

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION**

MATHIS KEARSE WRIGHT, JR.,

Plaintiff,

v.

SUMTER COUNTY BOARD OF
ELECTIONS AND REGISTRATION,

Defendant.

CIVIL ACTION NO. 1:14-CV-42 (WLS)

**DEFENDANT’S NOTICE REGARDING
RESPONSE TO PLAINTIFF’S REMEDIAL PROPOSALS**

Defendant files this Notice because Plaintiff’s counsel has accused Defendant’s counsel of misrepresenting something to the Court, an accusation without merit—and about a point immaterial to this Court’s decision—but taken seriously by undersigned counsel and most efficiently resolved through this Notice. The crux of Plaintiff’s accusation is that Defendant’s expert relied on the work of a non-testifying expert, a practice that is common in litigation generally, and even more common in litigation involving redistricting and voting rights, but did not *name* that expert in a declaration. As detailed below, nothing has been “misrepresented” to this Court.

As background, according to this Court’s December 18, 2017, Order (Dkt. 147), on January 22, 2018, Plaintiff filed a proposed remedial plan (Dkt. 174), and on February 5, 2018, Defendant filed a response to that proposed remedial plan (Dkt. 176). Attached to both Plaintiff’s proposal and Defendant’s response were declarations by the Parties’ testifying experts in this matter. (Dkts. 174-1; 176-1.) On February 6, 2018, Plaintiff’s counsel asked for a copy of all data related to assignments referenced in Dr. Owen’s declaration, (Exhibit A at 4-5), and

asked that Defendant's counsel name who did the assignment work. *Id.* On February 7, 2018, Defendant's counsel provided all requested data to Plaintiff's counsel. *Id.* at 3. Plaintiff's counsel accused Defendant's counsel of "lying to the Court" because the declaration at issue did not affirmatively disclose *who* did the assignment work. *Id.* In correspondence this morning, Plaintiff's counsel threatened to file bar complaints against Defendant's counsel, sought consent to depose Dr. Owen and the non-testifying expert "as soon as possible next week," and set a three-hour deadline for response. *Id.* at 1.

Georgia Rule of Professional Conduct 3.3 prevents a lawyer from, inter alia, "knowingly" making a "false statement of material fact or law to a tribunal," or offering "evidence the lawyer knows to be false." For the reasons detailed below, that did not occur here.

First, Defendant's counsel offered no "false" statement or evidence. Dr. Owen stated that she "analyzed" proposed plans "using elections data." (Dkt. 176-1 at ¶4.) That is true. Dr. Owen also stated that "[r]esults from those elections were assigned" to proposed districts. *Id.* at ¶5. That is also true. Results from elections were assigned to proposed districts. This use of the passive voice does not assign that action to Dr. Owen. Indeed, use of the passive voice is typical in legal documents and is universally recognized as not assigning agency to a specific actor. *See, e.g., Dickson v. Office of Pers. Mgmt.*, 828 F.2d 32, 37 (D.C. Cir. 1987); *Rubin v. Islamic Republic of Iran*, No. 03C9370, 2007 WL 1169701, at *9 n.2 (N.D. Ill. Apr. 17, 2007).

Although Plaintiff's counsel apparently, though his position remains somewhat unclear, believes that Dr. Owen should have affirmatively disclosed *who* did the assignment, he fails to explain how failing to disclose this fact makes the "statement" or "evidence" "false." What matters is that Dr. Owen analyzed the data and that the assignment occurred.

Second, Defendant's counsel provided Plaintiff's counsel with the data underlying Dr. Owen's analysis and disclosed that a non-testifying expert prepared some of that data. (Exhibit A at 1-3.) Plaintiff's expert has the opportunity to vet the accuracy of the work, and, if he disputes the accuracy, he can challenge it through the proper adversarial process. Plaintiff's counsel has everything he needs to proceed, so nothing "material" has been omitted.

Third, the rule plainly establishes a "knowing" standard. As described above, nothing false was stated and nothing material was omitted. Therefore, not only did Defendant's counsel not know of any misleading statement, there was no false statement or material omission counsel *could* have known about.

Finally, this Court has been working with the truncated post-trial schedule requested by Plaintiff. *See, e.g.*, Dkts. 107, 108, 114, 128. Plaintiff is rightfully concerned about Defendant's Response to Plaintiff's Remedial Plans. (Dkt. 176.) Should a remedy be necessary in this case, a point belied by the very weakness of Plaintiff's proposed remedies, *see, e.g., id.*, Defendant is prepared to engage in a robust remedy phase including discovery from experts the Court deems appropriate and allowing Plaintiff time to parse through an analysis that his own expert could have, and frankly should have, done in the first place. At the present time, without a finding of liability, further discovery would be premature.

Submitted by:

s/ Katherine L. McKnight
E. Mark Braden (*pro hac vice*)
Katherine L. McKnight (*pro hac vice*)
Richard B. Raile (*pro hac vice*)
BAKER HOSTETLER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 861-1500

**ATTORNEYS FOR DEFENDANT SUMTER
COUNTY BOARD OF ELECTIONS AND
REGISTRATION**

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2018 the foregoing was filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF system.

s/ Katherine L. McKnight
E. Mark Braden (*pro hac vice*)
Katherine L. McKnight (*pro hac vice*)
Richard B. Raile (*pro hac vice*)
BAKER HOSTETLER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 861-1500

Exhibit A

From: Bryan Sells <bryan@bryansellsllaw.com>
Sent: Thursday, February 8, 2018 8:57 AM
To: McKnight, Katherine L.
Cc: Braden, E. Mark; Raile, Richard; Laughlin McDonald; Aklima Khondoker
Subject: RE: Sumter - Owen Declaration

Kate -

I think you and your colleagues have crossed a serious line here, and we intend to take appropriate action if you do not correct the violation immediately. Your suggestion that this is hyperbolic suggests to me that you and your colleagues do not understand the seriousness of what you have done.

Dr. Owen's declaration and your response are misleading and therefore dishonest. They strongly suggest that Dr. Owen performed the GIS analysis upon which her declaration is based. Dr. Owen could have easily told the Court that she relied on GIS work performed by someone else, but she chose instead to leave the misleading impression that she performed the work herself. It was clear to me that she did not perform the analysis because I deposed her and questioned her about her lack of expertise in this area. I knew that she could not have performed the analysis. The Court does not yet know that.

This conduct violates Rule 3.3 of the Georgia Rules of Professional Conduct governing candor to the tribunal and Local Rule 83 governing the admission pro hac vice of attorneys not admitted to practice in Georgia. If you do not immediately correct this violation, we will seek appropriate remedial measures authorized by those rules.

Your conduct likely also violates the analogous ethical rules in other jurisdictions where you and the other attorneys for the defendant hold bar memberships, but we have not yet researched the full extent of those.

Please let us know by noon today whether you intend to correct this violation.

As for your suggestion that we are not entitled to discovery regarding your GIS expert, we disagree. The inclusion of that person's original expert work product in Dr. Owen's declaration makes him or her a testifying expert. That is particularly true because Dr. Owen is not qualified to do the work herself. You could not, for example, shield an astrophysics expert from discovery simply by having your political science expert adopt her work.

But even if your GIS expert were properly considered non-testifying in this instance, we would need discovery because Owen won't be able to answer my questions about the analysis.

We would like to depose Dr. Owen and your GIS expert as soon as possible next week. Please let us know by noon today whether you will agree to allow us to take those depositions by consent.

BRYAN

On Feb 7, 2018 12:17 PM, "McKnight, Katherine L." <kmcknight@bakerlaw.com> wrote:

Bryan,

As a starting point, you have repeatedly, casually, and without reference to any specific rule, threatened me and our firm with purported “ethics violations” in an apparent effort to gain an advantage in this litigation. I remind you that this, in and of itself, is a violation of ethical rules. See, e.g., <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion220.cfm>.

A non-testifying expert participated in the preparation of some of the data underlying Dr. Owen’s declaration and this is not inconsistent with any point in her declaration. That declaration does not purport to represent that Dr. Owen took each and every step in data preparation herself (something you concede is “clear”). Moreover, we are not required to provide you with the identity of that non-testifying expert absent extreme circumstances. Rule 26(b)(4)(D); see also *Ager v. Jane C. Stormont Hospital & Training School for Nurses*, 622 F.2d 496, 503 (10th Cir. 1980) (holding that a party seeking the identity of a non-testifying consulting expert must demonstrate “exceptional circumstances” that make it “impracticable” to get “facts or opinions on the same subject by other means.”). On a related note, none of Plaintiff’s discovery requests sought the identity of non-testifying experts.

Therefore, we are not “refusing to disclose” anyone but do seek to better understand the “extreme circumstances,” and even the relevance of this information, meriting such a disclosure. Can you share any such circumstances or any basis for relevance with us?

Finally, we really hope to move beyond the hyperbolic exchanges with you, Bryan. When Plaintiff failed to respond to our requests for shape file data we were accommodating and waited over 30 hours for production, longer than it took us to get data to you.

Kate

Katherine L. McKnight
Partner

BakerHostetler

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From: Bryan Sells [mailto:bryan@bryansells.com]

Sent: Wednesday, February 7, 2018 1:45 PM

To: McKnight, Katherine L. <kmcknight@bakerlaw.com>

Cc: Braden, E. Mark <MBraden@bakerlaw.com>; Raile, Richard <rraile@bakerlaw.com>; Laughlin McDonald <lmcdonald@aclu.org>; Aklima Khondoker <AKhondoker@acluga.org>

Subject: Re: Sumter - Owen Declaration

Received. I will review it and let you know if we need anything further. Are you refusing to disclose who performed this work?

We believe that Owen's declaration is affirmatively misleading because it implies that *she* did this when she clearly did not. I'm not sure about the ethical rules in Virginia, but this appears to be tantamount to lying to the court, and that would violate the ethical rules here in Georgia. We plan to point that out to the court and relevant authorities. Just so there's no confusion I want to ask again: who did this work?

BRYAN

On Wed, Feb 7, 2018 at 12:46 PM, McKnight, Katherine L. <kmcknight@bakerlaw.com> wrote:

Bryan,

Attached please find the requested data.

Kate

Katherine L. McKnight
Partner

BakerHostetler

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From: McKnight, Katherine L.
Sent: Wednesday, February 7, 2018 12:41 PM
To: 'Bryan Sells' <bryan@bryansellslaw.com>; Braden, E. Mark <MBraden@bakerlaw.com>; Raile, Richard <rRaile@bakerlaw.com>; Laughlin McDonald <lmcdonald@aclu.org>; Aklima Khondoker <AKhondoker@acluga.org>
Subject: RE: Sumter - Owen Declaration

Thanks for your e-mail, Bryan. We will be able to send the data by 1pm today if you need a sense of timing.

Kate

From: Bryan Sells [<mailto:bryan@bryansellslaw.com>]
Sent: Wednesday, February 7, 2018 12:37 PM
To: McKnight, Katherine L. <kmcknight@bakerlaw.com>; Braden, E. Mark <MBraden@bakerlaw.com>; Raile, Richard <rRaile@bakerlaw.com>; Laughlin McDonald <lmcdonald@aclu.org>; Aklima Khondoker <AKhondoker@acluga.org>
Subject: Re: Sumter - Owen Declaration

Good afternoon counsel. I have not heard back from you in response to my request for information yesterday morning. We intend to file a reply to your response shortly, and we are going to inform the Court that the defendant's attorneys have failed to provide this information.

BRYAN

On Tue, Feb 6, 2018 at 9:31 AM, Bryan Sells <bryan@bryansellslaw.com> wrote:

Good morning, Kate. Would you please tell us who did the assignment to which Dr. Owen refers in paragraph five of her new declaration and who prepared Table A and B? We would also like to have a copy of all data related to that assignment, including data showing the votes assigned to each census block.

BRYAN

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