In an instructive case from the Eastern District of Michigan, *In re Daimler Chrysler AG Securities Litigation*, 216 F.R.D. 395 (E.D.Mich,2003) (Whalen,

MJ),” the court carefully analyzed *Branzburg*, *Grand Jury* and key cases from other circuit courts, and deduced “the Court in *Grand Jury Proceedings* split with other jurisdictions which recognize a qualified privilege and employ a constitutional balancing test.” 216 F.R.D. at 400. The same magistrate judge reasserted this conclusion in December of 2007, when he again considered a motion to compel a reporter to disclose his confidential source. See *Omokehinde v. Detroit Board of Ed.*, No. 06-15241, 2007 WL 4357794, at *2 (E.D.Mich. Dec.13, 2007) (“*In re Grand Jury Proceedings* proscribed the application of any First Amendment privilege, qualified or otherwise, for reporters.”). The Northern District of Ohio has also endorsed this interpretation. *Hade v. City of Fremont*, 233 F.Supp.2d 884, 887-88 (N.D. Ohio 2002) (denying motion to quash subpoena).

*5 Despite the language of *Grand Jury* and its interpretation by most district courts in this circuit, Ashenfelter asserts that this court is still free to find a reporters’ privilege and extend it to him in these circumstances. Citing the only post-*Grand Jury* decision from a district court within the Sixth Circuit sustaining a claim of reporters’ privilege, *Southwell v. Southern Poverty Law Center*, 949 F.Supp. 1303 (W.D.Mich.1996) (McKeague, J.), Ashenfelter argues that *Grand Jury* does not apply in the civil context:

Although the Sixth Circuit, in dictum in *In re Grand Jury*, rejected the view held by most circuits that *Branzburg* could be interpreted as creating a qualified privilege, the court did so in the grand jury context and has yet to consider the much different issues raised in a civil proceeding.

Southwell, 949 F.Supp. at 1311-12. After drawing this conclusion, *Southwell* sided with the majority of circuit courts and granted the media Defendants a qualified First Amendment privilege. *Id.* at 1312. Ashenfelter urges this court to do the same, emphasizing the damaging effect of forced disclosure on First Amendment interests as recognized in cases such as *Zerilli*.

However, this court cannot agree to characterize as *Grand Jury* dicta what is more clearly seen as the Sixth Circuit’s conclusion: reporters are not entitled to a First Amendment privilege. A judicial statement is considered *obiter dictum*, and thus nonbinding, when it is “made while delivering a judicial opinion, but ... is unnecessary to the decision of the case.” *Black’s Law Dictionary* (8th ed.2004). The Sixth Circuit’s disavowal of a reporters’

privilege is central to the holding of *Grand Jury*. As explained by Magistrate Judge Whalen in *Daimler Chrysler*:

In reaching its decision in *Grand Jury Proceedings*, the Sixth Circuit undertook a detailed analysis of *Branzburg*, and concluded that the very test proposed by Respondents in the present case—that reporters have a qualified First Amendment privilege which can be overcome only if the party seeking the information meets some balancing test—was without support in either Justice White’s majority opinion or Justice Powell’s concurrence. Rather, the Sixth Circuit found that the only support for the qualified privilege/balancing approach was in Justice Stewart’s dissent, which was “rejected by the majority.” Furthermore, in reaching its conclusions, the Court in *Grand Jury Proceedings* explicitly rejected the reasoning and the holding of the very cases from other Circuits on which the Respondents rely in the present case, including *Zerilli v. Smith* The Sixth Circuit’s analysis was not a mere passing comment, but central to its ultimate decision. Its statement that *Branzburg* did not create any qualified privilege was categorical, not ruminative.

Daimler Chrysler, 216 F.R.D. at 401 (citations omitted) (quoting *Grand Jury*, 810 F.2d at 584).

*6 Simply put, this court is bound by the Sixth Circuit’s determination: *Branzburg* forecloses recognition of a qualified First Amendment privilege for reporters. “The Sixth Circuit’s decision in *Grand Jury*, though a minority of one, is the law in this circuit.” *Hade*, 233 F.Supp.2d at 888.

Ashenfelter’s additional arguments to the contrary do not persuade the court to depart from this conclusion. Ashenfelter claims that the Sixth Circuit’s decision in *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir.1998), recognizes constitutional protection for anonymous speech and thus undercuts *Grand Jury*’s general denial of a First Amendment reporters’ privilege. Closer examination, however, reveals that this case is

inapplicable. In *Midland*, the Sixth Circuit considered whether to enforce the National Labor Relations Board's ("NLRB's") subpoena calling for the *Midland Daily News* to identify an anonymous advertiser. *Id.* at 472. The court deemed the NLRB's exercise of its subpoena power a form of regulation, making the issue in *Midland* whether this regulation was an unwarranted governmental intrusion on the First Amendment right to commercial speech. *Id.* at 474-75. The extent to which the Government may directly control commercial speech has nothing to do with the extent to which a media defendant's First Amendment interests can be incidentally burdened by a private litigant's need for discovery.

Ashenfelter's assertions that Michigan's reporters' shield law¹¹ is ground for denying Convertino's motion is similarly unavailing. Since Convertino has only federal claims, evidentiary privileges are determined solely by federal law. *See* Fed.R.Evid. 501. The court agrees that Michigan's public policy of providing reporters protection from disclosure should not be ignored, but this factor-like the potential danger to reporters' First Amendment interests-can be given adequate weight in Rule 26 analysis. Harm resulting from Ashenfelter's reliance on the protection of Michigan's shield law is part of the "burden" imposed by Convertino's discovery request. *See* Fed.R.Civ.P. 26(b)(2)(C)(iii).

Ashenfelter's final argument calls upon this court to recognize a reporters' privilege as feature of federal common law and not as a constitutional principle. He claims that the recognition of a qualified reporters' privilege by ten of twelve federal judicial circuits and the legislatures of 48 states plus the District of Columbia¹² show that the privilege has become a common law rule post-*Branzburg*. However, the Sixth Circuit's disavowal of a First Amendment-based reporters' privilege in *Grand Jury* makes it equally clear that the Sixth Circuit does not consider a reporter's privilege in civil cases justified "in the light of reason and experience." Fed.R.Evid. 501.¹³ This court declines to circumvent the Sixth Circuit's ruling against a reporters' privilege by making artificial distinctions between one grounded in the First Amendment and one based in common law. The identity of Ashenfelter's DOJ sources does not fall under any evidentiary privilege recognized in the Sixth Circuit and is therefore discoverable should Convertino's request satisfy the requirements of Federal Rule of Civil Procedure 26.

B. Rule 26 Inquiry

*7 The mere fact that the identity of Ashenfelter's source does not fall under an evidentiary privilege does not mean Ashenfelter receives no First Amendment protection. The Sixth Circuit in *Grand Jury* reiterated the need for courts to "follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony," although it cautioned that "this balancing of interests should not then be elevated on the basis of semantical confusion[] to the status of a first amendment constitutional privilege." *Grand Jury*, 810 F.2d at 586.¹⁴ Established procedures for limiting the scope of discovery-a task long committed to the discretion of the trial court, *Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir.1993)-provide the district judge with "ample powers ... to prevent abuse." *Herbert v. Laufo*, 441 U.S. 153, 177, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (discussing Fed.R.Civ.P. 26(b)(1), 26(c)).

1. Scope of Discovery

The identity of Ashenfelter's sources is within the scope of discovery because it is "nonprivileged matter" and "relevant to [a] party's claim or defense." Fed.R.Civ.P. 26(b)(1). As the DOJ points out in its brief, Convertino cannot sustain his burden of proof on the Privacy Act claim without identifying Ashenfelter's source. To prove his Privacy Act case, Convertino must demonstrate that the agency acted "in violation of the Act in a willful or intentional manner, either by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act." *Albright v. United States*, 732 F.2d 181, 189 (D.C.Cir.1984). To establish that the DOJ committed a willful or intentional violation, he must present evidence of the disclosing person's state of mind, which requires him to identify and question those who perpetrated the allegedly improper disclosure. *Hatfill v. Gonzales*, 505 F.Supp.2d 33, 42-43 (D.D.C.2007) (memorandum opinion granting motion to compel and granting motions to quash subpoenas). As Convertino's claim depends on his ability to question Ashenfelter's sources, their identities are undoubtedly relevant under Rule 26(b)(1).¹⁵

2. Limitations on Discovery

a. Ashenfelter

Convertino's subpoena of Ashenfelter does not amount to discovery abuse. First, Convertino's request is not "unreasonably cumulative or duplicative" or obtainable "from some other source that is more convenient, less burdensome, or less expensive." Fed.R.Civ.P. 26(b)(2)(C)(i). Convertino is not asking for information that he knows, has already received through discovery from Ashenfelter or another source, or can ascertain from other intelligence he has accumulated during discovery. He attempted to identify Ashenfelter's sources by deposing the DOJ, but instead learned that an extensive internal investigation, conducted by the Department's OIG, was only able to narrow the pool of potential "leaks" to approximately 30 employees. (4/25/2007 Letter at 3-4, Pl.'s Ex. 2.) It certainly will be less convenient, more burdensome, and more expensive for Convertino to depose each of these officials individually. Doing so is likely to be futile, as the OIG has already obtained an affidavit from each denying that he provided information to the Free Press. (Redacted OIG Report at 5, Ashenfelter's Ex. E.) It is unrealistic to expect Convertino to have better results, given his inferior resources and the threat of perjury sanctions looming over any individual that may have already provided false information to OIG inspectors in an affidavit. Under these circumstances, turning to Ashenfelter—the one party absolutely known to have the information Convertino needs—is hardly an abuse of discovery.

*8 Second, Convertino has not "had ample opportunity to obtain the information by discovery in the action." Fed.R.Civ.P. 26(b)(C) (ii). As detailed above, Convertino has tried to use other means of discovery to unmask Ashenfelter's sources. He did not go directly to Ashenfelter until it became reasonably clear that doing so would probably be the only way for him to learn which official or officials supplied the reporter with the relevant information.

Third, "the burden or expense of the proposed discovery" does not "outweigh [] its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed.R.Civ.P. 26(b) (C)(iii). The potential benefit of the information is great. Convertino's case has a pressing need for the identity of Ashenfelter's sources, and discovery from Ashenfelter seems, at this point, the only way to get it. At stake is a case brought under the Privacy Act, a statute meant to "prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens," and "promote observance of valued principles of fairness and individual privacy." S.Rep. No. 93-1183, at 1 (1974), *as reprinted in*

1974 U.S.C.C.A.N. 6916, 6916.

The burden to Ashenfelter of Convertino's request does not outweigh these factors. The discovery requested of Ashenfelter—his presence at a deposition and the presentation of documents already within his control—will by no means cripple his resources, and in any case his burden is small when compared to the money damages Convertino could potentially recover in this action.

The biggest factor counseling against disclosure is harm to Ashenfelter's First Amendment interests. Virtually every case in which a court compels a reporter to disclose a confidential source implicates at least some risk, direct or otherwise, that news gathering activities protected by the First Amendment may be hindered. As described by the Second Circuit:

Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting ... threatens freedom of the press and the public's need to be informed.

Baker v. F & F Inv., 470 F.2d 778, 782 (2d Cir.1972). However, this generalized danger is minimized in this case, as the anonymous DOJ officials may well have violated federal law by communicating with Ashenfelter as to these matters. If the informants indeed violated the Privacy Act as Convertino alleges, potential sources of further similar violations *should* be deterred from interactions of this kind with representatives of the press. This is not an instance where the reporter's informant reveals hitherto unknown dangerous or illegal activities that, being unlikely otherwise to come to light, result in reporting that is obviously more weighty in a court's calculation of First Amendment safeguards. Rather, this situation is more akin to a reporter's observation of criminal conduct, from which the Supreme Court has explicitly stripped constitutional protection: "we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Branzburg*, 408 U.S. at 692.

*9 For similar reasons, any reliance Ashenfelter placed on the Michigan reporters' privilege is misplaced. A reporter

should not be allowed to use a state law to shield himself from disclosing his sources when the communication sought to be protected is a violation of federal law. Such reliance should not be encouraged by the court. Thus, the burden on Ashenfelter's First Amendment interests is minimal and the damage to his reliance on the Michigan shield law inconsequential. Both concerns are overbalanced by Convertino's countervailing interests.¹⁶ None of the provisions in Rule 26(b) (2)(C) call for this court to impose a discovery limitation.

Just as there is no evidence that Convertino is abusing discovery, there is no indication that Ashenfelter is entitled to a protective order under Rule 26(c). Ashenfelter has not petitioned the court for such an order, as called for by Rule 26(c)(1). More importantly, the proposed discovery will not subject Ashenfelter to "annoyance, embarrassment, oppression, or undue burden or expense." *Id.* Aside from the First Amendment considerations dealt with above, there is no evidence that fulfilling Convertino's request will cause Ashenfelter any hardship, beyond the ordinary inconvenience shouldered by anyone required to provide discovery. Because the discovery sought from Ashenfelter is not subject to limitation under Rule 26(b)(2)(C) and does not justify a protective order, Convertino's motion to compel will be granted in regard to Ashenfelter.

b. The Free Press

Based upon the court's approval of Convertino's request to Ashenfelter, and contingent upon its fulfillment, the court finds that the subpoena relating to the Free Press itself is outside the limitations of Rule 26(b)(2)(C). Specifically, the discovery sought from the Free Press is fairly determined to be "unreasonably cumulative [and] duplicative" because the information can be obtained from Ashenfelter, a "source that is more convenient, less burdensome, [and] less expensive." Fed.R.Civ.P. 26(b)(2)(C) (i). Because the Free Press is a corporation, Rule 30(b)(6) requires it to respond to Convertino's subpoena by presenting for deposition "one or more officers, directors, or managing agents, or ... other persons who consent to testify on its behalf." Fed.R.Civ.P. 30(b)(6). An organization's designated representative must be the individual with knowledge of the subject matter over which discovery is being had. When a party notices a newspaper for disclosure of confidential informants mentioned in one of its articles, its logical

representative is the reporter who wrote the piece. If a party, in straight cases such as these, were to seek disclosures concerning an article printed without identification of its author, it may well be appropriate to demand the information from the newspaper itself. Here, however, compelling enforcement of Convertino's subpoenas would essentially require Ashenfelter be deposed as an individual *and* that the Free Press present him to be deposed as a representative of their organization, since he is the employee best qualified to testify about any communication with DOJ officials' regarding the Article. Such an order would result in superfluous, unproductive discovery and is not necessary for Convertino to receive the information he needs.

*10 Besides the futility of deposing both Ashenfelter and a Free Press representative, whether that be Ashenfelter or someone else, the First Amendment interests at stake in this matter counsel against compelling discovery from the Free Press. As discussed with respect to Ashenfelter's subpoena, First Amendment interests are not a complete bar to disclosure. Nevertheless, the potential adverse effects on news gathering activities, posed by any order compelling disclosure of a confidential source, suggests that an order to disclose should be as narrow as possible. Given that Convertino's best chance of learning the identity of Ashenfelter's sources is deposing Ashenfelter himself, and that an additional subpoena of the Free Press is unlikely to produce more information than that uncovered in a deposition of Ashenfelter, the motion to compel is denied, without prejudice¹⁷ as to the Free Press.

IV. CONCLUSION

IT IS ORDERED that Plaintiff's July 6, 2007 Motion to Compel Production from Non-Party Reporter David Ashenfelter and Non-Party Corporation Detroit Free Press [Dkt. # 1] is GRANTED IN PART AND DENIED IN PART. Specifically, it is GRANTED with respect to David Ashenfelter and DENIED with respect to the Detroit Free Press.

IT IS FURTHER ORDERED that the clerk of the court is DIRECTED to close this case insofar as all matters in controversy has been resolved.

Footnotes

1 According to the Article, these allegations included: failing to get authorization before arranging plea bargains and sentence reductions, attempting to persuade a federal employee to provide confidential information for use against an adverse witness, arranging a deal with another criminal defendant without consulting the prosecutor handling the case, withholding from the defense potentially damaging credibility evidence on the prosecution's primary witness and threatening the defense attorney with a baseless criminal investigation if the attorney reported the misconduct to the judge. (Article at 1, Ashenfelter's Ex. C.)

2 The OIG investigated individuals from the Detroit United States Attorney's Office as well as officials in Washington, D.C. from various DOJ departments, including the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of Legislative Affairs, the Office of Legal Counsel, the Criminal Division, the Counter Terrorism Section of the DOJ, the Executive Office of United States Attorneys and the OPR.

3 As early as colonial times, various arguments for a "newsman's" privilege were advanced in American courts. 23 Charles Alan Wright, Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5426 (2008). In 1958 the Second Circuit became the first court to accept, in dicta, that such a privilege may be warranted under the First Amendment. See *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir.1958) ("[W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news."). To the extent that a reporter's privilege exists today, it is based on constitutional considerations. E.g., *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.1983) ("[A qualified reporters' privilege] has been imposed by the courts 'to reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principle concern of the First Amendment.'" (quoting *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir.1972))).

4 To date, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and District of Columbia Circuits have established some form of the qualified reporters' privilege in civil proceedings. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-97 (1st Cir.1980); *Baker*, 470 F.2d at 784-85; *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir.1979); *LaRouch v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir.1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir.1980); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93, 992 n. 9 (8th Cir.1972); *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir.1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir.1977); *Zerilli*, 656 F.2d at 712. The Eleventh Circuit likewise recognizes a reporters' privilege, having inherited the Fifth Circuit's holding in *Miller*. See *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir.1986).

5 Compare *Burke*, 700 F.2d at 76-77 ("[D]isclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.") with *Zerilli*, 656 F.2d at 713-14 (listing the "guidelines" of applying the reporters' privilege as whether the information "goes to the heart" of a civil litigant's case, the extent of the litigant's efforts to obtain the information from other sources, and the nature of the litigation at hand, in particular whether the reporter from whom discovery is sought is a party to the action).

6 Wigmore's predicates are:

(1) the communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship must be one which, in the opinion of the community, ought to be fostered; and (4) the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

Grand Jury, 810 F.2d at 584 (citing 8 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* § 2286 (J. McNaughton rev. ed.1940)).

7 As examples of those Circuit Courts it "declin[e]d to join," the Sixth Circuit listed the following cases: *Zerilli*, 656 F.2d 705, *Burke*, 700 F.2d 70, *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir.1980), *LaRouch*, 780 F.2d 1134 and *Miller*, 621 F.2d 721. *Grand Jury*, 810 F.2d at 584 n. 6. It is important to note that, although *Grand Jury Proceedings* dealt with subpoenas issued for a criminal prosecution, *Zerilli*, *LaRouch* and *Miller* confront this issue in a civil setting.

8 Ashenfelter cites three other opinions from the Eastern District of Michigan, claiming that they illustrate the availability of a reporters' privilege in this circuit: *United States v. Webber*, No. 02-80813 (slip op.) (E.D.Mich. July 14, 2003) (order granting motion to authorize subpoena and denying motion for protective order), *Clark v. Esser*, No. 92-72341, 1993 WL 13551485 (E.D.Mich. July 12, 1993) (order granting motion to quash subpoena), and *McArdle v. Hunter*, No. 81-10038 (slip op.) (E.D.Mich. Nov.5, 1981) (order granting motion to quash subpoena). These decisions have no precedential authority, being both unpublished and issued by a peer court; they are also unpersuasive on their merits. *McArdle* was decided before *Grand Jury*, so it is inapplicable. *Clark* is simply an order granting a motion to quash without analysis of the pertinent law or explanation of the court's reasoning. *Webber*, though it does contain a limited examination of pertinent case law, relies on cases repudiated by the Sixth Circuit in *Grand Jury* and adopts the view of other circuits that a qualified reporters' privilege exists. *Webber* relies on *Southwell v. Southern Poverty Lav Ctr.*, 949 F.Supp. 1303 (W.D.Mich.1996) for its reading of *Grand Jury*, an interpretation with which this court does not agree, see *infra*.

- 9 The district court agreed with the analysis and incorporated the magistrate judge's proposed resolution in its entirety.
- 10 The motion to compel had been referred to the magistrate judge for determination pursuant to 28 U.S.C. § 636(b)(1)(A).
- 11 Michigan law extends the following privilege to reporters:
A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication shall not be required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry authorized by this act, except an inquiry for a crime punishable by imprisonment for life when it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted.
MCL § 767.5a(1).
- 12 Forty-eight states and the District of Columbia have put in place a reporters' privilege, either by the passage of a press shield law or judicial recognition. A detailed description of which states have accepted a reporters' privilege and the means by which they did so is offered in *New York Times Co. v. Gonzalez*, 382 F.Supp.2d 457, 502-04 (S.D.N.Y.2005).
- 13 Particularly telling is the Sixth Circuit's conclusion that a reporters' privilege met only one of Wigmore's four fundamental pre-conditions to the recognition of any testimonial privilege. *Grand Jury*, 810 F.2d at 584.
- 14 The First Circuit has commented that:
Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a "conditional," or "limited" privilege is, we think, largely a question of semantics. The important point for purposes of the present appeal is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights.
Bruvo & Stillman, 633 F.2d at 595. Magistrate Judge Whalen asserted that recognizing a reporters' privilege makes crucial differences to the distribution of the burden of proof, see *In re Daimler Chrysler AG Securities Litigation*, 216 F.R.D. 395, 402 n. 9 (E.D.Mich.2003). The First Circuit's reasoning shows, though, that doing so is not the only way of vindicating a reporters' First Amendment interests.
- 15 Because of Convertino's burden of proof, his request would meet even the stricter standard imposed by the qualified privilege analysis laid out in *Southwell* and urged by Ashenfelter, which requires "the requested information goes to the heart of the litigant's case." 949 F.Supp. at 1312.
- 16 This case-specific balancing of interests is likely to yield the same results under the third factor in the *Southwell* privilege analysis, which requires "a case-by-case balancing of constitutional and societal interests ... to determine whether First Amendment interests would be jeopardized by ordering disclosure." 949 F.Supp. at 1312. Ashenfelter argues that a qualified privilege analysis must also include some evaluation of Convertino's case on the merits, claiming that disclosure is not appropriate if Plaintiff's claim cannot meet the standard for summary judgment. See *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 1169, 72 Cal.Rptr.3d 231 (Cal.Ct.App.2005). However, the authority cited for this position is drawn almost exclusively from defamation cases, which by their nature import heightened constitutional protection for defendants. There is no known authority for this court, having jurisdiction over the underlying suit, to deny a motion to compel based upon a proposed cart-before-horse determination that the merits of the claim are weak or lacking.
- 17 Contingent upon, for example, evidence of non-compliance with this order through impossibility, it may be appropriate to revisit the court's analysis as to the discovery obligations of the Free Press.

BEFORE THE BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

FILED
DEC 02 2013
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In re: :
Complaint against : Case No. 2013-037
Larry Dean Shenise :
Respondent :
Akron Bar Association :
Relator :

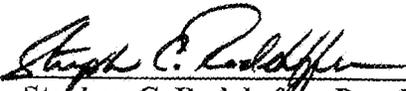
ENTRY

This matter comes before the Panel and the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio on the Motion to Quash Subpoena to Phil Trexler filed with the Board on November 8, 2013, by the Beacon Journal Publishing Company, Inc. and Phil Trexler.

In the Panel's opinion, the alleged statements made by the Respondent as reported in the news article of February 1, 2012, in the Beacon Journal are relevant to these proceedings and there does not appear to be any alternate means of proving the statements, other than through the testimony of Mr. Trexler, barring an admission by the Respondent that he made them. Further, the evidence subpoenaed on its face appears essential to the Relator's case and is therefore essential to the administration of justice in this case. Finally, the Panel does not find the subpoena to be vague, overly broad, or designed to harass Mr. Trexler as alleged in the motion.



Therefore, upon consideration of the foregoing the Panel Chair finds the motion to quash not to be well taken, and the same is hereby overruled.



Stephen C. Rodeheffer, Panel Chair
 per authorization