UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. DANA SKAGGS, et al.,	:	
	:	**Case No. 2:08 cv 1077**
Relators,	:	
	:	**Judge Marbley**
vs.	:	
	:	**Magistrate Judge King**
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	
Respondents.	:	

RELATORS DANA SKAGGS AND KYLE FANNIN'S RENEWED MOTION FOR AWARD OF ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1447(c)

Pursuant to 28 U.S.C. § 1447(c), Relators Dana Skaggs and Kyle Fannin ("Relators") hereby renew their earlier oral motion, made at the hearing on the Motion to Remand, for an order awarding them their reasonable attorneys incurred as a result of Respondent Ohio Secretary of State Jennifer Brunner's improper removal of the above-captioned matter to this Court. As set forth in the attached Memorandum, such removal lacked an objectively reasonable basis under the law and it was not fairly supportable. This motion, seeking legal fees of $59,263.00, is supported by the Affidavit of John W. Zeiger and the Affidavit of Anne Marie Sferra, which are attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A plaintiff/relator is properly awarded his attorneys' fees against a removing defendant where a case is remanded to state court if the removing defendant/respondent lacked an "objectively reasonable" basis for the removal. See, e.g., Chase Manhattan Mortgage Corp. v. Smith, 507 F.3d 910, 913-14 (6th Cir. 2007). Here, Relators are entitled to an award of their attorneys' fees in the amount of $59,263.00, incurred as a result of Ohio Secretary of State Jennifer Brunner's ("Secretary Brunner") removal, because such removal was objectively *unreasonable*.

As set forth below and in the Sixth Circuit's decision remanding this case to the Ohio Supreme Court, Secretary Brunner improperly removed to this court an action in which Relators sought, from the Ohio Supreme Court, a writ of mandamus compelling Secretary Brunner to comply with and to instruct county boards of election to comply with the plain and unambiguous language of *Ohio's* election statutes. Such relief is authorized under the *Ohio* constitution and it turns on the interpretation of an *Ohio* statute that the Ohio General Assembly enacted pursuant to authority expressly delegated to it by the U.S. Congress.

Secretary Brunner's asserted bases for removal, including the existence of consent orders relating generally to provisional ballots that were entered in another case, to which Relators are not parties; the fact that a Congressional election could be impacted by the result; and the application of the All Writs Act, ran afoul of the "well pleaded" complaint rule and controlling authority from the U.S. Supreme Court and Sixth Circuit. Indeed, the Sixth Circuit case law made clear that Secretary Brunner could not rely on consent orders entered by the Court in another action, to which Relators were not parties, in support of removal where, as here, Relators did not allege any violations of such orders. Likewise, the mere fact that a Congressional race might be affected could not have justified removal of an action premised on the meaning of the only section of the Ohio Revised Code that specifically relates to the evaluation and counting of provisional ballots—a function that Congress *expressly delegated to the states*. Finally, because the Court clearly lacked original jurisdiction premised on the above justifications, U.S. Supreme Court authority precluded Secretary Brunner from invoking the All Writs Act as a basis for removal.

In short, as discussed below, each of Secretary Brunner's three asserted bases for removal was barred by clear and controlling precedent. As a result, she lacked an objectively reasonable basis for removing this action from the Ohio Supreme Court. Relators are entitled to an award of their attorneys' fees incurred as a result of the Secretary's objectively unreasonable removal.

II. STATEMENT OF FACTS AND PROCEDURE

A. Secretary Brunner's Improper Removal Of Relators' State-Law Action.

Relators filed this original action in Mandamus on November 13, 2008 in the Supreme Court of Ohio. In their Complaint, Relators asserted *state law* mandamus claims, arising under the Ohio Constitution, and sought to compel Ohio Secretary Brunner, a *state* official, to instruct

county boards of election consistent with the plain and unambiguous language of an *Ohio* statute. Relators did not allege violations of prior consent orders entered by this Court in Northeast Ohio Coalition for the Homeless v. Brunner, Case No. 2:06-cv-896 (S.D. Ohio) ("NEOCH"). Rather, the Complaint expressly stated that "[n]o federal law claims are asserted" [Doc. No. 3, Complaint ¶ 1.]

Indeed, as the Sixth Circuit Court of Appeals noted in its decision remanding the case to the Ohio Supreme Court, the Complaint "presented a single cause of action under state law and sought a writ of mandamus and injunctive relief as a remedy." State ex rel. Skaggs v. Brunner, -- F.3d --, 2008 WL 4984973, *6 (6th Cir. Nov. 25, 2008). "Their complaint expressly disclaimed any reliance on federal law." Id. In fact, Relators' prayer for relief seeks a mandamus remedy that could *only* be granted by an Ohio state court, not a federal court. See id. at *10.

Nonetheless, on November 14, 2008, Respondent Secretary Brunner, without obtaining the consent of the Franklin County Board of Elections (the "Board"), the other Respondent named in Relators' complaint, removed the action from the Ohio Supreme Court to this Court. In her notice of removal and supplemental memorandum in support thereof, Secretary Brunner asserted that removal was proper for three reasons. *First*, she argued that the claims asserted in Relators' Complaint necessarily depended on the resolution of disputed federal issues because the state law issues presented "have been ensconced in" consent orders entered by this Court. [Doc. No. 2, Memorandum in Support of Notice of Removal, at 2 ("Notice").] Specifically, she argued that Relators' state law claims "cannot be decided without considering this Court's" October 24 and October 27, 2008 consent orders entered in another action, Northeast Ohio Coalition for the Homeless v. Brunner, Case No. 2:06-cv-896 (S.D. Ohio).

Second, Secretary Brunner argued that removal was proper because Relators' claims regarding the counting of provisional ballots would impact a federal congressional election. [See Notice at 1.] No legal support was provided for this proposition.

Third, Secretary Brunner argued, in a supplemental memorandum, that the All Writs Act, 28 U.S.C. § 1651(a), justified removal so that the Court could "uphold the integrity" of its prior consent orders in an action to which Relators were not parties. [See Doc. No. 8, Supplemental Memorandum in Support of Removal, at 2 ("Supplemental Notice").] She offered this argument despite recognizing that "the All Writs Act does not, by its specific terms, provide federal courts with an independent grant of jurisdiction." [Supplemental Notice, at 1 (quoting Syngenta Crop. Prot. v. Henson, 537 U.S. 28, 33 (2002)).]

On November 14, 2008, both Relators and the Board filed motions to remand the case back to the Ohio Supreme Court. The Court heard oral argument on the motions to remand on November 15, 2008, at which time Relators' counsel first asserted their request for attorneys' fees. On November 17, 2008, the Court denied the motions to remand and retained jurisdiction over the case. Notably, in its decision denying the motions to remand, this Court did not even address Secretary Brunner's arguments premised on the All Writs Act. Subsequently, the Court on November 20, 2008, granted Secretary Brunner's motion for summary judgment with respect to the merits of Relators' claims.

Relators appealed to the Sixth Circuit Court of Appeals. On November 25, 2008, the Sixth Circuit vacated these decisions, holding that the Court lacked subject matter jurisdiction over the removed action. Specifically, the Sixth Circuit held that Secretary Brunner possessed no valid basis for removing Relators' well-pleaded state law claims to federal court because, *inter alia*: (1) Relators expressly disclaimed any federal law claims in their Complaint, and the

Complaint did not otherwise allege any federal causes of action; (2) the consent orders entered in the NEOCH case provided no basis for federal jurisdiction because, *inter alia*, such orders were settlement agreements that, at best, bind only the parties thereto; and (3) the question of whether "a provisional ballot will be counted" has been "conspicuously" reserved to the states. See Skaggs, *supra*. Like this Court, the Sixth Circuit did not address Secretary Brunner's initial All Writs Act arguments. On the basis of its holding, the Sixth Circuit remanded the case directly to the Ohio Supreme Court for a determination of the merits of Relators' state-law claims. The Ohio Supreme Court entered its decision granting a Writ of Mandamus on December 5, 2008.

B. Relators Incurred Significant, Reasonable Attorneys' Fees As A Result Of Secretary Brunner's Improper Removal.

As a result of Secretary Brunner's improper removal, Relators have been forced to incur significant attorneys' fees as a result of the proceedings before this Court and the Sixth Circuit (the "federal proceedings"). As described in detail in the Affidavit of John W. Zeiger, attached as Exhibit 1 ("Zeiger Aff'd"), and given the expedited nature of these proceedings, Zeiger, Tigges & Little ("ZTL"), as counsel for Relators, was required to use the services of eight attorneys in its prosecution of the federal proceedings.[1] These attorneys, who are listed in the Zeiger Affidavit, worked a total of 262 hours as part of the federal proceedings. [Zeiger Aff'd ¶ 6 (setting forth breakdown of total time spent by each attorney).] The daily time for each of these attorneys is described in Exhibit A to the Zeiger Affidavit.

Based on ZTL's standard hourly rates, as reflected in paragraph 9 of the Zeiger Affidavit, the total fees for the 262 hours spent by ZTL as part of the federal proceedings are $78,931.25. [See Zeiger Aff'd ¶ 14.] For the Court's convenience, these hours have been divided into three separate categories: (1) Hours devoted solely to jurisdictional issues associated with the Motion

[1] ZTL's engagement in this action was with Relators Dana Skaggs and Kyle Fannin, as well as the Stivers for Congress Committee and the Stivers for Congress Recount Committee. [Zeiger Aff'd at ¶ 4.]

to Remand ("Remand Fees"); (2) Hours devoted to merits issues involved in motions for summary judgment in District Court ("District Court Merits Fees"); and (3) Hours devoted to the appeal to the Sixth Circuit ("Sixth Circuit Fees"). [Id. at ¶ 10.]

The Remand Fees reflect solely the hours and fees involved in preparation of the Motion to Remand filed in the District Court, and the underlying research related to the jurisdictional issue raised by the Motion to Remand. [Id. at ¶ 11.] The District Court Merits Fees reflect hours and fees involved in preparation of Relators' Motion for Summary Judgment necessitated by the Court's decision denying remand. This category includes fees related to Relators' requests for interim injunctive relief and injunctive relief pending appeal necessitated by removal and the denial of remand. [Id. at ¶ 12.] Finally, the Sixth Circuit Fees reflect hours and fees arising from the appeal to the Sixth Circuit and include hours and fees relating to the briefing of both jurisdictional and merits issues. [Id. at ¶ 13.] Broken down by category, ZTL's total time and fees are as follows: (1) 112.00 hours in Remand Fees, totaling $29,127.50; (2) 58.50 hours in District Court Merits Fees, totaling $17,090.00; and (3) 91.50 hours in Sixth Circuit Fees, totaling $32,713.75. [Zeiger Aff'd ¶ 14.]

Relators do not, however, seek an award of the entire $78,931.25 amount. Although the District Court Merits Fees were incurred as a result of the denial of the Motion to Remand by the District Court, some of the same research would have been required in the Supreme Court proceedings had the case not been removed. [See id. at ¶ 15.] Nonetheless, the time committed to briefing the Motion for Summary Judgment filed by Relators in the District Court arose solely as a result of the denial of the Motion to Remand. [Id.] Relators required an additional 57.75 hours to prepare their Supreme Court merit brief after remand by the Sixth Circuit (hours that are not reflected in this Affidavit or Exhibit A). [Id.] As a result, Relators submit that an allocation

of fifty percent (50%) of the District Court Merits Fees as being occasioned solely by the denial of the Motion for Remand is warranted. [Id.]

Likewise, while all of the Sixth Circuit Fees were occasioned solely by the denial of the Motion to Remand, approximately two-thirds of these fees related to the jurisdictional issue exclusively and were of no benefit in the subsequent Supreme Court briefing. [Id. at ¶ 16.] As such, Relators submit that an allocation of a minimum of sixty-six percent (66%) of the Sixth Circuit Fees as an expense that arose solely as a result of the denial of the Motion for Remand is equally warranted. [Id.]

As a result, Relators submit that they are entitled to an award of remand fees as follows:

100% of Remand Fees of $29,127.50	$29,127.00
50% of District Court Merits Fees of $17,090.00	$8,545.00
66% of Sixth Circuit Fees of $32,713.75	$21,591.00
Total Fee Request	**$59,263.00**[2]

As set forth in the affidavit of Affidavit of Anne Marie Sferra ("Sferra Aff'd"), attached as Exhibit 2, such fees are eminently reasonable and in line with standard rates charged in Central Ohio.[3] Furthermore, the actual time spent by the ZTL attorneys, as well as how the time

[2] Relators also incurred expenses in excess of $3,000 for court fees, photocopying, and computer research. However, Relators are unable to break down these expenses into the above categories. [Zeiger Aff'd ¶ 18.] As a result, they do not request reimbursement of those expenses here.

[3] ZTL's fees are based on its attorneys' standard, market-based hourly rates. [Zeiger Aff'd at ¶ 9.] This fact alone serves as one of the most important indicators of the reasonableness thereof. See, e.g.,Women's Medical Professional Corp. v. Baird, 2003 WL 23777732, *2 (S.D. Ohio 2003) ("In exercising its discretion, the Court should consider the fair market value of the services rendered by the attorney."); Northcross v. Board of Education, 611 F.2d 624, 638 (6th Cir. 1979) ("In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background and experience and skill of the individual attorney."); Morrison v. Davis, 88 F. Supp. 2d 799, 802 (S.D. Ohio 2000) ("The actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate."). Indeed, as this Court stated in Dowling v. Litton Loan Servicing, L.P., 2008 WL 906042 (S.D. Ohio 2008) (Marbley, J.):

was spent, was both necessary and appropriate for the prosecution of the relevant portions of this case. [See Sferra Aff'd ¶ 6.]

II. LAW AND ARGUMENT

A. Attorneys' Fees Are Properly Awarded, Under 28 U.S.C. § 1447(c), Where There Was No Objectively Reasonable Basis For Removal And/Or Removal Was Not Fairly Supportable Under The Law.

Pursuant to 28 U.S.C. § 1447(c), the Court is authorized to award a plaintiff "actual expenses, including attorney fees, incurred as a result of removal" where a removed action is remanded to state court. The Sixth Circuit has held that attorneys' fees are properly awarded where remand is granted and there was no "objectively reasonable" basis for removal and/or the removal was not "fairly supportable" under the law. Shafizadeh v. Bellsouth Mobility, LLC, 189 Fed. Appx. 410, 412 (6th Cir. 2006) (noting that both terms are "[t]o the same effect").[4]

The fact that a district court initially permits removal, but is subsequently reversed by the Sixth Circuit, does not preclude a finding that the removal lacked an "objectively reasonable" basis. Indeed, in Ahearn v. Charter Township of Bloomfield, 149 F.3d 1182 (table), 1998 WL 384558, *2 (6th Cir. June 18, 1998), the Sixth Circuit held that a district court abused its discretion in denying attorneys' fees, even though the same district court had originally denied

> Beholden to the forces of supply and demand, the rate at which an attorney bills non-fee-award clients is a reliable proxy for his services.
>
> This metric also has the virtue of simplicity. Rather than undertake the lengthy calculation of ascertaining the range of rates that comparable attorneys in the community charge for their time, the Court can look to an attorney's customary rate to keep the "litigation over fees from becoming … a second major litigation." … *Thus, the Sixth Circuit has stated that "normal billing rates usually provide an efficient and fair shortcut for determining the market rate."*
>
> [Id. at *1-2. (emphasis added).]

[4] Although Section 1447(c) provides for an award of attorneys' fees as part of "an order remanding the case," the Sixth Circuit has held that such an award may also be granted in response to a separate motion. See, e.g., Dun-Rite Construction, Inc. v. Amazing Tickets, Inc., 2004 WL 3239533, *2 (6th Cir. Dec. 16, 2004). An attorneys' fee award also may be made as part of a separate order. Stallworth v. Greater Cleveland Regional Transit Authority, 105 F. 3d 252, 257 (6th Cir. 1997).

remand, only to be reversed on appeal. In Ahearn, the defendant removed a state court action on the asserted ground that the action arose out of the same nucleus of operative facts as another pending, federal action, id. at *1—a claim similar to Secretary Brunner's consent order justification for removal. After the district court denied remand, the Sixth Circuit reversed and remanded because the federal removal statute required the district court to have original jurisdiction over the removed action, which it plainly did not have. Id. at *3. Subsequently, the district court denied attorneys' fees for the same reasons it denied remand, and the Sixth Circuit once again reversed. In doing so, the Sixth Circuit held that because there was no case law or statutory authority supporting the defendants' asserted bases for removal, no fairly supportable basis for removal existed, and the district court abused its discretion in denying fees. Id. at *4.

Courts have held that an award of fees is proper and, thus, no objectively reasonable basis for removal exists where the plaintiff's complaint does not allege a federal cause of action and was not artfully pleaded to avoid one. Chase Manhattan Mortgage Corp. v. Smith, 507 F.3d 910, 913-14 (6th Cir. 2007). The fact that a defendant seeks to assert federal defenses to the plaintiff's well-pleaded state-law claims does not provide an objectively reasonable basis for removal. Id. See also Taylor Chevrolet, Inc. v. Medical Mutual Services, LLC, 2007 WL 2206567, *3 (S.D. Ohio July 30, 2007) (attorneys' fees appropriate in light of plaintiff's well-pleaded state-law allegations, even though "ERISA plan appears tangentially among the facts").

Likewise, an award of attorneys' fees is proper where the defendant's asserted basis for removal is contrary to controlling precedent. For instance, in National City Bank v. Aronson, 474 F. Supp. 2d 925, 928 (S.D. Ohio 2007), this Court awarded attorneys' fees where the defendant asserted diversity jurisdiction despite the presence of a "stateless person," a doctrine expressly recognized by the U.S. Supreme Court as destroying diversity. So, too, in Mitchell v.

Lemmie, 231 F. Supp. 2d 693, 700-01 (S.D. Ohio 2002), this Court awarded attorneys' fees where Sixth Circuit precedent was contrary to the defendant's removal theory.

Applied to Secretary Brunner's purported bases for removal, as set forth below, this case law reveals that Secretary Brunner did not have an objectively reasonable basis for removing Relators' state-law mandamus action to this Court. As a result, an award of Relators' attorneys' fees is proper in this case.

B. Relators' Complaint Asserted *Only* State Law Claims And, Thus, The Well-Pleaded Complaint Rule Clearly Barred Removal.

As the Sixth Circuit recognized, the threshold question presented by Relators' Complaint is "what Ohio law means." Skaggs, 2008 WL 4984973, at *2. This is the question that appears from the face of Relators' Complaint, and this is the question ultimately resolved by the Ohio Supreme Court. Under the "well-pleaded" complaint rule, Relators are the "masters of their complaint," and thus, they are entitled to "file a lawsuit in whichever court system they prefer and thus … to choose for themselves which body will decide their case-so long as the court in which the case is filed has jurisdiction over their claim." See Skaggs, 2008 WL 4984973, at *1, *5 (citing Mikulski v. Centerior Energy Corp., 501 F.3d 555, 560 (6th Cir. 2007)).

Even though Relators expressly stated that "no federal claims are asserted," Secretary Brunner nonetheless argued that removal was proper because the issues alleged in the Complaint necessarily turned on the application and/or interpretation of this Court's prior consent orders, and could impact a Congressional election. She was clearly wrong on all counts. As the Sixth Circuit made clear, the well-pleaded complaint rule plainly precluded Secretary Brunner's attempt to re-write Relators' state law complaint.

1. The NEOCH Consent Orders Did Not Provide An Objectively Reasonable Basis For Removal.

Secretary Brunner's primary justification for removal was that Relators' Complaint necessarily implicated this Court's prior consent orders in the NEOCH case. As the Sixth Circuit's decision makes clear, this justification was not objectively reasonable, for multiple reasons.

First, as the Sixth Circuit expressly recognized, private settlements struck by Secretary Brunner with "putatively opposed parties" on the eve of the election and memorialized in consent orders cannot create federal court jurisdiction over an action brought by non-parties that presents questions with respect to the meaning and application of *state* statutes. Skaggs, 2008 WL 4984973, *8.[5] Indeed, such consent agreements, even if they represent valid agreements between the parties as to the meaning of Ohio statutes, could not subject Relators, who were not parties to the NEOCH case, to federal jurisdiction. Rather, "the decrees represent a settlement agreement between the parties to the [NEOCH] case and thus cannot control the outcome of a case involving different parties, *much less insulate a question of Ohio law from review by the one court with a final say over its meaning*." Id. at *7 (emphasis added); see also id. (the consent orders "have *no* direct bearing on the merits of this lawsuit because they merely reflect an agreement among parties to a different suit") (emphasis in original).

As the Sixth Circuit commented, a decision permitting the exercise of federal jurisdiction under such circumstances would effectively prevent state courts from determining the meaning of state law:

[5] Of course, Relators did not allege any violations of the consent orders. Rather, Secretary Brunner sought to invoke them only in a defensive capacity. As the Sixth Circuit noted, "[n]owhere did the claimants allege that the Secretary, by adopting a different interpretation of the state laws on November 10, had 'violated' her prior administrative directive or the court order that 'adopt[ed] and annexe[d]' it… To read the complaint any other way would suggest that the defendant, not the claimants, is 'the master of [their] complaint.'" Skaggs, 2008 WL 4984973, at *6. But federal question jurisdiction does not arise based upon an asserted federal defense. See, e.g., Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006).

> Congress's most recent handiwork concerning provisional ballots, the Help America Vote Act of 2002 … leaves no doubt which lawmaking body—the federal or state governments—has plenary authority over the counting of provisional ballots. It "conspicuously leaves … to the States" the determination of "whether a provisional ballot will be counted as a valid ballot," … *To allow federal courts free rein in determining whether and under what circumstances a partially deficient provisional ballot will count—under state law—would deprive state courts of their long-established role as the "final arbiter on matters of state law*," … *If all it takes to transform purely state-law questions into a substantial issue of federal law—sufficient to end state courts' supremacy in interpreting their own statutes—is the agreement of two putatively opposed parties and one federal judge incorporating an interpretation of that law into a consent decree, it is hard to imagine any state-law matter lying outside a federal court's reach.*
>
> [Skaggs, 2008 WL 4984973, at *8 (emphasis added).]

The rule precluding federal jurisdiction under these circumstances is not new. Prior to Secretary Brunner's removal, federal courts, including the Sixth Circuit, had consistently held that a "consent judgment" entered into by a state entity or subdivision in another federal case could not support removal of an action premised on state law because, *inter alia*, such a "judgment" "*lack[s] the power to supersede . . . [a state] statute*." City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007) (emphasis added).[6] Indeed, to the extent the orders at issue here are construed as requiring Secretary Brunner to act inconsistent with the applicable Ohio statutes, she lacked the authority to enter them, and such orders are illegal and void. See, e.g., City of Warren, 495 F.3d at 287 ("To the extent that Mich. Comp. Laws § 123.141(2) restricts Detroit's authority to set water rates, *Detroit could not consent to an inconsistent*

[6] See also Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995) ("While parties can settle their litigation with consent decrees, *they cannot agree to 'disregard valid state laws*….'"); Kasper v. Bd. of Election Comm'rs of the City of Chicago, 814 F.2d 332, 341-42 (7th Cir. 1987) ("When it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all, *the court may not readily approve a decree that contemplates a violation of law.* The Board may not "consent" to a higher budget or a new organic statute.").

judgment.") (emphasis added); 15 O Jur. 3d Civil Servants § 378 ("A failure to follow a mandatory provision [such as that in R.C. 3505.183(B)(1)(a)] renders [Secretary Brunner's] act to which it relates illegal and void."]). Obviously, federal jurisdiction cannot be premised on consent orders that have no legal effect.

Second, even if such voluntary agreements could theoretically have some effect in this case, Secretary Brunner's purported reliance on them in support of removal presumptively failed to present a "substantial" federal interest, as required for federal jurisdiction. Skaggs, 2008 WL 4984973, at *7. As the Sixth Circuit recognized, the "mere incorporation of state-law requirements in a federal-court consent decree does not automatically create a federal question, much less an important one." Id. at *8. In this case, no substantial issue is presented because "both [consent] orders by their terms reflect only the parties' mutual agreement about the meaning of these state laws, … a subject on which the state courts presumptively have the last word." Id. at *8.

The lack of a substantial federal issue is particularly evident where, as here, the consent orders provide "no specific guidance" about how to resolve the parties' present dispute. Id. Indeed, the first consent order at issue, entered on October 24, 2008, resulted in the Secretary's issuance of Directive 2008-101, which simply laid "out general state-wide rules for boards of elections to apply in determining how to count provisional ballots." Skaggs, 2008 WL 4894973, at *3. Such directive "merely restates Ohio law *without offering any elaboration on how it would apply to the ballot-counting problem presented in this case*." Id. at *8 (emphasis added).

The second consent order, entered on October 27, 2008, resulted in the issuance of Directive 2008-103, and provided only that provisional ballots may not be rejected for reasons that are attributable to poll worker error. Such order "did not purport to define what constitutes

poll worker error." Id. at *3. Rather, Directive 2008-103 "says nothing at all about what constitutes poll-worker error under state (or federal) law, much less about whether a voter's failure to sign a provisional ballot application or include one's name on it constitutes poll-worker error." Id. at *8. In short, even assuming *arguendo* that the consent orders could be applied, no substantial federal issue is presented and no federal jurisdiction is created because their application "would be no more helpful to [the court's resolution of the parties' dispute] than [the court's] interpretation of the underlying state laws themselves." Id.

Third, Relators' Complaint did not even raise the consent orders, and Secretary Brunner's after-the-fact recharacterization of Relators' claims did not afford her an objectively reasonable basis for removal. Even if federal consent orders entered in another case could create federal jurisdiction in some circumstances, they could not have done so here, where Relators' Complaint did not even mention the orders, but instead expressly disclaimed any reliance on federal law. Yet, in order to invoke the consent orders as a basis for federal jurisdiction, Secretary Brunner had to mischaracterize Relators' Complaint as somehow raising them. It clearly did not. As the Sixth Circuit recognized:

> The claimants, to start with, did not allege that the Secretary had violated the consent decrees or any other federal court order. *In the statement of claim and the prayer for relief, the complaint does not invoke the consent decrees, and indeed, it never mentions either consent decree.* The most that can be said is that, at one point in the complaint, the claimants mention the Secretary's Directive 2008-101, though not the consent decree. … But that reference was not in the context of alleging that the Secretary had violated a federal court order; it was in the context of alleging that the Secretary had offered one interpretation of the relevant statutes before the election and had offered another interpretation of the statutes after the election when the significance of these provisional-ballot-counting issues had become apparent.
>
> [Skaggs, 2008 WL 4984973, at *6 (emphasis added).]

Separate and apart from the reasons discussed above, it was objectively unreasonable for Secretary Brunner to invoke federal jurisdiction on the basis of consent orders that simply were not raised in Relators' well-pleaded complaint. See, e.g., Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006) ("Since a plaintiff is the master of his complaint, … where a choice is made to assert only a state law claim, the general rule prohibits recharacterizing it as a federal claim.").

For each of these reasons, the private settlement agreements Secretary Brunner entered into in another case simply failed to provide her with an objectively reasonable basis for removal.

2. The Issue Of Whether To Count Provisional Ballots Is Left To The States; Thus, The Fact That A Congressional Race Might Be Impacted Did Not Provide An Objectively Reasonable Basis For Removal.

Secretary Brunner's second asserted justification for removal, that the resolution of Relators' claims could impact a Congressional race, failed to get past the plain language of the federal Help America Vote Act ("HAVA"), Pub. L. No. 107-252, Title III, § 302, 116 Stat. 1666, 1706 (codified at 42 U.S.C. § 15301 *et seq.*). As such, it is not a reasonable basis for removal.

As the Sixth Circuit expressly recognized, quoting a prior published decision, HAVA "'conspicuously leaves . . . *to the States*' the determination of '*whether a provisional ballot will be counted as a valid ballot,*' *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004); see 42 U.S.C. § 15482(a)(4)." Skaggs, 2008 WL 4984973, at *8 (emphasis added). The fact that the counting of such ballots may impact a Congressional race does not change the states' clearly-demarcated role with respect thereto. Consistent with this express delegation, disputes with respect to the statute governing the counting of provisional ballots must be decided by the Ohio courts—the "final arbiter[s] on matters of state law." Id. at *8.

Inasmuch as Secretary Brunner's removal amounted to an effort to "transform purely state-law questions into a substantial issue of federal law—sufficient to end state courts' supremacy in interpreting their own statutes …", it was, again, objectively unreasonable. See id.

3. Secretary Brunner's Purported Reliance On The All Writs Act Ran Afoul Of U.S. Supreme Court Precedent.

Finally, Secretary Brunner sought to premise removal on the All Writs Act, even though, as she recognized, the Act "does not, by its specific terms, provide federal courts with an independent grant of jurisdiction." [Supplemental Notice, at 1.] This concession alone was fatal to the Secretary's attempt to remove on this basis, as reflected by the fact that neither this Court nor the Sixth Circuit even addressed the Secretary's All Writs Act argument in their respective decisions.

The actual holding in Syngenta Crop. Prot., Inc. v. Henson, 537 U.S. 28 (2002), the case cited by Secretary Brunner, bars any reliance upon the All Writs Act for purposes of removal. In that case, the Supreme Court held that the Act provides no authority for removal where the district court lacks original jurisdiction over the removed case. Syngenta involved various plaintiffs asserting torts claims against the same defendants in state court and in federal court; the federal action was filed first. See 537 U.S. at 30. The federal action was settled, and after the state court held that the settlement did not preclude certain claims from proceeding in the state action, the defendants responded by removing the state action to federal court. [Id.] The defendants (petitioners) argued to the Supreme Court that the All Writs Act supported removal of the state-court action because *if* the state-court claims had been brought in the federal action, the district court *could have* asserted ancillary jurisdiction over the claims. See 537 U.S. at 33. The Supreme Court rejected this argument:

> [Petitioners] fail to explain how the [federal court's] retention of jurisdiction over the [federal court] settlement authorized *removal* of the [state-court] action. Removal is governed by statute, and invocation of ancillary jurisdiction, like invocation of the All Writs Act, does not dispense with the need for compliance with statutory requirements."
>
> [Syngenta, 537 U.S. 28, 34.]

In short, since supplemental jurisdiction was the only alleged "grounds" for removal and the removal statute, 28 U.S.C. § 1441, requires original jurisdiction, the All Writs Act did not somehow authorize what the removal statute does not allow.

> Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement.
>
> [Id. at 34.]

The same is true here. Having failed to establish an objectively reasonable basis for this Court's original jurisdiction over the removed action, Secretary Brunner could not invoke the All Writs Act to establish jurisdiction where none exists. Although her All Writs Act arguments failed for multiple reasons, they fundamentally ran afoul of the very Supreme Court authority she cited in her supplemental memorandum in support of removal. It was, again, objectively unreasonable for her to remove the case on this basis.

IV. CONCLUSION

For all of the reasons set forth herein, Secretary Brunner lacked an objectively reasonable basis for removing this action from the Ohio Supreme Court. As a result, Relators are entitled to an award of their attorneys' fees in the amount of $59,263.00, incurred as a result of Secretary Brunner's improper removal.

Respectfully submitted,

/s/ John W. Zeiger
John W. Zeiger (0010707)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(Fax) (614) 365-7900

Trial Attorney for Relators
Dana Skaggs and Kyle Fannin

OF COUNSEL:

Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(Fax) (614) 365-7900

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel of record by means of the Court's CM/ECF system on this 9th day of December, 2008.

/s/ John W. Zeiger
John W. Zeiger (0010707)

859-001: 189561

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. DANA SKAGGS, et al.,	:	
	:	Case No. 2:08 cv 1077
Relators,	:	
	:	Judge Marbley
vs.	:	
	:	Magistrate Judge Kemp
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	
	:	
Respondents.	:	

AFFIDAVIT OF JOHN W. ZEIGER IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES PURSUANT TO 28 U.S.C. § 1447(c)

STATE OF OHIO)
) SS
COUNTY OF FRANKLIN)

John W. Zeiger, being first duly sworn, deposes and states as follows:

1. I am an attorney admitted to practice law in Ohio since 1972, Ohio Bar No. 0010707. I am also admitted to practice before the United States District Court for the Southern District of Ohio, the United States District Court for the Northern District of Ohio, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States.

2. I am a partner in the law firm of Zeiger, Tigges & Little LLP ("ZTL").

3. ZTL is a fourteen-lawyer boutique that specializes in complex business and commercial litigation. (Our website address is www.litohio.com.) Our clients include, among others, The Dispatch Printing Company, Limited Brands, The New Albany Company, OhioHealth, Fifth Third Bank, ING, Hexion Specialty Chemicals

EXHIBIT
1

(formerly, Borden Chemical), Stonehenge Financial Holdings, Scotts Miracle-Gro, United Healthcare, and JPMorgan Chase.

4. On November 12, 2008, our Firm was engaged by Dana Skaggs, Kyle Fannin, the Stivers for Congress Committee, and the Stivers for Congress Recount Committee to challenge the directions of Secretary of State Jennifer L. Brunner to count provisional ballots that did not facially comply with R.C. 3505.183. On November 13, 2008, our Firm therefore filed a mandamus action in the Ohio Supreme Court bearing the caption of State of Ohio ex rel. Dana Skaggs, et al. v. Brunner, et al., Case No. 08-2206 on November 13, 2008. On Friday, November 14, 2008, Secretary Brunner removed our mandamus action from the Ohio Supreme Court to this Court. On November 14, 2008, we filed a motion to remand, which this Court denied on November 16, 2008. The Court thereafter expedited cross-motions for summary judgment and entered judgment for Respondents on November 20, 2008. Relators appealed the same day and on November 25, 2008, the Sixth Circuit found a lack of federal question jurisdiction, vacated the judgment of the District Court and remanded to the Supreme Court of Ohio. On December 5, 2008, the Supreme Court of Ohio granted Relators the mandamus relief they sought. State ex rel. Skaggs v. Brunner, Slip Op. No. 2008-Ohio-6333. Relators now seek fees occasioned by the improper removal of this action.

5. Exhibit A is a detailed billing report for this case for the period commencing Friday, November 14, 2008, when this action was removed to this Court from the Supreme Court of Ohio, through and including Tuesday, November 25, 2008, when this action was remanded to the Supreme Court of Ohio by the Sixth Circuit Court of Appeals (the "Fee Application Period"). Exhibit A lists (i) the date of services

provided, (ii) the attorney providing the services, (iii) description of the services provided, (iv) the amount of time expended, and (v) at the end of the report, the total amount at ZTL's standard hourly rates. Exhibit A is a standard billing record of ZTL prepared in the normal and ordinary course of its business by persons with knowledge of the facts recited therein at or about the time recorded. Each ZTL attorney who worked on this case kept track of his time on a daily basis in accordance with ZTL's standard policies and procedures for timekeeping. This time was then entered into ZTL's computerized timekeeping and billing system to generate a comprehensive report in the form of Exhibit A of how much time was spent by each attorney, on a daily basis, during the Fee Application Period, and the work that was performed in each instance.

6. ZTL's time on this case during the Fee Application Period totaled 262 hours. Given the expedited nature of the proceedings, these hours were worked by eight lawyers: John W. Zeiger, Steven W. Tigges, Marion H. Little, Jr., Christopher J. Hogan, Kris Banvard, Scott N. Schaeffer, Damien C. Kitte, and Daniel P. Mead. (A brief professional biography of each is included in Exhibit C.) Their daily time is described on Exhibit A. By lawyer, their total time was:

	Hours
John W. Zeiger	71.75
Steven W. Tigges	4.75
Marion H. Little, Jr.	45.75
Christopher J. Hogan	73.25
Kris Banvard	6.00
Scott N. Schaeffer	10.50

Damien C. Kitte	20.75
Daniel P. Mead	29.25
Total Hours	262.00

7. I had overall responsibility for the case and made all strategic and tactical decisions. I argued the Motion to Remand and Motion for Summary Judgment, as well as requesting an injunction pending appeal to the Sixth Circuit.

8. Marion H. Little, Jr. was responsible for development of our legal position and preparation of briefs. He was assisted by Christopher J. Hogan, who prepared initial drafts of briefs and coordinated research assignments undertaken by Messrs. Banvard, Schaeffer, Kitte and Mead. Both Mr. Little and I assisted in revising and finalizing the briefs submitted on behalf of Relators. Mr. Tigges focused exclusively on analysis of the issue of federal question jurisdiction and assisted with related briefing.

9. ZTL's current standard, market-based hourly rates, used in calculating the fees described on Exhibit A, are as follows:

John W. Zeiger	$475
Steven W. Tigges	$440
Marion H. Little, Jr.	$390
Christopher J. Hogan	$190
Kris Banvard	$185
Scott N. Schaeffer	$180
Damien C. Kitte	$160
Daniel P. Mead	$160

10. I have reviewed each time entry during the Fee Application Period and have broken them into three separate categories as reflected by the color codes set forth on Exhibit A and an Invoice Summary attached as Exhibit B:

Color	Category
Yellow	Hours devoted solely to jurisdictional issues associated with the Motion to Remand ("Remand Fees")
Green	Hours devoted to merits issues involved in motions for summary judgment in District Court ("District Court Merits Fees").
Orange	Hours devoted to the appeal to the Sixth Circuit Court of Appeals ("Sixth Circuit Fees").

11. The Remand Fees reflect solely the hours and fees involved in preparation of the Motion to Remand filed in the District Court, and the underlying research related to the jurisdictional issue raised by the Motion to Remand. None of these hours and fees would have been incurred had the case not been removed from state court.

12. The District Court Merits Fees reflect hours and fees involved in preparation of Relators' Motion for Summary Judgment necessitated by the District Court decision denying remand. This category also includes fees related to Relator's requests for interim injunctive relief and injunctive relief pending appeal that were necessitated by the removal and the denial of remand.

13. The Sixth Circuit Fees reflect hours and fees arising from the appeal to the Sixth Circuit and include hours and fees relating to the briefing of both jurisdictional and merits issues. While both jurisdictional and merits issues had to be dealt with in the Sixth Circuit brief, approximately two-thirds of the Sixth Circuit Fees related to briefing, and

related research, on the jurisdictional issue occasioned by the denial of the Motion to Remand.

14. The breakdown of time and fees from Exhibit A into these three categories is:

Color	Description	Hours	Fees
Yellow	Remand Fees	112.00	$29,127.50
Green	District Court Merits Fees	58.50	$17,090.00
Raspberry	Sixth Circuit Fees	91.50	$32,713.75
	Total	262.00	$78,931.25

15. The District Court Merits Fees were incurred as a result of the denial of the Motion to Remand by the District Court. While some of the same research would have been required in the Supreme Court proceedings had the case not been removed, the time committed to briefing the Motion for Summary Judgment filed by Relators in the District Court arose solely as a result of the denial of the Motion to Remand. Given that Relators required an additional 57.75 hours to prepare their Supreme Court merit brief after remand by the Sixth Circuit (hours that are not reflected in this Affidavit or Exhibit A), at least fifty percent (50%) of the District Court Merits Fees would not have been incurred had the case remained in state court. A minimum allocation of fifty percent (50%) of the District Court Merits Fees as occasioned by the improper removal is therefore warranted.

16. While a small part of the Sixth Circuit Fees may have involved work with value in the Supreme Court after remand, at least two-thirds of these fees would not have been incurred had the case remained in state court. As such, a minimum allocation of

sixty-six percent (66%) of the Sixth Circuit Fees as expense that arose solely as a result of the improper removal is warranted.

17. Relators therefore request an award of remand fees as follows:

100% of Remand Fees of $29,127.50	$29,127.00
50% of District Court Merits Fees of $17,090.00	$8,545.00
66% of Sixth Circuit Fees of $32,713.75	$21,591.00
Total Fee Request	$59,263.00

18. Relators incurred expenses in excess of Three Thousand Dollars ($3,000.00) for court fees, photocopying, and computerized research in the federal proceedings and those in the Ohio Supreme Court. Relators, however, are unable to break down these expenses between those occasioned by the improper removal and those relating to the merits of the underlying Supreme Court action and therefore do not request reimbursement of any expenses.

19. Further Affiant sayeth naught.

John W. Zeiger

Sworn to before me and subscribed in my presence this 9th day of December 2008.

Janel Strickland
Notary Public

JANEL STRICKLAND
Notary Public, State of Ohio
My Commission Expires 07-24-13

859-001:189584

EXHIBIT A

ZEIGER, TIGGES & LITTLE LLP
41 South High Street Suite 3500
Columbus, Ohio 43215
(614) 365-9900

Federal ID # 20-0413072

December 8, 2008

Invoice# 25117 JWZ
Our file# 859 00001
Billing through 11/25/2008

Stivers for Congress Committee
Stivers for Congress Recount Committee
c/o Mr. Terry Casey
211 South 5th Street
Columbus, OH 43215

Re: General

PROFESSIONAL SERVICES

11/14/2008	KB	Draft portion of brief opposing Secretary of State's removal to federal court on All Writs Act and Anti-Injunction Act. Collect and review relevant cases. Prepare charts on same. for Mr. Zeiger to present to court at oral argument.	5.00 hrs
11/14/2008	DPM	Research and draft argument section regarding well pleaded complaint rule.	4.50 hrs
11/14/2008	CJH	Multiple teleconferences with Mr. Zeiger and Mr. Little regarding Secretary of State's removal of case to federal court and preparation of motion to remand same. Confer with Mr. Kitte and Mr. Mead regarding research necessary for preparation of remand motion. Prepare significant portion of motion to remand, and coordinate preparation of additional argument portions for inclusion in same.	9.25 hrs
11/14/2008	JWZ	Miscellaneous telephone conferences regarding removal of action from Ohio Supreme Court. Conferences with Mr. Little regarding analysis and assignments. Conference call with Judge Marbley and opposing counsel. Analysis of all writs act and anti-injunction act issues. Assistance in preparation of motion to remand and supporting brief.	4.75 hrs
11/14/2008	JWZ	Preparation for oral argument on removal and motion for remand.	2.00 hrs
11/14/2008	CJH	Review TRO response papers filed by Secretary Brunner in district court action. Prepare outline of	hrs

		Relators' responses to same for use by Mr. Zeiger in TRO hearing prep. Review all materials provided by Bricker firm.		
11/14/2008	DCK	Research case law analyzing the "well pleaded complaint rule;" whether the All Writs Act can be a basis for removal jurisdiction; and whether interpretation of a federal court consent order can be a basis for removal jurisdiction. Research HAVA provisions to determine if that statute provides an independent basis for removal. Research "rule of unanimity" in removal actions to determine if a party's appearance in a case defeats the exception to the rule where all defendants had not yet been served. Research case law analyzing the requirements for designating a party a nominal party for purposes of the exception to the rule of unanimity. Research case law analyzing the relitigation exception to the Anti-Injunction Act. Research whether there was federal standing for voters alleging vote dilution due to improper observance of election laws; and whether remand was required by the district court if it determines, after removal from state court, that the plaintiff lacks standing in federal court.	8.00	hrs
11/14/2008	MHL	Strategy regarding motion to remand; extensive analysis of all writs act. Dictate outline of memo contra. Research assignments to Mr. Banvard and Mr. Hogan. Multiple conferences with prosecutor's office.	6.50	hrs
11/14/2008	JWZ	Preparation for oral argument on TRO application.	1.00	hrs
11/15/2008	CJH	Final preparation for, attend and assist Mr. Zeiger at oral argument in federal court on Relators' motion to remand.	5.00	hrs
11/15/2008	JWZ	Preparation for and attendance at Court regarding motion to remand. Miscellaneous telephone conferences regarding status after hearing.	5.25	hrs
11/16/2008	JWZ	Analysis of cases cited by Judge Marbley regarding federal question on jurisdiction. Miscellaneous telephone conferences regarding unanimity requirement and additional briefing regarding same. Review of case law requiring remand in the absence of standing.	2.00	hrs
11/16/2008	JWZ	Preparation for oral argument on TRO.	2.25	hrs
11/16/2008	DCK	Research Sixth Circuit case law holding that a district court must remand if it determines, after removal from state court, that the plaintiff lacks standing in federal court. Research whether there was federal standing for voters alleging vote dilution due to improper observance of election laws; and whether remand was required by the district court if it determines, after removal from state court, that the plaintiff lacks	0.75	hrs

		standing in federal court.		
11/16/2008	CJH	Prepare memorandum contra Secretary Brunner's motion to realign parties.	2.00	hrs
11/16/2008	CJH	Review pertinent statutes and assist Mr. Zeiger in preparation for potential oral argument on motion for interim injunctive relief.	2.00	hrs
11/17/2008	KB	Locate documents to be used as exhibits in TRO hearing in Southern District of Ohio.	0.75	hrs
11/17/2008	CJH	Significant discussions with Mr. Little and Mr. Zeiger regarding strategy for summary judgment motion. Confer with Mr. Kitte, Mr. Schaeffer and Mr. Mead regarding research necessary for preparation of same. Begin drafting Relators' motion for summary judgment for filing in federal court action.	4.75	hrs
11/17/2008	SNS	Research regarding statutory construction and interpretation of specific and general provisions where statutory language is irreconcilable. Research regarding Expressio Unius canon of construction and presumption attendant to legislature using language in one section of a statute and omitting such language in other sections. Research regarding in pari material canon of statutory construction and irreconcilable statutes. Draft language to Mr. Hogan for review.	7.25	hrs
11/17/2008	MHL	Attention to outline for motion for summary judgment.	1.50	hrs
11/17/2008	JWZ	Appearance at Court for TRO hearing. Arguments regarding same. Outline of brief on summary judgment. Review of cases and statutes regarding statutory interpretation.	9.25	hrs
11/17/2008	CJH	Final preparation for, attend and assist Mr. Zeiger at federal court proceedings relating to Relators' motion for remand same.	4.00	hrs
11/18/2008	KB	Locate case law for summary judgment brief.	0.25	hrs
11/18/2008	CJH	Continue drafting Relators' motion for summary judgment in federal court action. Confer with Mr. Kitte, Mr. Mead and Mr. Schaeffer regarding additional research with respect to canons of statutory construction. Update, edit and revise motion.	7.25	hrs
11/18/2008	CJH	Brief research regarding states' obligations under HAVA. Multiple conferences with Mr. Zeiger and Mr. Little regarding final revisions to and filing of motion for summary judgment. Review motions for summary judgment filed by Secretary Brunner and Franklin County Board of Elections.	1.50	hrs
11/18/2008	MHL	Attention to summary judgment motion. Strategy regarding and revisions to same.	3.50	hrs
11/18/2008	SNS	Research regarding interpretation of statutes utilizing in pari material canon of construction. Research regarding interpretation of irreconcilable statutes. Draft language to Mr. Hogan for review.	3.25	hrs

11/18/2008	JWZ	Research regarding statutory construction. Preparation of statutory construction sections for motion for summary judgment. Review related case law. Review and revisions to motion for summary judgment.	5.50	hrs
11/18/2008	DPM	Research regarding the proper time to determine removal jurisdiction is at removal and subsequent events cannot affect removal determination.	0.75	hrs
11/18/2008	DPM	Research regarding whether standing is a matter of subject matter jurisdiction, whether a court may enter an order when the parties lack standing.	4.50	hrs
11/18/2008	DPM	Research whether court can read additional words into statute and whether a federal court consent order can create a binding interpretation of a state statute.	1.50	hrs
11/19/2008	CJH	Assist Mr. Little in preparation of motion for injunction pending appeal.	1.50	hrs
11/19/2008	CJH	Prepare appellants' merit brief for filing in Sixth Circuit Court of Appeals. Review Sixth Circuit rules in preparation for filing same.	8.50	hrs
11/19/2008	MHL	Strategy conference regarding options before Sixth Circuit. Attention to affidavit issue. Begin preparing motion for stay pending appeal. Work on merit brief. Conference with Sixth Circuit staff regarding procedure for the expedited consideration and timing considerations.	8.00	hrs
11/19/2008	JWZ	Arrangements regarding Sixth Circuit papers. Review briefs filed on merits issue in District Court and related pleadings. Review of election statutes regarding additional affidavits supporting injunction pending appeal. Meeting with Mr. Damschroder regarding same. Telephone conference with Mr. Walch regarding same. Conferences with Mr. Little regarding motion. Preparation of initial drafts of affidavits of Messrs. Damschroder and Walch in support of injunction pending appeal.	7.75	hrs
11/19/2008	DCK	Research the standards of appellate review for a district court's decision not to remand and its determination that it has subject matter jurisdiction. Research case law holding that federal courts are courts of limited jurisdiction and that courts should presume jurisdiction does not exist.	1.00	hrs
11/20/2008	DCK	Research appellate decisions holding that the "artful pleading" doctrine only applies when federal law completely preempts state law.	1.00	hrs
11/20/2008	CJH	Attend and assist Mr. Zeiger at hearing on motions for summary judgment and motion for injunction pending appeal.	3.00	hrs
11/20/2008	CJH	Continue preparing appellants' Sixth Circuit merits brief. Confer with Mr. Little regarding same. Update,	6.50	hrs

		edit and revise same. Review, edit and revise motion for injunction pending appeal. Additional review of Sixth Circuit rules to confirm all documents' conformance therewith.		
11/20/2008	MHL	Continued preparation of motion, hearing brief and related documents. Coordinate matters with Sixth Circuit. Attention to affidavit. Attention to filing, Multiple conferences with Sixth Circuit. Prepare motion for expedited consideration. Prepare notice with respect to injunction.	8.50	hrs
11/20/2008	JWZ	Preparation of affidavits for Messrs. Damschroder and Walch. Arrangements regarding affidavits from Union County, Madison County and Delaware County. Miscellaneous telephone conferences regarding same. Review and revisions of motion for stay pending appeal. Review and revisions to merits brief. Preparation for oral argument on motion for injunction pending appeal. Attend Court session.	8.50	hrs
11/21/2008	DPM	Research regarding whether a federal court can enter a consent order that conflicts with a state statute and whether a state official complying with a federal court consent order is a person acting under a federal officer for purposes of 28 USC 1442.	5.75	hrs
11/21/2008	MHL	Strategy conference and review research results.	1.75	hrs
11/21/2008	JWZ	Review of federal court jurisdiction argument. Assignments regarding consent order analysis. Outline for reply brief.	6.50	hrs
11/21/2008	CJH	Multiple conferences with Mr. Zeiger and Mr. Tigges regarding additional federal jurisdiction issues. Research regarding federal officer jurisdiction issues. Confer with Mr. Mead regarding additional jurisdictional research.	3.00	hrs
11/21/2008	SWT	Research and analysis of jurisdiction issues.	4.75	hrs
11/23/2008	JWZ	Review of jurisdictional case law and memo regarding same. Revisions to insert for reply brief. Review of related positions of merits brief.	3.50	hrs
11/24/2008	MHL	Extensive re-briefing with respect to reply brief in support of Sixth Circuit appeal.	12.00	hrs
11/24/2008	DPM	Research and draft argument regarding federal consent order cannot conflict with state statute absent a finding that state statute violates federal law. Research regarding applying Section 1442 removal to consent orders. Research regarding secretary of state acting contrary to statute.	11.25	hrs
11/24/2008	CJH	Review appellee's brief filed by Secretary Brunner and amicus briefs filed by NEOCH, the Ohio Democratic Party, and the ACLU and identify key issues to be addressed in reply brief. Confer with Mr. Little and Mr. Zeiger regarding same.	2.50	hrs

11/24/2008	CJH	Prepare Sixth Circuit reply brief. Update, edit and revise same. Multiple conferences with Mr. Zeiger and Mr. Little regarding same.	10.00	hrs
11/24/2008	JWZ	Meeting with clients. Analysis of brief filed by Secretary Brunner. Preparation of arguments in response and related assignments. Draft reply brief. Revisions to same.	13.50	hrs
11/24/2008	DCK	Research case law analyzing whether interpretation of a federal consent order could provide the basis for federal jurisdiction and prepare argument highlighting the Sixth Circuit's recognition that cases allowing for such jurisdiction have been abrogated. Research case law and prepare argument distinguishing cases cited for non-served defendant exception to the rule of anonymity. Research case law on primary purpose test for realignment of parties. Research case law for language defining a "nominal party" and finding that the party in question was not a nominal party.	10.00	hrs
11/25/2008	MHL	Begin preparing motion for per curiam consideration. Attention to court decision. Strategy options relating to same and issues with respect to Supreme Court.	4.00	hrs
11/25/2008	DPM	Research regarding when secretary of state acts contrary to statute, the action is void.	1.00	hrs

TOTAL FEES FOR THIS MATTER $78,931.25

BILLING SUMMARY

Banvard, Kris	6.00 hrs	185.00 /hr	1,110.00
Hogan, Christopher J.	73.25 hrs	190.00 /hr	13,917.50
Kitte, Damien C.	20.75 hrs	160.00 /hr	3,320.00
Little, Marion H.	45.75 hrs	390.00 /hr	17,842.50
Mead, Daniel P.	29.25 hrs	160.00 /hr	4,680.00
Schaeffer, Scott	10.50 hrs	180.00 /hr	1,890.00
Tigges, Steven W.	4.75 hrs	440.00 /hr	2,090.00
Zeiger, John W.	71.75 hrs	475.00 /hr	34,081.25
TOTAL FEES	262.00 hrs		78,931.25

TOTAL EXPENSES 0.00

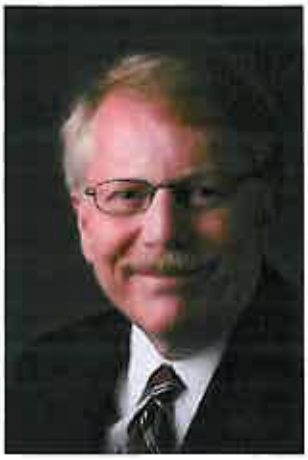
TOTAL CHARGES FOR THIS INVOICE $78,931.25

INVOICE SUMMARY

	JWZ	MHL	CJH	KXB	DPM	DCK	SNS	SWT	TOTAL
RATE	$475.00	$390.00	$190.00	$185.00	$160.00	$160.00	$180.00	$440.00	
Jurisdictions									
hrs	24.00	6.50	23.25	5.00	27.75	20.75		4.75	112.00
dollars	$11,400.00	$2,535.00	$4,417.50	$925.00	$4,440.00	$3,320.00		$2,090.00	$29,127.50
Merits									
hrs	18.00	5.00	22.50	1.00	1.50		10.50		58.50
dollars	$8,550.00	$1,950.00	$4,275.00	$185.00	$240.00		$1,890.00		$17,090.00
6th Circuit									
hrs	29.75	34.25	27.50						91.50
dollars	$14,131.25	$13,357.50	$5,225.00						$32,713.75
TOTAL									
hrs	71.75	45.75	73.25	6.00	29.25	20.75	10.50	4.75	262.00
dollars	$34,081.25	$17,842.50	$13,917.50	$1,110.00	$4,680.00	$3,320.00	$1,890.00	$2,090.00	$78,931.25

EXHIBIT B

EXHIBIT C



JOHN W. ZEIGER

Presiding Partner
zeiger@litohio.com
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Direct: 614.365.4101
Fax: 614.365.7900

41 S. High St.
3500 Huntington Center
Columbus, Ohio 43215

"One of the finest litigators in Ohio;" an "outstanding practitioner and business consultant."

[Chambers USA - America's Leading Business Lawyers, The Client's Guide (2003 - 2004)]

"John Zeiger is admired as a 'ferocious, hard-working litigator who combines creative thinking with excellent writing skills.' The backbone of his practice is complex litigation, primarily representing corporations, high net worth individuals and legal professionals. He is an experienced trial lawyer and is well versed in class action defense."

[Chambers USA - The Chambers USA Guide 2006]

John W. Zeiger is the Presiding Partner of Zeiger, Tigges & Little LLP. Mr. Zeiger has extensive trial experience in a broad range of complex litigation - primarily representing corporations, high net-worth individuals, and legal professionals. His practice focuses primarily on defense of major business disputes, securities law claims, legal professional liability, and media law litigation. He has wide ranging experience in contract,

trademark, copyright, bankruptcy, and class action defense.

PROFESSIONAL AFFILIATIONS

Current: Zeiger, Tigges & Little LLP

- Founding Partner of litigation boutique concentrating in corporate litigation defense, professional liability, and media cases.

1980 - 1993: Jones, Day, Reavis & Pogue (Columbus Office)

- Senior Litigation Partner in 60-lawyer Columbus office of international law firm.

COMMUNITY AND PROFESSIONAL AFFILIATIONS

Commissioner - Supreme Court of Ohio

- Creed of Professionalism (1989 - 1990)
- Client Security Fund of Ohio (1995 - 1997)
- Committee on Bar Examination (1997 - 1998)

Trustee, Grant-Riverside Methodist Hospitals
(1998 - 2002) (Chairman 2001 - 2002)

Director, OhioHealth Corporation
(2001 - 2007) (Secretary and Member of the Executive Committee 2002 - 2007)
(Central Ohio's largest not-for-profit health care system)

Trustee, Methodist Theological School in Ohio
(1995 - present) (Finance Chair 1997 - 2003; Chair-Elect 2003-2004; Chairman of the Board 2004 - 2008)

Trustee, The Ohio Reads Foundation
(1998 - 2005) (The charitable arm of Governor Taft's statewide literacy initiative)

REPRESENTATIVE EXPERIENCE

- Litigation counsel to Columbus civic leaders in returning control of key downtown shopping mall property to City of Columbus for redevelopment
- Trial counsel in challenge to Ohio General Assembly diverting $190 million of tobacco use prevention funding to jobs initiatives
- Trial counsel in $15 million indemnity claim on behalf of JPMorgan Chase arising out of class action settlement
- Defense counsel in preliminary injunction proceeding seeking to invalidate cartoon character licensing agreement in effort to thwart $85 million media company acquisition
- Lead trial counsel in representation of Columbus community leaders in dispute with Lamar Hunt over control of the Columbus Blue Jackets NHL franchise
- Trial counsel in property tax dispute involving newly-opened Nationwide Arena
- Lead trial counsel for a major law firm in three class action securities lawsuits

arising out of penny stock fraud and criminal proceedings
- Trial counsel in successful defense of a major tax fraud indictment, ultimately obtaining $800,000 tax refund for client
- Three-week pro bono death penalty murder trial representation
- Lead trial counsel of Federated Department Stores, Inc., in its successful $6 billion bankruptcy reorganization
- Trial counsel in Marathon Oil's successful defense of Mobil Oil Corporation's challenge to $6 billion white knight agreement with U.S. Steel
- Lead trial counsel in $1 billion real estate bankruptcy of Cardinal Industries, Inc., including lead trial counsel in prosecution of defendant class action involving 250 banks having $1 billion in loans

AWARDS AND RECOGNITIONS

- Chambers USA Leading Business Lawyer – Business Litigation (annually since publication commenced)
- Best Lawyers in America 1982 - 2008 (Corporate Litigation and Media Defense)
- Recognized as one of 100 Super Lawyers in Ohio by Cincinnati Magazine (January 2004 and 2005)
- Recognized in the National Law Journal as one of the top ten litigators in Ohio (March 2000)
- Appointed Delegate - Sixth Circuit Judicial Conference (2004)

EDUCATION

J.D., The Ohio State University Moritz College of Law, 1972
Summa Cum Laude
The Order of the Coif

B.S.B.A., The Ohio State University, 1969
Cum Laude

BAR ADMISSIONS

Supreme Court of Ohio
United States Supreme Court
United States Sixth Circuit Court of Appeals
United States District Courts, Northern and Southern Districts of Ohio

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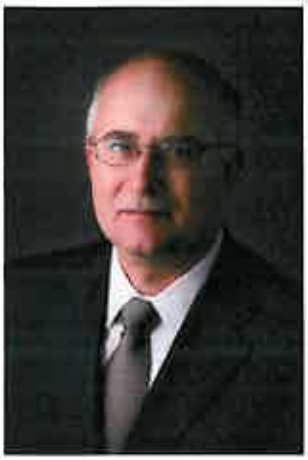

STEVEN W. TIGGES

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Steve Tigges is a Partner of Zeiger, Tigges & Little LLP. Mr. Tigges is a seasoned trial attorney who has practiced extensively in the areas of employment, health care, commercial contract, securities, construction, antitrust, and trademark litigation.

PROFESSIONAL AFFILIATIONS

Current: Zeiger, Tigges & Little LLP

- Partner of litigation boutique firm concentrating in corporate litigation defense, professional liability, and media cases.

1988 – 1993: Squire, Sanders & Dempsey LLP (Columbus Office)

- Litigation Partner in 80-lawyer Columbus office of international law firm.

1981 – 1988 : Murphy, Young & Smith LLP

COMMUNITY AND PROFESSIONAL ACTIVITIES

Mr. Tigges is a member of the Columbus, Ohio State, Federal, and American Bar

Associations.

REPRESENTATIVE EXPERIENCE

Like the other attorneys at Zeiger, Tigges & Little LLP, Mr. Tigges has extensive trial experience, with just some of those trials including:

- *McConnell v. Hunt*: Representation of Columbus community leaders in action to obtain NHL franchise for Columbus
- *The Dispatch Printing Company v. Recovery Limited Partnership* (United States District Court, Southern District of Ohio): Action for accounting of investments in gold exploration partnerships
- *Bank One Trust Company v. Scherer* (Franklin County Probate Court): Action for final trust accounting; defense of counterclaim for alleged breach of fiduciary duty
- *Coryell v. Bank One Trust Company* (Franklin County Common Pleas Court): Age discrimination
- *Blanchard Valley Health Association v. ProMedica Health System* (Hancock County Common Pleas Court, Lucas County Common Pleas Court): Actions for breach of hospital affiliation agreements and judicial dissolution
- *Berasi v. OhioHealth Corp.* (Franklin County Common Pleas Court): Defense of action for alleged wrongful revocation of medical staff privileges
- *City of Westerville v. Polaris Amphitheater Concerts, Inc.* (Delaware County Common Pleas Court): Defense of action for alleged violation of municipal noise ordinance
- *Newkirk v. Blue Cross Blue Shield* (Franklin County Common Pleas Court): Breach of insurance contract
- *Troutwein v. O'Brien* (Franklin County Common Pleas Court): Will contest
- *American Share Insurance v. California Commissioner of Corporations* (California Superior Court): Regulatory dispute, action for writ of mandamus
- *Horton Co. v. House* (Franklin County Common Pleas Court): Action to enforce noncompetition covenant
- *Kokosing Construction Co. v. BPS* (Franklin County Common Pleas Court): Breach of construction contract
- *Keiffer v. Sears Roebuck & Co.* (United States District Court, Southern District of Ohio): Sex discrimination
- *Advanced Drainage Systems v. Reich* (Defiance County Common Pleas Court): Action to enforce noncompetition covenant
- *Ashland Chemical v. GLS Corp.* (United States District Court, Southern District of Ohio): Corporate raiding of employees
- *Quissenberry v. Farrell* (Clark County Common Pleas Court): Medical malpractice action
- *Cunningham v. Sears Roebuck & Co.* (United States District Court, Southern District of Ohio): Race discrimination
- *Taylor v. Glimcher Co.* (Franklin County Common Pleas Court): Fraud and breach of contract
- *Fournier v. Rubbertec* (Franklin County Common Pleas Court): Corporate raiding of employees
- *Greff v. Meeks & Co.* (Franklin County Common Pleas Court): Action to set aside noncompetition covenant
- *Advanced Drainage Systems v. Lucas* (Lakeland County, Florida): Action to enforce noncompetition agreement
- *Blue Cross/Blue Shield of Central Ohio v. Blue Cross/Blue Shield Association*

(United States District Court, Southern District of Ohio): Trademark infringement
- *Stanley Tool v. Cooper Industries* (United States District Court, D. Connecticut): Corporate acquisition; antitrust
- *Lancaster Glass v. GTE* (United States District Court, Southern District of Ohio): Breach of sales contract
- *General Electric v. Norton Co.* (Franklin County Common Pleas Court): Action to enforce noncompetition agreement
- *Acceleration Insurance Co. v. Montana Bankers* (United States District Court, D. Montana): Breach of contract; violation of Bank Holding Company Act
- *Hitt v. Tressler* (Franklin County Common Pleas Court): Election contest

AWARDS AND RECOGNITION

- Ohio Super Lawyers
- Best Lawyers in America

EDUCATION AND PUBLICATIONS

J.D., The Ohio State University Moritz College of Law, 1981
Summa Cum Laude, Order of the Coif

- Editor-in-Chief,The Ohio State Law Journal

B.S., The Ohio State University, 1975
Cum Laude

- Author, *"Into the Religious Thicket – Constitutional Limits on Civil Court Jurisdiction Over Ecclesiastical Disputes,"* 41 Ohio State Law Journal 475 (1986)
- Author, "*Federal Tuition Tax Credits and the Establishment Clause: A Constitutional Analysis,*" 28 Catholic Lawyer 35 (1983)
- Author, "*Return to the Twilight Zone – Federal Long-Arm Jurisdiction and Amenability to F.R.C.P. 4(f) Bulge Service of Process,*" 41 Ohio State Law Journal 685 (1980)
- Mr. Tigges has spoken before several groups, including the Ohio Society of Certified Public Accountants and the Columbus Bar Association Litigation Practice Institute

BAR ADMISSIONS

Supreme Court of Ohio
United States Court of Appeals, Fourth, Sixth and Seventh Circuits
United States District Courts, Northern and Southern Districts of Ohio

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Marion Little is a Partner of Zeiger, Tigges & Little LLP. Mr. Little is a seasoned trial attorney who has practiced extensively in the areas of securities, commercial contracts, employment, legal professional liability, and media law litigation. Mr. Little has extensive experience in trial and appellate advocacy.

PROFESSIONAL AFFILIATIONS

Current: Zeiger, Tigges & Little LLP

- Partner of litigation boutique firm concentrating in corporate litigation defense, professional liability, and media cases.

1991 – 1994: Schwartz, Kelm, Warren & Rubenstein (Columbus, Ohio)

- Litigation Associate in Columbus firm which served as principal counsel for the Limited, Inc. and its affiliates.

CLERK AND GOVERNMENT EXPERIENCE

1989 – 1991: Law Clerk for District Court Judge Joseph P. Kinneary, Southern District

of Ohio, Eastern Division

COMMUNITY AND PROFESSIONAL AFFILIATIONS

Mr. Little is a member of the Ohio State and Columbus Bar Associations. He served as a member of the Board of Trustees of Franklin County Children's Services from 2003 to 2007.

REPRESENTATIVE TRIAL EXPERIENCE

- Lead trial counsel in successful defense of energy facility developer. Plaintiffs alleged fraudulent conspiracy by defendants in securing real property for $300 million electrical plant. Jury trial concluded by directed verdict in client's favor.

- Lead trial counsel in four-week trial advancing derivative claims for misappropriation of corporate opportunities and breach of fiduciary duty by corporate president and director. $19.8 million verdict returned in clients favor included award of punitive damages and the imposition of constructive trusts.

- Lead trial attorney in defense of action pursued by approximately 500 plaintiffs. Clients' overall exposure was $300 million. Case tried to a defense verdict.

- Co-counsel in four-week jury trial advancing fraud and federal RICO claims upon behalf of plaintiff. Jury verdict in favor of client. Believed to be the only successfully tried civil RICO case in the Southern District of Ohio, Easten Division.

- Lead trial attorney upon behalf of Governor Voinovich's administration of successful defense of eleven lawsuits alleging discriminatory employment practices based upon political affiliation in violation of the First Amendment.

- Lead trial attorney in defense of multi-week penny stock fraud arbitration. Claimants sought in excess of $3 million. Case tried to a defense verdict.

- Lead trial attorney in defense of four-week arbitration involving defamation claims and damage claim well in excess of $3 million. Case tried to a defense verdict.

- Lead trial attorney in multiple preliminary and permanent injunction actions, including actions to enforce non-compete and non-solicitation agreements and protect trade secrets.

- Lead trial attorney in multiple arbitrations tried before the National Association of Securities Dealers, Inc.

- Numerous court appearances on behalf of media clients to ensure court access for both print and electronic media.

- Numerous original actions for writs of mandamus and/or prohibition before Ohio Supreme Court

REPRESENTATIVE APPELLATE ADVOCACY

- Ohio Civil Rights Commission v. Triangle Real Estate Services, Inc., 2007 WL 1125482 (Ohio App. 10 Dist. 2007). Successfully defended owner, builder and developer from claims of discrimination in the construction and design of multi-family units.

- Columbus Homes, Ltd., et al. v. S.A.R. Construction, Inc., et al., 2007 WL 1083254 (Ohio App. 10 Dist. 2007). Successfully affirmed lower court monetary judgment in excess of $19 million.

- McConnell v. Cardiothoracic Vascular Surgical Services, Inc., 165 Fed. Appx. 423 (6th Cir. 2006). Successfully defended hospital against claims of fraud and tortious interference and alleged violation of Anti-kickback and Stark Laws.

- Central Funding, Inc. v. CompuServe Interactive Services, Inc., 2003 WL 22177226 (Ohio App. 10 Dist. 2003). Successfully sought reversal of lower court grant of summary judgment in favor of plaintiff. Court ultimately found, on appeal, client was entitled to summary judgment on its claim that plaintiff proceeded in bad faith.

- State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education, 97 Ohio St. 3d 58 (2002). Prevailed in mandamus action to compel production of public records. Court found that Respondent had engaged in a history of failing to timely comply with public-records requests.

- Citicasters Co. v. Bricker & Eckler LLP, 149 Ohio App. 3d 705 (2002). Successfully argued for affirmance of lower court's dismissal of multi-million dollar fraud claim against law firm.

- Tallal v. Bank One, N.A., 94 Ohio St. 3d 1251 (2002). Retained to handle Supreme Court briefing and oral argument. Successfully convinced the Supreme Court to dismiss the appeal as having been improvidently granted.

- Advanced Analytics Laboratories, Inc. v. Kegler Brown Hill & Ritter LPA, et al., 148 Ohio App. 3d 440 (2002). Successfully defended law firm against legal malpractice claims.

- Dennis Holley v. WBNS 10 TV, Inc., 149 Ohio App. 3d 22 (2002). Successfully defended television station against slander claims.

- Ware v. Kowars, 2001 WL 58731 (Ohio App. 10 Dist. 2001). Successfully defended broker-dealer against claims under Blue Sky law and various common law theories relating to security sales.

- State ex rel. Dispatch Printing Co. v. Louden, 91 Ohio St. 3d 61 (2001). Successful mandamus/writ of prohibition action against Delaware court judge who had excluded media from courtroom and courthouse.

- FontBank, Inc. v. CompuServe Incorporated, 138 Ohio App. 3d 801, 742 N.E.2d 674 (Ohio App. 10 Dist. Aug. 3, 2000). Successfully defended against fraud and

contract claims.

- Rountree v. WBNS TV, Inc., 1999 WL 1054882 (Ohio App. 10 Dist. 1999). Successfully defended television station against slander claims.

- Collins v. Voinovich, et al., 150 F.3d 575 (6th Cir. 1998). Successfully argued for affirmance of lower court's dismissal of political discrimination claim.

- Powell v. Squire, Sanders & Dempsey, et al., Sixth Circuit Court of Appeals, Case Nos. 98-3668; 98-3670. Successfully argued for affirmance of order imposing Rule 11 sanctions against attorney.

- Myron N. Terlecky v. Dwight I. Hurd, et al., 133 F.3d 377 (6th Cir. 1997). Successfully argued for affirmance of District Court's dismissal of fraud claims brought by bankruptcy trustee against defendant attorneys and law firm. Underlying litigation involved an alleged penny stock fraud scheme.

- Knowlton v. Brown, 107 F.3d 870 (6th Cir. 1997). Assumed representation after trial court had ruled in plaintiff's favor. Successfully convinced Sixth Circuit to reverse lower court's decision on an interlocutory appeal.

- Kreuzer v. Brown, 28 F.3d 359 (6th Cir. 1997). Successfully argued for affirmance of lower court's dismissal of political discrimination claim.

- Eugene Flis v. George Voinovich, Governor of Ohio, et al., Case No. 96-4369, Sixth Circuit Court of Appeals. Successfully argued for affirmance of lower court's dismissal of political discrimination claim brought against Governor Voinovich's administration.

- Roberts, Administrator v. Bank of America, Trustee, 107 Ohio App. 3d 301, 668 N.E.2d 942 (Franklin Cty. Nov. 7, 1995). Enforceability of arbitration clause. Client prevailed.

AWARDS AND RECOGNITION

- Ohio Super Lawyers
- Best Lawyers in America

EDUCATION

J.D., The Ohio State University Moritz College of Law, 1989
Summa Cum Laude, The Order of the Coif

- Articles Editor, The Ohio State Law Journal, 1989

B.A., The Ohio State University, 1986

BAR ADMISSIONS

Supreme Court of Ohio

United States Court of Appeals; Third, Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits
United States District Court; Northern and Southern Districts of Ohio
United States District Court, Eastern District of Michigan

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Chris Hogan represents clients in a wide variety of litigation matters. Mr. Hogan counsels clients in several areas including health care, insurance, media law, and professional liability. His practice includes representation of both public and private companies, and he has counseled both for-profit and non-profit organizations.

Before coming to Zeiger, Tigges & Little, Mr. Hogan served as a public affairs reporter with ThisWeek Newspapers, in suburban Columbus.

Mr. Hogan attended The Ohio State Moritz College of Law where he graduated with honors and was elected to Order of the Coif. Mr. Hogan is a graduate of The University of Chicago, where he received a B.A. in American History, with Honors.

PROFESSIONAL & BAR ASSOCIATION MEMBERSHIPS

Columbus Bar Association

EDUCATION

J.D., The Ohio State Moritz College of Law

Elected to Order of the Coif
Graduated with Honors

B.A., American History, The University of Chicago
Graduated with Honors

BAR ADMISSIONS

Supreme Court of Ohio
United States Court of Appeals; Third, Fourth, Eighth, Ninth, Tenth and Eleventh Circuits
United States District Court, Southern District of Ohio

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KRIS BANVARD

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Columbus, Ohio 43215

Kris Banvard represents clients in a wide variety of litigation matters, including commercial contract disputes, tort and agency-law actions, securities law, employment law, media law, First Amendment issues, and attorneys' professional liability.

Before coming to Zeiger, Tigges & Little, Mr. Banvard had a long career in newspaper journalism as a reporter, writer, and editor. Most recently, he was an editorial writer for The Columbus Dispatch. He previously held positions as assistant city editor of the Roanoke (Va.) Times & World-News and reporter with The Sacramento Union.

Mr. Banvard attended Capital University Law School, where he graduated Summa Cum Laude and was a member of the Law Review. His Law Review Paper, Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Burdens on Religious Practice, is published at 31 Cap. U. Law Rev. 279 (2003). Mr. Banvard attended the University of Oregon where he graduated Phi Beta Kappa with a B.A. in Journalism.

PROFESSIONAL & BAR ASSOCIATION MEMBERSHIPS

Columbus Bar Association

Ohio State Bar Association

EDUCATION

J.D., Capital University Law School
Summa Cum Laude
Member of the Law Review

B.A., Journalism, University of Oregon
Phi Beta Kappa

BAR ADMISSIONS

Supreme Court of Ohio
United States District Court, Southern District of Ohio
United States Court of Appeals, Sixth Circuit

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SCOTT N. SCHAEFFER

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Scott Schaeffer represents clients in a wide variety of litigation matters. Mr. Schaeffer counsels clients in several areas including insurance, media law, and professional liability. His practice includes representation of both public and private companies, and he has counseled both for-profit and non-profit organizations.

Before coming to Zeiger, Tigges & Little LLP, Mr. Schaeffer gained business experience with a subsidiary of Hitachi Corporation. Mr. Schaeffer consulted Fortune 500 businesses in Sales, Business Process, Customer Service, Enterprise Relationships and Enterprise Reporting.

Mr. Schaeffer attended The Ohio State Moritz College of Law where he graduated Magna Cum Laude and was elected to Order of the Coif. Mr. Schaeffer is a graduate of Miami University, Oxford, Ohio where he received B.S. Degrees in Finance and Management Information Systems. Mr. Schaeffer attended Miami University in Differdange, Luxembourg in 1997 where he studied international business.

PROFESSIONAL & BAR ASSOCIATION MEMBERSHIPS

Ohio State Bar Association

Columbus Bar Association

American Bar Association
Section of Litigation

EDUCATION

J.D., The Ohio State Moritz College of Law
Magna Cum Laude

B.S. Degrees in Finance and Management Information Systems, Miami University, Oxford, Ohio

Miami University in Differdange, Luxembourg

BAR ADMISSIONS

Supreme Court of Ohio
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DAMIEN C. KITTE

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Damien Kitte represents clients in a wide variety of litigation matters. Mr. Kitte counsels clients in areas including ERISA, media law, professional liability, and the law of unfair competition.

Before coming to Zeiger, Tigges & Little LLP, Mr. Kitte gained business experience working for Fifth Third Bank and Bank One.

Mr. Kitte attended The Ohio State Moritz College of Law where he was a member and Associate Editor of the *Ohio State Law Journal*. Mr. Kitte has also earned a B.S. in Computer Science and a B.A. in History from The Ohio State University.

EDUCATION

J.D., The Ohio State Moritz College of Law
The Ohio State Law Journal, Associate Editor 2007-2008, Staff Member 2006-2007

B.S. in Computer Science, The Ohio State University

B.A. in History, The Ohio State University

JURISDICTIONS ADMITTED TO PRACTICE

Ohio Admission Pending

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DANIEL P. MEAD

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Daniel Mead represents clients in a wide variety of litigation matters. Mr. Mead counsels clients in several areas including construction, media law, and professional liability. His practice includes representation of both public and private companies.

Before coming to Zeiger, Tigges & Little LLP, Mr. Mead gained experience as a law clerk at Campbell Knutson in Eagan, Minnesota where he represented clients in the Twin Cities area.

Mr. Mead attended the University of Minnesota Law School where he graduated Magna Cum Laude and was elected to Order of the Coif. Prior to attending law school, Mr. Mead graduated from The Ohio State University Summa Cum Laude, receiving a degree in Music Theory.

EDUCATION

J.D., University of Minnesota School of Law
Magna Cum Laude, The Order of the Coif.

- Minnesota Journal of Law, Science and Technology, Supervising Editor 2007-08, Staff Member 2006-07

B.A. in Music Theory, The Ohio State University
Summa Cum Laude

JURISDICTIONS ADMITTED TO PRACTICE

Ohio Admission Pending

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Columbus, Ohio Litigation Lawyer Zeiger, Tigges & Little LLP Home
Contact Ohio Trial Attorney Zeiger, Tigges & Little LLP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. DANA SKAGGS, et al.,	:	
	:	Case No. 2:08 cv 1077
Relators,	:	
	:	Judge Marbley
vs.	:	
	:	Magistrate Judge Kemp
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	
Respondents.	:	

AFFIDAVIT OF ANNE MARIE SFERRA IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES PURSUANT TO 28 U.S.C. § 1447(c)

STATE OF OHIO)
) SS
COUNTY OF FRANKLIN)

Anne Marie Sferra, being duly sworn, states from personal knowledge:

1. Qualifications. I am a litigation partner, and the Chair of the Appellate Advocacy Group, of the law firm of Bricker & Eckler. I graduated from The College of Law of The Ohio State University in 1985 and was admitted to practice in Ohio in the same year. I have been a member of the Bar of the United States District Court for the Southern District of Ohio since 1986 and am a member of the Bar of the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit.

2. In addition to extensive experience in litigation involving insurance claims and coverage, tort law, trade secrets and similar business related issues, and in appellate proceedings, I have been involved as legal counsel in numerous election and referenda

EXHIBIT
2

issues throughout the State of Ohio. In 2008, I became the first Columbus-area attorney to be certified as an Appellate Law Specialist by the Ohio State Bar Association.

3. Scope of Engagement. I have been retained for the purpose of making an examination of the reasonableness of the fees sought by Relators in this matter.

4. What I Reviewed. I have briefly reviewed numerous papers for this attorney fee analysis, including:

(a) Complaint in the Ohio Supreme Court;

(b) Respondent Ohio Secretary of State Jennifer Brunner's Notice of Removal;

(c) Relators Dana Skaggs and Kyle Fannin's Motion for Remand of Case to the Ohio Supreme Court;

(d) Respondent Franklin County Board of Elections' Motion for Remand;

(e) Court's Decision denying Relators' Motion for Remand;

(f) Relators' Motion for Summary Judgment;

(g) Defendant Ohio Secretary of State Jennifer Brunner's Motion for Summary Judgment;

(h) Defendant Franklin County Board of Elections' Motion for Partial Summary Judgment;

(i) Joint Motion of the Northeast Ohio Coalition for the Homeless and the Ohio Democratic Party for Summary Judgment;

(j) U.S. District Court Opinion granting Defendant Ohio Secretary of State Jennifer Brunner's Motion for Summary Judgment;

(k) Notice of Appeal to the U.S. Court of Appeals for the Sixth Circuit;

(l) Brief of Appellants;

(m) Brief of Appellees Franklin County Board of Elections;

(n) Brief of Proposed Intervenor-Appellee The Northeast Ohio Coalition for the Homeless;

(o) Brief of Defendant-Appellee Jennifer L. Brunner;

(p) Brief of Amicus Curiae Ohio Democratic Party;

(q) Brief of Proposed Amicus Curiae The ACLU Voting Rights Project and ACLU of Ohio;

(r) Reply Brief of Relators-Appellants;

(s) Opinion of the U.S. Court of Appeals;

(t) Merit Brief of Relators Dana Skaggs and Kyle Fannin;

(u) Relators' Appendix of Evidence;

(v) Merit Brief of Ohio Democratic Party;

(w) Ohio Secretary of State Jennifer Brunner's Merit Brief;

(x) Respondent Ohio Secretary of State Jennifer Brunner's Submission of Evidence;

(y) Brief of Amicus Curiae The ACLU Voting Rights Project and ACLU of Ohio;

(z) Merit Brief of Respondent Franklin County Board of Elections;

(aa) Evidence Submitted by Respondent Franklin County Board of Elections;

(bb) Relators' Dana Skaggs and Richard Fannin's Motion for Award Of Attorneys' Fees Pursuant To 28 U.S.C. § 1447(c); and,

(cc) Affidavit of John W. Zeiger in Support of Relators' Motion for Award of Attorney Fees Pursuant to 28 U.S.C. § 1447(c) (the "Zeiger Affidavit").

My Opinions

5. Billing Rates. In my opinion the billing rates charged by the timekeepers described in the Zeiger Affidavit and its Exhibit A are reasonable. I am generally familiar with billing rates charged in Ohio (and elsewhere) from a number of sources, *e.g.*, my hiring of other law firms as co-counsel or local counsel, my discussions with clients, my review of published reports in professional literature of fee surveys, my review of other law firms' bills when I have represented clients other than as their litigation counsel, and my taking over (substituting for) attorneys when our firm has replaced other firms. I examined the billing rates involved in Relators' attorneys' fee request based on this knowledge and experience, and based on Ohio Rule of Professional Conduct 1.5, a copy of which is attached Exhibit A.

6. Time Spent. I reviewed a summary of the time records kept by the law firm of Zeiger, Tigges & Little LLP on this matter that are set forth in the Zeiger Affidavit and its Exhibit A. The activities reflected in these records were necessary and appropriate to the prosecution of the case. The amounts of time, and how the time was spent, are reasonable, as are the allocations described in Paragraphs 15-17 of the Zeiger Affidavit.

7. Relevant Factors. The factors listed in Rule 1.5(a) of the Ohio Rules of Professional Conduct support my conclusion. The first factor ("the time and labor

required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly") weighs in favor of the reasonableness of the requested fees. The novelty of the jurisdictional arguments advanced by Secretary Brunner required skill and ability to counter them and prevail. The second factor ("the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer") is self-evident for a fourteen lawyer law firm which committed significant lawyer time, including significant partner time, on a very expedited schedule, impacting the Firm's ability to take on other matters simultaneously. The third factor ("the fee customarily charged in the locality for similar legal services") also weighs in favor of the reasonableness of the requested fee award, because the billing rates of the law firm are in line for legal services in cases of this nature. The fourth factor ("the amount involved and the results obtained") requires little comment. The fifth factor ("the time limitations imposed by the client or by the circumstances") also weighs in favor of the reasonableness of the fee because of the tight timeframes imposed on briefing in election cases. The sixth factor ("the nature and length of the professional relationship with the client") favors the reasonableness of the requested fee because the law firm is unlikely to be engaged by Relators in future matters. The seventh factor ("the experience, reputation, and ability of the lawyer or lawyers performing the services") weighs in favor of the reasonableness of the requested fee award because the experience, reputation, and ability of the two lead lawyers, John Zeiger and Marion Little, is outstanding, as is evidenced by their work in this case, and by their reputation and ability as I have known them. The eighth and final factor ("whether the fee is fixed or

contingent") weighs in favor of the reasonableness of the fee because the case was undertaken on a straight hourly fee basis at the Firm's regular hourly fees.

8. In sum, in my opinion, the time and amounts requested in the Zeiger Affidavit and its Exhibit A are both necessary and reasonable in this case.

Anne Marie Sferra

Sworn to before me and subscribed in my presence this 9th day of December, 2008.

Julie K Colburn
Notary Public

JULIE K. COLBURN
Notary Public, State of Ohio
My Commission Expires June 14, 2009

RULE 1.5: FEES AND EXPENSES

(a) A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.

(1) Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly

EXHIBIT
A

notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

(2) If the lawyer becomes entitled to compensation under the contingent fee agreement and the lawyer will be disbursing funds, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and lawyer.

(d) A lawyer shall not enter into an arrangement for, charge, or collect any of the following:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support, or property settlement in lieu thereof;

(2) a contingent fee for representing a defendant in a criminal case;

(3) a fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

(e) Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;

(4) the total fee is *reasonable*.

(f) In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration.

Comment

Reasonableness of Fee

[1] Division (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in divisions (a)(1) through (8) are not exclusive. Nor will each factor be relevant in each instance.

Nature and Scope of Representation; Basis or Rate of Fee and Expenses

[2] The detail and specificity of the communication required by division (b) will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis of the rate or fee. A writing that confirms the nature and scope of the client-lawyer relationship and the fees to be charged is the preferred means of communicating this information to the client and can clarify the relationship and reduce the possibility of a misunderstanding. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be established promptly. Unless the situation involves a regularly represented client, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. So long as the client agrees in advance, a lawyer may seek reimbursement for the reasonable cost of services performed in-house, such as copying.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of division (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may accept property in payment for services,

such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] If all funds held by the lawyer are not disbursed at the time the closing statement required by division (c)(2) is prepared, the lawyer's obligation with regard to those funds is governed by Rule 1.15.

Prohibited Contingent Fees

[6] Division (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support or other financial orders because such contracts do not implicate the same policy concerns.

Retainer

[6A] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. What is often called a retainer is in fact an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy. The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation [*e.g.*, factor (a)(2) might justify the entire fee], nor does it

determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial lawyer. Division (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. Within a reasonable time after disclosure of the identity of each lawyer, the client must give written approval that the fee will be divided and that the division of fees is in proportion to the services performed by each lawyer or that each lawyer assumes joint responsibility for the representation. Except where court approval of the fee division is obtained, closing statements must be in a writing signed by the client and each lawyer and must otherwise comply with division (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rules 1.1 and 1.17.

[8] Division (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes between a client and a lawyer, such as an arbitration or mediation procedure established by a local bar association, the Ohio State Bar Association, or the Supreme Court of Ohio, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[10] A procedure has been established for resolution of fee disputes between lawyers who are sharing a fee pursuant to division (e) of this rule. This involves use of an arbitration or mediation procedure established by a local bar association or the Ohio State Bar Association. The lawyer must comply with the procedure. A dispute between lawyers who are splitting a fee shall not delay disbursement to the client. See Rule 1.15.