IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN DECRANE *Plaintiff,* v. EDWARD J. ECKART, *et al.*, *Defendant.*	Case No. 1:16-cv-02647 Judge Christopher A. Boyko Magistrate Judge William H. Baughman, Jr.

PLAINTIFF SEAN DECRANE'S MOTION TO DISQUALIFY THE LAW FIRM OF ZASHIN & RICH FROM REPRESENTING ALL DEFENDANTS BECAUSE OF A MATERIAL CONFLICT

Plaintiff Sean DeCrane respectfully moves that the Court disqualify the Zashin & Rich law firm from representing all Defendants and witness Patrick Kelly due to a conflict of interest. The Sixth Circuit requires the Court to undertake a sufficient factual inquiry to facilitate appellate review.[1] A memorandum in support is attached.

[1]*Gen. Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704, 710 (6th Cir. 1982) ("[A] decision for disqualification is adequately founded without an evidentiary hearing if the 'factual inquiry' is conducted in a manner that will allow of appellate reviews.")

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ISSUE PRESENTED

A court must disqualify attorneys with a conflict of interest unless they can "provide competent and diligent representation to each affected client."[2] Defendant Ed Eckart has accused witness Patrick Kelly of perjury. Defense counsel Zashin & Rich has signed Kelly as a client anyway, and its obligations to him impair its ability to conduct diligent factual investigations, cross-examinations, and settlement negotiations. Should the Court allow a firm with such divided loyalties to continue representing Defendants and Kelly?

INTRODUCTION

Three days before filing Defendants' summary-judgment motion, the Zashin & Rich firm elected to simultaneously represent a witness, Patrick Kelly, whose testimony, under penalty of perjury, created a genuine issue of material fact precluding summary judgment. The firm's new representation of Kelly creates an unavoidable conflict of interest preventing the firm from simultaneously fulfilling its ethical duties of loyalty and disclosure to Defendants on one hand and Kelly on the other. The Court should grant the motion to protect the integrity of the proceedings.

FACTS

DeCrane sued Defendants for retaliation based on Defendant Eckart's mistaken belief that DeCrane was the whistleblower who alerted the media that then-fire chief Daryl McGinnis lacked the training and certifications necessary to be even a line firefighter. Evidence now before the Court shows Defendants effected this retaliation through McGinnis's successor, Patrick Kelly. As part of its retaliation campaign, the City was threatening to outsource DeCrane's job to Tri-C. Kelly believed that doing so would leave the Division's new recruits less prepared to protect the City.[3]

But Eckart offered to stop the outsourcing effort if Kelly removed DeCrane from his job. Under penalty of perjury, Kelly testified: "Eckart agreed to continue operating the Fire Training Academy in-house, but only if I removed Sean from his position as the head of the academy."[4]

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[2] *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 183 Ohio App. 3d 770, 791 (2009).

[3] First Decl. of Patrick Kelly, ¶ 17, attached as Ex. 1.

[4] First Kelly Decl., ¶ 18.

But in his deposition, Eckart accused Kelly of perjury:

Q: Did you agree to continue operating the Fire Training Academy in-house if Chief Kelly removed Sean DeCrane from his position as the head of the FTA?
A: No.
Q: If Chief Kelly testifies that you did, is he lying?
A: He is.[5]

To support its motion to suppress Kelly's testimony, the City obtained a slickly lawyered second declaration from Kelly technically consistent with that prior testimony but that, at first glance, might appear to contradict it.[6] The new declaration denies that Eckart agreed to abandon the outsourcing plan if Kelly "removed Sean DeCrane from the [Fire Training Academy]," while the first says that Eckart offered to abandon the plan if Kelly "removed Sean from his position *as the head of* the academy" (emphasis added). If Eckart would have allowed Kelly to reassign DeCrane to a *lower*-ranking position at the Academy, both statements are true.

But Kelly's second declaration included false statements. Among them was an allegation that Brian Bardwell, the Chandra Law clerk who spoke to Kelly on DeCrane's behalf, violated professional-conduct rules.[7] Because the City's disqualification motion left unclear whether the City's attorneys represented Kelly, who had retired years earlier, DeCrane's counsel asked lead defense attorney Jon Dileno whether Zashin represented Kelly.[8] Dileno confirmed on February 22, 2018 that neither he nor the firm represented Kelly.[9] DeCrane's attorneys then informed Kelly that DeCrane was considering state-court civil litigation based on his perjurous statements and asked him to retain counsel to contact Chandra Law immediately.[10] Yet Kelly's response came via Dileno, proclaiming

[5] Eckart Dep., 247:15–22, attached as Ex. 2. Kelly, meanwhile, describes Eckart as a "disingenuous" boss who would "frequently turn around and undercut" Kelly. First Kelly Decl., ¶ 12.
[6] *See* Second Decl. of Patrick Kelly, ¶ 9, attached as Ex. 3.
[7] *See* Pl.'s Opp. Mot. Disqual., Doc. #56 at 9–13. (contrasting Kelly's testimony with audio recording)
[8] Decl. of Subodh Chandra (Mar. 20, 2018), ¶ 3, attached as Ex. 4 (Letter from Chandra to Dileno dated Feb. 17, 2018 attached as Ex. 4-A).
[9] Chandra Decl. at ¶ 4; Letter from Dileno to Chandra dated Feb. 22, 2018 (attached as Ex. 4-B).
[10] Chandra Decl. at ¶ 5; Letter from Chandra to Kelly dated Feb. 22, 2018 (attached as Ex 4-C).

that he and his firm do now represent Kelly.[11]

Mr. Chandra replied to Dileno the next day, warning that representing Kelly would create serious and unavoidable conflicts because:

1. No attorney could diligently represent two clients whose sworn statements on a critical factual question contradict each other;
2. DeCrane's settlement position regarding Kelly differs completely from DeCrane's position regarding Defendants, whose scorched-earth defense and refusal to settle have forced him to incur over $600,000 in attorneys' fees; and
3. Dileno himself, along with his firm, were potential co-defendants in the contemplated action against Kelly, based on their role in procuring the perjured declaration.[12]

Dileno never responded to that letter.[13]

LAW & ARGUMENT

In *McGriff v. Christie*,[14] counsel for a plaintiff–doctor in a race-discrimination case against his hospital secured a witness's cooperation by promising to represent her in a malpractice case against the same hospital while coaxing her out of suing the doctor. The trial court granted the hospital's motion to disqualify the attorney from representing the doctor, holding it was "clearly improper for a lawyer to simultaneously represent two clients when he is unable to maintain loyalty to both clients and may need to breach client confidentiality."[15] The appeals court affirmed, holding the patient's interests would be hurt "if information she previously disclosed to Counsel is used to undermine her trial testimony," especially when her trial testimony on "key issues" conflicted with the doctor's.[16]

Zashin's conduct aligns with the "clearly improper" conduct of *McGriff*'s disqualified attorney. Zashin represents different clients against the same party in the same action and a contemplated separate action. Conflicts exist between Zashin's clients, beginning with each one's

[11] Chandra Decl. at ¶ 6; Letter from Dileno to Chandra dated Mar. 6, 2018 (attached as Ex. 4-D).
[12] Chandra Decl. at ¶ 7; Letter from Chandra to Kelly dated Mar. 7, 2018 (attached as Ex 4-E).
[13] *Id.* at ¶ 8.
[14] 477 F. App'x 673 (11th Cir. 2012).
[15] *McGriff*, 477 F. App'x at 677.
[16] *Id.* at 679.

need to prove that he has not committed perjury and that the other one has. And the differences between the two clients go directly to "the ultimate facts to be decided by the factfinder."[17]

Zashin's decision to represent Kelly puts the firm in an impossible situation unfair to both Kelly and Defendants, and it requires disqualification to protect the integrity of these proceedings.

I. Zashin's duties to Kelly irreconcilably conflict with its duties to Defendants.

A conflict exists when "there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client."[18] Identifying a material limitation requires the Court to ask two questions: "(1) whether a difference in interests between the client and lawyer or between two clients exists or is likely to arise; and (2) if it does, whether this difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of any affected client."[19]

This case presents a textbook material limitation. As Rule 1.7's comments note, a material limitation arises when "there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or substantially different possibilities of settlement of the claims or liabilities in question."[20] By concurrently representing the Defendants and Kelly, Zashin checks all the boxes:

- ☑ **There is a substantial discrepancy in the clients' testimony.** Kelly testified that a "disingenuous" Eckart induced him to demote DeCrane. Eckart testified that Kelly is lying.
- ☑ **The clients have incompatible positions in relation to another party.** DeCrane is suing Defendants. Kelly has generally cooperated with DeCrane in pursuing those claims, meeting repeatedly with his firm, providing a declaration, and sharing documents.
- ☑ **The clients have potential cross-claims.** Either Eckart or Kelly is lying about the order to remove DeCrane from his job. This means that either Kelly or Eckart is lying about the

[17] *Id.*

[18] Rule 1.7(a)(2). *See also Columbus Bar Assn. v. Ross*, 107 Ohio St. 3d 354, 359 (2006) (finding a conflict where a single attorney "represents both the defendant and the chief witness for the State in the same case.").

[19] Rule 1.7, cmt. 14.

[20] Rule 1.7 cmt. 15.

other's testimony. And the City's position is that DeCrane's claims against Eckart are more properly claims "against Chief Kelly."[21]

☑ **The clients have substantially different possibilities of settling.** Although Kelly acquiesced to Eckart's demands to remove DeCrane from his job, Kelly's culpability is not nearly at Defendants' level. Defendants have forced DeCrane to run up a massive legal bill. Kelly's settlement prospects for lying under oath will reflect those realities.

As pervasive as they are, the conflicts between Kelly and Defendants are not as severe as the conflicts between Kelly and the Zashin attorneys themselves. DeCrane knows Kelly well enough to recognize that his second declaration is not his own work but the product of slick lawyering. If Kelly forces him to pursue separate state-court litigation to resolve his claims regarding the declaration's false statements, DeCrane will likely jointly name those who appear to have drafted it: Zashin attorneys Jon Dileno and David Vance, and their employer, Zashin & Rich.

These parties' exposure depends entirely on the information that DeCrane learns from Kelly and Kelly's willingness to cooperate. In that position, not surprisingly, Zashin rushed to sign up Kelly as a client just one day after learning that DeCrane had rock-solid proof that Kelly had lied in the declaration it had solicited. That instinct is exactly why Prof. Cond. R. 1.7 exists.[22]

Zashin's obligations to Defendants—along with its attorneys' interest in self-preservation—bear all the hallmarks of a material limitation on its ability to represent Kelly. And its newfound obligations to Kelly pose all the same threats to its ability to represent Defendants and protect itself from financial and reputational harm. These conflicts demand disqualification.[23]

II. Zashin cannot diligently uphold its duties to Defendants because it must prove Kelly's accusations against them are true.

Prof. Cond. R. 1.7 permits conflicts only when the lawyer can prove three things:

1. the lawyer will be able to provide competent and diligent representation to each affected client;

[21] Mem. in Supp. of Defs.' Mot. Disqual., Doc. #43-1 at 6.

[22] Rule 1.7, cmt. 20 ("[I]f the probity of a lawyer's own conduct in a transaction is in serious question, the lawyer may have difficulty or be unable to give a client detached advice in regard to the same manner.").

[23] It is not clear whether Kelly is paying Zashin & Rich for its services. If the City is paying this witness's bills instead—for conduct occurring *after* Kelly was a City employee—the representation raises even more concerns under Ohio Prof. Cond. R. 1.8(f) and Ohio Rev. Code § 2307.60 (civil liability for criminal acts).

2. each affected client gives *informed consent, confirmed in writing*;
3. the representation is not precluded by division (c) of this rule.

If the conflicted lawyer cannot prove all three, "the trial court must grant a motion for disqualification."[24] Even if Kelly has given informed consent to these conflicts, "[t]here are some conflicts of interest to which a client may not consent."[25] This is one.

"Some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently … For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic, regardless of their consent."[26] Even before this suit, Kelly's relationship with Defendants was antagonistic. As a firefighter and chief, Kelly was perpetually at odds with Eckart (a "disingenuous" boss who would "frequently turn around and undercut me"[27]), with Safety Director Michael McGrath (who refused to rein Eckart in[28]), and with the mayor ("a bully" who would "reprimand and belittle people"[29]). Not even two years after being sworn in at the top of the organization to which he had dedicated his career, Kelly fled, taking a 35% pay cut to work in the suburbs.[30]

It would have been difficult enough to represent both sides of this employment relationship even before this litigation, but the case has long since developed in such a way that no lawyer could competently and diligently represent the City while also representing Kelly.

In *CenTra, Inc. v. Estrin*,[31] the owner of Detroit's Ambassador Bridge sued the law firm

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[24] *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 183 Ohio App. 3d 770, 791 (2009).

[25] *CenTra, Inc.*, 538 F.3d at 412.

[26] Rule 1.7, cmt. 38; Ohio Adv. Op. 2009-3, Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, 2009 WL 1764109 ("Regardless of consent, multiple representations should not be undertaken when two clients' interests are fundamentally antagonistic").

[27] First Kelly Decl., ¶ 12.

[28] *Id.*

[29] *Id.* at ¶ 10.

[30] Atassi, Leila, "Retiring Cleveland Fire Chief Patrick Kelly leaves a department still recovering from controversy" (Aug. 27, 2015) [perma.cc/H554-MZR5].

[31] 538 F.3d 402 (6th Cir. 2008).

handling its bridge-expansion efforts after learning that the firm was also representing the City of Windsor in efforts to block the expansion. The district court entered summary judgment for the firm, holding that the client had impliedly consented to the conflict, based on its knowledge—more than a year before engaging the firm—that the firm had been engaged in directly adverse representation. The Sixth Circuit reversed, holding that the district court had ignored the possibility that such a conflict is not consentable: "[I]t is not true that all conflicts are consentable. … According to the commentary to Michigan's Rule 1.7, a conflict is nonconsentable 'when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.'"[32]

The conflict here is worse. In *CenTra*, there was no pending litigation between the two parties, and each was represented by different lawyers in different offices in different cities in different countries. Here, a single firm, Zashin, purports to represent both Defendants and the witness, both here and in a contemplated separate lawsuit where the witness (with his counsel) may become defendants in direct opposition to Defendants (and their counsel—the same counsel).

A. Diligent representation would require Zashin to accuse its own clients of perjury.

Most blatant among the conflicts between Kelly and Defendants are the competing accounts of Eckart's involvement in removing DeCrane from his position at the head of the FTA. Under penalty of perjury, Kelly testified that Eckart made a deal to persuade Kelly to remove DeCrane. Eckart swore under oath that Kelly is lying.

DeCrane will call Kelly and Eckart to testify at trial. Zashin will be forced to decide how to handle two clients accusing each other of lying. Will it sacrifice Kelly to spare the client on trial? Will it accuse Eckart of lying, sparing its new client? Will it duck questioning either and let the conflicting testimony stand (thus undercutting the City's position)? Maybe Zashin is skillful enough to thread

[32] *CenTra, Inc.*, 538 F.3d at 413.

the needle and reconcile the testimony of two men accusing each other of perjury. But that strategy would still be tainted because it was adopted to save two clients with conflicting objectives, when each client had the right to an attorney acting with loyalty *only to him*.

Similarly nonconsentable conflicts drove disqualification in *Johnson v. Clark Gin Serv., Inc.*[33] In *Johnson*, a plaintiffs' team brought personal-injury claims on behalf of several employees in an Amtrak crash. Amtrak sought to disqualify the team based on its inability to represent parties who had an interest in shifting blame onto each other as well as the defendants. The district court granted the motion, holding that the conflict was not one to which they could consent:

> Although Plaintiffs correctly note that none of the Plaintiffs individually name any of the other Plaintiffs in their respective complaints, this does not change the fact that in the context of this proceeding, proving certain Plaintiff's claims will necessarily be adverse to the interests of other Plaintiffs represented by Plaintiffs' counsel in the same litigation.[34]

The U.S. Supreme Court has rejected such conflicts as incompatible with the integrity of the courts. In *Holloway v. Arkansas*, a trial judge permitted one lawyer to represent two defendants—one of whom had previously incriminated the first—despite an objection that the lawyer could not effectively cross-examine either.[35] Even though the second defendant recanted his incriminating testimony and the defendants provided favorable and consistent testimony, the Court reversed, holding that the "probable risk of a conflict of interests" deprived the defendant of effective representation.[36] And in *Wheat v. U.S.*, the trial court refused to allow a criminal defendant to be represented by an attorney with another client likely to be called as a witness to incriminate the defendant, holding that such a representation would cause "an irreconcilable conflict of interest."[37] The Court affirmed, holding that the presumption for allowing a defendant his choice of counsel

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[33] *Johnson v. Clark Gin Serv., Inc.*, No. 15-3315; 2016 WL 7017267 (E.D. La. Dec. 1, 2016).
[34] *Johnson*, 2016 WL 7017267, at *11.
[35] 435 U.S. 475 (1978).
[36] *Id.* at 484.
[37] 486 U.S. 153, 157 (1988).

was overcome "by a showing of a serious potential for conflict."[38] Because opposing counsel was likely to call one of the attorney's clients to incriminate the defendant, "necessitating vigorous cross-examination," the attorney "would have been unable ethically to provide that cross-examination."[39]

If a conflict is disqualifying when buttressed by the Sixth Amendment right to choice of counsel, it is even more fatal in the civil context. As in *Johnson*, *Holloway*, and *Wheat*, Zashin represents clients who incriminate each other, setting up the same "irreconcilable conflict." Even if the firm can somehow, as in *Holloway*, persuade one client to change his testimony to align with the others', the "probable risk of a conflict" still demands separate counsel.

B. Diligent representation would require Zashin to demand discovery from its clients and simultaneously defend against its own requests.

Factual investigation poses another challenge to Zashin's ability to diligently and independently advise its dueling clients. Kelly acknowledges that when he retired from the City, he "kept a binder" full of records related to the administrative charges against DeCrane. An apparently unconflicted lawyer advised him against releasing those records.[40] Without copies of those records, no one can be sure whether that binder full of records supports Kelly's or Eckart's version of why DeCrane was disciplined. That he kept them suggests one thing, while the fact that his lawyer-advisor didn't want them disclosed suggests another. Only Kelly can say for sure.

On October 13, 2017, Zashin issued to Kelly a subpoena *duces tecum* demanding documents about DeCrane.[41] Did Kelly produce the full binder? Again, only Kelly can say for sure. But whether Kelly produced the binder earlier or provides it to his new counsel, Zashin must decide what to do

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[38] *Id.* at 164.

[39] *Id. See also* Ohio Adv. Op. 2008-4, Supreme Ct. of Ohio Bd. of Comm'nrs on Grievances and Discipline, 2008 WL 4186032 at *7 ("In a lawyer's simultaneous representation of one co-defendant in a felony case and the other co-defendant in an unrelated misdemeanor case, a 'directly adverse' conflict of interest will occur when effective representation of the co-defendant in the felony case requires cross examination of the client represented in the misdemeanor case.").

[40] Bardwell Decl. ¶ 26.

[41] *See* Defs.' subpoena *duces tecum* to Patrick Kelly (Oct. 13, 2017) (attached as Ex. 6).

with that information. If Zashin determines Kelly did not comply with Defendants' subpoena, will the firm advise Kelly to move to quash it? How will the firm advise Defendants to proceed if Kelly resists? Will Zashin move to compel its client Kelly to comply with the subpoena?

New problems arise if the Court permits DeCrane's requested discovery to prepare for a hearing on Defendants' motion to disqualify or for a hearing on that motion. How will Zashin handle Kelly's deposition or hearing testimony? If he stands by his story, the firm's duty to Kelly will bar it from vigorously cross-examining him.[42] This conflict led to disqualification in *Banner v. City of Flint*.[43] There, an attorney deposed a witness he had advised on potential claims against the defendant. The magistrate denied a motion to disqualify, holding that voluntarily submitting to questioning by her attorney without objection "constituted a voluntary waiver of any attorney-client privilege or other claim for confidentiality."[44] The district court set aside the magistrate's order and disqualified the attorney, holding he had violated his ethical obligations "by using … confidential information and secrets to the advantage of Banner, as well as for his and/or his firm's monetary gain."[45] The district court said the magistrate had erred by ignoring "the nuance of this case: *that the deposition examiner seeking to disclose the confidential information is the examinee's own attorney.*"[46]

C. Diligent representation would require Zashin to disclose each client's confidential information to the other.

If Zashin attempted to resolve the conflicts among its clients' testimony, it would likely have to question those clients under oath. But the firm cannot diligently question any of its clients

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[42] *TransPerfect Glob., Inc. v. MotionPoint Corp.*, No. C-10-02590 CW JCS, 2012 WL 2343908, at *14 (N.D. Cal. June 20, 2012) ("Once a client engages a lawyer, that client must be able to expect undivided loyalty. McDermott's concurrent representation—which has already resulted in McDermott deposing its own client, Shawe—does not fulfill this expectation.").

[43] 136 F. Supp. 2d 678 (E.D. Mich. 2000), *aff'd in part, rev'd in part,* 99 F. App'x 29 (6th Cir. 2004).

[44] *Id.* at 682.

[45] *Id.* at 684.

[46] *Id.* at 682 (emphasis in original). *See also Hernandez v. Paicius*, 109 Cal. App. 4th 452, 468 (2003) (reversing jury verdict for defendant because "court cannot permit, much less preside over, an attorney's attack on his or her own client").

without tapping into its reserve of confidential information obtained from the other clients.[47]

This tension between diligent representation and maintaining confidences was among the grounds for disqualifying a lawyer from representing either of his two clients in *U.S. v. Shearburn*.[48] There, the attorney had represented co-defendants until the judge raised the conflict issue *sua sponte*. Even after a colloquy ending with both clients' agreement to proceed, the court was unpersuaded that both clients appreciated the hazards of joint representation and appointed new, independent counsel for each client. The court specifically cited the "serious risk"[49] that it would be impossible for the lawyer to balance the duties of diligence and maintaining confidentiality:

> This concern is especially sensitive here due to the proffered proof differences and postures, relative to the evidence, between the two defendants. … Ultimately, if [the lawyer] knows or learns information that is helpful to one client but harmful to the other, he will face a dilemma to which there is no ethical solution; whether he uses or withholds the information, he acts to the detriment to one of his clients.[50]

Kelly deserves counsel who can prove that his testimony against Eckart is honest, and vice versa. That testimony goes to the heart of the matter on which Zashin has been representing Eckart for two years. The firm's attorneys have a massive store of information—most importantly from conversations with Eckart himself—allowing them to direct Kelly's inquiry, to try to vindicate Eckart. Zashin must instead walk a tightrope to vindicate Eckart without implicating Kelly. A diligent lawyer would tap into any information available to defend his client's credibility. Under the circumstances, Zashin now cannot diligently represent either client. (*See* Part IIF below for more on this.)

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[47] Rule 1.7, cmt. 27 ("[C]ommon representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit.").

[48] *U.S. v. Shearburn*, No. 3:15-CR-5-GFVT-REW, 2015 WL 12999704 (E.D. Ky. July 10, 2015).

[49] *Shearburn*, 2015 WL 12999704, at *4.

[50] *Shearburn*, 2015 WL 12999704, at *5.

D. Diligent representation would require Zashin to advise each client how it could shift blame in this matter to its other clients.

Zashin will also find it impossible to maintain its duty of loyalty to Defendants and to Kelly when advising them on who should be parties to this action and any separate action against Kelly. This conflict already manifests itself in Zashin's briefing. Less than three weeks before the firm engaged with Kelly, the City's position was that Kelly was "solely responsible" for deciding whether to pursue charges against DeCrane and that DeCrane's claims based on those charges are actually "direct allegations against Chief Kelly."[51] But in Defendants' summary-judgment motion—filed just three days after Zashin began representing Kelly—the firm now plays down Kelly's involvement and shifts blame back to the City:

- "The City disciplined multiple employees";[52]
- "[T]he City did not formally discipline [DeCrane]";[53]
- "[T]he City scheduled a joint pre-disciplinary hearing."[54]

With Kelly as a client, Zashin soft-pedals his involvement and pins these disciplinary decisions on "the City," which it also represents—despite having procured a declaration from Kelly claiming he was the only one making these decisions and that "no one influenced" those decisions.[55] Having obtained a declaration from a third party admitting to being "solely responsible"[56] for the actions attributed to his client, another defense attorney might bring that party in as a third-party defendant or otherwise seek to indemnify his clients for any damages resulting from the conduct. But Zashin can't counsel the City to do that without violating its duty of loyalty to Kelly. The same thing would happen if DeCrane files a separate action or supplements his complaint to bring claims based on Kelly's false declaration: Zashin would have to advise Kelly on claims against the City and

[51] Mem. in Supp. of Defs.' Mot. Disqual., Doc. #43-1 at 5–6 (emphasis added).
[52] Defs.' Mot. for Summ. J., Doc. #61-1 at 4.
[53] *Id.*
[54] *Id.* at 7.
[55] Second Kelly Decl., ¶ 18.
[56] Mem. in Supp. of Defs.' Mot. Disqual., Doc. #43-1 at 5.

its employees (and Zashin attorneys) for their roles in inducing him to sign it, but the firm could not do so without violating its duty of loyalty to Defendants.

The Kelly binder itself presents the City with new claims against Kelly. Ohio Rev. Code § 2921.41 bars theft of property owned by a municipal corporation, and the statute can be incorporated into Ohio Rev. Code § 2307.60, which provides a civil cause of action for any criminal misconduct. Ohio Rev. Code § 149.351 provides a civil cause of action permitting an injunction and a forfeiture of up to $10,000 for unlawfully removing records from a public office. Will Zashin side with the City and recommend litigation against Kelly to maximize its financial benefit and send a deterrent message to those who would do the same? Or will it protect Kelly by advising the City to drop the matter and forgo the thousands of dollars that taxpayers may be rightly owed?

The possibility of claims between clients required disqualification in *Waneck v. CSX Corp.*[57] There, a law firm represented the plaintiffs in a case against CSX while defending the city against claims from CSX arising from the same accident. Even though the clients *were not asserting claims against each other*, the magistrate judge recommended disqualification because the *possibility* that one client was liable to the other presented "exactly the type of circumstances under which a disinterested lawyer would conclude that a client should not agree to the … lawyer's representation."[58] The district court adopted the magistrate's recommendation, holding that such an arrangement "presents a nonconsentable conflict of interest warranting disqualification."[59]

E. Diligent representation would require Zashin to sacrifice one of its clients in settlement negotiations.

Zashin cannot diligently represent the interests of both Kelly and Defendants in settling this matter. In both his willingness to accept Eckart's directives and his complicity in the City's efforts to

[57] *Waneck v. CSX Corp.*, No. 1:17CV106-HSO-JCG, 2017 WL 5157394 (S.D. Miss. Nov. 7, 2017).
[58] *Id.* at *2.
[59] *Id.* at *5.

deprive DeCrane of counsel, Kelly has inflicted real injuries for which DeCrane may have relief. But DeCrane recognizes these injuries are not as great as those inflicted by Defendants, who engaged in a years-long campaign of retaliation against him, denied him a promotion to the job he had worked for all his life, and forced him out of the career he loved, only because they mistakenly believed that he was the whistleblower who warned the public that its fire chief was not qualified to hold his job.

Kelly's settlement prospects to avoid litigation are thus substantially different than those of Defendants, who have, on top of it all, forced DeCrane to incur hundreds of thousands of dollars in legal fees and expenses to remedy the much more significant damages they have caused. All of that must be accounted for in any settlement with Defendants. Kelly, meanwhile, has not traveled so far down this road with Defendants that he cannot turn back. Assisted by competent counsel unburdened by a duty of loyalty to Defendants, Kelly can negotiate an amicable release of liability without litigation. But negotiations would require exchanging sensitive information in a confidential mediation, and would require Kelly to provide a full, truthful accounting of how he came to sign a false declaration for the City and its lawyers. Whether Kelly ultimately agrees to those terms or not, he is entitled to conflict-free counsel who can have confidential settlement discussions and fairly advise him of that path's benefits—without simultaneously trying to protect the very people Kelly will be called to testify against.

In *Gordon v. Dadante*, this Court rejected an attempt to consent to such a conflict because concurrent representation threatened settlement negotiations.[60] There, one attorney attempted to represent numerous plaintiffs in a fraud claim, including Frank Regalbuto, who claimed his interests in receivership assets were superior to other plaintiffs'. A separate plaintiffs' group sought to have the attorney disqualified. The Court granted the motion because separate allegations against Regalbuto were holding up a settlement. The Court held the conflict between Regalbuto and the

[60] No. 1:05-CV-2726, 2009 WL 2732827, at *5 (N.D. Ohio Aug. 26, 2009).

other plaintiffs nonconsentable: "[t]here is, at the absolute minimum, the 'substantial risk' that counsel's ability to 'consider, recommend, or carry out an appropriate course of action' for the Objecting Plaintiffs will be 'materially limited by' counsel's responsibilities to Frank Regalbuto."[61]

F. Zashin's duty of loyalty to Kelly will continue even if it terminates the representation.

Having embraced a conflicted representation, Zashin cannot put the genie back in the bottle. Confidences are "assumed to be disclosed in the attorney-client relationship."[62] Dual representation of clients with adverse interests is prohibited "to ensure that confidences or secrets of a client imparted to an attorney in the course of their attorney-client relationship will not be revealed to an adverse party or used to the client's disadvantage."[63] A "lawyer's duty to preserve the client's confidences survives the termination of the attorney-client relationship," not even expiring "upon the client's death."[64] And the confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[65] "An attorney who fails to observe his obligation of undivided loyalty to his client injures his profession and demeans it in the eyes of the public."[66] Thus, Zashin cannot escape its duty of loyalty to Kelly by discarding him to protect its representation of Defendants.

CONCLUSION

"In some situations, the risk of failure is so great that multiple representation is plainly impossible."[67] Here, nearly every risk factor counsels against multiple representation. Zashin's duties to Kelly will cripple its ability to diligently represent Defendants, and even informed consent cannot cure the conflict. The Court should disqualify the firm from representing Defendants and Kelly.

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[61] *Gordon*, 2009 WL 10689678, at *5.
[62] *Lightbody v. Rust*, 137 Ohio App. 3d 658, 664, (Ohio App. 2000) (citation omitted).
[63] *Kelley v. Buckley*, 193 Ohio App. 3d 11, 24, (Ohio App. 2011).
[64] *Id.* at 27 (citations omitted).
[65] Rule 1.6 cmt. [3].
[66] *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 183 Ohio App. 3d 770 (Ohio App. 2009).
[67] Rule 1.7, cmt. 25.

Respectfully submitted,

/s/ Subodh Chandra
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Attorneys for Plaintiff Sean DeCrane

CERTIFICATE OF SERVICE

I certify that the above document was filed on March 20, 2018 using the ECF system, which will send notification to all counsel of record.

/s/ Subodh Chandra
One of the attorneys for Plaintiff Sean DeCrane

Declaration of Patrick Kelly

I, Patrick Kelly, being duly sworn according to law, testify as follows:

1. I am over the age of 18.

2. I have personal knowledge of and am competent to testify regarding the matters set forth in this declaration.

3. I was a member of the Cleveland Division of Fire for 33 years. In that time, I held a variety of positions with varying levels of responsibility, from first-grade firefighter to chief of the Division when I retired in 2015.

4. During my employment, I had the opportunity to work with Sean DeCrane. Sean had good leadership skills and was well respected from his involvement in various activities. He did a good job running the Fire Training Academy and was secretary of the International Association of Firefighters Local 93. He was also involved in several committees with the union.

5. Sean had a strong grasp of the technical skills involved in firefighting. He was passionate about fire safety and was involved in many "extracurricular" activities as a firefighter, such as speaking for Underwriters Laboratories, a national safety organization. Sean traveled extensively because of the demand for his knowledge about fire safety.

6. Sean was a very responsive employee. If you asked him to do anything, he would get it done and then some.

7. When the city promoted Darryl McGinnis to chief of the Division, it selected a firefighter who was not well-liked or well-respected within the Division. Darryl made many enemies in the Division through his involvement in various lawsuits, by running his mouth, and by adopting a confrontational style with other firefighters. Many firefighters in the Division would have been strongly motivated to want him removed from his position as chief.

8. Every firefighter in the Division had access to records showing that Darryl was not keeping current with his continuing-education requirements. The records were available through the city's intranet service provider, SharePoint, which was accessible by anyone in the Division.

9. After Darryl resigned, the administration did not want to interview Sean for the promotion to chief. Safety Director Marty Flask told me they didn't have to because of civil service rules.

10. I was promoted to replace Darryl as chief. Dealing with the administration and its various vendettas was very challenging. On the day I was named acting chief of the Division, I was called to City Hall to meet with Mayor Frank Jackson. Jackson greeted me with a simple directive: "Don't fuck me." From my conversations with

him, I found the mayor to be insightful and street smart, but also a bully. He would reprimand and belittle people during cabinet meetings. He is loyal to those who he believes are loyal to him.

11. In another meeting shortly after Chief McGinnis resigned, the mayor made it clear to me that he was angry with the Division of Fire about McGinnis's lack of qualifications coming out in the media, saying we "threw him under the bus."

12. As chief, I reported directly to Assistant Safety Director Ed Eckart. I found Eckart to be disingenuous. He presented himself as an ally and a friend but would frequently turn around and undercut me and other people. I asked Safety Director Michael McGrath to rein him in, but McGrath made clear that Eckart was in control, telling me, "He's running the fire department. You've got to listen to him."

13. When Sean took over the Fire Training Academy from Chief McGinnis, he inherited a mess. The recordkeeping was deficient, but Sean sought to correct the problems and modernize the system. The city stopped that effort when it seized his records as part of an audit to see whether other firefighters were as far behind on their continuing-education requirements as Darryl had been.

14. While the city brought in a former police investigator for the audit, it also brought in Christopher Chumita to help run the Office of Integrity Control. Chumita was a former paramedic. I was unsure about his qualifications as an investigator.

15. Eckart briefed me on his investigators' progress throughout the audit. He told me they were finding discrepancies in the academy's records. Some documents contained mistakes, but the errors were generally clerical, such as numbers or names missing from forms. I repeatedly expressed concern about the impact of the audit and explained to the administration that the department needed its records to continue operations. There were no duplicates of the records Sean needed, and it would be difficult for anyone to recreate them.

16. While the audit was ongoing, I attended a meeting with representatives from Cuyahoga Community College as part of the administration's plan to eliminate the Fire Training Academy, which the city characterized as a cost-cutting measure. When Tri-C submitted a bid that was high enough to trigger City Council review, Assistant Safety Director Ed Eckart told them to resubmit their bid with a price that the mayor could approve without oversight from City Council.

17. After receiving Tri-C's proposal, I asked Sean to prepare a counterproposal. Sean put together a good plan to keep the academy in-house while matching or beating Tri-C's cost projections. I recommended that the city continue handling training in-house. I was concerned about the cost reductions the administration wanted because they would have required significant staff reductions and significant workload increases for the remaining instructors, which my experience told me could have a negative impact on the quality of training and sustainability.

18. Eckart agreed to continue operating the Fire Training Academy in-house, but only if I removed Sean from his position as the head of the academy. Eckart asked me to reassign Sean. I reassigned Sean, and Eckart stopped pursuing the outsourcing plan.

19. After the audit was complete, Eckart forwarded me the report. It recommended that I pursue administrative charges against Sean for recordkeeping violations. I approved the charges against Sean, but I also recommended charges against myself. I had discovered that before being promoted to chief, I had failed to implement a policy requiring updates to the academy's recordkeeping procedures. After recommending charges against 180 other firefighters during my time as chief, I believed it was important to hold myself to the same high standards I expected of others and to take a hit for the team.

20. The Division has a ritual known as the Last Day, where retiring firefighters have an open house at their station. Their friends and family often attend, as do firefighters from other stations. For larger events, firefighters would prepare a notice to be approved for posting by the Chief of the Division. The notice went to the chief not to request permission for the event, but to help advertise it. But these events are typically low-key and not something a chief needs to worry about beyond dropping in to pay his respects. As chief, I never denied anyone permission to host a Last Day, I never ordered anyone's Last Day shut down, and I never disciplined anyone for hosting a Last Day without permission.

I declare the above to be true and correct under penalty of perjury of the laws of the United States of America.

_____ 09/08/17_____

Patrick Kelly Date

STATE OF OHIO,)
COUNTY OF CUYAHOGA.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN DECRANE,)
)
Plaintiff,)
)
vs.) CASE NO. 1:16-CV-02647
)
EDWARD J. ECKART,)
et al.,)
)
Defendants.)

- - - - -

THE VIDEOTAPED DEPOSITION OF EDWARD J. ECKART
TUESDAY, NOVEMBER 21, 2017

- - - - -

The videotaped deposition of EDWARD J. ECKART, called by the PLAINTIFF for examination pursuant to the Ohio Rules of Civil Procedure, taken before me, the undersigned, Kristin L. Fryman, Notary Public within and for the State of Ohio, taken at The Chandra Law Firm, 1265 West 6th Street, Suite 400, Cleveland, Ohio, commencing at 10:08 a.m., the day and date above set forth.

- - -

APPEARANCES:

On behalf of the Plaintiff:

ASHLIE CASE SLETVOLD, Esq.
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Department of Law
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spellom@city.cleveland.oh.us

ALSO PRESENT:

Peter Graves, Videographer
Sean DeCrane, Plaintiff
James Votypka, Defendant
Brain Bardwell, Law Clerk

Q Do you know how Sean DeCrane came to put together that document?
A I do not.
Q Would you agree that, if Sean DeCrane received an instruction from a superior officer to prepare a plan to oppose the outsourcing to Tri-C, he would have to follow that instruction and prepare the plan?
A Yes.
Q Did the plan that Sean DeCrane prepared offer the City cost savings over what the Tri-C outsourcing would have cost?
A No, because the comparison wasn't an apples-to-apples comparison.
Q Did you agree to continue operating the Fire Training Academy in house if Chief Kelly removed Sean DeCrane from his position as the head of the FTA?
A No.
Q If Chief Kelly testifies that you did, is he lying?
A He is.
Q Did you, in fact, stop pursuing the outsourcing plan once Chief Kelly reassigned Sean DeCrane out of the academy?

THE STATE OF OHIO,) SS:
COUNTY OF CUYAHOGA.)

I, Kristin L. Fryman, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that EDWARD J. ECKART, was first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotypy in the presence of said witness, afterwards transcribed on a computer/printer, and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified. I do further certify that I am not a relative, counsel or attorney of either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 7th day of DECEMBER, 2017.

Kristin L. Fryman, Notary Public
within and for the State of Ohio
My Commission expires December 19, 2019.

THE STATE OF)
) SS:
COUNTY OF)

Before me, a Notary Public in and for said state and county, personally appeared the above-named EDWARD J. ECKART, who acknowledged that he did sign the foregoing transcript and that the same is a true and correct transcript of the testimony so given.

IN TESTIMONY WHEREOF, I have hereunto affixed my name and official seal at

this day of , 2017.

EDWARD J. ECKART

Notary Public

My Commission expires:

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EDWARD J. ECKART

DECLARATION OF PATRICK J. KELLY

I, Patrick J. Kelly, declare under penalty of perjury that the following is true and correct:

1. I am over the age of 18 and have personal knowledge of the facts included herein.

2. I retired from the City of Cleveland Division of Fire in September 2015. At that time, I was the Chief of the Division of Fire.

3. I became the Chief of the Division of Fire in December 2013. The Chief is the first in command within the Division of Fire.

4. In August 2013, I became the Acting Chief of the Division of Fire and then the Interim Chief of the Division of Fire. Immediately before becoming the Acting Chief, I was Executive Officer of the Division of Fire. The Executive Officer is the second in command within the Division of Fire.

5. I believe I was well qualified to serve as the Executive Officer, Acting Chief, Interim Chief, and Chief of the Division of Fire.

6. As Acting and Interim Chief, I followed former Chief of the Division of Fire Daryl McGinnis. Former Chief McGinnis told me that he recommended to the City that I be named Chief following his departure.

7. In August 2013, an incident occurred at a graduation party for the Division of Fire cadets that recently finished their initial training at the City of Cleveland's Fire Training Academy ("FTA"). This incident, which occurred at PJ McIntyre's Pub, is commonly referred to as "urine-gate." At the time, Sean DeCrane was the head of the Fire Training Academy. Someone had taken the photograph of the recently retired Chief Daryl McGinnis from the FTA and placed it in a urinal at PJ McIntyre's Pub. Members of the Division of Fire urinated on Chief McGinnis' photograph and someone actually took a picture of Chief McGinnis' photograph in the urinal. This picture then was distributed via text message to a number of individuals, including former Chief McGinnis, who retired just days earlier. During my 30 plus years working for the Division of Fire this was one of the most heinous, if not the most heinous, events that I had been aware of associated with the Division of Fire. I fully supported the discipline of those involved, which included the second in command at the Fire Training Academy. The discipline hearings and the related discipline for urine-gate continued into 2014.

EXHIBIT
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8. Due, in part, to urine-gate and what happened with the 2013 cadet class, I did not feel comfortable allowing Sean DeCrane to remain at the Fire Training Academy for the 2014 cadet class. As such, I detailed him to headquarters for the 2014 cadet class only. I asked then Battalion Chief Angelo Calvillo to lead the 2014 cadet class instead. Battalion Chief Calvillo agreed, and I transferred him to the FTA to lead the cadet class only. When the cadet class was over, it always was my intention to return Sean DeCrane to the FTA, which I did. It was solely my decision to return Sean DeCrane. When I returned Sean DeCrane to the FTA, I did not receive any negative feedback from Assistant Safety Director Ed Eckart ("Eckart"), Safety Director Michael McGrath, Mayor Frank Jackson, or anyone else within the City of Cleveland's Administration.

9. Although Eckart had asked that I detail Sean DeCrane from the FTA for the 2014 cadet class, due to the urine-gate matter, his request mirrored my intentions due to the severity of the urine-gate scandal. Moreover, at no time did Eckart or anyone from the City of Cleveland state or suggest to me that the City would discontinue its efforts to outsource training from the FTA to Tri-C, only if I removed Sean DeCrane from the FTA. To the extent Paragraph 18 of my prior declaration suggests such, it is not accurate.

10. The 2014 cadet class at the FTA was much more efficient and cost-effective than other earlier classes, including those overseen by Sean DeCrane. A number of individuals were responsible for the cost-cutting measures, including, but not limited, myself, Tim O'Toole, Frank Chontos, and Sean DeCrane.

11. Brian Bardwell from The Chandra Law Firm LLC contacted me about completing a declaration.

12. When Mr. Bardwell contacted me, he stated that his firm represented Sean DeCrane. Mr. Bardwell did not fully explain the lawsuit or the adverse nature of Sean DeCrane's position as compared to the City of Cleveland's position. At the time, I generally was aware of the scope of the lawsuit.

13. Mr. Bardwell never asked me if I was represented by counsel. He also never suggested that I seek the advice of counsel.

14. When I worked for the City of Cleveland, I had many privileged communications with the City of Cleveland's Legal Department and outside attorneys, including Jon Dileno. For example, as Chief of the Division of Fire, I typically discussed significant discipline with the City of Cleveland's Legal Department.

15. Mr. Bardwell never advised me that I should not disclose to him any of my privileged discussions with either the City of Cleveland's Legal Department or its outside attorneys.

16. In January 2017, I spoke with Attorney Jon Dileno about this case. I conveyed this to Mr. Bardwell. Mr. Bardwell asked about my conversation with Mr. Dileno, and I provided a brief synopsis of my conversation with Mr. Dileno to him.

17. Mr. Bardwell drafted a declaration and advised me to sign it. It was at the advice of Mr. Bardwell that I agreed to sign the declaration.

18. In 2015, I decided to put Sean DeCrane and Pat Corrigan up on Administrative Charges. A true and complete copy of the Charges against Sean DeCrane is attached as Exhibit A, which is Bates stamped 00462-00463. A true and complete copy of the Charges against Pat Corrigan is attached as Exhibit B, which is Bates stamped 00464-00465. The decision as to whether or not to bring charges against Sean DeCrane and Pat Corrigan resided solely with me. It was solely my decision to Charge Sean DeCrane and Pat Corrigan. No one influenced my decision to Charge Sean DeCrane and Pat Corrigan or demanded that I do so. I also recommended Charges against myself. No one influenced by decision to recommend Charges against myself or demanded that I do so.

19. While I felt that Jim Votypka of the Office of Integrity Control, Compliance, and Employee Accountability ("OIC") conducted a thorough investigation related to the underlying conduct that resulted in the Charges against Sean DeCrane and Pat Corrigan, I also wanted to do a thorough review of whether the circumstances warranted Charges, which I did. As part of my review, I noticed a small number of discrepancies in OIC's findings, which I addressed and resolved prior to making my decision to bring Charges against Sean DeCrane and Pat Corrigan. In making my decision to bring Charges against Sean DeCrane and Pat Corrigan, I also opted not to bring Charges against other individuals that were less involved in the underlying misconduct.

20. I took the decision to bring Charges against Sean DeCrane and Pat Corrigan seriously. In fact, I kept a binder that I created related to my decision to do so.

21. The Charges against Sean DeCrane and Pat Corrigan were legitimate, and I am unaware of any scheme to bring false criminal or administrative charges against Sean DeCrane or Pat Corrigan related to the FTA's record keeping or the conduct that resulted in the Charges (Exhibit A and Exhibit B).

22. Prior to bringing Charges against Sean DeCrane, I spoke with Sean DeCrane (i.e., I interviewed Sean DeCrane) about the underlying misconduct. Sean DeCrane had every opportunity to tell me his version of what happened. In fact, he sent me numerous emails related to the investigation, all of which I reviewed and considered before making my decision to bring him up on Charges.

23. If I did not put Sean DeCrane and Pat Corrigan up on Charges I would not have been doing my job.

24. Since at least January 1, 2011, the Division of Fire has been under heavy scrutiny by the City of Cleveland's Division of Public Safety, likely for a number of problematic issues that have occurred within the Division of Fire.

25. I was in favor of and supported the OIC conducting an independent review of the Division of Fire's continuing education and medical certifications in 2013. It would have been inappropriate for the Division of Fire, especially members of the FTA, to review or audit the materials they were required to maintain. As part of the OIC's review, I never thought OIC kept the files it obtained from the FTA in disarray. In fact, throughout my tenure with the City and experience with the OIC, I never felt the OIC kept its files in disarray. Additionally, I never thought the OIC improperly or unnecessarily seized records from the FTA.

26. During the time that I was the Acting, Interim, and Chief of the Division of Fire, the FTA had adequate resources to track employees' recertification hours as well as the training provided by the FTA. During periods that the OIC had FTA training records, FTA staff could schedule an appointment with the OIC to review those records, which were kept at EMS Headquarters.

27. While I was the Acting, Interim, and Chief of the Division of Fire, Sean DeCrane regularly went to fire conferences and speaking events such that he would be away from the FTA or his other, non-FTA assignments. I alone made the decision to decrease the number of conferences and speaking events Sean DeCrane attended while on duty.

28. In approximately 2014, Sean DeCrane expressed to me a desire to work for the International Association of Fire Fighters ("IAFF") in Washington, DC.

29. Any decision I made regarding Sean DeCrane was for business reasons and without a retaliatory or improper motive. I never took any adverse or negative actions against Sean DeCrane at the request or behest of someone else.

30. At no time did I try to damage Sean DeCrane's reputation or career. I am unaware of others, within the City of Cleveland, that intentionally sought to damage Sean DeCrane's reputation or career.

31. I never refused to respond to Sean DeCrane's emails and do not recall removing him from group emails regarding City of Cleveland business.

32. I never refused to meet with Sean DeCrane regarding City of Cleveland business.

33. I never felt that I could gain favor with the City of Cleveland's Division of Public Safety or the Mayor's Office if I retaliated against Sean DeCrane or otherwise treated him poorly.

FURTHER DECLARANT SAYETH NAUGHT.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 12, 2017

Patrick J. Kelly

PATRICK J. KELLY

CITY OF CLEVELAND
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF FIRE

JULY 14, 2015

TO: PATRICK J. KELLY (NAME) CHIEF- DIVISION OF FIRE (RANK)

FROM: FRANCIS M. CHONTOS (NAME) EXECUTIVE OFFICER (RANK)

SUBJECT: CHARGES AGAINST SEAN DECRANE, BC

Battalion Chief DeCrane:

You are hereby notified of charges against you as follows:

VIOLATION OF GENERAL ORDER #10-1:

"The FTA Officer is responsible for all training activities within the Division of Fire including maintaining appropriate training records. In addition, they shall oversee and coordinate all required internal and external reporting related to training."

VIOLATION OF RULES & REGULATIONS / RULE 3.1, 3.2, 3.3, 3.10.(1,3,18), 4.7:

3.1. "Personnel shall not violate any law of the United States, the State of Ohio, Charter provision or ordinance of the City of Cleveland, or neglect to perform any duty required by law, nor shall they engage in any conduct that would constitute a crime under the laws of the United States, the State of Ohio, or the Charter provision or ordinances of the City of Cleveland.."
3.2. " Personnel shall not willfully disobey any Rules, Regulations, General Orders or written directives of the City of Cleveland Civil Service Commission, Department of Public Safety, Division of Fire, or any lawful orders, written or oral, issued to them by a superior officer of the Division of Fire."
3.3. "Personnel shall perform all duties required by rules, directives, or orders of the Division of Fire."
3.10. "As outlined in Civil Service Rule 9.10: "But any officer or employee in the classified service may be discharged, suspended or reduced in rank for any one or more of the following:

1. Neglect of Duty.
3. Incompetence or inefficiency in performance of duties.
18. For other failure of good behavior which is detrimental to the service, or for any other act of misfeasance, malfeasance or nonfeasance in office."

4.7. "Be truthful and unbiased in all written reports, verbal reports, court testimony and conversations affecting the Division of Fire, it officers and employees or persons under its jurisdiction."

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VIOLATION OF CIVIL SERVICE RULE 9.10 (1,3,18) and Ohio Administrative Code 4765-7-09 D (1-9):

"...any officer or employee in the classified service may be discharged, suspended, or reduced in rank for any one or more of the following causes:

1. Neglect of duty.
3. Incompetence or inefficient performance of duties.
18. For other failure of good behavior, which is detrimental to the service, or for any other act of misfeasance, malfeasance or nonfeasance in office."

Specifications:

It is alleged that on January 15, 2015 the OICCEA received a complaint from a firefighter that was ordered to record training records into a FTA Master Class File. The firefighter felt it could be illegal because the data was improper and inaccurate. The OICCEA found that the information that the firefighter was told to put in the FTA Master Class File was improper and inaccurate. The reviews also found that other training records were improperly and inaccurately recorded and many records were missing and incomplete. These activities were found to be in violation of the Ohio Administrative Code-Approval of Ohio EMS continuing education programs and Division of Fire Policy.

These charges may be amended at a later date.

You have the right to confer with a representative of the Union prior to answering these charges and you have the right to have a representative of the Union present any time these charges are discussed.

After conferring with Union representation, you may submit a written response to these charges detailing any circumstances regarding the alleged violations specified above. Responses should be directed to the Executive Officer and must be received prior to the scheduled hearing. You will receive separate notification of the scheduled hearing date.

Your signature below is merely an indication of receipt of a copy of these charges. It is not an admission of guilt and will not be construed as such in any disciplinary proceedings.

Received by: _____ Date: 7-16-15

Witness: _____ Date: 7-16-15

Cc: Local 93
Vanguards
Personnel File

CITY OF CLEVELAND
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF FIRE

JULY 14, 2015

TO: PATRICK J. KELLY (NAME) CHIEF- DIVISION OF FIRE (RANK)

FROM: FRANCIS M. CHONTOS (NAME) EXECUTIVE OFFICER (RANK)

SUBJECT: CHARGES AGAINST PATRICK CORRIGAN, CAPT.

Captain Corrigan:

You are hereby notified of charges against you as follows:

VIOLATION OF GENERAL ORDER #10-1:

"The EMT Office is responsible for maintaining all office files including Continuing Education Unit Files, Class attendance records and paramedic and paramedic overtime request. The EMT Office will manage continuing education classes, attendance records, certification statuses and expiration dates of all members in the Division."

VIOLATION OF RULES & REGULATIONS / RULE 3.1, 3.2, 3.3, 3.10.(1,3,18), 4.7:

3.1. "Personnel shall not violate any law of the United States, the State of Ohio, Charter provision or ordinance of the City of Cleveland, or neglect to perform any duty required by law, nor shall they engage in any conduct that would constitute a crime under the laws of the United States, the State of Ohio, or the Charter provision or ordinances of the City of Cleveland.."
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1. Neglect of Duty.
3. Incompetence or inefficiency in performance of duties.
18. For other failure of good behavior which is detrimental to the service, or for any other act of misfeasance, malfeasance or nonfeasance in office."

4.7. "Be truthful and unbiased in all written reports, verbal reports, court testimony and conversations affecting the Division of Fire, it officers and employees or persons under its jurisdiction."

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VIOLATION OF CIVIL SERVICE RULE 9.10 (1,3,18) and Ohio Administrative Code 4765-7-09 D (1-9):

"...any officer or employee in the classified service may be discharged, suspended, or reduced in rank for any one or more of the following causes:

1. Neglect of duty.
3. Incompetence or inefficient performance of duties.
18. For other failure of good behavior, which is detrimental to the service, or for any other act of misfeasance, malfeasance or nonfeasance in office."

Specifications:

It is alleged that on January 15, 2015 the OICCEA received a complaint from a firefighter that was ordered to record training records into a FTA Master Class File. The firefighter felt it could be illegal because the data was improper and inaccurate. The OICCEA found that the information that the firefighter was told to put in the FTA Master Class File was improper and inaccurate. The reviews also found that other training records were improperly and inaccurately recorded and many records were missing and incomplete. These activities were found to be in violation of the Ohio Administrative Code-Approval of Ohio EMS continuing education programs and Division of Fire Policy.

These charges may be amended at a later date.

You have the right to confer with a representative of the Union prior to answering these charges and you have the right to have a representative of the Union present any time these charges are discussed.

After conferring with Union representation, you may submit a written response to these charges detailing any circumstances regarding the alleged violations specified above. Responses should be directed to the Executive Officer and must be received prior to the scheduled hearing. You will receive separate notification of the scheduled hearing date.

Your signature below is merely an indication of receipt of a copy of these charges. It is not an admission of guilt and will not be construed as such in any disciplinary proceedings.

Received by: _____ Date: 7/16/15

Witness: _____ Date: 7/16/15

Cc: Local 93
Vanguards
Personnel File

Declaration of Subodh Chandra

I, Subodh Chandra, declare as follows:

1. I am over the age of 18.

2. I have personal knowledge of and am competent to testify regarding the matters set forth in this declaration.

3. I wrote a letter to attorney Jon Dileno of Zashin & Rich on February 17, 2018, asking whether he or his firm have represented former chief Patrick Kelly since his retirement from the Cleveland Division of Fire. That letter is attached as Exhibit A.

4. Mr. Dileno replied on February 22, saying that neither he nor his firm has represented Mr. Kelly since his retirement. That letter is attached as Exhibit B.

5. I sent a letter to Mr. Kelly the same day, notifying him that my client was considering civil litigation against him because of his false declaration. I never threatened to present criminal charges against Mr. Kelly. (The civil litigation our firm is contemplating against Kelly either uses civil provisions of criminal statutes or Ohio Rev. Code § 2307.60, which establishes civil liability for criminal acts and would encompass several criminal statutes.) In my letter, I urged Mr. Kelly to have an attorney reach out to me. I believed and continue to believe that if Mr. Kelly has a truly independent lawyer speak with me, the dispute related to Mr. Kelly's conduct could be quickly resolved through productive dialogue and the need for litigation avoided. That letter is attached as Exhibit C.

6. Mr. Dileno wrote me again on March 6, saying that he and his firm now represent Mr. Kelly. That letter is attached as Exhibit D.

7. I responded to Mr. Dileno's letter on March 7. In that letter, I warned him that taking on Mr. Kelly as a client would put him in an impossibly conflicted position, based on the differences in his clients' testimony and settlement positions, and the possibility that he and his firm could be co-defendants (and at a minimum witnesses) in the contemplated litigation arising out of Mr. Kelly's declaration, which post-dated Mr. Kelly's employment as a City employee. My March 7 letter is attached as Exhibit E.

8. Mr. Dileno has not responded to my March 7 letter.

I declare under penalty of perjury that the foregoing is true and correct.

3/20/18

Subodh Chandra

Date

EXHIBIT
4

THE CHANDRA LAW FIRM LLC

THE CHANDRA LAW BUILDING
1265 W. 6TH STREET, SUITE 400
CLEVELAND, OH 44113.1326
216.578.1700 OFFICE
216.578.1800 FAX
WWW.CHANDRALAW.COM

February 17, 2018

Via email

Jon Dileno
Zashin & Rich Co., LPA
950 Main Ave., 4th Floor
Cleveland, OH 44113

Re: *DeCrane v. Eckart, et al.*, N.D. Ohio Case No. 1:16-cv-02647

Dear Jon:

Your recent correspondence and motion to disqualify leave one issue unclear: do your firm and you purport to represent Patrick Kelly in the *DeCrane* matter?

Kindly respond by the close of business on Tuesday, February 20 with a clear and unambiguous response to this question. If you do not tell us you represent Kelly by then, we will continue to assume that you and your firm do not represent him in the matter.

Sincerely,

Subodh Chandra

Barbara Langhenry, Director of Law (via email)
Gary Singletary, Chief Counsel (via email)
Thomas J. Kaiser, Chief Trial Counsel (via email)
David Vance (via email)
Stacey Pellom (via email)

EXHIBIT
4-A

ZASHIN & RICH

Ernst & Young Tower | 950 Main Avenue, 4th Floor | Cleveland, Ohio 44113 | p: 216 696 4441 | f: 216 696 1618 | zrlaw.com

Jon M. Dileno
Attorney at Law
jmd@zrlaw.com

February 22, 2018

VIA ELECTRONIC MAIL ONLY
Subodh Chandra, Esq. (Subodh.Chandra@ChandraLaw.com)
Ashlie Case Sletvold, Esq. (Ashlie.Sletvold@ChandraLaw.com)
Patrick Haney, Esq. (Patrick.Haney@ChandraLaw.com)
Patrick Kabat, Esq. (Patrick.Kabat@ChandraLaw.com)
The Chandra Law Firm, LLC
1265 W. 6th St., Suite 400
Cleveland, OH 44113

Re: **DeCrane v. Eckart, et al.**
U.S. District Court for the Northern District of Ohio, Case No. 1:16-cv-02647-CAB

Dear Subodh:

I am writing in response to your letter dated February 17, 2018. Neither I nor my firm has represented Patrick Kelly since his retirement from the City of Cleveland.

Very truly yours,

ZASHIN & RICH CO., L.P.A.

Jon M. Dileno

JMD/tr

cc: The City of Cleveland

EXHIBIT
4-B

ZASHIN & RICH

Ernst & Young Tower | 950 Main Avenue, 4th Floor | Cleveland, Ohio 44113 | p: 216 696 4441 | f: 216 696 1618 | zrlaw.com

Jon M. Dileno
Attorney at Law
jmd@zrlaw.com

March 6, 2018

VIA ELECTRONIC MAIL ONLY
Subodh Chandra, Esq. (Subodh.Chandra@ChandraLaw.com)
Ashlie Case Sletvold, Esq. (Ashlie.Sletvold@ChandraLaw.com)
Patrick Haney, Esq. (Patrick.Haney@ChandraLaw.com)
Patrick Kabat, Esq. (Patrick.Kabat@ChandraLaw.com)
The Chandra Law Firm, LLC
1265 W. 6th St., Suite 400
Cleveland, OH 44113

Re: **DeCrane v. Eckart, et al.**
U.S. District Court for the Northern District of Ohio, Case No. 1:16-cv-02647-CAB

Dear Subodh:

Please be advised that my firm and I represent Patrick Kelly in connection with the above matter. Please direct all future communications regarding this matter directly to my firm. My understanding is that you have threatened Mr. Kelly repeatedly regarding alleged criminal wrongdoing and possible litigation. Please contact me to discuss exactly what it is you are hoping to obtain from Mr. Kelly.

Very truly yours,

ZASHIN & RICH CO., L.P.A.

Jon M. Dileno

cc: Patrick Kelly

EXHIBIT
4-C

THE CHANDRA LAW FIRM LLC

THE CHANDRA LAW BUILDING
1265 W. 6TH STREET, SUITE 400
CLEVELAND, OH 44113.1326
216.578.1700 OFFICE
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WWW.CHANDRALAW.COM

March 7, 2018

Via email

Jon Dileno
Zashin & Rich Co., LPA
950 Main Ave., 4th Floor
Cleveland, OH 44113

Re: *DeCrane v. Eckart, et al.*, N.D. Ohio Case No. 1:16-cv-02647

Dear Jon:

On February 22, 2018, you wrote to inform us that you and your firm have not represented former-Chief Patrick Kelly since his retirement in 2015. But your letter of March 6, 2018 claims that you now do represent him regarding this matter, as well as, apparently, the separate civil lawsuit contemplated against Kelly.[1]

We need to investigate how Mr. Kelly came to give demonstrably false testimony. Given that your office produced his perjurious declaration in discovery, we suspect that you or someone working at your direction led him down this path. We can hardly explore the facts or engage with Mr. Kelly through you to resolve the matter if your inclination to protect yourself and your colleagues prevents you from disinterestedly advising Mr. Kelly about the mess he has created for himself.

To put a finer point on this, you and individuals at your firm are potential co-defendants (and at a minimum witnesses) in the contemplated civil suit, and you simply cannot ethically represent Mr. Kelly in the matter in an effort to keep your friends close and your enemies closer. I leave it to you as to whether you wish to notify your firm's insurance carrier of this likely claim or engage competent ethics counsel. We would be happy to discuss your firm's exposure with your firm's counsel.

[1] Your March 6 letter references a threat of criminal action. We are not threatening Kelly with criminal action. Our February 22, 2018 letter to Kelly, asking him to obtain counsel have that counsel contact us, mentioned Ohio Rev. Code § 2307.60, which establishes civil liability for criminal conduct. Ohio Rev. Code § 2921.05(C), also mentioned in the letter, creates a civil cause of action for using a false writing, otherwise contemplated in the rest of the statute as criminal conduct. Perhaps these references were the source of your confusion.

EXHIBIT 4-D

And then there is the obvious conflict between Mr. Kelly's testimony and your other clients' interests. Mr. Kelly's testimony proves that your clients retaliated against Sean DeCrane in violation of his First Amendment rights. Your duties to the City, Mr. Eckart, Mr. Chumita, and Mr. Votypka prevent you from advocating effectively for Mr. Kelly. How are you going to cross-examine your own new "client" about his testimony?

We reached out to Mr. Kelly because we believed that if we spoke with his independent counsel with no duty of loyalty to anyone but him, we would have been able to reach an amicable resolution with him on these issues without the need to file separate litigation. Now that he is represented by counsel with a conflict of interest, he is in a worse position than if he had been represented by an independent lawyer.

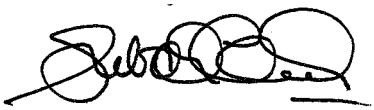
It is wrong for you to do that to him. By embracing a conflicted representation, you have left us with little choice but to proceed with what should have otherwise been avoidable litigation.

We urge you to advise Mr. Kelly to retain independent counsel so he has a reasonable opportunity to avoid litigation over the false statements in his December 12, 2017 declaration. If Mr. Kelly is candid with us, we believe we can reach an amicable resolution with him on these issues. Your firm's involvement is an obvious impediment to that given its involvement in instigating and obtaining that perjured declaration from Mr. Kelly.

We reiterate our demand that you produce all of your firm's communications with Mr. Kelly post-dating his City employment. Having said that you do not represent him, you cannot now cloak your earlier communications with him retroactively with privilege.

As required by Ohio Prof. Cond. R. 1.4(a)(3), please give this letter to Mr. Kelly immediately. I copy the City's lawyers, including Ms. Pellom, as always in the hope that they will put a stop to this ethical trainwreck unfolding under the law director's authority. By the way, if the City is paying for the representation of Mr. Kelly regarding acts (giving false testimony) in which he engaged long *after* his City employment ended, that is an abuse of Cleveland's treasury and the law director can expect that to be the subject of taxpayer litigation.

Sincerely,



Subodh Chandra

Barbara Langhenry, Director of Law (via email)
Gary Singletary, Chief Counsel (via email)
Thomas J. Kaiser, Chief Trial Counsel (via email)
David Vance (via email)
Stacey Pellom (via email)

Declaration of Brian Bardwell

I, Brian Bardwell, declare as follows:

1. I am over the age of 18.

2. I have personal knowledge of and am competent to testify regarding the matters set forth in this declaration.

3. I heard and learned absolutely nothing about or substantially related to the *DeCrane* matter in the 45 days I was a 2016 Cleveland summer law clerk, including DeCrane's public-records request. Accordingly, I did not personally and substantially participate in the matter. I have disclosed absolutely no confidential information about the matter. I have absolutely no confidential information about the matter that I could disclose.

4. Before entering the legal profession, I spent 15 years in journalism. Through that experience I learned, came to appreciate, and fastidiously adhered to the industry's ethical standards for maintaining the confidentiality of certain information. My interpretations of those standards were typically more rigid than industry standards. This sometimes meant sacrificing important stories rather than disclosing a source's identity to my supervisors, honoring retroactive requests for confidential treatment of information that was provided on the record, and refusing to confirm the identity of sources who had already outed themselves. As in the legal profession, journalists' disclosure of confidential information impedes the flow of honest and accurate information to the people who need it and undermines the integrity of a vital democratic institution. I will not violate that duty.

5. Since college, I have been a vocal advocate for improvements to the Ohio Public Records Act. In that capacity, I was the relator in several lawsuits to remedy violations of the Ohio Public Records Act, including one in which the City of Cleveland was the respondent.[1] Because of that work, the ACLU of Ohio, the Ohio State Bar Association, the Cleveland Employment Inn of Court, and the Cleveland Academy of Trial Attorneys have invited me to speak at numerous events about how to navigate and reform Ohio's transparency laws.

6. The City of Cleveland was less impressed with this work. Assistant Law Director Jay Payne named me "one of the seediest plaintiffs" he had ever litigated against and asked me whether my mother was proud of me.

7. In the summer of 2016, between my second and third years of law school, I was an extern for Magistrate Judge Kathleen Burke, who required scrupulous adherence to the Code of Conduct for Judicial Employees, including its strict demands for the confidentiality of all activities and discussions taking place in chambers.

8. In the second half of that summer, I was a volunteer for the City of Cleveland Department of Law. My first day was July 5, 2016, and my last day was August 19, 2016. When applying,

[1] *State ex rel. Bardwell v. City of Cleveland*, 126 Ohio St. 3d 195 (2010) (attached as Ex. A).

EXHIBIT 5

I had emphasized my desire to work in the Department's Division of Public Records, and the City approved me to do such work:

a. I first inquired about the position with Assistant Law Director Jack Bacevice, whom I had previously met at a career event where we discussed my public-records litigation.

b. I requested an application from paralegal Tara Hoffman, a high-school classmate who knew about my public-records litigation from her time working at a firm that I had sought to engage for that work.

c. Ms. Hoffman referred me to the chief of the Public Records Division, Kim Roberson. I had worked with Ms. Roberson years earlier on the records request that led to my lawsuit against the City.

d. I interviewed with Assistant Law Director Jillian Dinehart, who noted and inquired about my public-records litigation because I included it in my cover letter.[2]

e. On my first day, I was assigned to a desk directly outside the office of Mr. Payne, who had defended the City in the *State ex rel. Bardwell v. City of Cleveland.*

f. On the first or second day, Ms. Roberson inquired about my career plans and asked if I wanted to be "the next David Marburger," a reference to one of Ohio's preeminent access attorneys. I told her that I did.

9. I was permitted to work as a normal law clerk for only about one week. I was assigned to review records requests from 2014 and earlier to determine whether any closed requests were still sitting in the City's filing cabinets for open requests. To do this, I pulled file folders for individual requests out of the cabinets and searched in Outlook for emails containing the corresponding request numbers. If the request had not been fulfilled, I was supposed to email employees in departments that were likely to have responsive records. I would then print out that email, a tracking sheet for the request, and a note to follow up on the request, insert all three documents into the file folder, and return it to the filing cabinet. On the rare occasions where a request had actually been fulfilled, I printed out the tracking sheet, inserted it into the folder, and moved the folder to a different filing cabinet.

10. As I recall, the tracking sheets were generated from a Sharepoint database. That database is not privileged:

a. The City granted me access to the database without ever suggesting it was in any way confidential.

b. The spreadsheet had roughly a dozen fields, and the members of the public who request records invariably knew the information in six of them: the request number, the requester's name, the date the request was made, the date the request was received, what records were requested, and whether the request was open or closed.

[2] *See* Bardwell cover letter provided to City of Cleveland to apply for internship (attached as Ex. B).

c. Most of the remaining information was often known to the requester, as well. It included the name and phone extension for the city employee responsible for gathering the requested records, the name of the last person to update the request's entry in the database, and the date that the request was last updated.

d. The database also included one field that I believe was labeled "notes" or "comments." In every instance that I can remember, that field provided progress reports on each request, saying that the appropriate department heads had been asked to begin searching for records, that records were being gathered, that responsive records did or did not exist, that the request had been filled and closed, and the like.

e. I can recall no instances in which the database contained anyone's opinion about a request or an assessment of "whether the City is legally obligated to respond to particular requests." Offering such an opinion would be pointless, as state law requires the City to respond one way or the other to every request it receives.[3] Failing to do so is grounds for fee-shifting.[4]

f. More than a year after I had left the City, I submitted a public-records request for the database, and Ms. Roberson provided me a partial copy that went back to 2014.[5]

11. After I began to update the database as assigned, Ms. Roberson came to my workspace with an unexplained instruction to stop all work on the project and immediately return all the files I had been reviewing. The City deactivated my network credentials, and I could not log on to a computer until August 2. Even then, I was locked out of the database I needed to access to review record requests. Attorneys stopped handing out new assignments. I was able to do very little substantive work for the vast majority of my seven-week externship, and there were long stretches in which I had literally no work to do. My records indicate that I only had access to that database for about two days.

12. At some point after restricting my access to the public-records database, the City asked me to sign a confidentiality agreement. That agreement included no suggestion that the database was confidential.

13. For much of my remaining time in the externship, I was assigned to answer phones at the front reception desk. The vast majority of my work involved redacting Social Security numbers and addresses from records to be turned over in response to discovery and public-records requests.

14. Throughout my time with the City, employees offered shifting explanations for my reassignment to menial tasks and my lack of computer access. At the end of my internship, Ms. Dinehart explained that Law Director Barbara Langhenry had learned about my

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[3] *State ex rel. DiFranco v. S. Euclid*, 138 Ohio St. 3d 367, ¶ 28 (2014) ("DiFranco is entitled to statutory damages because she was subjected to a violation of R.C. 149.43(B) when the city failed to respond to her request in any way for two months.").

[4] R.C. 149.43(C)(3)(b).

[5] Attached as Ex. C.

previous public-records case against the City and decided to cut me off from the public-records work for which I had been hired. Ms. Dinehart told me that had Ms. Langhenry known about it earlier, I probably would not have been hired in the first place.

15. The City's comprehensive efforts to freeze me out for having previously petitioned the courts to settle my public-records dispute with the City prevented me from accessing almost any confidential information whatsoever. The only matters I can remember having any involvement in are the following:

    a. *Holloway v. City of Cleveland*, No. 1:15-cv-00869 (N.D. Ohio May 1, 2015). I redacted records to be produced for discovery and had no access to privileged information or confidential work product.

    b. *State ex rel. Ortiz v. City of Cleveland*, No. 2016-0447 (Ohio Supreme Court). I sat in on a conference call with opposing counsel and a mediator. I had access to no privileged information or confidential work product.

    c. *State of Ohio ex rel. Ali v. City of Cleveland*, No. 2016-1131 (Ohio Supreme Court). I had no access to privileged information.

    d. An excessive-force case against a probation officer. I informally answered an attorney's question and generated no work product.

    e. A public-records request from WEWS-TV for personnel files. I redacted records to be produced in response and had no access to privileged information or confidential work product.

    f. An analysis of Ohio Senate Bill 321. I had no access to privileged information.

    g. Looking for documentation that would help a public-records requester prove that he was a princess, that he was a descendant of the Rockefellers, that he was entitled to a sizable share of the estate of the artist formerly known as Prince, and that he was given the key to the City. I had no access to privileged information or confidential work product.

16. In my seven weeks with the City, I had no involvement with either of Sean DeCrane's lawsuits against the City, as neither of them had been filed. I had no involvement in handling or even awareness of Mr. DeCrane's 2015 public-records request, which fell outside the period of requests I had reviewed. I had no involvement in or awareness of any personnel matters involving Mr. DeCrane. I had no involvement in any discussions relating to any issues involved in Mr. DeCrane's case. I never spoke with or met Jon Dileno, David Vance, or Stacey Pellom. I had no involvement in any discussions relating to any issues involving the Division of Fire. Nearly a year would pass between my last day with the City and the first time I heard anyone mention Mr. DeCrane.

17. I had a job interview with the Chandra Law Firm on February 13, 2017. I met with attorneys Don Screen and Sandhya Gupta. I disclosed in that meeting that while I was volunteering for the City, I had worked on two cases that the firm was litigating: the *Ortiz* and *Ali* matters. I disclosed no further information or details about the nature of the work, other than

mentioning that I sat in on the conference call with one of the firm's attorneys and a mediator.

18. My first day as a summer law clerk for the firm was May 22, 2017. On that day, I again notified everyone at a firmwide meeting that I had done some work on the *Ortiz* and *Ali* matters. Although my involvement in those cases was negligible, we all agreed—and the firm's managing partner Subodh Chandra directed—that I should not work on them. The firm took care to ensure that an assignment on the *Ortiz* case went to another clerk. The firm also had several mediation sessions scheduled in the near future in the *Ali* case, The other law clerks attended those sessions for their educational benefit, while I stayed behind. I personally overheard Mr. Chandra instruct our senior paralegal to limit my access to records from those cases in our online file-management system. No one at the firm has ever asked me for any information about those cases; nor have I ever disclosed any information whatsoever about my work on them.

19. Early in my time working for the firm, I was assigned to work on the *DeCrane* matter. Attorneys asked whether I had worked on the case for the City, and I assured them that I had not. In the 10 months since then, we have repeatedly revisited the issue based on insinuations from opposing counsel and come to the same conclusion: I never worked on the *DeCrane* case or any substantially related matter during my time with the City.

20. Because the conflict check revealed no problems, I proceeded to complete the *DeCrane* tasks the firm assigned me. First on that list was arranging interviews to collect declarations from potential witnesses in the case. Because virtually all the witnesses in whom we were interested were current or former City employees, I met with Chandra Law Firm partner Ashlie Case Sletvold to discuss the extent to which the Rules of Professional Conduct would permit us to set up and conduct these interviews and obtain relevant evidence from the potential fact witnesses.

    a. I pulled up Ohio Prof. Cond. R. 4.2 in anticipation of that meeting with Ms. Sletvold on May 23, 2017, and I received and reviewed a copy of Ohio Ethics Opinion 2016–5.

    b. During that meeting, we discussed Rule 4.2 Comment 7 and who could obligate the City. Without waiving privilege or work product, it is fair to report that Ms. Sletvold concluded that no one at or below Mr. DeCrane's rank could have authority to obligate the City regarding decisions about his employment and promotion. Therefore, she instructed me not to interview any current employee whose rank was Assistant Chief or higher.

    c. Ms. Sletvold also concluded that I would need to ask each potential declarant whether he had worked closely enough with City attorneys to make an interview improper. I was not to inquire, of course, into the nature of any such communications.

    d. Ms. Sletvold and I discussed all the disclosures I would need to make to ensure that interviewees understood that the firm represented only Mr. DeCrane, what my role in the case was, that I was not providing them legal advice, that they should not disclose privileged information, and so forth.

e. I had already created a spreadsheet to track my efforts to set up these interviews. Based on our review of the Ohio Rules of Professional Conduct, I added a field to designate anyone who we believed I should not contact. I filtered out those employees and never reached out to any of them.

21. The current firefighters with whom I spoke are members of International Association of Firefighters Local 93. After learning that they were represented by Tom Hanculak of the Diemert Law Firm, I spoke to Mr. Hanculak about my plans. We were both concerned about the possibility that the City might retaliate against firefighters who spoke with us. Mr. Hanculak asked me to suspend my efforts to conduct these interviews while he considered whether his clients had any duty to report their participation to the City and whether that participation was likely to pose any risk to them. On May 31, he told me that he was in touch with the City's Chief Assistant Director of Law, William Menzalora. The next day, Mr. Hanculak emailed me to tell me that the City Law Department believed it did not need to be notified of these interviews—and that the Chief of the Division of Fire had not bothered to reply to Mr. Hanculak's inquiry. He consented to my interviews of Local 93 members, telling me twice that I was "good to go."[6]

22. Several current and former firefighters agreed to interviews. The interviews took place between about June 2 and July 10. I introduced myself to each of them with substantially the same greeting: "This is Brian Bardwell from The Chandra Law Firm. We're representing Sean DeCrane." Everyone I talked to was fully aware that Mr. DeCrane had sued the City and why. It had been widely publicized, including in an article on Cleveland.com.[7] On the rare occasions when potential witnesses needed clarification, I explained that I was working for Mr. DeCrane and not the City.

23. In preparing interview outlines for each of these witnesses, I included prompts at the very top to remind myself to inquire into Comment 7's applicability, to explain that I was representing Mr. DeCrane and could not provide them with any legal advice, and to warn them not to share any privileged information. I believe I had these conversations with every declarant I interviewed, and they indicated they understood the ground rules. I recorded some of my meetings with declarants, and every recording I have reviewed includes an inquiry into the extent of the witness's coordination with the City, a warning not to disclose any privileged communications, and an explanation that I could not provide any legal advice:

a. In an interview with former Chief Patrick Kelly, I began by asking Mr. Kelly, "So you haven't been in touch with the City about the case?" He told me that he had not been in touch since he retired. Next I told him: "Any discussions you've had with, like, city attorneys that would be privileged or anything, like, don't tell me anything about what you guys were discussing. If there's like facts or stuff that you guys discussed in there, like facts you can still tell me about. But I don't want— I'd like— you shouldn't be telling me, you know, I told the city attorneys…" Mr. Kelly told me he understood that I was talking about "privileged information." Mr. Kelly asked if I was an attorney, and I

[6] *See* Ex. D and Ex. E.

[7] *See* Higgs, Robert. *Former Cleveland fire official sues city, claims mistaken retaliation* (Nov. 1, 2016) (attached as Ex. F).

told him that I was "actually a law clerk," that I was a law student, and that "anything here is not legal advice."[8] Kelly told me that he understood Mr. DeCrane was suing the City, that he had personally read at least some of the complaint, and that he had read news coverage of the case.

b. In an interview with Captain Dennis Corrigan, I went through the same routine: "Have, like, city attorneys reached out to you about this case at all?" He told me they had not. "Have you talked to any of them?" He told me he had not. "I'm not providing any legal advice or anything in this conversation." He indicated that he understood. "If something all of a sudden comes to you and you realize that you did, at any point, talk to any of the city attorneys or anything, I can't, shouldn't, don't want to hear anything about what they told you, or what you told them about the case." I told him he could tell me the same facts that he told the attorneys, but that the conversations themselves should "go in a black box."[9]

c. In an interview with Battalion Chief Frank Szabo, I did it all again: "Have you talked to the city's attorneys at all about this case? Have they reached out to you?" He told me they had not. I told him, "[There's] no lawyer-client relationship between you and me. I'm not giving you any legal advice." He told me he understood. I told him, "If anything comes up while we're talking, and it sort of triggers anything that you forgot about, or you did have a discussion with any of the attorneys, you know, don't tell me anything about what conversation you had or, you know, things like that, or what they told you."[10]

d. I do not have a recording of my interview with Battalion Chief Patrick Corrigan. My outline and contemporaneous notes from that day reflect that the interview started with the same precautions.[11] I reminded him that I was only working for Mr. DeCrane and suggested that he reach out to Mr. Hanculak for any legal advice.

24. Mr. Kelly was the only declarant I interviewed to say he had talked to City attorneys about the *DeCrane* matter. Even in Mr. Kelly's case, those conversations were not privileged because they had happened after he had retired. Nonetheless, Mr. Kelly did not disclose the substance of those conversations. Although the Dileno declaration indicates that Mr. Dileno had several privileged discussions with then-Chief Kelly about plans to eliminate Mr. DeCrane's job by outsourcing training to Tri-C, Chief Kelly never disclosed those conversations to me, nor did he disclose any other privileged matter.

25. I did not advise Mr. Kelly to sign his declaration. I asked him to review it and told him I would make any revisions that would make him comfortable signing it. When I brought it to him, he closely scrutinized it and was very assertive about making changes to ensure that

[8] *See* excerpts of Patrick Kelly interview recording and transcript (attached as Ex. G and Ex. H) (audio files submitted with concurrently filed Notice of Lodging).

[9] *See* excerpts of Dennis Corrigan interview recording and transcript (attached as Ex. I and Ex. J).

[10] *See* excerpts of Frank Szabo interview recording and transcript (attached as Ex. K and Ex. L).

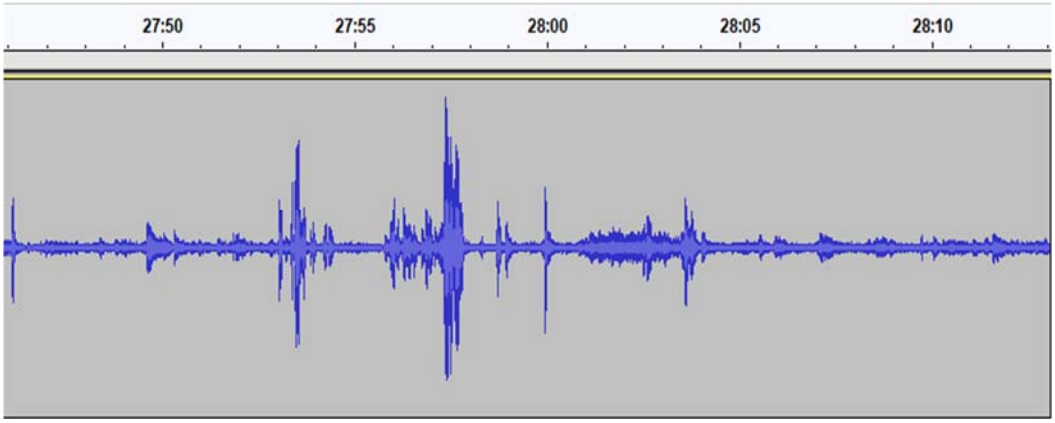
[11] *See* excerpts of Patrick Corrigan notes (attached as Ex. M).

everything was as accurate as possible. By the time he signed the declaration, I had spent nearly an hour waiting for him to settle on final language.

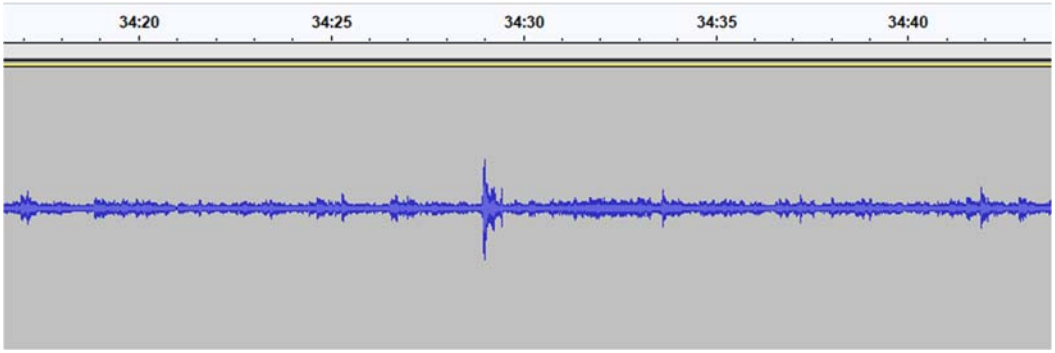
26. After he signed the declaration, Mr. Kelly invited me to his home to give me copies of records he kept about incidents involved in the *DeCrane* case. While I was there, Mr. Kelly asked me whether his continued possession of the records could expose him to liability. I told him that I could not provide him any legal advice and that if he believed he needed any, he should call an attorney. He told me he had someone he could call. My impression from the conversation was that he was not actually represented by counsel, but rather that he had an acquaintance he could consult for informal advice. He excused himself to the next room and made a phone call. I could hear his side of the conversation and some of the other party's. When the call ended, Mr. Kelly returned and told me that the lawyer had advised him not to give me copies of the records. I made no further request for copies from Mr. Kelly, and the interview ended almost immediately thereafter.

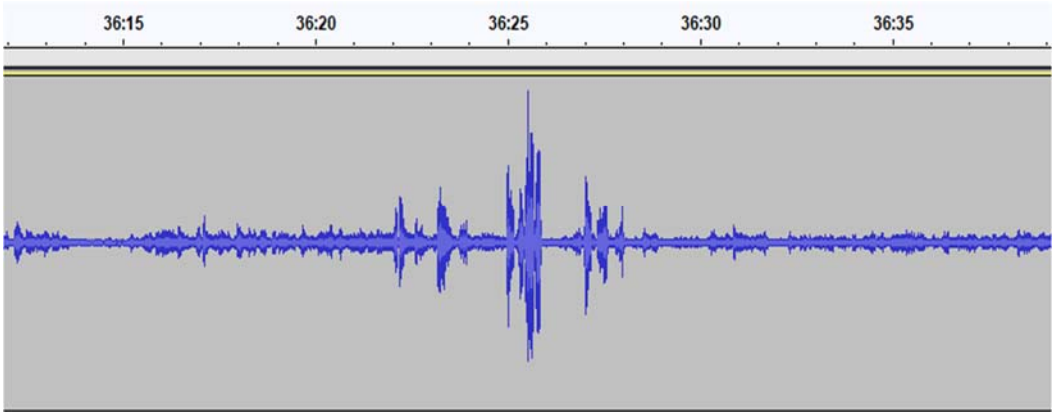
27. The recordings of my interviews are attorney work-product. While recording, I annotated the files so I could quickly find the most important portions without having to play the entire interview. When the interview subject says something that I find particularly important, I make an audible notation that allows me to quickly locate it when reviewing the file in waveform. I cannot remove these annotations from the audio files. The following images illustrate my annotations:

a.



b.



c. 

28. Since Mr. Dileno and the Zashin firm began making vague assertions in the fall of 2017 that I should not be involved in the *DeCrane* matter, Chandra Law Firm attorneys and I have had more conversations than I can remember about exactly what my work at the City involved. We assumed that defense counsel had some good-faith basis for their assertions. Every time they raised the issue, I have had additional discussions with firm attorneys to plumb my memory for anything that might create some type of conflict. We have never been able to identify a possible conflict under even our most conservative interpretations of the rules.

29. None of the "confidential" information listed in the Roberson declaration (¶ 9) is confidential.

a. The length of time the City takes to respond to record requests is known by the people who make the requests and receive the responses. For instance, I know that the City took 30 days to respond to my request for a copy of the public-records database. Further, because the database is itself a public record, the time taken for every request is a matter of public record.

b. The Department of Law's involvement with public-record requests is not confidential.

i. Before I volunteered for the City, I knew about the Department's involvement in processing public-record requests through my previous litigation.

ii. On more occasions than I can count, I have requested records directly from the departments that maintain them only to be directed to submit my request to the Department of Law instead.

iii. Everyone who submits a request receives a response signed by "The Public Records Section, Kim Roberson \ Joe Wilin \ Katia King, City of Cleveland – Department of Law."[12]

[12] A copy of one such response is attached as Ex. N.

iv. The City's standard request form explicitly directs the public to send requests to "Public Records Section, Department of Law."[13]

v. Ms. Roberson's public profile on LinkedIn says that she has been the "Public Records Administrator" in the "Cleveland Department of Law."[14]

vi. Law Director Barbara Langhenry freely disclosed the Department's involvement with public-record requests to me after speaking on a career panel at my school.

vii. Assistant Law Director Jack Bacevice freely disclosed the Department's involvement with public-records requests when he spoke at a career event at my school.

viii. Ms. Langhenry freely discussed the Department's involvement with a *Plain Dealer* reporter for a story about the City's chronic failure to timely process public-record requests.[15]

ix. The City's Operations Efficiency Task Force publicly identified "Public Records management" as one of the Department of Law's "major departmental programs."[16]

x. Law-department review of public-record requests is standard operating procedure in cities across the state.

c. The manner in which the City processes record requests is not confidential.

i. I knew how the City processed record requests before I volunteered for the City. Before the Ohio Supreme Court affirmed the Eighth District's order granting mandamus in my case, a City employee explained the Department's procedure for handling requests to justify the delay in releasing my records.

ii. During the litigation of that case, I had discussions about those procedures with Ms. Roberson and Mr. Payne.

iii. The City's Operations Efficiency Task Force discussed upcoming changes to the City's processing of record requests in its Phase 2 Final Report.[17]

iv. The City's Public Records Policy is posted on its website.[18]

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[13] A copy of that form is attached as Ex. O.

[14] A copy of that profile is attached as Ex. P.

[15] A copy of that story is attached as Ex. Q.

[16] Exhibit R, p. 68.

[17] Exhibit R, p. 68, ¶ 106–08.

[18] A copy of that policy is attached as Exhibit S.

v. The Ohio Supreme Court has already disclosed the manner in which the City processes record-requests.[19]

vi. Ms. Roberson has detailed the manner in which the City processes record-requests on multiple occasions, including in an affidavit filed in *State ex rel. Shaughnessy v. Cleveland*, 2016-Ohio-8447, 149 Ohio St. 3d 612.[20]

vii. The City regularly invokes the red tape involved in processing records to justify its failure to comply with requests.

viii. Public understanding of the manner in which the government does its job is a basic prerequisite of democratic government.

d. Even Ms. Roberson's boss, Director Langhenry, disavows these expansive assertions of confidentiality.[21]

30. Having read the Defendants' Motion to Disqualify, I still have absolutely no idea what work I did or what information I learned that defense counsel feels would create a conflict of interest on the *DeCrane* case. The City's assertions of privilege over even the most banal details of its bureaucratic processes explain less about this case than about the biweekly lawsuits filed against it for violating open-government laws.[22]

I declare the above to be true and correct under penalty of perjury of the laws of the United States of America.

Brian Bardwell

03/02/18
Date

[19] *State ex rel. Cranford v. Cleveland*, 2004-Ohio-4884, 103 Ohio St. 3d 196, ¶¶ 6–7 (outlining back-and-forth communications between Ms. Roberson and City employees working to fulfill a request).

[20] A copy of that affidavit is attached as Exhibit T.

[21] Higgs, Robert, *Policy behind city's secrecy? Sorry, but that's a secret* (March 1, 2018) (Attached as Ex. U.).

[22] Heisig, Eric, *Cleveland has largest number of records complaints in state* (March 16, 2017) (Attached as Exhibit V.)

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

SEAN DECRANE
Plaintiff
v.
CITY OF CLEVELAND, et al.
Defendant

Civil Action No. 1:16-cv-02647-CAB

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Patrick Kelly
10688 Lake Meadows Drive, Strongsville, Ohio 44136
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Subpoena Duces Tecum, attached as Exhibit A.

Place:	Date and Time:
Zashin & Rich Co., L.P.A. Ernst & Young Tower 950 Main Avenue, 4th Floor, Cleveland, OH 44113	10/31/2017 10:00 am

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/13/2017

CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* City of Cleveland, who issues or requests this subpoena, are:

David P. Frantz, Zashin & Rich, 950 Main Ave., 4th Floor, Cleveland, OH 44113; dpf@zrlaw.com; (216) 696-4441

EXHIBIT 6

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:16-cv-02647-CAB

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

SUBPOENA DUCES TECUM

EXHIBIT A

I. INSTRUCTIONS

1. YOUR APPEARANCE IS NEITHER REQUESTED NOR REQUIRED BY THIS SUBPOENA.

2. Please produce the documents detailed below to Zashin & Rich Co., L.P.A., Attn: David R. Vance, 950 Main Ave., 4th Floor, Cleveland, OH 44113. If you prefer to send the documents electronically, please email them to Attorney David R. Vance at drv@zrlaw.com.

3. If you have any questions, please contact Attorney David R. Vance at (216) 696-4441 or drv@zrlaw.com.

4. The documents requested for production include those in the possession, custody, or control of you, your agents, representatives, or attorneys.

5. The term "document" refers to any printed, typewritten, handwritten, or otherwise recorded matter, of whatever character, including, without limitation, any letter, memorandum, memorandum of conference or telephone conversation, telegram, telefax, teletype, ledger, log, travel record, notes, summary, analysis, diary, journal, notations on a calendar, appointment book, business card, report, investigation, study, expert report, minutes list, schedule, notice, statistics, tabulation, computer printout, electronic compilation of data, e-mail, paper, certificate, paper or exhibit filed or submitted in a court or in an administrative or arbitration proceeding, permit, permit application, book, pamphlet, handbill, circular, poster, advertisement, bulletin, brochure, magazine article, press release, newspaper article, publication, script, transcript, manual, handbook, form, record, application, agreement, offer, prospectus, contract, agreement, instrument, will, deed, assignment, loan/mortgage application, loan/mortgage paper, appraisal, estimate, license, graph, chart, diagram, map, drawing, blueprint, site plan, picture, photograph, tape, videotape, movie, accounting record, statement, invoice, canceled check, per diem record, calculation, payment receipt, bank account record, financial statement, tax return, articles of incorporation and all other tangible things upon which any handwriting, typing, printing, drawing, representation, photostatic or other copy, magnetic or electrical impulse, or other form of communication is recorded or reproduced. If the original is not in your or your attorney's or agent's possession, custody or control, "document" means the best copy of such recorded matter that is in your possession, custody or control.

6. Each request refers to all documents that you know exist or that you can locate or discover by reasonably diligent efforts.

II. DOCUMENTS TO PRODUCE

You are subpoenaed to provide the following documents:

1. Any communications that you have had with members of IAFF Local 93's ("Local 93") Executive Board regarding Sean DeCrane ("DeCrane") since January 1, 2010;

2. Any communications with DeCrane since your retirement from the City of Cleveland Division of Fire;

3. Any documents or communications related to your promotion to Acting Chief, Interim Chief, or Chief of the City of Cleveland Division of Fire;

4. Any documents or communications regarding former Division of Fire Chief Daryl McGinnis' training or qualifications to serve as Chief; and

5. Any documents or communications since January 1, 2010 regarding:

    a. DeCrane's potential retirement from the Division of Fire;
    b. the lawsuit DeCrane filed against the City of Cleveland and others;
    c. the proposed outsourcing of training from the Fire Training Academy to Tri-C;
    d. DeCrane's desire to be promoted within the Division of Fire;
    e. Assistant Chief and higher promotions within the Division of Fire;
    f. the possible merger of the Division of Fire and the Division of EMS;
    g. the Fire Training Academy's records;
    h. the Fire Training Academy generally;
    i. Ed Eckart;
    j. former Division of Fire Chief Daryl McGinnis; or
    k. the events that transpired at PJ McIntrye's Pub in August 2013 regarding former Division of Fire Chief Daryl McGinnis.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN DECRANE,	)	CASE NO. 1:16-cv-02647-CAB
	)	
Plaintiff,	)	
	)	JUDGE CHRISTOPHER A. BOYKO
v.	)	
	)	
CITY OF CLEVELAND, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF RECORDS CUSTODIAN

COMES NOW, before the undersigned officer duly authorized by law to administer oaths, the undersigned Affiant, who, after being duly sworn, states as follows:

1. My name is _____. I am over the age of 18 years and am competent to make this Affidavit.
2. I am the custodian of records maintained by _____and/or I have authority to certify the authenticity of such records.
3. Pursuant to the request and authorization served upon_____, I have reviewed our records and files and have determined that the documents attached to this Affidavit constitute true and accurate copies of all files, records, and other documents responsive to the request and authorization received in the above-styled case.
4. These records were prepared by the personnel and staff of _____, or persons acting under the control of this organization, in the ordinary course of business.

_____

_____ (Printed Name)

Affiant

Sworn to and subscribed before me,

this _____ day of _____, 2017.

_____

Notary Public

[SEAL]

My Commission Expires: