

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	Case No. 2:06-cv-00896-ALM-TPK
Plaintiffs,	:	Judge Algenon Marbley
vs.	:	DECLARATION OF SUBODH CHANDRA
J. KENNETH BLACKWELL, in his official capacity as Secretary of State of Ohio,	:	
Defendant.	:	
	:	
	:	

I, Subodh Chandra, respectfully submit this declaration under 28 U.S.C. § 1746.

1. I am one of the counsel to Plaintiffs in the above action. This declaration supports the representations that my counsel made in the Memorandum of Subodh Chandra in Response to the Motion of Defendant J. Kenneth Blackwell for an Order to Show Cause filed on November 20, 2006.
2. On the afternoon of November 17, 2006, I sent an email (copy attached) directly to 87 of the 88 county boards of election in Ohio and to counsel that I knew had claimed to be representing the 88th county board of elections (Franklin County). I copied co-counsel and opposing counsel on the email. The email forwarded a prior Secretary of State email to the boards.
3. I apologize for sending this email. I take full and sole responsibility for sending it.
4. I did not intend through this act to usurp or undermine the authority of the Court. Nor did I intend to show any disrespect to opposing counsel. I also did not intend to violate any orders of this Court or the Ohio Code of Professional Responsibility.
5. I respectfully and humbly submit to the Court the following information, not to excuse or justify my actions, but to explain my intent in sending the email.
6. My goals were to avoid further court action by encouraging the boards of elections to follow the prior orders of this Court and to consult their legal counsel as needed to

ensure that happened. Previously in this case, I—or others working in cooperation with me—resolved many issues informally with board members or board staff. I had contacted the Court and opposing counsel only when I learned of actual violations of the law and the Court’s orders that my co-counsel and I were unable to remedy through informal means.

7. By sending the email in question, I did not intend to show disrespect to the Court or avoid deferring to it. To the contrary, I was trying to vindicate the Court’s orders without taxing the Court’s resources. I was optimistic that the email would help avert violations before they occurred and thus avoid the need to burden the Court further.
8. When I left the Court after the extended November 14 session (which had started on November 9) in which the Court had mediated the Agreed Enforcement Order, I left feeling, given what the Court and the parties had all gone through over several days, that we should not burden the Court again unless we had an issue both serious and ripe for review and remedy. It is clear now that I misread the situation.
9. It is now apparent that I did not understand this Court’s expectations about communications in this case with boards of elections. I deeply regret that this Court, opposing counsel, and my co-counsel have had to take extra time and energy away from other, more productive work to consider my action.
10. Friday, November 17, 2006 was the tenth day after the November 7 election. After that day, under Ohio law, the boards of elections are allowed and expected to tabulate and forward their vote counts to the Secretary of State. I believed that if any mistakes were made at that point, they would become very difficult to undo.
11. On the evening of Wednesday, November 15, 2006, I received information that that morning, the *Cincinnati Enquirer* had quoted a federal employee of U.S. Representative Jean Schmidt in the still-contested race for Ohio’s second-district congressional seat saying, “voters can’t go back and update their ballots or provide missing forms of ID.” Ohio Revised Code Section 3505.181 provides that, “during the ten days after the day of an election, an individual who casts a provisional ballot...shall appear at the office of the board of elections and provide to the board any additional information necessary to determine the eligibility of the individual who cast the provisional ballot.” Thus voters would have had until November 17 to provide any identification that will help establish their eligibility to vote. Voters relying upon the statement in the *Enquirer* reading region would have been disenfranchised.
12. On the afternoon of November 15, I learned of allegations that staff answering telephone calls at the Warren County Board of Elections were incorrectly advising voters that they should return *after* the ten-day period to provide identification information.

13. Later that same evening, I learned of an allegation that a staff member for the Clermont County Board of Elections had incorrectly told a provisional voter that the voter could not submit any identification until after Friday, November 17.
14. It appeared that voters or the board might have been causing mutual confusion depending on how the question was asked. If the question was when voters could learn whether their provisional ballots were counted, the correct answer is after the ten days. If the question was when certain voters needed to do anything else to ensure their votes were counted, the correct answer would be during the ten days. It seemed that staff might have been unintentionally giving answers that misdirected the voters.
15. On Thursday afternoon, November 16, 2006, I learned that Russ Pry, a member of the Summit County Board of Elections, had concerns about plans by another member of the Summit County Board to try to graft additional criteria onto the eight-factor test for provisional-ballot counting that is in the Ohio Election Code and this Court's orders. Mr. Pry explained his concerns and I agreed that the new criteria would be improper. I did not think that Mr. Pry was seeking my legal advice but rather was conferring on the best strategy for avoiding the problem. Mr. Pry did not say that he was represented by counsel. Still, I suggested that he speak with his county prosecuting attorney for support in persuading other members the board of his position. Mr. Pry indicated that he might do so.
16. On the evening of November 16, 2006, a person who had a conversation with a Portage County Board of Elections member expressed concern to me that the board member had stated an intention to add additional requirements to the criteria for counting provisional ballots.
17. Then, on the morning of Friday, November 17, 2006, I received allegations that the Brown County Board of Elections was prepared to start counting provisional ballots beginning on November 22 and that there was a question about whether the board would permit substitution under the Agreed Enforcement Order. Although those seeking to place observers would attempt to work this out with the Brown County Board, there was a risk that no one would be able to watch or hold the Brown County Board of Elections accountable in their provisional-ballot counting under this Court's Orders. It made it all the more imperative that the provisional-ballot counting occur properly because there might be no one there to ensure that this happened.
18. These facts, as examples of what I was hearing in the numerous telephone calls and emails from around the state — and the fact that the close of business of the 10th day after the election was imminent — concerned me about whether some boards of elections or staffs would properly implement the law and this Court's Consent and Enforcement orders concerning provisional ballots. While I did not believe that there had been actual violations yet, I believed that the circumstances were exigent and that immediate action was necessary to avert them. While I did not know with certainty

how widespread the problems were, my sense based on the frequency of the information coming was that these potential problems could be widespread.

19. I sincerely did not believe that I was expected to communicate with boards of elections through the Court or opposing counsel—a matter on which I plainly stand corrected. Although I considered that option, I decided not to do so because the time was so short and opposing counsel had previously recommended direct contact, as described below, where the circumstances were so exigent. I thought that effort on the tenth day after the election would be futile and would consume time that might then result in the need for further court action.
20. My intention in copying opposing counsel on the email was so they could see my concerns in writing and could react accordingly, including assisting with potential resolutions of the problem.
21. In any case, the Secretary of State's special counsel had previously invited me to communicate with boards directly by email:
 - (a) The day that the Secretary of State was negotiating the November 1 Consent Order and requiring that the Consent Order contain complex statutory language, the Secretary of State issued an advisory that interpreted the word "amend" in the observer-appointment statute in a way that would limit the number of observers that would hold boards accountable to the Consent Order. The previous practice under the identical language in the statute had been that observers (then called challengers) could be freely added by 4:00 pm the Monday before the election. The Secretary of State had changed this. I learned about this before the deadline for observer-list amendments.
 - (b) My clients, who were going to rely on the observers including members of their own organizations to ensure compliance were quite upset. Cleveland attorneys Christopher Thorman and Peter Hardin-Levine, with whom I was coordinating, filed a case on the issue in the Cuyahoga Common Pleas Court on Friday, November 3, 2006 on behalf of another party. That afternoon, I pleaded with Assistant Attorney General Coglianesse to fix the situation or we would have to return to this Court. After Mr. Coglianesse said, "I can't help you," I undertook discussions over the weekend with special counsel, Larry James. Plaintiffs' counsel were prepared to return to this Court if the other party did not successfully resolve the case in Cuyahoga County.
 - (c) On Monday morning, November 6, 2006 around 10 am, Mr. James agreed to a court order in the Cuyahoga County case that would require the Secretary of State to issue forthwith a directive with statewide application undoing his advisory on observer amendments. We received incorrect information from the Secretary of State that the directive had gone out and would be on the website shortly. But it had not gone out and was not posted on the website. By mid-afternoon, with the 4:00 pm deadline looming, I asked Mr. James what was going on. Mr. James

acknowledged the circumstances and then urged us to directly contact the boards of elections. I referred him to Mr. Thorman, and Mr. James or his office then eventually transmitted an Excel spreadsheet containing the email addresses of all boards of elections. The Secretary of State sent out the directive at 3:59 pm and the content was not, in my view, what Mr. James had agreed to or what the Court had ordered as to statewide effect or even an extended deadline until midnight. The directive also expressly challenged the state trial court's authority. When I called Mr. James and asked him about that, he again acknowledged the circumstances and asked if our own email attaching the Court's order and stating the extended deadline had gone out to the boards.

- (d) These recommendations about direct contact and self help were on my mind as I considered how best to resolve the concerns I had accumulated by November 17. I used the Excel spreadsheet that Mr. James' office had forwarded as the source of the list of boards of elections' email addresses.

22. In addition to the above factors, I believed that I was observing the law governing representation of public entities and the ethical rules on attorney contact with represented parties, with which I was familiar because of certain practice experiences. Again, by way of explanation and not justification, these experiences may have narrowed my field of vision as I decided to send the email:

- (a) As Cleveland's law director, I had to research and apply on numerous occasions issues about who the client is and who the client's attorney is when dealing with city actors and other government entities. I also experienced several instances of *ex parte* contact with my clients by lawyers who knew my clients to be represented on the particular matters at issue, whether in or out of litigation, sometimes, in my view, to the clients' detriment. I had the issues thoroughly researched and drafted a standard letter and developed a protocol for city attorneys to use when such contacts occurred.
- (b) As a result of that project, I was familiar with Opinion No. 92-7 of the Ohio Supreme Court Board of Commissioners on Grievance (1992) (attached). I was aware of the Opinion's language that "Technically, the government is always represented by counsel. However, if a government party were always considered to be represented by counsel for purposes of the rule, the free exchange of information between the public and the government would be greatly inhibited For purposes of [DR 7-104(A)(1)], the restriction on communication begins once government counsel has been brought into the matter. However, since it might not always be obvious to the opposing counsel whether or not a government attorney has been brought into the matter, the attorney should identify himself or herself and the purpose of the communication, so that the government employee, public official, or public body would have the opportunity to inform the attorney that the government's counsel has been brought into the matter. At the point when the attorney knows of the government's representation, the attorney would have the ethical

duty to seek consent by opposing counsel in order to communicate with the government party on the matter.” Recollections of these concepts were specifically in my mind as I prepared, consulted about, and sent the email.

- (c) I had had experiences with the unique nature of government entities regarding applying the *ex parte* rule. For example, as special presidential counsel for the American Bar Association, I helped develop the ABA’s response to Attorney General Richard Thornburgh’s efforts to expand the circumstances under which the U.S. government could have *ex parte* contact with represented parties under ABA Model Rule 4.2. As an Assistant U.S. Attorney coordinating health-care fraud investigations, I handled issues regarding the propriety of contacts with represented parties, including other government entities like public hospitals and governmental-insurance providers. When I taught a professional-responsibility course at Case Western Reserve University School of Law, I devoted a substantial portion of class time and reading to the *ex parte* rules because of my own interest in the subject matter based on the above experiences.
 - (d) Finally, I am currently involved in several client engagements where I almost weekly address on the clients’ behalf the *ex parte*-contact issues concerning governments.
23. I also did not believe that the Secretary of State or Attorney General represented or even could represent the boards of elections in the matter. Rather, I was under the belief that the boards are separate legal entities with the Secretary of State having limited jurisdiction over them. I did not believe that boards of elections are automatically represented by county prosecutors at all times. Rather, I believed that under O.R.C. 309.09, county prosecuting attorneys are available to represent a board if the board so directs, is a party to a suit, or decides that it requires instructions from the prosecuting attorney.
24. Because assistant Franklin County prosecuting attorneys had appeared as nonparties in negotiations on the Agreed Enforcement Order I substituted assistant prosecuting attorney Patrick Piccininni’s email address for the email address that Mr. James had provided for the Franklin County Board of Elections. I requested Mr. Piccininni share the email with the members and director of the Franklin County Board of Elections.
25. My intention with the language in the email encouraging the boards to speak with their county prosecuting attorneys and have them contact me for further discussion was to avert the substantive problems, avoid further litigation, and to help inform me whether in fact the boards’ counsel has been brought into the matter. I was aware that many if not most boards of elections’ members are attorneys.
26. On November 17, as I was gathering information and formulating a strategy, I spoke with three different attorneys who have been involved in the issues in this case,

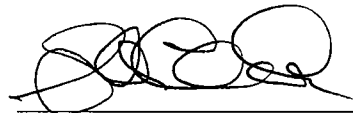
including trial counsel on this case. Without waiving privilege, confidences, and work-product, and while I take full and sole responsibility for sending the email, after the conversations, I continued to believe that I was on solid legal ground. I regret that I did not see that it breached this Court's expectations about communication with boards in the case.

27. Throughout the course of this litigation, and related litigation, I have had informal direct and indirect contact and observations with persons members and staff of boards of elections, from members, to poll workers, to telephone operators, where I did not know these officials to be represented by counsel. I never imagined those conversations to be improper. All the information that surrogates and I gathered about violations and possible violations of the Ohio Revised Code, Constitution, Consent Order, and Agreed Enforcement Order in this case came from countless such contacts. At no time that I was engaging in that kind of information flow did I believe that I was improperly communicating or causing others to communicate with represented parties. I considered these contacts unremarkable and vital to identifying and informally resolving problems, and if necessary bringing issues to this Court's and other courts' attention.
28. With all such communications, however, I was sensitive to contact-with-represented-parties issues. On Election Night, Cuyahoga County prosecuting attorneys contacted me after I had filed voting-related litigation. Two board officials with whom I previously had been freely speaking then called me in succession trying to discuss the matter. I told the officials that I could not speak with them until the case was over because they were represented by counsel. I terminated the conversations immediately. I did not speak with either official again until their portion of the case was resolved a few hours later. Throughout these voting-related cases, I have been drawing lines and believed that I was drawing them correctly and ethically.
29. My sense was that many boards of elections officials (again, whom I believed to be unrepresented) wanted to communicate with Plaintiffs' counsel directly. For example, I exchanged telephone messages with Tim Burke, who is a member of the Hamilton County Board of Elections about this litigation and his possible participation in this Court's discussions about the Agreed Enforcement Order.
30. Opposing counsel were aware from numerous conversations we had throughout the litigation that I was gathering information from and communicating my views to, directly and indirectly, boards of elections. This was never before a point of contention. As mentioned, above, moreover, Mr. James had already encouraged direct email communication with the boards. When I sent the email, I did not consider that doing so was much different than the prior course of conduct. I am deeply sorry that I misjudged the situation.
31. It is my fervent desire, on behalf of my clients, that every legitimate vote be counted in the 2006 election. In the days ahead if I become aware of any alleged violations of

law related to the above case that I cannot resolve informally, I will bring them to the attention of opposing counsel and the Court.

32. Although it was not my intention, after the November 17 conference call with the Court, I recognize that I offended the Court's sense about the proper protocol in this case. All lawyers are trained to respect courts generally and I am no exception. My experience with this Court on this case has led me to respect and appreciate this Court immensely. This Court set aside its calendar, invested substantial time, and supervised the production of two agreements among the parties under circumstances that were challenging given the parties' divergent interests. Given all of that, I am particularly disappointed to have offended this Court.
33. I respect this Court. I respect this Court's process. And I ask that this Court forgive me.

I make this declaration under penalty of perjury under the laws of the United States of America.



SUBODH CHANDRA

11/21/2006

DATE

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2006, the foregoing was served on all counsel of record via the Court's CM/ECF.

/s Albert G. Lin

Albert G. Lin