COURT OF COMMON PLEAS
CIVIL DIVISION
BROWN COUNTY, OHIO

GEORGE DUNNING, et al.,	)	**CASE NO. CVH 2015-0001**
	)	Judge Scott T. Gusweiler
Plaintiffs,	)	
	)	**DEFENDANT'S**
vs.	)	**MEMORANDUM IN**
	)	**OPPOSITION TO PLAINTIFFS'**
JUDITH A. VARNAU	)	**MOTION TO REMOVE**
	)	**COUNSEL**
Defendant.	)	

Defendant, by and through counsel, in opposition to the Plaintiffs' Motion to Remove (the undersigned) Counsel from this case, submits the following Memorandum.

I. Facts and procedural history

On January 2, 2015, these Plaintiffs through their present counsel filed this Complaint against Dr. Judith Varnau, the Brown County Coroner, and had her served accordingly. The undersigned (no one else having stepped in to represent her interests) filed an appearance on her behalf on January 6, 2015. As this court is aware, this counsel has represented Dr. Varnau in other matters and has for years, both related to her job as coroner and otherwise. Plaintiffs made no objection. The matter was set for a hearing on January 15, 2015, and this counsel on Defendant's behalf requested it be continued. Plaintiffs made no objection. The hearing was then continued to February 4, 2015.

Defendant, this counsel filed an Answer of Dr. Varnau's behalf on January 20, 2015. Plaintiffs again made no objection. That was followed, again by this same counsel on Defendant's behalf, with a Motion to Dismiss (etc.) filed on January 27, 2015. On the same day, this court signed an entry appointing Attorney Charles Robert Junk as

government counsel for Dr. Varnau, and he then filed an appearance and requested a continuance of the February 4, 2015, hearing date. Plaintiffs subsequently filed a Memorandum opposing this Counsel's Motion to Dismiss, etc., but without complaining about whom on Dr. Varnau's behalf filed that Motion.

The matter was set for phone conference on February 3, at which time all counsel participated, including the undersigned and Mr. Junk. Prior to the phone conference Plaintiffs caused to be filed their Motion for Contempt against Dr. Varnau, also serving this counsel, requesting substantial and punitive sanctions against Dr. Varnau, personally and individually. At the February 3, 3015, phone conference the court inquired and was informed that both this counsel and Mr. Junk would be jointly representing Dr. Varnau. Again, no party of counsel voiced any concerns or objections. The hearing was reset with all counsel's assent for March 7, 2015.

Dr. Varnau filed a Memorandum in Response to the Motion for Contempt on February 9, 2015, and Plaintiffs filed a Reply, again not complaining about whom or how Dr. Varnau was being represented in this matter.

Plaintiffs' pleadings frequently submit and attach and rely on correspondence between this undersigned counsel and others in support of their claims and defenses, without reservation or objection.

The hearing set by this court for March 7 is less than two weeks away. On or about February 17, 2015, and about 3 weeks and multiple pleadings after Mr. Junk appeared in the case and advised the court that both counsel would be working together for Dr. Varnau (with Mr. Junk's consent), Plaintiffs have filed a Motion to Remove Dr. Varnau's other chosen counsel from the case, and including the quite frankly

unprecedented request that all prior pleadings, filed without contemporaneous objection, be stricken from the record.

II. Law and argument.

A. Standard and burden of proof on motion to remove or disqualify counsel.

The burden is always on a movant to prove disqualification is required. *Centimark Corp. v. Brown Sprinkler Serv., Inc*., 85 Ohio App.3d 485, 489, 620 N.E.2d 134 (11th Dist. 1993). Because disqualification of one's chosen counsel is a "drastic measure," and the judicial system has an obligation to "stop any attempt by counsel to use the motion to disqualify as a trial tactic to delay proceedings, deprive the opposing party of counsel of [her] choice, or as a tool to harass, embarrass and frustrate the opponent," *Ross v. Ross*, 94 Ohio App.3d 123, 132, 640 N.E.2d 265 (8th Dist. 1994), disqualification should not be granted unless it is "absolutely necessary." *Hall v. Tucker*, 169 Ohio App.3d 520, 524, 2006-Ohio-5895, 863 N.E.2d 1064 (4th Dist.). "Disqualification is such a drastic measure that it should be invoked if, and only if, the court is satisfied that real harm is likely to result from failing to invoke it." *Hayes v. Central States Orthopedic Specialists, Inc*., 51 P.3d 562, 565 (Ok. 2002).

As one court stated it:

> The disqualification of counsel is a drastic measure. A violation of the Code of Professional Responsibility, alone, should not result in disqualification, unless it is absolutely necessary. Furthermore, disqualification should not be based solely upon allegation of a conflict of interest. Even if the requested disqualification is allegedly based on ethical considerations, the party moving for disqualification still bears the burden of demonstrating the need to disqualify counsel. When the moving party cannot demonstrate the necessity to disqualify counsel, disqualification is improper.

Kitts v. U.S. Health Corp., 97 Ohio App. 3d 271, 275, 646 N.E.2d 555 (4th Dist. 1994). It

is not so necessary or justified to any degree under the circumstances of this case.

For example, the mere allegation that allowing representation to continue, or allowing it raises a "possibility" of some impropriety is not enough to meet their burden. *Morgan v. North Coast Cable Co*., 63 Ohio St.3d 156, 160, 586 N.E.2d 88 (1992); *Phillips v. Haidet*, 119 Ohio App.3d 322, 327, 695 N.E.2d 292 (3d Dist. 1997). Even an allegation of an ethics violation, if unsupported by evidence, is not enough to justify the drastic action of disqualification. *Hollis v. Hollis*, 124 Ohio App.3d 481, 485, 706 N.E.2d 798 (8th Dist. 1997).

B. Plaintiffs' have no standing to seek removal of another party's counsel unless there is a conflict with Plaintiffs' attorney-client relationship or confidentiality.

Plaintiffs, strangers to Dr. Varnau's attorney-client relationship, have no standing to complain or challenge her choice of counsel – when it is not a breach of Plaintiffs' own attorney-client relationship. See *Morgan v. North Coast Cable Co*., 63 Ohio St.3d 156, 159, 586 N.E.2d 88 (1992); *Witschey v. Medina Cty. Bd. of Commrs*., 169 Ohio App.3d 214, 224, 2006-Ohio-5135, 862 N.E.2d 535, ¶ 32 (9th Dist.) ("[S]trangers to the attorney-client relationship lack standing to assert that a conflict of interest exists.").

As with much of what Plaintiffs are complaining about regarding Dr. Varnau, who and how she is being represented is also none of their business.

C. Plaintiffs' waived any complaint and acquiesced in Dr. Varnau's representation by private counsel.

The current representation has existed since the beginning of this case, and for a substantial time both before and after Mr. Junk appeared, and during the most important part of the case: the merits both procedurally and substantively, and the upcoming hearing. Although having numerous opportunities to do so, even using the words of this

counsel in the capacity of Dr. Varnau's attorney to his (perceived) advantage, no complaint was raised when it could and should have been, if ever. Now after Dr. Varnau's chosen counsel is integrated in the representation and planning of the case, Plaintiffs seek to derail that, too.

A party may be held to have waived the right to object to an attorney's subsequent representation by failure to timely raise an objection. See, *Sarbey v. National City Bank, Akron*, 66 Ohio App.3d 18, 28-29, 583 N.E.2d 392 (9th Dist. 1990) (dealing with an actual conflict of interest). Generally, the time within which to raise an objection is promptly after the onset of litigation or within a reasonable time thereafter. Id. (citing cases finding a waiver by failure to object after only ten days). As one court stated:

> A recurring theme throughout these cases that have recognized waiver as a basis for denying motions for disqualification is the need to insure that such motions are not used for strategic purposes.

Barberton Rescue Mission v. Hawthorn, 9th Dist. Summit No. 21220, 2003-Ohio-1135, ¶ 5-7, citing *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985) ("disqualification motions must be diligently pursued to avoid waiver and may not be used as strategic litigation tactics"). See also, *Cox v. American Cast Iron Pipe Co*., 847 F.2d 725, 729 (11th 1988); *Williams v. Bell*, 793 So. 2d 609, 613 (Miss. 2001) ("Failure to move for disqualification at the earliest practical opportunity will constitute waiver[]").

Any complaint has therefore been waived by acquiescence. See also, Annotation, 52 A.L.R. 2d 1243, 1268 (1957), section 9.

D. Defendant is entitled to be represented by counsel of her choice, at her own expense, even if official counsel is also provided.

There is nothing in the statutes Plaintiffs cite that prohibits a county official from being represented by counsel of their choice, even if also represented by official or

county-appointed "official" counsel. R.C. 309.09(A) only provides what a county prosecuting attorney must or "shall" do. R.C. 309.14(A) says what the court "may" do if there is a conflict between the county prosecutor and the county official. Neither statute prohibits any county official from doing anything or being represented by anyone, and expressly prohibits private counsel only if "at the expense of the county." By the clear, precise, and express terms of the Statute, the coroner is only prevented from charging the County, unless her attorney is appointed by the County pursuant to R.C. 3015.14. It says nothing about stopping any county official from hiring, on their own, anyone they want.

As with so many of the arguments Plaintiffs rely upon to sustain their case, this one also requires the court to rewrite the statute, to pretend like the qualifier "at the expense of the county" doesn't mean anything, since if *all* private counsel were prohibited that text would be meaningless. If the Legislature meant to restrict a coroner's representation, even at her own expense, to only the county-appointed attorney, it could have said so. Not saying so is on purpose. *State ex rel. Butler Twp. Bd of Trs. v. Mont. Cty. Bd. of Comm'rs*, 124 Ohio St.3d 390, 394, 2009-Ohio-169, 922 N.E.2d 945, ¶ 21. An unambiguous statute must be applied consistent with the plain meaning of the statutory language, and a court cannot ignore or *add* words. *Portage Cty. Bd. of Commrs. v. City of Akron*, 109 Ohio St. 3d 106, 116, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52. But that is what Plaintiffs (again) require the court to do.

Of course any litigant is entitled to the legal counsel of their choice. See, e.g., *Martinez v. Yoho's Fast Food Equip*., 10th Dist. Franklin No. 00AP-441, 2000 Ohio App. LEXIS 5946, at 8 ("Although some recent decisions have called the analysis in *Russell* and *Guccione* into question, the fundamental predicate of *Russell* and *Guccione* is that, in

a civil matter, *a party has a substantial right to choose privately retained counsel*.") (Emphasis added). "[A] court may not cavalierly disregard a party's choice of counsel," because a "litigant's request to be represented by counsel of his choice, when freely made, should be respected by the court, unless some legitimate state interest is thwarted . . . ." *In re Estate of Ramun*, 7th Dist. Mahoning No. 05 MA 189, 2007-Ohio-3150, ¶ 15 (addressing grant to out of state attorney pro hac vice status), quoting *State v. Roble*, 6th Dist. No. L-04-1374, 2006-Ohio-328, ¶ 13 (quotations omitted).

By these Statutes, she can just not force the County to pay for the counsel of her choice. But there is no authority to stop her from having someone else, at her own expense. There is of course precedent for allowing a county official to be represented by private counsel of his choice, if at his own expense. See *State ex rel. Varnau v. Wenninger*, 131 Ohio St. 3d 169, 173-174, 2012-Ohio-224, 962 N.E.2d 790.

Plaintiffs have asserted no interest and no authority preventing any county official from hiring anyone they want, as long as they don't seek to make the County pay for it. Even an "appearance of impropriety," although the Coroner exercising her right of counsel is not that, without a ground in a specific disciplinary rule, has no legal significance and is not in and of itself grounds for disqualification. *Kitts v. U.S. Health Corp.*, 97 Ohio App. 3d at 277.

Invoking these Statutes for this purpose is a continuation of Plaintiffs' efforts to intimidate, coerce, and prevent the Coroner's exercise of her statutory authority and duty to seek the truth about what happened in the Brown County Jail, now by not only interfering in her right of counsel that has nothing to do with them, but by continuing to try to make it as expensive as they can for her to complete that duty.

E. The complaint is moot due to appointed counsel adopting the undersigned as co-counsel.

On information and belief county-appointed attorney Mr. Junk is agreeable to and has accepted this counsel as his "co-counsel" on the case, at no additional expense to the County – as he is entitled to do. That should render any complaint these Plaintiffs have, whether they have any standing, right, or authority to make it, moot.

Wherefore the Motion should be denied.

THOMAS G. EAGLE CO., L.P.A.

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Thomas G. Eagle (0034492)
Attorney for Defendant
3386 N. St. Rt. 123
Lebanon, OH 45036
Phone: (937) 743-2545
Fax: (937) 704-9826
Email: eaglelawoffice@cs.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the Attorney for Plaintiffs, Anthony B. Holman and John H. Phillips, 9521 Montgomery Road, Cincinnati, OH 45242, Special Prosecutor Charles Robert Junk, Jr., 100 E. Second Street, Waverly, OH 45690, David R. Kelley & Mark R. Weaver, Special Prosecuting Attorneys for 110, West Main Street, West Union, OH 45693, Niroshan M. Wijesooriya, 2712 Observatory Ave, Cincinnati, OH 45208 by ordinary U.S. Mail this _____ day of February, 2015.

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Thomas G. Eagle (0034492)