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THE THIRD JUDICIAL CIRCUIT
OF MICHIGAN

April , 2007

Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Attention: Mr. Corbin R. Davis
Clerk of the Court

Re: Trial Lawyers Association of Wayne County Juvenile Court, et al v. Hon. Mary Beth Kelly, Chief Judge Third Judicial Circuit Court, et al
Supreme Court Docket No. 133616

Dear Mr. Davis:

Enclosed please find for filing on behalf of the defendants in the above-captioned matter, eight copies of defendants' answer to the complaint for superintending control, brief in support of answer, exhibits, defendants' response to plaintiffs' motion for immediate consideration and objections to plaintiffs' first set of interrogatories and first request for production of documents and proof of service.

Very truly yours,

Gregory J. Kocab
Judicial Assistant

enc.

cc: Hon. Mary Beth Kelly — Chief Judge
Bernard J. Kost — Executive Court Administrator
Julie H. Hurwitz, Esq. — Attorney for Plaintiffs

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

TRIAL LAWYERS ASSOCIATION OF WAYNE COUNTY JUVENILE COURT; SUE E. RADULOVICH, P.C.; SUE E. RADULOVICH, as Next Friend of NADIA E., a Minor; SUE E. RADULOVICH, as Next Friend of TOMMIE P., a Minor; DEBORAH TRENT; DEBORAH TRENT, as Next Friend of TONY B., a Minor; MURIEL SHILLINGFORD; MURIEL SHILLINGFORD, as Next Friend of KIMBERLY S., a Minor; JEREMY BRAND; JEREMY BRAND, as Next Friend of NAOMI S., a Minor; JEREMY BRAND, as Next Friend of KYISHIA R., a Minor; JEREMY BRAND, as Next Friend of TERRI N., a Minor; SYDNEY L. RUBY; SYDNEY L. RUBY, as Next Friend of CLARENCE S., a Minor; SYDNEY L. RUBY, as Next Friend of of WILLIAM and WESLEY D., Minors; PATRICK DEVINE; PATRICK DEVINE, as Next Friend of JUSTIN S., on behalf of themselves and all others similarly situated,

Plaintiffs,

-v- Docket No. 133616

HON. MARY BETH KELLY, CHIEF JUDGE THIRD JUDICIAL CIRCUIT COURT, in her official administrative capacity; THIRD JUDICIAL CIRCUIT COURT, jointly and severally,

Defendants.

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ANSWER TO COMPLAINT FOR SUPERINTENDING CONTROL
AND AFFIRMATIVE DEFENSES
BRIEF IN SUPPORT OF ANSWER
EXHIBITS
PROOF OF SERVICE

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

TRIAL LAWYERS ASSOCIATION OF WAYNE COUNTY JUVENILE COURT; SUE E. RADULOVICH, P.C.; SUE E. RADULOVICH, as Next Friend of NADIA E., a Minor; SUE E. RADULOVICH, as Next Friend of TOMMIE P., a Minor; DEBORAH TRENT; DEBORAH TRENT, as Next Friend of TONY B., a Minor; MURIEL SHILLINGFORD; MURIEL SHILLINGFORD, as Next Friend of KIMBERLY S., a Minor; JEREMY BRAND; JEREMY BRAND, as Next Friend of NAOMI S., a Minor; JEREMY BRAND, as Next Friend of KYISHIA R., a Minor; JEREMY BRAND, as Next Friend of TERRI N., a Minor; SYDNEY L. RUBY; SYDNEY L. RUBY, as Next Friend of CLARENCE S., a Minor; SYDNEY L. RUBY, as Next Friend of WILLIAM and WESLEY D., Minors; PATRICK DEVINE; PATRICK DEVINE, as Next Friend of JUSTIN S., on behalf of themselves and all others similarly situated,

Plaintiffs,

-v- Docket No. 133616

HON. MARY BETH KELLY, CHIEF JUDGE THIRD JUDICIAL CIRCUIT COURT, in her official administrative capacity; THIRD JUDICIAL CIRCUIT COURT, jointly and severally,

Defendants.

ANSWER TO COMPLAINT FOR SUPERINTENDING CONTROL AND AFFIRMATIVE DEFENSES

Now come defendants, the Hon. Mary Beth Kelly, Chief Judge of the Third Circuit Court, and the Third Circuit Court, through their attorney, Gregory J. Kocab, Office of the Judicial Assistant for the Third Circuit Court, and for their Answer to the Complaint for

Superintending Control state as follows:

1. Admit in part as to the nature of the challenge, but deny that the plaintiffs have standing to represent "all children who are now or who will be under the jurisdiction of the ... Court ..."

2. Admit in part as to the nature of the challenge, but deny the remainder of the allegations insofar as they amount to legal conclusions.

3. Admit the description of the nature of the challenge, but deny the remainder of the allegations insofar as they amount to legal conclusions.

4. Neither admit nor deny but leave plaintiffs to their proofs.

5. Admit as to the adoption of Third Circuit Court Local Administrative Order (LAO) 2006-08 and that contracts for the provision of counsel for juveniles were awarded, but neither admit nor deny the remainder of the allegations but leave plaintiffs to their proofs.

6. Admit with respect to the articulation of certain factors that were stated in the Court's Request for Proposal, but by way of further answer notes that the plaintiffs omit that one of the other criteria for selection was the "expertise and past experience in providing legal representation to juveniles in general and in particular in Wayne County."

7. Admit that under LAO 2006-08, the Chief Judge of the Third Circuit Court has the authority to remove previously appointed counsel for juveniles but otherwise deny the remainder of the allegations as being untrue or articulating erroneous legal conclusions.

8. Deny for the reason that the allegations are either untrue or are speculative.

9. Admit that some attorney client relationships have been terminated as a result of the implementation of LAO 2006-08 but that such terminations only occurred in post-dispositional proceedings, and otherwise deny the remainder of the allegations as either untrue or stating erroneous legal conclusions.

10. Deny for the reason that the allegation is untrue.

11. Deny for the reason that the allegations are either untrue or are erroneous legal conclusions.

12. Deny for the reason that the allegations are either untrue or are erroneous legal conclusions.

13. Admit that the Supreme Court has jurisdiction over writs of superintending control.

14. Admit, but further assert that none of the various constitutional or statutory cites mentioned have been violated.

15. Neither admit nor deny for lack of sufficient information.

16. Neither admit nor deny for lack of sufficient information.

17. Neither admit nor deny for lack of sufficient information.

18. Neither admit nor deny for lack of sufficient information.

19. Neither admit nor deny for lack of sufficient information.

20. Neither admit nor deny for lack of sufficient information.

21. Neither admit nor deny for lack of sufficient information.

22. Admit.

23. Admit.

24. Admit that Radulovich received orders of removal of assigned counsel, but deny that said orders required her to turn over her files to unnamed counsel. By way of further answer, the orders of removal required her to provide to successor counsel, at most, five documents: the petition and any supplemental petitions; any findings of fact or law; any orders; the most recent court report and the most recent placement information about the juvenile including the name, address and telephone number of the current caregiver.

25. Admit but deny said orders of removal were without good cause.

26. Admit.

27. Admit that Radulovich received an order removing her as counsel for plaintiff Nadia E. Neither admit nor deny the remainder of the allegations for lack of sufficient information, but by way of further answer notes that Radulovich's motion to strike orders of removal included plaintiff Nadia E, and as noted in the Court's Opinion, p 1, n 1, Radulovich chose to base her motion on certain legal arguments and not on the basis of a particularized showing contemplated by LAO 2006-08(III)(D)(3). Further, Radulovich did not seek leave to appeal.

28. Admits that Radulovich received an order removing her as counsel for plaintiff Tommie P. Neither admit nor deny the remainder of the allegations for lack of

sufficient information, but by way of further answer notes that Radulovich's motion to strike orders of removal included plaintiff Tommie P. and as noted in the Court's Opinion, p 1, n 1, Radulovich chose to base her motion on certain legal arguments and not on the basis of a particularized showing contemplated by LAO 2006-08(III)(D)(3). Further, Radulovich did not seek leave to appeal.

29. Neither admit nor deny for lack of sufficient information.

30. Neither admit nor deny for lack of sufficient information.

31. Admit.

32. In part, neither admit nor deny for lack of sufficient information, but deny that Trent was removed without good cause on the record.

33. Admit.

34. Neither admit nor deny for lack of sufficient information.

35. Neither admit nor deny for lack of sufficient information.

36. Neither admit nor deny for lack of sufficient information.

37. Admit.

38. Neither admit nor deny for lack of sufficient information.

39. Admit that Shillingford was removed as counsel from cases but deny that she was removed without good cause.

40. Neither admit nor deny for lack of sufficient information.

41. Neither admit nor deny for lack of sufficient information.

42. Neither admit nor deny for lack of sufficient information.

43. Admit.

44. Neither admit nor deny for lack of sufficient information, but deny that plaintiff Brand was removed without good cause.

45. Admit in part but deny that plaintiff Brand was removed as counsel without good cause.

46. Neither admit nor deny for lack of sufficient information.

47. Neither admit nor deny for lack of sufficient information.

48. Neither admit nor deny for lack of sufficient information.

49. Neither admit nor deny for lack of sufficient information, but by way of further answer state that pursuant to LAO 2006(III)(D)(2) removal of counsel was authorized only in post-dispositional proceedings.

50. Neither admit nor deny for lack of sufficient information.

51. Admit.

52. Neither admit nor deny for lack of sufficient information.

53. Neither admit nor deny for lack of sufficient information.

54. Neither admit nor deny for lack of sufficient information.

55. Admit.

56. Neither admit nor deny for lack of sufficient information.

57. Admit.

58. Neither admit nor deny for lack of sufficient information.

59. Neither admit nor deny for lack of sufficient information.

60. Neither admit nor deny for lack of sufficient information.

61. Neither admit nor deny for lack of sufficient information.

62. Neither admit nor deny for lack of sufficient information.

63. Admit.

64. Neither admit nor deny for lack of sufficient information.

65. Admit.

66. Neither admit nor deny for lack of sufficient information.

67. Neither admit nor deny for lack of sufficient information.

68. Admit.

69. Deny as erroneous the characterization of the Third Circuit Court as a "county court," but admit that the Third Circuit Court through its Juvenile Section of the Court's Family Division has jurisdiction over child protective proceedings and delinquency matters arising within Wayne County, Michigan.

70. Admit.

71. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

72. Admit.

73. Admit.

73(a). Admit as to the accuracy of the cite to LAO 2006-08, but deny the remainder of the allegations.

73(b). Admit in part but deny as to characterization of the Chief Judge's discretion as being "unfettered."

73(c). Admit in part regarding the requirement that attorneys must make motions to remain assigned counsel but deny the remainder of the allegation.

74. Deny for the reason that this paragraph states an erroneous conclusion of law.

75. Admit.

76. Admit, but by way of further answer, the Request for Proposal also required prospective bidders to demonstrate "expertise and past experience in providing legal representation to juveniles in general in particular in Wayne County."

77. Deny that the Court in awarding contracts under the RFP did not take into consideration the best interests of juveniles.

78. Neither admit nor deny for lack of sufficient information.

79. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further the defendants incorporate by reference the foregoing answers to the previous allegations.

80. Admit that certain organizations have adopted certain standards regarding the effective representation of juveniles, but deny that those standards are legally

binding on this Court or otherwise applicable to this case.

81. Admit that suggestions were made to the Michigan Supreme Court State Court Administrative Office (SCAO), but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

82. Admit the accuracy of the quote from the recommendations issued by the National Ass'n of Counsel for Children, but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

83. Admit the accuracy of the quote from the recommendations issued by the National Ass'n of Counsel for Children, but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

84. Admit that the Muskie School of Public Service at the Cutler Institute for Child and Family Policy and the American Bar Association on Children and the Law (Muskie-ABA) made recommendations to SCAO, but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

85. Admit the accuracy of the quote from the recommendations issued by the Muskie-ABA, but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

86. Admit the accuracy of the quote from the recommendations issued by the Muskie-ABA, but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

87. Admit that the Bureau of Justice Assistance issued a report and that the plaintiffs have accurately quoted from the report, but by way of further answer assert that there is no proof that either the Supreme Court or SCAO adopted these recommendations as binding on Michigan trial courts.

88. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further the defendants incorporate by reference the foregoing answers to the previous allegations.

89. Admit that the Third Circuit Court's Director of Assigned Counsel circulated to then current assigned counsel an e-mail, but deny that this e-mail was in violation of law.

90. Admit.

91. Admit in part but deny that the notice interfered with assigned counsel's ability to represent the best interest of their clients.

92. Neither admit nor deny for the reason that this allegation calls for speculation.

93. Admit in part but deny that removals were not for good cause.

94. Neither admit nor deny for the reason that the Juvenile Task Force Report speaks for itself, but by way of further answer states that one problem identified by the Report was that of the frequency of substituted counsel.

95. Admit, but by further answer note that LAO 2006-08 empowered the Chief Judge to reassign counsel during the post-dispositional stage of a case in order to implement the LAO.

96. Admit.

97. Admit in part but deny that removals were not for good cause.

98. Admit.

99. Deny.

100. Deny.

101. Admit in part but deny that Radulovich only filed her motion on behalf of 35 children, and that the Court's Opinion, p. 1, n. 1, reflects she was representing 63 juveniles whom she purported to represent.

102. Admit that Chief Judge Kelly on January 30, 2007, issued an Opinion and Order denying Radulovich's Motion to Strike Orders of Removal of Counsel, but deny the remainder of the allegations.

103. Deny. By way of further answer state that in numerous cases the Chief Judge has granted motions by counsel to remain assigned to represent a juvenile, that Radulovich in her motion chose only to make legal arguments as opposed to an individual showing why special circumstances would justify the retention of assigned counsel, and that Radulovich chose not to seek leave to appeal the denial of her motion.

104. Neither admit nor deny what motivated the other named attorneys not to bring motions to remain on cases but by way of further answer state that such motions were not futile, and that in numerous cases the Chief Judge had granted motions

by counsel to remain assigned to represent a juvenile.

105. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

106. Neither admit nor deny for lack of sufficient information.

107. Neither admit nor deny for lack of sufficient information.

108. Neither admit nor deny for lack of sufficient information.

109. Deny for the reason that the contract system was premised on prospective vendors taking into account the time and effort necessary to effectively represent juveniles and using that as a basis for their bid.

110. Deny for the reason that this is untrue.

111. Admit.

112. Admit that the Court does not oversee what private legal groups or non profit corporations pay their attorneys.

113. Admit with respect to the contents of the Third Circuit Court's 2005 Annual Report, but deny the remainder of the allegations.

114. Neither admit nor deny because this paragraph sets forth a general legal conclusion.

115. Admit.

116. Admit that the Court's proposal did not include a provision for Court oversight of the vendors' attorneys to insure that the vendors' attorneys would not be confronted with a conflict of interest; such, however, is the professional responsibility of the vendors' attorneys, not the Court.

117. Neither admit nor deny for lack of sufficient information the number of children who are African-American, but deny the remainder of the paragraph for the reason that it is untrue.

118. Neither admit nor deny because this paragraph sets forth an opinion or legal conclusion.

119. Neither admit nor deny because this paragraph sets forth opinions.

120. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

121. Admit.

122. Deny that the plaintiffs lack an adequate remedy and by further answer maintain that counsel remained free to file motions asking to be retained as counsel and could have raised their legal challenges therein, as was done by Radulovich, and could have sought further relief through applications for leave to appeal any adverse orders entered by the Court. Further, resort to the jurisdiction is unnecessary to challenge the validity of a local administrative order since the substantive merits of a local administrative order could be adjudicated in the course of appellate proceedings in the Court of Appeals.

123. Neither admit nor deny because the allegations state legal conclusions and are based on speculation and by further answer state that these plaintiffs lack standing to represent the interests of children with whom they have no professional relationship.

124. Neither admit nor deny because this allegation asserts a legal conclusion.

125. Deny for the reason that it calls for speculation, and by further answer state that these plaintiffs lack standing to represent the interests of children with whom they have no professional relationship.

126. Neither admit nor deny for the reason that this paragraph states a legal conclusion and is based on speculation, and by further answer state that these plaintiffs lack standing to represent the interests of children with whom they currently have no professional relationship.

127. Neither admit nor deny for the reason that this paragraph states a legal conclusion and by further answer state that these plaintiffs lack standing to represent the interests of children with whom they have no professional relationship.

128. Neither admit nor deny for the reason that this paragraph states a legal conclusion.

129. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

130. Neither admit nor deny for the reason that this paragraph states a legal conclusion and by further answer state that these plaintiffs lack standing to represent the interests of children with whom they have no current professional relationship.

131. Admit that the Chief Judge has a clear legal duty not to violate the several statutes cited in paragraph 130.

132. Deny for the reason that this paragraph states erroneous legal conclusions.

133. Deny for the reason that this paragraph states erroneous legal conclusions.

134. Deny for the reason that this this paragraph states an erroneous legal conclusion.

135. Deny for the reason that plaintiffs have an adequate remedy at law.

136. Deny that children are denied the effective representation of counsel for the reason that it is untrue.

137. Deny for the reason that the allegations state erroneous legal conclusions.

138. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

139. Neither admit nor deny for the reason that this allegation sets forth legal conclusions.

140. Neither admit nor deny because the identity of the parties asserting the alleged interest is ambiguous and for the further reason that this allegation sets forth legal conclusions.

141. Deny that LAO 2006-08 violates the plaintiffs' children's right to effective assistance of counsel for the reason that each of the subsections of this paragraph states erroneous legal conclusions or factual assumptions.

142. Deny for the reason that this paragraph states an erroneous legal conclusion.

143. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

144. Deny for the reasons set forth in answer to paragraphs 138-142.

145. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

146. Neither admit nor deny because the allegations set forth legal conclusions.

147. Deny as being untrue.

148. Deny for the reason that the statements and conclusions made in this allegation are untrue.

149. Admit that the plaintiffs have reincorporated their previously asserted allegations, and further incorporate by reference the foregoing answers to the previous allegations.

150. Neither admit nor deny because the allegations set forth legal conclusions.

151. Neither admit nor deny because the allegations set forth legal conclusions.

152. Neither admit nor deny because the allegations set forth legal conclusions.

153. Neither admit nor deny because the allegations set forth legal conclusions.

154. Neither admit nor deny because the allegations set forth legal conclusions.

AFFIRMATIVE DEFENSES

1. The plaintiffs have an adequate remedy at law that they have failed to exhaust.

2. The plaintiffs come to the Court with unclean hands.

3. The plaintiffs' complaint is barred by the doctrine of laches.

4. The plaintiff Trial Lawyers Association of Wayne County Juvenile Court lacks standing to represent juveniles who are subject to the jurisdiction of the Court in delinquency or neglect cases. The plaintiffs individual attorneys lack standing to represent all juveniles who either were not their former clients or who they never represented.

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DATED: April 17, 2007

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

TRIAL LAWYERS ASSOCIATION OF WAYNE COUNTY JUVENILE COURT; SUE E. RADULOVICH, P.C.; SUE E. RADULOVICH, as Next Friend of NADIA E., a Minor; SUE E. RADULOVICH, as Next Friend of TOMMIE P., a Minor; DEBORAH TRENT; DEBORAH TRENT, as Next Friend of TONY B., a Minor; MURIEL SHILLINGFORD; MURIEL SHILLINGFORD, as Next Friend of KIMBERLY S., a Minor; JEREMY BRAND; JEREMY BRAND, as Next Friend of NAOMI S., a Minor; JEREMY BRAND, as Next Friend of KYISHIA R., a Minor; JEREMY BRAND, as Next Friend of TERRI N., a Minor; SYDNEY L. RUBY; SYDNEY L. RUBY, as Next Friend of CLARENCE S., a Minor; SYDNEY L. RUBY, as Next Friend of WILLIAM and WESLEY D., Minors; PATRICK DEVINE; PATRICK DEVINE, as Next Friend of JUSTIN S., on behalf of themselves and all others similarly situated,

Plaintiffs,

-v- Docket No. 133616

HON. MARY BETH KELLY, CHIEF JUDGE THIRD JUDICIAL CIRCUIT COURT, in her official administrative capacity; THIRD JUDICIAL CIRCUIT COURT, jointly and severally,

Defendants.

BRIEF IN SUPPORT OF ANSWER TO COMPLAINT FOR SUPERINTENDING CONTROL

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INDEX OF EXHIBITS

Exhibit Number	Exhibit Description
A	Affidavit of Chief Judge Mary Beth Kelly
B	Affidavit of David Cucinella
C	Affidavit of Mayssa Attia
D	Affidavit of Judith New and R. William Schooley
E	Affidavit of André Mays
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G	Affidavit of Regina Daniels-Thomas
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STATEMENT OF JURISDICTION

The defendants agree that since the plaintiffs seek to challenge the general practices of the Third Circuit Court as embodied by Third Circuit Court Local Administrative Order 2006-08, the Supreme Court has jurisdiction under its superintending control jurisdiction pursuant to Const 1963, art 6, § 4.

COUNTER-STATEMENT OF ISSUES PRESENTED

I. Should the Supreme Court dismiss the complaint because plaintiffs failed to utilize an adequate alternative remedy, including in the instance of plaintiff Radulovich and the juveniles she purports to represent, seeking leave to the Court of Appeals to appeal the denial of her motion to vacate orders of removal?

The plaintiffs would answer "No."
The defendants answer "Yes."

II. Should the Supreme Court deny relief to the plaintiffs since they come to the Court with unclean hands?

The plaintiffs would answer "No."
The defendants answer "Yes."

III. Should the Supreme Court deny relief to the plaintiffs since their complaint is barred by laches?

The plaintiffs would answer "No."
The defendants answer "Yes."

IV. Should the Supreme Court dismiss the complaint with respect to counts one through four since plaintiffs lack standing?

The plaintiffs would answer "No."
The defendants answer "Yes."

V. Should the Supreme Court deny relief under count one since defendants have not violated the provisions of the Juvenile Code?

The plaintiffs would answer "No."
The defendants answer "Yes."

VI. Should the Supreme Court deny relief under counts two and three since defendants have not violated the Federal or Michigan Constitutions?

The plaintiffs would answer "No."
The defendants answer "Yes."

VII. Should the Supreme Court deny relief under count four since defendants have implemented Third Circuit Court Local Administrative Order 2006-08 so as to insure that the best interests of the juveniles are protected?

The plaintiffs would answer "No."
The defendants answer "Yes."

VIII. Should the Supreme Court deny relief under count five since defendants' orders do not interfere with the property interest or ethical obligations of their former clients?

The plaintiffs would answer "No."
The defendants answer "Yes."

COUNTER-STATEMENT OF FACTS

A. General Overview of Proceedings Involving Juveniles

Pursuant to MCL 600.1021(e), the family division of circuit court has jurisdiction over cases brought under the auspices of the Juvenile Code, MCL 712A.1, et seq.[1] These include so-called delinquency cases in which the juvenile is charged with having committed certain offenses, MCL 712A.2(a), (d), or so-called neglect proceedings, where a person legally responsible for the care of a juvenile is alleged to have neglected to fulfill this duty. MCL 712A.2(b). In both delinquency and child protective cases, there are two major phases of proceedings. The first phase of the case is the adjudication phase. This phase begins with the filing of a petition and extends through the court's determination of whether it has jurisdiction under the Juvenile Code over the juvenile regarding the matter alleged in the petition. The dispositional phase follows adjudication. During this phase, the court determines the appropriate disposition of the case. For delinquency cases, see MCR 3.941; MCR 3.942(d), and for neglect cases see MCR 3.973. After the initial disposition, post dispositional proceedings will occur which involve, for example in neglect cases, the court reviewing placement decisions that may have already occurred. See for example, MCR 3.874(2); MCR 3.975(C). These are held at specific intervals set by the court or by court rule, but often involving a post review hearing every 91 days in the first year post disposition or otherwise 182 days. *Id.*, and MCR 3.976(A); MCR 3.978.

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[1] In the Third Circuit Court, one section of the Court's Family Division is the Juvenile Section. The judges and referees assigned to the Juvenile Section adjudicate delinquency and neglect cases. The Juvenile Section is comprised of the presiding judge and six other judges, as well as the chief referee and thirteen other referees. Affidavit of Bernard J. Kost, ¶ 4.

A juvenile has a right to the appointment of counsel in delinquency matters. MCL 712A.17c(1). Additionally, in neglect proceedings, the court is required to appoint a lawyer guardian ad litem (LGAL) for the juvenile, MCL 712A.17c(7), whose duties are set forth in MCL 712A.17d.

B. Assignment of Counsel and Proceedings in the Juvenile Court Pre Third Circuit Court Local Administrative Order 2006-08

Prior to September 2006, in the Third Circuit Court (the Court), the assignment of lawyers to represent juveniles was regulated by a series of local administrative orders whose provisions relative to the assignment of lawyers in juvenile matters were similar. The last of this series of local administrative orders was Third Circuit Court Local Administrative Order (LAO) 2006-01. See plaintiffs' exhibit 22. Relative to the assignment of lawyers for juveniles, LAO 2006-01 and its predecessors essentially provided for the random selection of attorneys from a group of attorneys who had been previously qualified by the Court to accept assignments to represent juveniles.

According to the Court's records, in 2006, the last year in which assignments under LAO 2006-01 were made, the Court made assignments in juvenile matters to 288 attorneys. Thirty-seven attorneys, including five of the six Plaintiff Attorneys, received in excess of 100 assignments.[2] Affidavit of Bernard J. Kost (hereinafter Kost Aff't) ¶ 5. Payments were made to the attorneys on a per phase or proceeding basis according to the

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[2] Court records reflect that Plaintiff Attorney Brand received 216 assignments; Plaintiff Attorney Devine received 135 assignments; Plaintiff Attorney Radulovich received 121 assignments; Plaintiff Attorney Trent received 118 assignments; Plaintiff Attorney Shillingford received 102 assignments; and Plaintiff Attorney Ruby received 83 assignments. See Kost Aff't ¶ 7.

provisions of a fee schedule. As detailed in Mr. Kost's affidavit, the Plaintiff Attorneys received total compensation far above the average attorney . *Id.*, ¶¶ 6-9. When compared to all attorneys who received compensation from the Court as a result of juvenile assignments, the Plaintiff Attorneys fell within the top 35 or 12% of those attorneys. Kost Aff't ¶ 9.

In 2005, Chief Judge Mary Beth Kelly chaired the Juvenile Docket Task Force, the Report of which is attached as Plaintiffs' exhibit 26. Also see Affidavit of Chief Judge Mary Beth Kelly (hereinafter Judge Kelly Aff't), ¶ 5. Two of the barriers to the speedy and efficient adjudication of juvenile matters identified in the Report, p. 5, were as follows: "Frequently attorneys are scheduled for hearings in both referee and judge courtrooms at the same time, thus causing delays in one or both of the courtrooms." Another barrier identified was substitution of counsel, about which the Report stated, "Many times where there is substitution of counsel, it may cause delays in case processing in order for the new counsel to become familiar with the case." Also see Judge Kelly Aff't ¶ 6.

Chief Judge Kelly recounts in her affidavit the problems that substitution of counsel was a routine occurrence and the problems that it engendered included substituted counsel not being prepared, a poor quality of representation in general, and the necessity for adjournments. *Id.*, ¶¶ 7-8. The Court's records attested to in Chief Judge Kelly's affidavit reflect that the Plaintiff Attorneys were no strangers to this practice. For example, with respect to plaintiff Terri N., who was represented by Plaintiff Attorney Brand, court records reflect that although he appeared at a pre-trial hearing held on January 25, 2005, he missed the next four hearings and did not reappear on the case until October 11, 2006. In the meantime, three different attorneys appeared to represent the juvenile. Judge Kelly

Aff't ¶ 10, Also see Judge Kelly Aff't ¶ 11 for a similar situation with respect to plaintiff Tony B. Further, court records show that during a randomly selected separate two week period, there were over 210 proceedings in which substituted attorneys were used, and that Plaintiff Attorneys used substitutions in a number of these cases. Judge Kelly Aff't, ¶¶ 12-13.

C. Implementing a New Method of Assigning Counsel Under LAO 2006-08.

In an effort to make substitutions less of a problem or at least insure that where substitutions occurred the substituted attorney would have some connection to the case, the defendants decided to move to a system of appointing counsel in which a discrete group of attorneys would have responsibility for representing juveniles in front of one referee. Judge Kelly Aff't ¶ 14. In so doing, the defendants were aware that a similar system had been successfully implemented in the Seventh Circuit Court in 2004. See Affidavit of Barbara Menear; Kost Aff't, ¶ 10.

In April 2006, Chief Judge Kelly authorized a request for proposal (the RFP) to be issued that solicited bids from attorney groups to provide representation for juveniles in neglect and delinquency cases in a particular referee courtroom. Judge Kelly Aff't ¶ 15. A copy of the RFP is attached to plaintiffs' Complaint as exhibit 2. Several factors were used to determine the award of contracts. RFP, p 7, § (III)(D)(2). In response to the RFP, the Court received bids from sixteen attorneys or attorney groups including two of the plaintiffs in the instant case, the Trial Lawyers Association of Wayne County Juvenile Court and Radulovich. Judge Kelly Aff't, 19. After a thorough vetting of the proposals, and based on the recommendations of a committee formed to review the proposals, the defendants entered into two year contracts with the following attorney groups: Legal Aid & Defender

Association (LAD) for six referee courtrooms (effective October 1, 2006), the Michigan Children's Law Center (MCLC) for four referee courtrooms (effective November 1, 2006), the Child Advocacy Program (CAP) and the Child and Family Law Center (CFLC) each for one referee courtroom (each effective December 1, 2006,) and the Juvenile Law Group (JLG) for the half docket of the Chief Referee and other miscellaneous dockets (effective April 16, 2007). Kost Aff't ¶ 11.

In the meantime on September 22, 2006, Chief Judge Kelly promulgated LAO 2006-08, attached as exhibit 1 to the Complaint. Judge Kelly Aff't ¶ 22. On October 27, 2006, the State Court Administrative Office (SCAO) transmitted its approval of LAO 2006-08. Kost Aff't, ¶ 11.

The first of the reassignment orders generated to effect the removal of counsel under LAO 2006-08(III)(D)(2) and reassignment to the attorney groups was issued in October 2006. Ultimately, approximately 3,000 orders were issued. Kost Aff't, ¶ 13. Thereafter, the Court's administrative staff's efforts to effect the new system of assignment began in earnest. Between November 2006 and April 10, 2007, it is estimated that at least approximately 1800 employee hours time was used to implement the new system of assignment. This included numerous meetings between top administrators of the Court, time spent by legal counsel, mid-level managerial meetings, computer programing and work performed by clerical staff. Kost Aff't ¶ 15. It is estimated that in salaries alone the cost to the Court in completing negotiating the remaining contracts and implementing the new system was at least approximately $62,000 in salary (not including the value of fringe benefits chargeable to those salaries). Kost Aff't, ¶ 16. Other facts will be recounted later where factual development is more closely related to a given topic.

ARGUMENT

I. The Supreme Court Should Dismiss the Complaint Because Plaintiffs Have An Adequate Remedy

MCR 3.302(B) states in pertinent part:

> If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed.

MCR 3.302(D)(2) further states:

> (2) When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

As noted in *Bennett v School Dist. of City of Royal Oak,* 10 Mich App 265, 269; 159 NW2d 245 (1968):

> A remedy is not 'inadequate' so as to authorize judicial intervention before exhaustion of the remedy merely because it is attended with delay, expense, annoyance, or even some hardship ... There must be something in the nature of the action or proceeding that indicates to the court that it will not be able to protect the rights of the litigants or afford them adequate redress otherwise than through the exercise of this extraordinary jurisdiction.

In the case at bar, LAO 2006-08 (III)(D)(3), states:

> Upon receiving notice of reassignments, an attorney may bring a motion before the Chief Judge to remain as the assigned counsel *in one or more cases*. Upon a demonstration of special circumstances, the Chief Judge retains the discretion to allow the moving attorney to remain the assigned counsel."
>
> (Emphasis added).

LAO 2006-08(III)(D)(3) established an orderly procedural mechanism for attorneys

who desired to contest orders removing them as assigned counsel under which former counsel could present arguments as to why special circumstances would be present to excuse counsel from being removed. Significantly, the text of that section contemplated that one motion could be filed on behalf of multiple juveniles in multiple cases so that repetitious motions would not need to be filed on behalf of the attorneys affected, and indeed, in the motions that were heard by the Court, this practice was adopted by attorneys who chose to avail themselves of this procedural remedy. See for example, *In the Matter of Jalen R. et al,* Case No. 05-444672, 12–12-06 Tr., p 3, attached to the Affidavit of Chief Judge Kelly's official court reporter, David Cucinella, Exhibit B. In the course of adjudicating motions that were made under this provision, Chief Judge Kelly developed certain objective criteria outlined in her affidavit, such as the age of the juvenile, the length of the representation, how often appointed counsel has had substituted counsel appear, or other special needs of the juvenile.[3] *Id.*, also see Kelly Aff't, Exhibit A, ¶ 29. A denial of that motion could have been appealed to the Court of Appeals through the filing of an application for leave to appeal pursuant to MCR 7.203(B)(1).[4] Indeed, as attested to by

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[3] The fact that Chief Judge Kelly articulated certain factors that would be used in adjudicating these motions refutes the assertion by the plaintiffs that she exercised her discretion without utilizing any standards or in an otherwise arbitrary manner. A review of the transcripts attached to the Cucinella affidavit shows that Chief Judge Kelly applied these standards consistently throughout her adjudication of these motions.

[4] Plaintiffs' conclusory suggestion that an attorney would not have standing to pursue such an appellate remedy is specious in light of their asserted interest in this litigation and their being aggrieved by the denial of such a motion. See generally, 7A Michigan Pleading and Practice, § 54:2, pp 105-106 ("It is well settled that to be entitled to appeal one must be (a) interested in the subject matter of the litigation, and (b) aggrieved by the judgment or order from which the appeal is sought").

Chief Judge Kelly's court reporter, David Cucinella, Court records indicate that at least 97 motions were made on behalf of the juveniles by counsel who found themselves subject to removal orders.

Alternatively, an attorney who wished to contest the general validity of the order or the validity of LAO 2006-08 on behalf of their clients could have done what Plaintiff Radulovich, one of the Plaintiff Attorneys did, namely file a motion to strike the orders of removal of counsel. Significantly, it should be noted that in Radulovich's motion to strike the orders of removal of counsel, she raised the same or similar substantive arguments that are currently being asserted by plaintiffs in this case.[5]

While it may be that filing motions before the Chief Judge contesting orders of removal (either specifically or generally) would have been attended by some delay or expense, as noted in the *Bennett* decision, this alone would not render that remedy inadequate. Moreover, contrary to plaintiffs' summary argument, filing motions under LAO 2006-08(III)(D)(3) would not have been futile. As attested to in Chief Judge Kelly's affidavit, of the 97 motions filed with the Chief Judge for assigned counsel to be excepted from the application of LAO 2006-08(III)(D)(3), the Court granted 68 or 70% of these motions. Resort to filing a motion to remain the assigned counsel was therefore far from futile.

In short, the members of the Trial Lawyers Association of Wayne County Juvenile Court or the Plaintiff Attorneys had an adequate remedy, namely to contest specifically the

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[5] It is altogether unclear why Radulovich chose not to seek leave to appeal the denial of her motion, but the fact remains that she did not. Thus, because she did not seek leave to appeal the Court's January 30, 2007 Opinion and Order denying her motion to vacate orders of removal, no relief should be granted to her or the juveniles that she purports to represent and her claims should be dismissed under MCR 3.302(D)(2).

orders of removal or generally the provisions of the LAO 2006-08 which are now in dispute, and pursuing an appellate remedy if necessary. Accordingly, the Court should dismiss the Complaint pursuant to MCR 3.302(B), (D)(2).

II. The Supreme Court Should Deny Relief to the Plaintiffs Because Plaintiffs Come Before the Court with Unclean Hands

Recently, in *Rose v National Auction Group, Inc,* 466 Mich 453, 463: 646 NW2d 455 (2002), Chief Justice Taylor explained the doctrine of unclean hands,

> ...one who seeks the aid of equity must come in with clean hands... the scope and purpose of the clean hands doctrine ... [is as follows]:
> 'a self-imposed ordinance that closes the doors of a court of equity to *one tainted with inequitableness or bad faith relative to the matter in which he seeks relief*, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.'
> (Emphasis added, authorities omitted).[6]

In the case at bar, the plaintiffs come to this Court with unclean hands. The members of the Trial Lawyers and the Plaintiff Attorneys, or those whom they claim to represent, all contributed to the problems facing the defendants in overcoming the problems associated with excessive substitutions. It is ironic, indeed, that the plaintiffs accuse the defendants of interrupting the attorney-client relationship when, at their whim and convenience, they have felt free to have substitutions appear for them, thus effectively

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[6] Research has not revealed that the Michigan Supreme Court has dismissed an action for superintending control on the basis of "unclean hands." Yet the order of superintending control sought by the plaintiffs is in the nature of an order of mandamus. It appears to be well settled that "Mandamus ... will not be granted in aid of those who do not come into court with clean hands," since the writ issues "to remedy a wrong, not to promote one." *Turner v Fisher*, 222 US 204, 209; 32 S Ct 37; 56 L Ed 165 (1911). The defendants' unclean hands argument is, therefore, properly before the Court in this action.

destroying the ideal that they loftily seek to vindicate, namely continuity of counsel. For example, in just two one-week periods, as reflected by data attached to Mr. Kost's affidavit, Plaintiff Attorneys used substitutions in 25 proceedings. In that same two week period altogether there were 210 instances of substitutions. See, Judge Kelly Aff't ¶¶ 12-13, Kost Aff't, ¶ 19 The cases recounted in Judge Kelly's affidavit additionally aptly illustrate the chutzpah of the Trial Lawyers and Plaintiff Attorneys advancing the present claims since they are engaging in the very misconduct that they allege of the defendants. Two of the Plaintiff Attorneys each missed over a year of hearings involving their respective clients, and in the four consecutive hearings that they missed, they allowed three different attorneys to substitute for them. Indeed, it was to avoid this sort of revolving door approach to attorney representation for juveniles that was practiced by the members of the Trial Lawyers or the Plaintiff Attorneys that prompted defendants to promulgate and implement LAO 2006-08. Judge Kelly Aff't ¶ 14.

Additionally, as detailed in the affidavit of Frederick Gruber on behalf of MCLC, notwithstanding court orders in numerous cases requiring the members of the Trial Lawyers or the Plaintiff Attorneys to make copies of certain documents that could otherwise be found in the court file (see part eight infra), none of the previously assigned counsel complied with the orders, or through an appropriate motion sought to have that part of the order rescinded. Instead, former counsel chose to simply ignore that part of the order. Gruber Aff't, ¶ 6. Moreover, in two of the cases identified by Mr. Gruber, the formerly assigned LGALs continued to appear at hearings notwithstanding the orders of the court, thus serving only to confuse the proceedings. Id., ¶ 10. In other cases, the formerly assigned counsel have simply failed to appear at the last hearing, necessitating an

adjournment. Attia Aff't, ¶ 6; Daniels Thomas Aff't ¶ 11.[7]

Thus, not only have the Trial Lawyers or the Plaintiff Attorneys, or those they seek to represent, engaged in misconduct relative to the matter in which they seek relief, but they have also engaged in misconduct after the orders of removal and reassignment were issued. Accordingly, the Trial Lawyers or the Plaintiff Attorneys or those whom they purport to represent come before this Court with unclean hands, and the Court should accordingly deny any relief to them.

III. The Plaintiffs' Action for Superintending Control Is Barred Due to Laches

A. General Principles

The classic definition of laches was articulated in *Lothian v City of Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982):

> Laches, the corresponding judicially-imposed equitable principle, denotes "the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." .. The doctrine of laches reflects "the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust." .. Laches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time ... Instead, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay. As a general rule, "[w]here the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot ...be

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[7] Although perhaps not amounting to misconduct, another measure of the disingenuous nature of this lawsuit can be gleaned from the very high number of case assignments accepted by the Plaintiff Attorneys. If that is any measure of their caseload, then five of the six have exceeded the 100 caseload limit that they have attempted to foist on the defendants.

> recognized." ... Simply stated, "laches [is concerned] with the *effect* of delay", while "limitations are concerned with the *fact* of delay." (Emphasis in original; authorities omitted).

The doctrine of laches has been applied to actions for superintending control where "because of unexcused delay or unaccounted for inaction and apparent acquiescence, changes have occurred which make the granting of relief inadvisable." 11B Callaghan, Michigan Pleading & Practice (2nd ed), § 92.12, pp 416 (and cases cited therein).

For example, in one early case, *Beutel v Bay Circuit Judge,* 124 Mich 521, 523; 83 NW 278 (1900), proceedings were taken to vacate a portion of a city plat which included a street. The relator, the owner of land in the vicinity, eight months afterwards filed a petition for the writ of certiorari (now writ of superintending control, see MCR 3.302(C)) to review those proceedings. The petitioner in the vacation proceedings had meanwhile invested a large amount of money in buildings upon the vacated street. The Supreme Court held that relator was barred by laches to contest the validity of the proceedings.

Laches had been held to apply in cases in which constitutional questions are at issue. In *Kuhn v Secretary of State,* 228 Mich App 319, 334; 579 NW2d 101 (1998), the plaintiff sought a declaratory judgment that MCL 600.9931(1), which abolished the Recorder's Court for the City of Detroit and merged it with the Third Circuit Court, was unconstitutional on the basis that under its provisions judges from the abolished court were unconstitutionally appointed circuit court judges. In the course of affirming the lower court, the Court of Appeals had the occasion to discuss the doctrine as potentially barring the plaintiff's claim:

> [W]e note that plaintiffs waited for almost one year after the statute was passed to allege that it was unconstitutional. They filed their complaint three months before the effective date of

> the merger, after much of the work necessary to effect the merger had been accomplished. Even after the circuit court issued its opinion and order, plaintiffs waited two weeks to file an emergency motion for leave to appeal, which was filed only twelve days before the merger took place.
>
> In *Schwartz [v Secretary of State*, 393 Mich. 42, 222 N.W.2d 517 (1974)]. supra at 50, n. 5, our Supreme Court expressed its displeasure with the plaintiff's waiting seven weeks after the questioned legislation was approved to file his complaint, commenting, "Waiting until the 11th hour to challenge some aspect of the electoral process has served as grounds for denying relief." In an earlier opinion, *Bigger v. Pontiac*, 390 Mich. 1, 4, 210 N.W.2d 1 (1973), the Supreme Court had noted that the nature of the case often dictates the speed at which a plaintiff must act:
>
> > In cases where because of the nature of the subject matter absolute time limits must be observed, the law requires speedy resort to the courts by those who wish to prevent or modify contemplated transactions or procedures.
>
> We agree....
>
> *Kuhn, supra*, 334-335.

In the case at bar, the two elements of laches, inexcusable delay and resulting prejudicial change in circumstances, are unquestionably present.

B. Plaintiffs Have Inexcusably Delayed Filing Their Complaint

The RFP was first published in April 2006. The RFP clearly indicated that the Court desired to move away from the old system of random rotational appointments to one in which a specific group of attorneys would be responsible for the representation of juveniles in a specific courtroom. Plaintiffs were acutely aware of the publication of the RFP since both the Trial Lawyers and Radulovich submitted bids.

Next, the Court promulgated LAO 2006-08 on September 22, 2006. The LAO, like

all others promulgated in 2006, was soon posted on the Court's website. Notably, it was in that LAO that the Court indicated it would contract with attorney groups "to provide exclusive representation for juveniles .... " LAO 2006-08(III)(A); that the Chief Judge would be empowered to order the removal of previously assigned counsel after a disposition in order to "expeditiously implement this Plan as indicated in Section III(A) and to ensure that the interests of the children and the public are properly served," LAO 2006-08(III)(D)(2), but that an attorney who was removed by operation of subsection (D)(2) could move to remain assigned counsel by a demonstration of special circumstances in a motion before the Chief Judge, LAO 2006-08(III)(D)(3).

To any attorney who cared to read the LAO, it would have been obvious, taken in conjunction with the RFP, that once the Court entered into contracts with an attorney group, orders of reassignment would follow the disposition of a case.

By the beginning of October 2006, the first of the contracts, this one with LAD, and which called for LAD to assume responsibility for providing representation for juveniles in six referee courtrooms, was implemented. The contract for MCLC, calling for it to provide representation in four referee courtrooms, which became effective in November 2006, was executed by Chief Judge Kelly on November 2, 2006. Finally, on November 22, 2006, Chief Judge Kelly executed contracts with the Child Advocacy Program and the Child and Family Law Center for the remaining two referee courtrooms, and those contracts began to be implemented in December 2006.

In October 2006, as noted in the electronic notices sent to attorneys, reproduced in plaintiffs' exhibit 3, the Court's Director of Assigned Counsel, Leonard Branka, began to notify attorneys who would be removed of the impending change. In November 2006,

if not sooner, as borne out by copies of removal orders reproduced in plaintiffs' exhibit 6, actual orders of removal were being issued. Indeed, by December 2006, the Chief Judge had already been adjudicating motions to be retained as counsel by attorneys affected by the orders of removal.

Finally, on November 30, 2006, Radulovich had completed her motion to strike orders of removal. When one compares the substance of that motion, see plaintiffs' exhibit 27, with the legal theories advanced in the Complaint, it becomes readily apparent that the same arguments are being raised in both. Indeed, it is not an exercise in hyperbole to say that Radulovich's motion served as a trial run for the arguments that the plaintiffs would later use in the case at bar. The Court denied Radulovich's motion on January 30, 2007.

The Complaint in this case was filed with the Supreme Court on April 10, 2007.

As the foregoing time line reflects, the plaintiffs were put on notice of the practices that they find objectionable arguably as early as the publication of the RFP in April 2006, or by September 22, 2006, when the LAO was promulgated and notices of the contemplated practices were being sent to attorneys, and, in any event, no later than November 2006, when actual orders of removal were being issued. Yet, plaintiffs inexplicably waited until April 10, 2007, at the very least five and half months later, to file the Complaint. Given that the moving plaintiffs are comprised of attorneys and must be deemed to be aware of their rights and those of their former clients, the delay in the filing of this case is especially puzzling. Indeed, because of the potential for loss of income to their members, which is asserted as an interest that gives them standing, Complaint ¶ 17, the plaintiffs had every motivation to file as soon as possible, yet unaccountably and inexcusably, they delayed.

C. Due to the Unexcused Delay the Court Will Be Prejudiced If Relief Is Granted

In the case at bar, during the period when the plaintiffs could have filed suit and chose to delay, the Court proceeded to implement the new system of assigning counsel. Uncountable hours of administrative staff time were spent in attempting to effect the changes necessary in the court's computer programs and other operations to implement the new system of assignments. For example, the Court undertook to renovate space in the Lincoln Hall of Justice for the use of the attorney groups. The juveniles who were former clients of the plaintiffs have been reassigned new counsel, except in those cases where former counsel successfully moved to remain on the case. Indeed, by the time that the plaintiffs filed their lawsuit, the changes contemplated by the LAO and under the contracts with the lawyer groups had, in fact, been put into place. This case does not so much represent an 11th hour attack, as condemned in *Schwartz, supra,* but one that has been launched well past midnight! In short, were the Court to grant relief to the plaintiffs, the time and effort that the Court has spent over the months while plaintiffs delayed will be wasted to its prejudice, and the Court would be saddled with an enormous administrative expense in undoing the presently in place attorney assignments. Indeed, had the case been filed in October 2006, the Court would not have gone forward with entering into other contracts with the other three vendors given the uncertainties of the litigation process.

Additionally, prejudice is further shown by the delay in filing this lawsuit in that if the plaintiffs' suit was allowed to go forward and somehow the relief sought was granted, further time in adjudicating these cases will be spent since administrative steps to undo the orders of reassignment would need to be taken. While the plaintiffs delayed their attack, orders of reassignment were issued in all or nearly all of the cases subject to being

reassigned under the LAO. Had the case been commenced in October 2006, plaintiffs could have sought a stay of proceedings or the Court would have stayed their issuance until the plaintiffs' challenges were resolved. Instead, the attendant delay and confusion in rescinding orders of assignment can only prejudice the sound administration of justice and the expeditious resolution of these matters.

In very real and tangible ways, the Court has been prejudiced by the delay in plaintiffs' filing this lawsuit.

Beyond the prejudice to the Court, if the plaintiffs are permitted to go forward and prevail, the juveniles, whom the plaintiffs purport to protect, will also have been prejudiced by the delay, since the orders of reassignment were issued while the plaintiffs sat on their asserted rights. Reversing those orders at this late date cannot be in the juveniles' best interests since it will mean yet another round of reassignments, with the attendant confusion and delays in adjudicating those cases.

Thus, in this case, the inexcusable delay of the Trial Lawyers and Plaintiff Attorneys has prejudiced the defendant Third Circuit Court, prejudiced the expeditious administration of justice, and prejudiced the very class of juveniles that the plaintiffs seek to protect.

In conclusion of this part, the defendants request that the Supreme Court find that laches bars the Complaint and consequently dismiss the Complaint.

IV. The Trial Lawyers and Plaintiff Attorneys Lack Standing to Assert the Claims in Counts One Through Four of the Complaint

A. Introduction

While the Complaint sets forth a multitude of allegations, when all is said and done, the Complaint seeks relief on the basis of legal theories set forth in five counts. Complaint,

¶¶ 129-154.

In Count 1 of the Complaint, ¶¶ 129-137, plaintiffs seek relief on the basis that the defendants have violated several sections of the Juvenile Code. The alleged persons whose rights are being violated are "the rights of each and every child who has a pending case within ... the Court." *Id.*, ¶ 132. More specifically, it is alleged that as a result of these alleged violations of the Code, "Plaintiff children and all others similarly situated are deprived of effective legal counsel." *Id.*, ¶ 136.

In Count 2 of the Complaint, ¶¶ 138-142, plaintiffs assert violations of substantive due process rights secured by US Const Am V and XIV. Once again, the plaintiffs whose rights are asserted to have been violated are the "Plaintiff children's constitutional rights to effective assistance of counsel ..."

Count 3 of the Complaint, ¶¶ 143-144, mirrors Count 2's substance but the legal premise is that the defendants have violated the due process clause of Const 1963, art 1, § 17.

In Count 4 of the Complaint, ¶¶ 145-148, plaintiffs seek relief on the basis that the Court has violated an alleged duty under the Code to act only in the best interests of juveniles who come within its jurisdiction. While the identities of the plaintiffs are not specified, it is apparent that the only interests that are at stake in Count 4 are those of the so called plaintiff children.

Finally, in Count 5 of the Complaint, ¶¶ 149-154, the defendants are alleged to have violated the attorneys' property interests in files and to have interfered with their duty to maintain the confidences of their former clients.

Hence, the relief sought in the first four counts is not premised on the rights of the

Trial Lawyers or the Plaintiff Attorneys, but on the rights of the plaintiff children.

B. The Plaintiff Attorneys Are Not Next Friends

Initially, it should be noted that while the Plaintiff Attorneys assert to act as "next friends" to the juveniles named in the Complaint, none have produced orders appointing them "next friend." The phrase "next friend," as used in pleadings is a term of art and its designation with respect to minors is regulated by MCR 2.201(E). In particular, MCR 2.201(E)(1) requires that a court appoint a person to act on behalf of the minor in the capacity of a "next friend." The Plaintiff Attorneys have not attached to the Complaint any order of any court appointing them to represent the named minors as "next friend." Nor is there such a motion before this Court. Accordingly, the Plaintiff Attorneys may not invoke the standing that a "next friend" would otherwise have to represent a minor. Instead, the standing of the Plaintiff Attorneys, along with that of the Trial Lawyers, should be determined on general principles of standing.

C. General Principles of Standing

Ordinarily, as explained in *Michigan Chiropractic Council v. Commissioner of Office of Financial and Ins. Services,* 475 Mich 363, 375; 716 NW2d 561 (2006):

> The general rule is that a litigant cannot vindicate the rights of a third party. The rule disfavoring jus tertii — litigating the rights of a third party — "assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." Furthermore, this rule reflects a "healthy concern" that if the claim is brought by a third party, "the courts might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.' "
>
> (Authorities omitted).

In *Michigan Chiropractic Council, supra,* pp 377-378,[8] the Court adopted the following test to determine whether one party has standing to vindicate the rights of another:

> A party seeking to litigate the claims of another must, as an initial matter, establish standing under the test established in *Lee [v Macomb County Bd of Com'rs,* 464 Mich 726, 739; 629 NW2d 900 (2001)].[9] Second, the party must have a "close relationship" with the party possessing the right in order to establish third-party standing. Last, the litigant must establish that there is a "hindrance" to the third party's ability to protect his or her own interests.

D. The Trial Lawyers and the Plaintiff Attorneys Cannot Establish Standing under *Lee, supra,* because They Lack Any "Legally Protected Interest"

In the case at bar, the Trial Lawyers and the Plaintiff Attorneys claim that they have

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[8] It should be noted that Justice Young's Opinion in *Michigan Chiropractic Council, supra,* that pertained to third party standing was in relation to count one of the petition. Although only Chief Justice Taylor and Justice Corrigan concurred in Justice Young's opinion in its entirety, Justice Markman concurred "in both the analysis and the result reached by the lead opinion with respect to count I of the petition." Justice Young's opinion regarding third party standing thus can be said to be the Supreme Court's opinion.

[9] The test for standing set forth in *Lee, supra,* alluded to in *Michigan Chiropractic Council, supra,* is as follows:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
> *Lee, supra,* p 739.

an economic interest in remaining appointed counsel which will suffer if LOA 2006-08 is carried out, Complaint, ¶ 17. According to the Trial Lawyers and the Plaintiff Attorneys, if the orders of appointment are not vacated, they will lose the opportunity to earn additional fees. Nonetheless, they have not identified or explained how that interest is a "legally protected interest," as required by *Michigan Chiropractic Council, supra*, and *Lee, supra*, p 739.

It is well settled that "a mere statement without authority is insufficient to bring an issue before this Court. It is not sufficient for a party 'simply to announce a position ... and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998). Thus, this Court may preliminarily conclude that because neither the Trial Lawyers nor the Plaintiff Attorneys have attempted to demonstrate how their interest in this litigation as it pertains to the first four counts is a "legally protected interest," the Court should summarily conclude that the Trial Lawyers and Plaintiff Attorneys do not possess a legally protected interest in remaining counsel for the so-called plaintiff children, and further conclude they lack standing in this case.

In any event, a close examination of the basis of the claims of the Trial Lawyers and the Plaintiff Attorneys, and their interest that they assert gives them standing, namely their pecuniary interest in receiving future revenue as a result of remaining assigned as counsel, reflects that they are ultimately seeking to establish an interest in the method or mode the defendants use to assign counsel in delinquency or neglect cases as previously established in LAO 2006-01, since what they ultimately seek is for the Court to strike the

provisions of LAO 2006-08 that changed the formerly effective LAO 2006-01.

In *Minty v State,* 336 Mich 370, 390; 58 NW2d 106 (1953), quoting from Cooley's Constitutional Limitations (8th Ed.) vol. 2, p. 749, the Court noted, "It would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws ...." It is for this reason that no one can be said to have a vested right in the continuation of modes of procedure only. *People v Dolph-Hostetter,* 256 Mich App 587, 597; 664 NW2d 254 (2003).

To reiterate, in the case at bar, the basis for the Trial Lawyers' and Plaintiff Attorneys' asserted interest is really nothing more than their asserting a right to the continuation of the mode of procedure utilized by the defendants in assigning counsel, since what they ultimately seek is for the Court to strike the provisions of LAO 2006-08 that changed the formerly effective LAO 2006-01. Under *Minty, supra,* and *Dolph-Hostetter, supra,* therefore, the Trial Lawyers and the Plaintiff Attorneys cannot establish that any interest they have in the continuation of receiving assignments and payment under the former system is vested or protected.

Finally, a close examination of the ethical constraints against a lawyer acquiring an interest in litigation requires the conclusion that a court-appointed attorney should not have any protected interest in remaining appointed counsel in any given case. MRPC 1.8(j) states:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien authorized by law to secure the lawyer's fee

or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Acknowledgment that court-appointed attorneys have a protected property interest in remaining counsel, based on their pecuniary interest in continuing to receive fees as suggested in the Complaint, ¶ 17, would be tantamount to granting the court-appointed attorney a proprietary interest in the case and thus would be contrary to MRPC 1.8(j).[10]

This Court, therefore, should find that neither the Trial Lawyers nor the Plaintiff Attorneys have a legally protected interest in remaining counsel in these cases, have no standing under *Michigan Chiropractic Council, supra*, and *Lee, supra*, and hence lack standing to assert the claims of the minor plaintiffs (either named or unnamed) in this case.

E. The Trial Lawyers and The Plaintiff Attorneys Lack a "Close Relationship"

Additionally, at least with respect to the unnamed plaintiff juveniles, it is entirely unclear how the Trial Lawyers or the Plaintiff Attorneys can have a "close relationship" with this class of plaintiffs. Nor can it be demonstrated that the Trial Lawyers have any particular relationship with the unnamed juveniles. However, assuming for the sake of argument that the Plaintiff Attorneys do have a sufficiently close relationship with the

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[10] Notably, in the realm of civil litigation, even if a lawyer has a contingency fee agreement with a client and thus may expect to share in the recovery, courts recognize that the attorney is dischargeable at will and the client remains liable only in *quantum meruit* for the attorney services that were actually rendered. See generally, *Reynolds v Polen*, 222 Mich App 20, 24-25; 564 NW2d 467 (1997). In other words, in situations in which the retention of the attorney is a matter of private arrangement and not court appointment, the attorney has no cognizable property right to continue to represent the client. There is nothing set forth in the Complaint or Brief in Support to suggest why this rule should not be applied in instances of court-appointed attorneys.

named juveniles who were their respective clients, nonetheless, beyond speculation, the Trial Lawyers and the Plaintiff Attorneys fail to concretely demonstrate how the interests of these juveniles cannot be adequately protected by presently appointed counsel. Hence, neither the Trial Lawyers nor the Plaintiff Attorneys can maintain the requisite showing under the second or third factors to establish third party standing.

F. Conclusion

Because the Trial Lawyers and Plaintiff Attorneys cannot establish their standing to maintain the claims in counts one through four under *Lee, supra,* insofar as they have do not have any "legally protected interest " in remaining counsel or the continuation of the former system of assignments, and because the Trial Lawyers and Plaintiff Attorneys have otherwise failed to demonstrate that they have a "close relationship" to those they seek to represent under *Michigan Chiropractic Council, supra,* the Trial Lawyers and Plaintiff Attorneys have failed to establish that they have standing to assert the claims of the juveniles who are the persons whose interests are actually at stake in counts one through four, but who are not presently properly before the Court. Consequently, this Court should dismiss Counts One through Four of the Complaint due to a lack of standing.

V. The Supreme Court Should Deny Relief under Count One Since the Defendants Have Not Violated the Provisions of the Juvenile Code

A. The Defendants Had Good Cause to issue the Orders of Removal, and Thus Compiled with MCL 712a.17c(9)

Plaintiffs seek relief under count one of the Complaint based on alleged violations of numerous provisions of the Juvenile Code, MCL 712A.1, et seq. However, when the plaintiffs' Complaint and Brief are examined closely, it is apparent that count one is

primarily based on their assertion that the orders of removal entered by Chief Judge Kelly violate MCL 712A.17c(9), which states, in pertinent part:

> An attorney or lawyer guardian ad litem appointed by the court under this section shall serve until discharged by the court. If the child's case was petitioned under section 2(b) of this chapter, the court shall not discharge the lawyer-guardian ad litem for the child as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan children's institute or other agency, *unless the court discharges the lawyer-guardian ad litem for good cause shown on the record.*
>
> (Emphasis added).

Plaintiffs contend that the orders of removal violate § 17c(9) because they were entered without a showing of good cause. Because the plaintiffs' argument rests on the language used in this section, the ordinary rules of statutory construction should be applied to determine the merits of their contention.

The primary rule of statutory construction is to discover and give effect to the legislative intent. *Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park*, 400 Mich 184, 187; 253 NW2d 646 (1977). Legislative intent is to be derived from the actual language used in the statute. *In re Certified Questions*, 416 Mich 558, 567; 331 NW2d 456 (1982). No interpretation is necessary where the language used is clear and unambiguous. *Id.* In reviewing a statute's language, every word should be given meaning, and courts should avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). It is a well-established rule of statutory construction that this Court will not read words into a statute. *Omelenchuk v City of Warren*, 461 Mich 567, 575; 609 NW2d 177

(2000). Moreover, as an aid to a textual construction of statutes, courts apply the well-recognized maxim, *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. *Feld v R & C Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990) (Riley, J, conc.).

Preliminarily, it should be noted that § 17c(9) refers to two groups of attorneys, those that are appointed generally to represent juveniles, and LGALs who represent children in neglect cases. The discharge for good cause applies only to the latter group, and not to the former. To read into this section a requirement that all attorneys appointed to represent juveniles under § 17c can be discharged only for good cause would largely render the express reference to the discharge of LGALs only for good cause superfluous, and read into § 17c(9) words that are not there, contrary to the above noted rules of statutory construction. Moreover, application of the maxim *expressio unius est exclusio alterius* would lead to the conclusion that since the Legislature applied the good cause requirement only with respect to LGALs, but failed to do so with respect to appointed attorneys in general, the Legislature did not intend for court appointed attorneys in general to be dischargeable only upon a finding of good cause.

With respect to § 17c(9)'s requirement that LGALs be discharged only for good cause shown on the record, the plaintiffs' construction of this section chiefly depends on their contention that the good cause must flow from conduct that is attributable to the attorney. However, once again the plaintiffs have chosen a construction that, for its validity, depends on reading into § 17c(9) the phrase "attributable to the attorney." As pointed out above, this is contrary to the rule of construction that proscribes courts from reading into a statute words or phrases that are not present.

Indeed, it should be recalled that where the Legislature has desired that a showing of "good cause" be attributable to a class of persons, it has said just that. For example, one section of the Michigan Employment Security Act, MCL 421.1, et seq., disqualifies a former employee from receiving unemployment benefits if the former employee "[l]eft work voluntarily without good cause attributable to the employer." MCL 421.29(1)(a). In the case at bar, what plaintiffs really want the Court to do is to read into § 17c(9) the same sort of phrase that the Legislature used in MCL 421.29(1)(a). The fact that the Legislature chose not to have an analogous qualifying phrase attached to the good cause requirement of §17c(9) should lead this Court to reject plaintiffs' construction of this section.

Hence, the Court should find that § 17c(9) permits a trial court to find that good cause for removal of an LGAL (or other assigned counsel) may exist for reasons *aliunde* of the LGAL (or other attorney)'s conduct in a specific case.[11]

Because § 17c(9) did not limit an LGAL from being removed for cause attributable to the LGAL, the real issue in this case is whether implementation of LAO 2006-08 provided good cause for the removal of the LGALs. There are no cases that definitely define what constitutes "good cause" as used in § 17c(9). The Michigan Supreme Court

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[11] It is for this reason that plaintiffs' reliance on cases such as *People v Johnson*, 215 Mich App 658, 662-663; 547 NW2d 65 (1996), is misplaced, since in *Johnson, supra,* the Court examined the issue of whether a trial court could remove appointed counsel for, in essence, vigorously representing his client. Notably, although the Court of Appeals provided some reasons why counsel could be removed, the Court did not intimate that its list was exclusive. Pointedly, the case did not arise under § 17c(9). Indeed, the Court of Appeals in *Johnson, supra,* noted the absence of authority of the trial judge to remove counsel. In the case at bar, Chief Judge Kelly acted properly in accordance with the power accorded her by a duly promulgated LAO, which was approved by SCAO. *Johnson, supra*, and other cases like it cited by the plaintiffs are, therefore, distinguishable.

has noted the phrase "good cause" is difficult to define. *Cummer v Butts*, 40 Mich 322, 325; 29 Am Rep 530 (1879) (the phrase "good cause," "has no frontier of meaning which can be defined"). However, courts have construed "good cause" as used by the Legislature in other statutes.

In the context of a statutory requirement that teachers may be discharged only for "good cause," the Michigan Supreme Court explained that good cause included "any ground which is put forward by the committee in good faith and which is not arbitrary, irrational, unreasonable, or *irrelevant to the committee's task of building up and maintaining an efficient school system.*" (Emphasis added). *Nephew v Wills*, 298 Mich 187, 196; 298 NW 376 (1941); accord, *Franchise Management Unlimited, Inc v America's Favorite Chicken*, 221 Mich App 239, 247; 561 NW2d 123 (1997) (Applying the definition used in *Nephew, supra*, to a provision in the Franchise Investment Law, MCL 445.1501, et seq, that franchises only be terminated for "good cause." See MCL 445.1527). By analogy, therefore, the Court should find that a trial court may discharge an LGAL (or other appointed counsel representing a juvenile) for good cause where the reason is in good faith, not arbitrary or irrelevant to the task of maintaining the efficient administration of justice.

When so construed, it is evident that the Chief Judge had ample good cause to remove the attorneys or LGALs. First, as recounted by the Chief Judge in her affidavit, one of the problems encountered by the Court in the furtherance of the sound administration of justice was that, under the former system of assigning counsel, substitutions were frequent and led to an alarming number of instances where substituted counsel were

simply unprepared or the case had to be adjourned to allow substituted counsel to become prepared. Moreover, although the plaintiffs in this case have loudly proclaimed that the legislative intent behind § 17c(9) was to ensure continuity of counsel, certainly under the old system that allowed frequent substitution of counsel, this legislative goal was not served, as evidenced by Plaintiff Attorneys Brand's and Ruby's failure to appear at four consecutive hearings over a year's period of time and their allowing three different attorneys to represent the juvenile during this period. To further the objectives of enhancing the efficient administration of justice and the legislative goal of continuity of counsel, the Court, based on the model in Genesee County, divined that having a discrete group of attorneys responsible for the representation of juveniles who came before a given referee would achieve these objectives. To this end, the Chief Judge issued the RFP, LAO 2006-08 was promulgated, the Chief Judge entered into contracts with the chosen vendors, and ultimately the orders of removal were entered.

Contrary to the allegation of the Complaint, ¶ 132(a), that the defendants' actions were arbitrary and that the promulgation of the LAO was simply something that Chief Judge Kelly published of her own accord, and instead, consistent with MCR 8.112(B)(3) and MCR 8.123(C),[12] the Chief Judge, after due deliberation and mindful of what at least one other circuit court had implemented, also sought and obtained the approval of the SCAO. Thus, the LAO should not be considered, as argued by the plaintiffs, some trumped

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A minor argument made by the plaintiffs that LAO 2006-08 is invalid since the defendants did not seek to have it issued as a local administrative order is without merit since, per the express provisions of MCR 8.123(C), the defendants were required to promulgate its plan of assignment of counsel as a local administrative order.

up authority.[13]

When all of the circumstances of the case that led to the issuance of the orders of removal are considered, it should be concluded that the LGALs (and other attorneys) were removed for good cause insofar as their removal was in furtherance of the efficient administration of justice, and that the plaintiffs' assertion that the defendants violated the good cause requirement of MCL 712A.17c is without merit.

B. Appointing Counsel with Respect to an Attorney Group Instead of One Attorney Does Not Violate the Juvenile Code

The plaintiffs, citing to a variety of provisions in the Juvenile Code, contend that the defendants have violated the Code by appointing an attorney group to represent a juvenile rather than a single attorney. It is unnecessary to address each provision cited by the plaintiffs since their argument essentially puts form over substance, and ignores that the Supreme Court has indicated that trial courts can contract with attorney groups as a way of providing for appointment of counsel. See MCR 8.123(D) (referring to courts that contract with attorney groups to provide services).

Moreover, contrary to the intimation of the plaintiffs, the defendants contracting with attorney groups will result in a single attorney being responsible for the representation of a given juvenile. See, for example, Affidavits of Mayssa Attia on behalf of CAP, ¶ 5; of Judith New and R. William Schooley on behalf of CFLC, ¶ 25; of André Mays on behalf of

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[13] In one other part of the Complaint ¶ 132(a), the plaintiffs alleged that the defendants interfered with the Trial Lawyers and Plaintiff Attorneys' attorney-client relationships through the issuing of orders that required the attorneys to turn over privileged matters in the attorneys' files to successor counsel. This contention is addressed at length in Argument VIII.

JLG, ¶ 9; of Regina Daniels-Thomas on behalf of LAD, ¶6; and of Frederick Gruber on behalf of MCLC, ¶¶ 4, 11 (Exhibits C, D, E, G and H respectively). In other words, through the assignment of a referee's docket to an affiliated group of attorneys, who will designate which of its attorneys will be the attorney on the case, the defendants have complied with their duty to provide each juvenile with his or her own attorney. To suggest otherwise, as advocated by the plaintiffs, essentially puts form over substance.

C. Miscellaneous Allegations in Count One Provide No Basis for Relief As They Are Premised on Wild Speculation and Inaccurate Assumptions

In count one of the Complaint, ¶ 132(b), the plaintiffs allege that the defendants have violated the juveniles' right to counsel under MCL 712A.17c because they have, through the implementation of the RFP and LAO 2006-08, created "a general system of assignment of counsel through private lump sum contracts which result in excessive case loads and insufficient number of counsel available to adequately and effectively represent the children in the system ..."

Preliminarily, the disingenuousness of this contention cannot be overemphasized. Both the Trial Lawyers and Plaintiff Radulovich bid to be awarded contracts under the RFP. Both of them submitted bids based on a lump sum. Presumably, had the defendants awarded them contracts, they would not be suing the defendants. In some sense, this allegation reveals that ultimately this case is nothing more than a suit by disappointed bidders.[14]

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[14] Indeed, because the Trial Lawyers and Plaintiff Radulovich are disappointed bidders the Court should find they have no standing in this case for the additional reason that one who is unsuccessful in bidding on a public contract does not have standing to challenge (continued...)

In any event, the assertion that the process engaged in by the defendants to contract with groups of attorneys has or will lead to insufficient number of counsel is simply speculation that is belied by the affidavits of the five successful vendors, as well as the affidavit of Barbara Menear, Court Administrator for the Seventh Judicial Circuit Court (Exhibit F), upon which program the defendants based their LAO. Affidavits of Mayssa Attia on behalf of CAP, ¶ 3; of Judith New and R. William Schooley on behalf of CFLC, ¶¶ 43-45; of André Mays on behalf of JLG, ¶ 4, of Regina Daniels-Thomas on behalf of LAD, ¶¶ 4, 5; and of Frederick Gruber on behalf of MCLC, ¶ 2 (Exhibits C, D, E, G and H respectively).

Moreover, while the plaintiffs take issue with the idea of awarding contracts for a flat rate, they do not cite any case law that condemns such a practice. In any event, as observed by Mr. Mays in his affidavit on behalf of JLG, ¶ 14, the contract provided for the vendor to seek an award of extraordinary fees, and that the ability to make such requests ensures that each client will be adequately and effectively represented without regard to cost.

The other miscellaneous allegation in count one of the Complaint, ¶ 132(c), is that the defendants violated the juveniles' right to counsel under MCL 712A.17c in allegedly creating "a system in which the primary factor in determining assignment of counsel is based on the lowest cost and best interest of the Court rather than the child."

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[14](...continued)
the result or the bidding process itself. This rule is based on the belief that statutes or ordinances requiring such bidding procedures for public contracts were adopted to benefit taxpayers or the general public. *Talbot Paving Co v Detroit*, 109 Mich 657, 660-661; 67 NW 979 (1896). Accordingly, any duty owed under such procedures is to the public, not those individuals involved in the solicitation process. Id. at 661-662.

This contention is based on a misstatement of the provisions of the RFP. As pointed out elsewhere, contrary to the suggestion of the plaintiffs, cost was not the only factor taken into account. To repeat, the RFP, ¶ (III)(D)(2),(3) state:

> 2. The award of one or more contracts under this RFP shall be based on an evaluation of a Vendor's ability to completely and economically provide the services required by this RFP as reflected in the Proposal, including, but not limited to, an evaluation of:
> a. The expertise and past experiences in providing legal representation to juveniles in general and in particular in Wayne County.
> b. The appropriateness of the plan of the delivery of legal services as contained in a Proposal and whether it sufficeitly conforms to the organziation of the Juvenile Section as described in the RFP.
> c. The provision of the services required under the RFP at the lowest overall cost.
>
> 3. In the sole and exclusive discretion of the Court, the Court shall evaluate each Proposal and accord such weight to the foregoing factors as the Court deems to be in its best interests. No one factor shall necesarily be determinative.

As can be seen, cost is a factor, but not the only one, and indeed not even the first of the factors mentioned. As explained by the Chief Judge in her affidavit, cost nonetheless was considered given the limitations on the Court's budget. This was, of course, entirely appropriate. As noted in *State v Mempa,* 78 Wash 2d 530, 536; 477 P2d 178 (1970), in setting the compensation to be paid to appointed counsel, it is appropriate for a trial court to consider, *inter alia*, "the amount of public funds made available for such purposes, and a judicious respect for the taxpaying public as well as the needs of the accused." Indeed, it would be hard to explain to taxpayers the squandering of their funds through fiscally irresponsible contracting. Nonetheless, beyond mere cost, the RFP tasked the Court to make its choice on the basis of factors that looked to the quality of the bidder. Plaintiffs'

charge that cost was the only factor used by the Court is simply wrong.[15]

For all the reasons stated above, the Supreme Court should not grant any relief under the allegations and theories advanced in count one of the Complaint.

VI. The Supreme Court Should Deny Any Request for Relief Based on Counts Two and Three Since Defendants Have Not Violated the Federal or Michigan Constitutions

The gist of count two's general allegation is that the defendants have violated the juveniles' substantive due process rights under US Const Am V and XIV[16] to the effective assistance of counsel in delinquency and neglect cases.

Specifically, the plaintiffs contend that the defendants have violated this purported right for four reasons[17], the last three of which are stated in plaintiffs' Brief, p 31, as

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15 Once again, as explained in note 2, supra, as disappointed bidders, the Trial Lawyers and Plaintiff Radulovich lack standing to complain about the decision-making process that led to the award of contracts under the RFP.

16 Count three asserts a violation of the analogous due process clause of the Michigan Constitution, see Const 1963, art 1, § 17. Therefore, the merits of count two are determinative of the merits of count three, because such claims are subject to the same analysis as due process claims under the federal constitution. See, *In re CR.*, 250 Mich App 185, 204; 646 NW2d 506 (2002).

17 Because, as shown below, the underlying premises of the plaintiffs' constitutional claims are without factual or legal merit, an extended discussion on the nature of the alleged rights is not necessary. For purposes of argument only, the defendants assume that the juveniles have a due process right to counsel in at least delinquency matters. In contrast, however, the Court of Appeals has held that the right to counsel in child protective proceedings is statutory, not constitutional. *In re AMB*, 248 Mich App 144, 221-222; 640 NW2d 262 (2001). However, once again the statement of the issue by the plaintiffs underscores that the rights to be adjudicated are not those of the Trial Lawyers or the Plaintiff Attorneys, and for the reasons articulated above, they lack standing to advance these claims.

follows:[18]

> b) by dramatically reducing the number of individual attorneys, including African American attorneys, and creating a system which results in excessive caseload, inadequate flat fee compensation, and financial disincentives for vigorous and effective advocacy;
>
> c) by appointing groups rather than individuals to represent the children, thereby creating a "revolving door" system of representation, subverting the restriction on substitution of counsel and interfering with the profession standards regarding the criteria necessary to provide effective assistance of counsel
>
> d) by failing to have in place any mechanism for screening conflicts within and among the "group" contractors."

Preliminarily, it should be noted that the premise of counts two and three is false, since in them the plaintiffs ask that the Supreme Court find, in advance of an actual demonstration of ineffective assistance of counsel in an actual case, that certain features of LAO 2006-08 or the contracts into which the defendants have entered will, as a matter of law, result in the ineffective assistance of all (or even some) of the juveniles who come before the defendants.

As recounted in detail elsewhere, in these counts the plaintiffs assert that the adoption of LAO 2006-08 will result in the denial of an asserted constitutionally protected guarantee of effective assistance of counsel to all juveniles presently, and those in the future who may be within the Court's jurisdiction (counts two and three), or that

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[18] The first reason proffered by plaintiffs as to how the defendants violated their rights to effective assistance of counsel was stated as "by arbitrarily removing counsel from their assigned cases in violation of MCL 712A.19c." The defendants have fully addressed this issue above in Part 5 (A) of this Brief.

implementation of LAO 2006-08 will not be in the juvenile's best interest (count four).

The question of whether any litigant has been deprived of the effective assistance of counsel is "a mixed determination of law and fact that requires the application of legal principles to the historical facts of ... [a] case." *Cuyler v Sullivan*, 446 US 335, 342; 100 S Ct 1708; 64 L Ed 2d 333 (1980). Thus, it is universally held, where the question arises, that ordinarily what constitutes effective assistance of counsel is determined on a case by case basis, *People v Vanterpool,* 143 AD2d 282, 283-284; 532 NYS2d 279 (1988), after considering the totality of the representation, *Thompson v State,* 9 SW3d 808, 813 (Tex Crim App,1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Ex parte Cruz*, 739 SW2d 53, 59 (Tex Crim App,1987).

Michigan cases generally have taken this tack, and eschewed determining whether one particular fact, viewed in isolation from the events that transpired during trial, amounts to ineffective assistance of counsel. For example in *People v Mitchell,* 454 Mich 145, 161-162; 560 NW2d 600 (1997), the defendant argued that he was denied the effective assistance of counsel since counsel was suspended for the 30 days immediately preceding trial. The Court explained:

> Likewise, an allegation of deficient performance stemming from a thirty-day suspension coupled with six-months time for preparation does not justify a presumption. These are not circumstances making it so likely that "no lawyer could provide the respondent with the effective assistance of counsel required by the Constitution," that examination of the actual performance of counsel or prejudice is irrelevant. (Authorities omitted).

In the case at bar, the plaintiffs' broad-based assertions in counts two and three that

the juveniles' rights to effective assistance of counsel have been denied should be rejected since they are not made in the context of any given case.

In any event, the plaintiffs' specific contentions are without merit.[19]

With respect to the contentions made in part "b," it should be noted that the only actual case the plaintiffs have cited that provides legal support for their contention that the method adopted by the defendants to award contracts to a group of attorneys would result in the ineffective assistance of counsel is *Recorder's Court Bar Ass'n v Wayne Circuit Court* 443 Mich 110,115; 503 NW2d 885 (1993), which they contend stands for the proposition that all fixed fee systems of compensating counsel are unlawful. The plaintiffs then argue that the fixed fee contracts the Court has entered into are no different than the fixed fee schedule found unlawful in *Recorder's Court Bar, supra*. However, *Recorder's Court Bar, supra,* has no application to this case.

First, there was no finding in *Recorder's Court Bar, supra*, that any criminal defendants had been denied the effective assistance of counsel. Indeed, the plaintiff in that case was an attorney group who alleged that the trial court's fee schedule violated their members' right to reasonable compensation for services rendered under MCL 775.16. Hence, it is difficult to say that this supports the plaintiffs' contention that the contracts entered into by the defendants will deny any juvenile the effective assistance of counsel.

Second, the plaintiffs in the case at bar have misapprehended the holding of

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It should be noted that throughout the Complaint and Brief are allegations concerning the number of attorneys and competency of those attorneys in the attorney groups with whom the defendants contracted. The affidavits from the five attorney groups, attached hereto, demonstrate that these gratuitous attacks are simply unfounded, that these attorney groups will provide effective representation of counsel to the juveniles.

Recorder's Court Bar, supra. In that case, the Court's review of the fixed fee schedule adopted by the trial court, which was based on an estimation of the average fee paid to an attorney under a former event-driven schedule, found that the premise behind creating the fee schedule, namely that attorneys would be expected to receive multiple assignments so that cases that were adjudicated early on (and thus resulting in "over" compensation) would balance those that resulted in lengthy proceedings (thus resulting in "under" compensation). The Court explained the major flaw in this premise:

> The record, however, is completely devoid of evidence indicating the existence of attorney assignment procedures implemented to assure individual attorneys receive the requisite number and type of cases that would provide them with a realistic opportunity to "average" the fees that they would have earned had the fee system remained event-based. Absent such assignment control procedures, there is no assurance whatsoever that the fixed fees operate to reasonably compensate individual assigned counsel for the services they perform.
> *Id.*, at 132-133.

The Court, nonetheless, opined, "If this (i.e., that attorneys actually received a sufficient number of assignments to justify the premise) indeed were the case, then we may have reached a different decision." *Id.*, at 133.

In the case at bar, the contract system adopted by the defendants assured that attorney groups would receive a sufficient number of cases so that the average fees to be paid to the attorneys would bear some relationship to what an attorney might receive on a case had the attorney been paid under the current fee schedule insofar as an attorney group would be responsible for representing all juveniles (except in the instance of conflict of interests or where the Chief Judge had granted former counsel's motion to remain assigned to the case) who came before a given referee. Seen in this light, *Recorder's Court*

Bar, supra, does not reflect that the amount the Court elected to pay under the contracts was per se inadequate because it was a fixed amount, but instead, provides support for the lawfulness of the approach taken by the defendants.

Thus, *Recorder's Court Bar, supra*, is either inapplicable to the case at bar, or to the extent that it has any application, it supports the lawfulness of the defendants' actions.

In any event, it is simply untrue that the contracts awarded by the defendants to the attorney groups would result in substandard wages being paid to the attorneys working for the attorney groups. For example, in the affidavit submitted by Schooley and New for CFLC, ¶¶ 33-40, they provide a detailed description of how they arrived at the compensation package for their attorneys and that ultimately it approached the average compensation for newer attorneys.

The other matters mentioned in subpart "b" are entirely the product of speculation by the plaintiffs, or are otherwise legally without any support, and hence should be rejected.

Notably, the plaintiffs rely heavily on policy statements made by various organizations including the American Bar Association (ABA). However, although our State's appellate courts have not addressed the precise issue of whether a violation of all ABA standards per se results in the deprivation of effective assistance of counsel, other courts have rejected this proposition. See for example, *State v Holm,* 91 Wash App 429, 437; 957 P2d 1278 (1998)("In such cases, however, we would not view the ABA Standards as controlling our analysis of ineffective assistance allegations in Washington"); *Van Alstine v State,* 263 Ga 1, 3-4; 426 SE2d 360, 362-363 (Ga,1993)(disagreeing with

commentary to ABA Standard 4-5.2). *Hodges v State*, unpublished opinion per curiam of the Tennessee Court of Criminal Appeals, decided December 9, 1992 (Docket No. 02C01-9206CC00133); 1992 WL 361336, p 2 (rejecting argument that violation of ABA Standards for Criminal Justice, § 4-4.1 will be considered, per se, the ineffective assistance of counsel regardless of the circumstances). To paraphrase the Court in *United States v Decoster*, 624 F2d 199, 208; 199 US App DC 359 (1976), while the ABA Standards may prove a useful guide to issues of effective assistance of counsel, they are only guides.

Because plaintiffs have not pointed to any legislative enactment or court rule adopted or order issued by the Supreme Court that adopts the ABA Standards or other reports, the Supreme Court should not find that the defendants have violated the juveniles' rights to effective assistance of counsel based on whether the defendants' conduct runs afoul of these.

Finally, the other basis for plaintiffs' arguments under subpart "b" is the canard posited in the Complaint and Brief that somehow the race or ethnicity of an attorney qualifies him or her for representing children. While there does not appear to be any direct Michigan case law precisely on this issue, the California Court of Appeals soundly rejected a similar contention in *People v Fitzgerald*, 29 Cal App 3d 296, 309 -310; 105 Cal Rptr 458 (1972), and explained as follows:

> We also reject the contention that the race of the assigned attorney should be a criteria for appointment. Any limitation on court appointments based on race or ethnic factors has no place in the administration of justice. The right to be free from discrimination is an individual right, and it should not be abridged or modified on the basis of an individual's race or other ethnic factors. The deliberate preference for an individual of one race, and solely because of his race, over an individual of another race, even in cases where the latter individual is

> better qualified in all other respects, is a grave injustice and an unconscionable violation of constitutional principles of equal protection.

Accord, *Carter v Indiana*, 512 NE2d 158, 172 (Ind, 1987).

In any event, the recent amendment to the Michigan Constitution occasioned by the passage of Proposition 2 in the 2006 general election would appear to make it illegal for the defendants to award contracts or attorney assignments based on the racial characteristics of either the attorneys or the juveniles. See Const 1963, art 1, § 26.[20]

Turning to the merits of plaintiffs' contention that the contracts entered into by the Court will result in a revolving door system and engender excessive substitutions, it can be observed that the fact the Trial Lawyers and Plaintiff Attorneys would make such an argument is remarkable inasmuch as under the former system attorneys representing juveniles, especially in neglect cases, routinely substituted in for each other. Indeed, the revolving door approach to juvenile representation practiced by at least some of the named Plaintiff Attorneys, such as Plaintiffs Brand and Ruby, is illustrative of the chief evil that they accuse the defendants of engendering.

In contrast, under the approach taken by the successful vendors, juveniles will have consistent representation, as borne out by the methods adopted by the contractors. See affidavits of Mays for JLG, ¶¶ 9, 17; Attia for CAP, ¶¶ 5; Schooley and New for CFLC, ¶ 25; Daniels-Thomas for LAD, ¶ 6; and Gruber for MCLC, ¶¶ 4, 11. Indeed, given that each group is comprised of a limited number of attorneys, other attorneys, not just the attorney

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[20] In any event, the attorney groups with whom the Court has contracted have members who are racially and ethnically diverse. See affidavits of Attia for CAP, ¶ 3; Mays for JLG, ¶ 20; Daniels-Thomas for LAD, ¶ 4.

who was assigned to represent the juvenile, will be familiar with the case, and will have ready access to the file. See for example, affidavits of Schooley and New for CFLC, ¶ 26; and Attia for CAP, ¶ 5. In contrast, under the former system, there were unlimited and unregulated opportunities for literally any attorney to be substituted in for the attorney present. The plaintiffs' "revolving door" argument, if anything, is an argument for why the defendants decided to move from the former system of appointing counsel to the present system of contracting with attorney groups.

Finally, with respect to the contention in subpart "d" that the fact the defendants did not have in place any mechanism for screening conflicts within and among the "group" contractors, once again the plaintiffs provide no legal authority that imposes this duty on the Court. Instead, this duty is imposed by the rules of professional conduct on attorneys. See for example, MRPC 1.9; 1.10.

Further, the groups are aware of their ethical duty in this regard and have established safeguards to prevent their attorneys from representing juveniles where a conflict of interest might appear. See, for example, affidavits of Mays on behalf of JLG, ¶ 15; Attia for CAP, ¶ 5; Daniels-Thomas for LAD, ¶ 8.

In short, the fact that the LAO did not provide a mechanism for screening conflicts within and among the "group" contractors should not be viewed as depriving the juveniles the effective representation of counsel.

For all the reasons stated above, the Supreme Court should not grant any relief under the allegations and theories advanced in counts two and three of the Complaint.

VII. The Supreme Court Should Deny Relief under Count Four Since There Is No Basis to Conclude That the Defendants Have Not Acted According to the Best Interests of the Juveniles

In count four of the Complaint, the plaintiffs charge that the defendants have systematically ignored the "best interests" of the juveniles who come before the Court in promulgating LAO 2006-08 and implementing the new system of assigning counsel for the juveniles in violation of several sections of the Juvenile Code. Generally, however, the plaintiffs merely rely on the above noted arguments that they make in counts one through three. Plaintiffs' Brief, pp 43-44. In particular, however, the Complaint notes three bases for their contention that the defendants have acted contrary to the best interests of the juveniles.

First, the plaintiffs again cite to the defendants' termination of existing attorney client relationships. Complaint ¶ 148(a). However, LAO 2006-08(III)(D)(2),(3) provided a mechanism for attorneys to remain assigned to cases where the maintenance of an existing attorney client relationship was especially critical. Indeed, LAO 2006-0808(III)(D)(2) reflects that the purpose of this exercise would be to "ensure that the interests of the children ... are properly served." As noted in Chief Judge Kelly's affidavit, she developed certain factors that would allow her to make a consistent and reasoned determination of this question, and application of those factors led her to grant the overwhelming majority of the motions that were brought before her. Notwithstanding that some attorneys elected not to make appropriate motions, the fact remains that a provision was made for accommodating the interests of juveniles to remain with existing counsel. Hence, the defendants did take into account the best interests of the children even though existing counsel were replaced in many instances.

The second basis for plaintiffs' assertion that the defendants did not take into account the best interests of the juveniles is their allegation that the defendants replaced soi-disant "authentic" attorney-client and LGAL relationships[21] with "non existent relationships" between the juveniles and attorney groups. Complaint ¶ 148(b). This allegation simply has no basis in fact. As attested to by each of the attorney groups, juveniles are being assigned to specific attorneys within the group. See affidavits of Mays for JLG, ¶¶ 9, 17; Attia for CAP, ¶¶ 5; Schooley and New for CFLC, ¶ 25; Daniels-Thomas for LAD, ¶ 6; and Gruber for MCLC, ¶ ¶ 4, 11.

The final basis for the plaintiffs' claim that the defendants acted contrary to the best interests of the juveniles is that the defendants awarded the contracts on the basis of costs. As demonstrated above in Argument 5C, this is simply inaccurate.

For all the reasons stated above in this section and the previous sections, the Supreme Court should conclude that relief cannot be granted on the basis of the claim asserted in count four of the Complaint.

VIII. The Supreme Court Should Deny Relief under Count Five Since the Defendants' Orders Do Not Interfere with the Property Interest or Ethical Obligations of Their Former Clients

In Count Five of the Complaint, plaintiffs assert that the defendants' orders have violated their property interest in their files and their ethical obligations to their former

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21 The Trial Lawyers and Plaintiff Attorneys clearly imply that the relationships that their members or the Plaintiff Attorneys have with their clients are "authentic" attorney client relationships. Yet, one can only wonder what this means when there was such a substantial number of proceedings in which substituted counsel were used, and where, specifically with respect to two of the named Plaintiff Attorneys, they did not attend court hearings for one of the named juvenile plaintiffs for a year and allowed three different attorneys to attend the four hearings held during the year.

clients. The basis of this claim emanates from e-mails sent by Leonard Branka, the Court's Director of Assigned Counsel, to attorneys who were being removed from representing juveniles in October 2006, when their representation of the juveniles would be terminated. In pertinent part, the e-mails stated, "After this hearing (e.g., the last one in which they would represent the child) please relinquish all relevant materials pertaining to the case in the referee's courtroom." See Plaintiffs' exhibit 3.

This e-mail was followed up by actual orders of removal of assigned counsel. All of the orders had a single provision which stated:

> IT IS FURTHER ORDERED that upon the entry of this Order, the removed counsel shall provide to newly appointed counsel the following documents as soon as possible:
>
> A. In abuse and neglect proceedings:
> 1) the petition and any supplemental petitions;
> 2) any finding of fact or law:
> 3) any orders;
> 4) the most recent court report; and
> 5) the most recent placement information about the juvenile including the name, address and telephone number of the current care giver; or
>
> (B) In delinquency proceedings:
> 1) the petition and any supplemental petitions;
> 2) any finding of fact or law:
> 3) any orders;
> 4) the most recent court report.
>
> See, Plaintiffs' exhibit 6.

Preliminarily, it can be observed that the plaintiffs are simply mistaken to the extent that they characterize the e-mail from Branka as an order of the Court. It can be observed that no judge signed the e-mail. Hence, it cannot be deemed an order of the Court. MCR 2.602(A)(2)("... all judgments and orders must be in writing, signed by the court ...").

The actual order that was issued was the one signed by Chief Judge Kelly. That order required formerly assigned counsel to make copies of certain documents that would be in formerly assigned counsel's file. As can be seen, Chief Judge Kelly's orders did not require the members of the Trial Lawyers or Plaintiff Attorneys to turn over any work product of the attorney, or reveal any communications between counsel and his or her former clients.[22] Instead, the documents were of a public record that would have been found in the court's file. See, MCR 3.925 (C), (D), and information about the child's placement would be such that would be of record with the court.

Given the sheer number of cases that were involved, it would have been impractical to expect that the Court Clerk would be able to keep up with the sudden demand on her office if newly appointed counsel were required to obtain the relevant documents from the Court file. Additionally, supplying newly appointed counsel in neglect cases with the most recent placement information about the juvenile, including the name, address and telephone number of the current care giver, would provide newly appointed counsel with the information necessary for him or her to begin making contact with his or her client as soon as possible. Having formerly assigned counsel provide newly appointed counsel with copies of the relevant documents would further ensure that there would be no adjournments due to difficulties that would doubtless arise if the Clerk's office were to try to attempt to either make copies of the documents for newly appointed counsel, or supply

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The Trial Lawyers and Plaintiff Attorneys intimate that perhaps some of the orders that they were required to copy *might* contain notes or comments that would reveal their own mental processes. Aside from the fact that this contention is highly speculative, the plaintiffs could avoid any problem by simply providing redacted copies of the orders or other documents provided to newly assigned counsel.

all of the court files for newly appointed counsel to make the copies themselves. In short, it was the determination of the Chief Judge that requiring formerly assigned counsel to make copies of the documents would further the expeditious administration of justice in these cases.

"From time immemorial attorneys at law have been recognized as officers of the court." *Johnson v DiGiovanni*, 347 Mich 118, 127; 78 NW2d 560 (1956). Courts universally recognize that because attorneys are officers of the court, lawyers have a duty to aid or assist in the "efficient and fair administration of justice." *Tyler v State*, 47 P3d 1095, 1105 (Alaska App,2001); *Horwitz v Holabird & Root*, 212 Ill 2d 1, 36; 816 NE2d 272, (2004); *Lindsey v City of Beaufort*, 911 F Supp 962, 966 (D SC,1995). One aspect of the duty to assist in the administration of justice requires lawyers engaged in litigation to aid the court in "the expeditious consideration and disposal of cases." *In re Smith*, 168 Ill 2d 269, 287; 659 NE2d 896 (1995).

In the case at bar, the order of Chief Judge Kelly did not implicate the property rights of formerly assigned counsel or cause them to violate any ethical duties. Instead, the orders required formerly assigned counsel to perform an action that would greatly assist in the efficient administration of justice, since it would enhance the ability of newly assigned counsel to become quickly familiar with critical documents and information necessary for them to effectively represent their clients, and to avoid the attendant delays to the adjudication of these cases if newly appointed counsel were unable to secure these documents and information in a timely and efficient manner. In complying with these orders, therefore, members of the Trial Lawyers and Plaintiff Attorneys would simply be assisting the Court in the expeditious consideration and disposal of cases, and thus,

fulfilling their duties as officers of the court. Thus, far from requiring formerly assigned counsel to breach an ethical duty, to the extent that the members of the Trial Lawyers and Plaintiff Attorneys have disobeyed these orders, they are engaged in conduct prejudicial to the administration of justice!

In any event, the authority cited by the Trial Lawyers and Plaintiff Attorneys does not support their ultimate contention that Chief Judge Kelly's order violated their property interest or would cause them to violate their former clients' confidences.

First, no Michigan appellate case law is cited but rather, two opinions of the Michigan State Bar's Standing Committee on Professional and Judicial Ethics: R-19 (2000) and R-5 (1989).

R-5 (1989) is an opinion pertaining to a request to the Committee to provide advice concerning ethical requirements applicable to the establishment of a law firm's record retention policy. This opinion simply has nothing to say about whether a court can require former counsel to make copies of certain public documents or provide other information to newly assigned counsel.

R-19 addresses whether a lawyer can charge reasonable copying costs to the former client when the client requests a copy of the lawyer's file. The Committee expressed an opinion that the client would be liable for such costs after opining that the physical file was the property of the lawyer, not the client. Yet again, that opinion does not address the scope of the lawyer's duty to assist the court in the administration of justice by providing successor counsel in delinquency or neglect cases copies of prior court orders or other such documents that may be in the court file.

In short, neither of the ethics opinions cited by the Trial Lawyers or Plaintiff

Attorneys supports their claim that the defendants have interfered with or denied them a property interest.

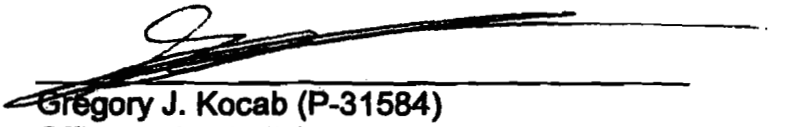
Finally, it should be noted that, given the preceding four counts in which the Trial Lawyers and Plaintiff Attorneys repeatedly assert their concern over the fate of the juveniles, this last count and the refusal of some attorneys to abide by the removal orders' requirements that the removed attorney provide new counsel with certain critical documents that would ensure that new counsel could be informed about the case as soon as possible, reveals the disingenuous nature of this lawsuit. Because the attorneys are not being asked to provide their work product, their behavior in not compiling the requested documents for successor counsel shows that they are not as interested in the well-being of their juvenile clients (or former clients) as they claim to be.

For all the above reasons, the Supreme Court should deny relief under count five since the defendants' orders do not interfere with the property interests or ethical obligations of the Trial Lawyers or Plaintiff Attorneys.

CONCLUSIONS AND RELIEF REQUESTED

"For superintending control to lie, the petitioners must establish that the respondents have failed to perform a clear legal duty and the absence of an adequate legal remedy." *Recorder's Court Bar Ass'n, supra*, 443 Mich at 134. In the case at bar, for the reasons more fully stated in the ensuing arguments, the plaintiffs have failed to establish their entitlement to relief. Not only do several affirmative defenses of both legal and equitable nature stand in their way of obtaining relief, but additionally, when the merits of their claims are fleshed out, it is evident the plaintiffs have failed to demonstrate that the defendants have failed to perform a clear legal duty.

For all the reasons stated in the foregoing arguments, defendants respectfully request that this Honorable Court deny the plaintiffs' request for the issuance of a writ of superintending control and dismiss the Complaint with prejudice.



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DATED: April 20, 2007