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April 5, 2021

Mr. Andrew Mills Holford
JOHRENDT & HOLFORD
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Columbus, Ohio, 43215

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Re: No. AM-20-CV-003954; *Kegler Brown Hill & Ritter Co., L.P.A. v. Carlo M. Croce;* Court of Common Pleas, Franklin Co., Ohio.

Dear Mr. Holford,

Thank you for the opportunity to assist you in your representation of Carlo Croce, M.D. This letter constitutes my expert witness report as requested.

Scope of My Engagement & Compensation.

I was retained by Dr. Carlo Croce, M.D. ("Croce") through his counsel Mr. Andrew Holford to serve as an expert witness upon the issue of the reasonableness and necessity of the attorneys fees sought by Kegler, Brown, Hill & Ritter Co., L.P.A. ("KBHR") and related issues[1]. In this case, this also requires evaluation of the applicable standard of care in assisting the client to make informed decisions. My hourly rate for this assignment is $350.00 per hour. To date I have been paid a retainer of $7,500.00 and as of the completion of this report have billed 37.1 hours plus expenses of $120.00, or $13,105.00.

Qualifications.

I have been a trial attorney since licensure in Texas in 1989. I have practiced through Carl J. Kolb, P.C. since October 1, 1990. During most of those years, I have been a sole practitioner and have worked alongside other law firms in particular cases. I am admitted to practice before all of the state courts in Texas and in the United States District Courts for the Western and Southern Districts of Texas. My Curriculum Vitae is provided with this report.

The majority of my practice involves legal professional responsibility and malpractice. I regularly represent lawyers and clients in professional malpractice actions, disciplinary proceedings, and fee disputes and have done so since approximately 1992. I am approved Texas defense counsel for three legal malpractice insurance carriers. I also have experience relevant to the underlying defamation case, having successfully tried

[1] Exhibit 1, CJK Engagement Agreement, February 22, 2021.

EXHIBIT A

three defamation cases to a jury, two concluded by settlement and one concluded by jury verdict and successful defense of the appeal from the verdict. Those tried to a jury included a claim of defamation by a terminated employee that resulted in two settlements, including a $200,000.00 settlement and a $603,000.00 settlement during trial, a claim by a physician defamed by words injurious to his fitness to serve his profession, in which the physician had no special damage allegations, resulting in a $570,000.00 settlement during trail, and a claim by a licensed professional counselor defamed by words injurious to her fitness to server her profession, resulting in a jury verdict of $575,000.00 which was reduced by the court to $410,000.00. I also successfully defended one interlocutory appeal from the denial of a media defendant's Motion for Summary Judgment in a libel action in which the Defendant incorrectly argued that the Plaintiff was a limited purpose public figure and was required to establish "actual malice".

Within the last ten years I have served as a retained expert only a handful of times in the following matters:

1. 2011-CI-11362, *Franciscan Sisters of Chicago Service Corp. v. Rebecca Joe C. Reser & Davidson & Troilo;* 166th District Court, Bexar County, Texas;
2. 2012-CCV-618573, *Bill McBride v. Daniel F. Horne & Stone & Horne;* County Court at Law No. 3, Nueces County, Texas.
3. 2013-CI-12661, *Blanco Rio, Ltd. vs. Barry Snell & Bayne, Snell & Krause,* 166th District Court, Bexar County, Texas;
4. In Arbitration: *Nava & Glander, PLLC et al vs. Will Allan Law Firm, PLLC & Will Allan.*

Information Reviewed.

In connection with this assignment, I have been provided with and reviewed the following information which I have considered in coming to my opinions:

1. KBHR-Croce Engagement Agreement December 13, 2016;
2. Docket Sheet, Croce vs. Sanders;
3. Docket Sheet, Croce vs. NYT;
4. NYT's Motion to Dismiss July 10, 2017;
5. Croce's Response to NYT's Motion to Dismiss August 31, 2017;
6. NYT's Reply to Brief In Opposition to NYT's Motion to Dismiss October 9, 2017;
7. Transcript of December 11, 2017 Hearing on NYT Motion to Dismiss;
8. NYT's Memorandum of Law In Support of NYT's Supplemental Motion to Dismiss February 14, 2018;
9. Croce's Response in Opposition to NYT's Supplemental Motion to Dismiss, March 16, 2018;
10. NYT's Reply Memorandum of Law In Support of Supplemental Motion to Dismiss, March 22, 2018;
11. *Carlo M. Croce v. New York Times Company*, et al, 345 F. Supp. 3d 961 (S.D. Ohio, Eastern Div. 2018);
12. June 18, 2020 Complaint KBHR vs. Croce;
13. KBHR invoices December 22, 2016-July 12, 2018;
14. KBHR Timekeeper Legend;

15. Economics of Law 2019, Ohio State Bar Assn;
16. Aggregate Totals (by billing period and by attorney);
17. Attorney Data Manipulated (by invoice date and attorney);
18. Fees Data Master Copy (by billing period and category of charge);
19. Science Hours Data;
20. Discovery Hours Data;
21. List of Croce Payments to KBHR;
22. Deposition of Thomas Hill;
23. Deposition of Loriann Fuhrer;
24. Deposition of Jane Gleaves;
25. Deposition of Carlo Croce;

Additional documents were reviewed which are either redundant or are not specifically referenced in this report, but which also support the information and opinions in this report. All documents reviewed are being provided with this report.

I have also relied on the authorities included in the "Authorities" sent with this report.

I have also had the opportunity to speak to Dr. Croce on April 3, 2021.

Of course, as further information becomes available this report will be supplemented.

Assumptions.

For the purposes of this report, I assume the following:

1. The existence of the attorney-client relationship is not in dispute.
2. The hourly rates agreed to by Dr. Croce and KBHR are comparable to market rates in the Columbus, Ohio area.
3. Ohio law governs the relations between Croce and KBHR.

Basic Facts.

Croce is a well-known cancer researcher employed with Ohio State University ("OSU")[2]. In November 2016 Croce received a letter from New York Times ("NYT") reporter James Glanz ("Glanz") addressed to him and OSU which requested answers to questions arising from charges by others that Croce had engaged in what has been described as "research misconduct" and which caused him to hire legal counsel. The charges had been made by Purdue University professor David Sanders ("Sanders") and an anonymous "whistleblower" named Clare Francis ("Francis"), among others, that Croce and his collaborators had falsified and manipulated data, and committed plagiarism, in their published scientific papers[3].

[2] Exhibit 2, Complaint, par. 6.
[3] Exhibit 2, Complaint, par. 7.

Prior to December 16, 2016 Croce had engaged KBHR for estate planning services[4]. Croce later engaged KBHR on December 16, 2016 to advise him regarding potential defamation claims[5] on an hourly engagement. Relevant portions of the fee agreement are:

> **1. The Firm's Services.**
>
> Client retains Firm to advise and represent Client regarding claims arising from statements and accusations made about Client (hereinafter "Statements") by James Glanz (a New York Times reporter) and David A. Sanders (an associate professor at Purdue University), which Statements Client believes are false and defamatory. The Firm's representation of Client will include investigating the falsity of those Statements and pursuing the appropriate course of action against the responsible parties who may be liable for their publication, which course of action will, if appropriate and authorized by Client, include filing and prosecuting a lawsuit on behalf of Client in the United States District Court for the Southern District of Ohio against the appropriate defendants, which may include The New York Times, James Glanz, David A. Sanders, and, if the facts and the law merit it, Purdue University.
> representations, assurances, or guarantees concerning about the outcome; (b) before filing any lawsuit, an initial pre-litigation investigation must be undertaken and completed to gather evidence necessary to support making a good faith claim in any lawsuit that the Statements were false and defamatory; (c) that pre-litigation investigation will require the hiring of independent experts to advise the Firm on the relevant science and other technical issues necessary to understand Statements and their falsity; and (d) there is no assurance, and the Firm makes no representations,
>
> **2. Fees and Expenses.**
>
> Client will pay the Firm fees for the Firm's services based on the Firm's standard hourly rates. The legal team working on the case will include attorney Thomas W. Hill as lead counsel, attorney Timothy A. Kelley, and paralegal Lou Anne Conrad. Their current hourly rates are:
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> |---|---|
> | Thomas W. Hill | $485 per hour |
> | Lori Fuhrer | $370 per hours |
> | Lou Anne Conrad | $175 per hour (paralegal) |

The Engagement Agreement does not provide a billing rate for Gleaves, does not inform the client that he will be billed in quarter-hour (.25 hr.) increments, and does not inform the client of the basis for charging of in-house case expenses. I am not aware whether in his prior engagement Croce was made aware of the billing increment or of the basis for in-house case expense charges. In-house expenses charged include "Everlaw" and reproduction and printing costs[6].

The Engagement Agreement does not specifically refer to any representation in connection with inquiries made by OSU. It does appear that Dr. Croce authorized work associated with a response to a letter sent by Glanz to OSU, but his recollection is that little work was necessary for this aspect of the representation. Neither Hill nor Fuhrer had prior experience in handling initial inquiries at the University level.

Hill says that the scope of duty undertaken was to "restore [Croce's] good name"[7]. Initially, KBHR understood that to involve responding to a letter Croce and OSU had received from Glanz inquiring about

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[4] Exhibit 3, Deposition of Hill, p. 58, line 25-p. 59, line 3.

[5] Exhibit 4, Engagement Agreement.

[6] Exhibit 3, Deposition of Hill, p. 132, lines 4-15, p. 133, line 9-p. 134, line 13.

[7] Exhibit 3, Deposition of hill, p. 19, line 22-p. 20, line 2.

allegations of research misconduct in order to steer Glanz away from writing an article in the NYT and possibly to address any article that might later appear in the NYT[8][9][10]. Prior to litigation, KBHR consulted two professors suggested by Croce, but it appears they were not retained experts[11]. After some initial investigation by KBHR, a lawsuit was filed against Sanders, after which the NYT published the article concerning Croce, at which point suit was filed against NYT as well[12].

Suit was initially filed against David Sanders in the Franklin County Court of Common Pleas ("state court"). That suit was then removed on April 20, 2017 to the United States District Court, Southern District of Ohio ("federal court")[13]. On July 13, 2018 KBHR filed a Motion to Withdraw which was granted on August 13, 2018[14]. Attorney James Arnold then appeared for Croce. A Motion for Summary Judgment was later filed by Sanders which was granted in part on May 12, 2020[15]. That judgment was then affirmed upon appeal[16].

On March 8, 2017, the NYT published a digital version of an article with the headline, "Years of Ethics Charges, but Star Cancer Researcher Gets a Pass. Dr. Carlo Croce was repeatedly cleared by Ohio State University, which reaped millions from his grants. Now, he faces new whistle-blower accusations"[17]. The article was "Number One" on the list of "Most Popular" articles in the digital version of the NYT[18]. The next day the print version of the article was released on the front page of the NYT[19].

I have neither seen nor reviewed any evidence to support the proposition that Croce lost his position at OSU or anywhere else, or that Croce has sustained any significant economic damages or other recoverable special damages as a result of the Statements. Hill understood this from the inception of the representation*.

On May 10, 2017, suit was filed against the NYT in federal court[20]. On July 10, 2017 NYT filed a Motion to Dismiss pursuant to Rule 12 (b) (6), Fed. R. Civ. P.[21] On August 31, 2017 KBHR filed Croce's Response in Opposition to the NYT's Motion to Dismiss[22]. On December 11, 2017 the court held an oral hearing on the Motion to Dismiss. At the hearing Judge Graham appeared to focus upon several key questions. One question concerned whether Croce had alleged defamation *per quod* and the special damages Croce claimed to result[23]. Another focus was whether the NYT article as a whole could be construed as making a

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[8] Exhibit 3, Deposition of Hill, p. 20, lines 13-18.
[9] Exhibit 5, Deposition of Gleaves, p. 15, line 16-p. 16, line 5.
[10] Exhibit 3, Deposition of Hill, p. 21 , lines 3-24
[11] Exhibit 3, Deposition of Hill, p. 40, line 5-p. 42, line 7.
[12] Exhibit 5, Deposition of Gleaves, p. 16, line 6-22.
[13] Exhibit 6, Docket Sheet, Croce vs. Sanders.
[14] Exhibit 6, Docket Sheet, Croce vs. Sanders.
[15] Exhibit 6, Docket Sheet, Croce vs. Sanders.
[16] *Carlo Croce v. David Sanders,* 6th Cir. No. 20-3577, 2021 WL 387489 (Feb. 3, 2021).
[17] *Carlo Croce v. New York Times Co.,* 345 F. Supp. 3d 961, 972 (S.D. Ohio, Eastern Div., 2018).
[18] *Id.*
[19] *Id.*
[20] Exhibit 7, Docket Sheet, Croce vs. NYT.
[21] Exhibit 7, Docket Sheet, Croce vs. NYT.
[22] Exhibit 7, Docket Sheet, Croce vs. NYT.
[23] Exhibit 8, Transcript, December 11, 2017, p. 3, line 14-p. 6, line 3, p. 8, lines 11-22.

false statement of fact, or constituted a "balanced report of both parties arguments and defenses" involved in the controversy, as NYT contended[24].

Ultimately, after an amended complaint and a Supplemental Motion to Dismiss was filed, Judge Graham granted the Motion to Dismiss as to all but one allegedly defamatory statement (made by Glanz to the effect that Dr. Croce was unethically involved in awarding grants for research with money from tobacco companies)[25], and was affirmed upon appeal[26].

Croce told me that before suit was filed against Sanders he was only told only that he had a "good case" against Sanders[27]. Croce contends he then was told he had a "good case" against the NYT, as well. But it is also the case that Croce was informed that the litigation would be very expensive and might not be of economic value to Croce even if he prevailed[28].

In the course of KBHR's representation from engagement through July 2018, lawyers Hill, Fuhrer and Gleaves and paralegal Conrad were the largest billers. Hill is a KBHR Director[29] and Fuhrer is a KBHR partner[30]. Gleaves was an associate attorney licensed in November, 2016[31].

KBHR's total billings were $1,672,080.61[32] between December 22, 2016 and July 12, 2018 [3334]. Croce paid $748,635.10 of this amount[35].

Lawyers' and paralegal time are represented to be 4494.75 hours at various rates for $1,600,715.00 of time charges[3637]. This results in a "blended" or average hourly rate of $356.00 per hour. The remainder of the $1,672,080.61 is case expense. The three highest-billing lawyers, Hill, Fuhrer and Gleaves, billed 3807.5 hours[38]. Hill accounts for 1573.5 hours at $485.00 per hour or $763,147.50, Fuhrer accounts for 1332.75 hours at $370.00 and $375.00 per hour during the relevant time period, at least $493,117.50; and Conrad, the paralegal, accounts for 392 hours at $175.00 per hour or $68,600.00[39]. Gleaves accounts for 901.25 hours at an unspecified rate[4041] The Invoices do not show the billing rates but only the hours worked[42]. The difference

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[24] Exhibit 8, Transcript, December 11, 2017 p. 39, lines 17-18.
[25] *Croce v. New York Times,* 345 F. Supp. 3rd 961, 994 (S.D. Ohio, 2018)
[26] *Croce v. New York Times,* 930 F. 3d 787 (6th Cir. 2019).
[27] Telephone conversation April 3, 2021.
[28] Exhibit 9, Deposition of Croce, p. 46, line 16-P. 47, line 6.
[29] Exhibit 3, Deposition of Tom Hill, Exhibit A2,
[30] Exhibit 3, Deposition of Tom Hill, page 127, lines 22-4.
[31] Exhibit 5, Deposition of Gleaves, p.4, line 14-15.
[32] Exhibit10, Fees Data Master Copy.
[33] Exhibit 11, Attorney Data Master Copy.
[34] Exhibit 12, KBHR Invoices 12/22/16-7/12/18
[35] Exhibit 13, Croce Payments
[36] Exhibit 10, Fees Data Master Copy.
[37] Exhibit 14, Attorney Totals.
[38] Exhibit 14, Attorney Totals.
[39] Exhibit 14, Attorney Totals
[40] Exhibit 14, Attorney Totals.
[41] Exhibit 4, Engagement Agreement.

between the $1,600,715.00 charged for 4494.75 hours, and the $1,324,865.00 of combined billing for Hill, Fuhrer and Conrad is $275,850.00. So, it appears that Gleaves was billed at $306.00 per hour. The information[43] I have indicates Gleaves is typically billed at $220.00 and $240.00 per hour during the relevant time period. The difference might be accounted for by the increases in rates for Gleaves and Fuhrer during the representation.

The invoices contain many instances of "block billing" in which multiple tasks are combined into a single time entry with no allocation of the time for each task.

Significant case expenses include Computer Assisted Legal Research ("CALR") of $17,084.07[44]. Offsite Storage of $11,147.00[45], and Professional Services of $26,519.10[46]. The basis of these expense billings, for instance whether it is a "pass-through" of an actual cost paid to others or whether it is a marked-up cost that is charged by the firm, is not clear from the Engagement Agreement or from the Invoices.

On June 18, 2020 KBHR sued Croce for unpaid legal fees in the amount of $923,445.51 on theories of breach of contract, open account, and promissory estoppel/unjust enrichment/quantum meruit[47]. Croce disputes the reasonableness and necessity of the fees and contends that he was not given the information necessary to make reasonably informed decisions regarding whether to proceed with litigation, that is, whether the litigation had merit sufficient to at least accomplish the goal of protecting his reputation.

Opinions.

1. **Contracts with lawyers are interpreted from the "reasonable client" perspective.**

Lawyer-client contracts are to be construed as a reasonable person in the circumstances of the client would have construed it. See, *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth,* 122 Ohio St. 3d 595, 2009-Ohio 3601, ¶¶ 24-25 (adopting and approving the Restatement [3d] of Law Governing Lawyers); *Restatement (3d) of the Law Governing Lawyers,* Section 18 (2).

2. **Croce's informed consent was necessary to file suit and incur litigation costs.**

The plain language of the Engagement Agreement shows that KBHR was not retained to do more than consider the merits of a claim for defamation against the New York Times ("NYT"), James Glanz ("Glanz"), David A. Sanders ("Sanders") and Purdue University ("Purdue"), and to file suit only with informed consent.

The Engagement Agreement requires KBHR "to advise and represent [Croce] regarding claims arising from [the Statements] by James Glanz and David A. Sanders which...[Croce] believes are defamatory"[48],

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[42] Exhibit 12, Invoices.
[43] Exhibit 15- KBHR Timekeeper Legend
[44] Exhibit 10, Fees Data Master Copy.
[45] Exhibit 10, Fees Data Master Copy.
[46] Exhibit 10, Fees Data Master Copy.
[47] Exhibit 2, Complaint, pars. 53-67.
[48] Id., par. 1.

including "...investigating the falsity of those Statements and pursuing the appropriate course of action against the responsible parties who may be liable for their publication which course of action will, if appropriate and authorized by [Croce], include filing and prosecuting a lawsuit ..." in the United States District Court for the Southern District of Ohio. The Engagement Agreement expressly requires KBHR to conduct, "...before filing any lawsuit, a pre-litigation investigation...to gather evidence necessary to support...that the Statements were false and defamatory.." which investigation will "..require the hiring of independent experts to advise the firm on the relevant science and other technical issues necessary to understand the Statements and their falsity...".

In addition, Rule 1.4, Ohio *Prof.Cond.R.*, provides:

(a) A lawyer shall do all of the following:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Prior to the adoption of the "Model Rules, the Ohio Supreme Court recognized EC 7-8 of the Code of Professional Responsibility as a duty of a lawyer in a professional malpractice case[49]. EC 7-8 provided that:
"A lawyer should exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations. [T]he lawyer should always remember that the decision whether to forego legally available objectives or methods is ultimately for the client and not for himself".

Construing the Engagement Letter from the "reasonable client" perspective alongside the duties imposed by Rule 1.4, KBHR owed Croce a duty of ordinary care to provide him with the information necessary to make a reasonable decision whether to incur the expense of suit against Sanders and/or NYT, or to take some other course of action. Therefore, KBHR was required to inform Croce if he could even survive the inevitable dispositive motions in the trial court, and/or upon appeal. This ensures Croce will be able to give "informed consent" to incurring the expense of a lawsuit and will incur only "necessary" attorneys' fees.

3. Negligent failure to advise.

Croce testified that Hill did inform him that the litigation would be expensive and that, even if he were to win, it may not be economically advantageous[50]. On the other hand, Croce stated to me that at no time did KBHR inform him that he was likely to lose to Sanders and/or NYT upon dispositive motions but that in both instances he was told he had a "good case". Croce informs me that had he known he was most likely to lose on dispositive motions without being able to establish at least that the Statements were defamatory and false, he would not have authorized the lawsuits and would not have incurred the expense because he would not have accomplished anything necessary to protect his reputation.

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[49] *McInnis v. Hyatt Legal Clinics,* 10 Ohio St. 3d 112, 113 (1984).
[50] Exhibit *, Deposition of Croce, p. 46, line 16-P. 47, line 6.

In support of its motions to dismiss, NYT relied partly upon *American Chemical Society v. Leadscope, Inc.,* 133 Ohio St. 3rd 366, 2012-Ohio-4193, in support of its assertion that it could not be liable to Croce because the article, as a whole and viewed from the perspective of the "reasonable reader", was a balanced report of a controversy and therefore not defamatory as a matter of law.

American Chemical was a case in which a publisher, who was not a party to the suit, published an article concerning a suit by ACS against employees for misappropriating intellectual property, in which ACS' counsel was quoted as saying, "our motivation in filing suit is to acquire back the protected information they took from us"[51], which the Plaintiffs contended was defamatory. Per the opinion, "[t]he article made clear that ACS filed a lawsuit and that the statement of counsel represented an allegation, and also presented statements from Leadscope to the effect that the suit had 'no merit'[52]." In *American Chemical,* the court held that a "reasonable reader" considering the article "as a whole" would understand that ACS's statement reflected its position and that Leadscope denied ACS' allegations of wrongdoing, and therefore in the context of an accurate and "balanced report" of the positions of both sides[53] the article was not defamatory as a matter of law[54]. The majority of the court applied this rule to ACS, even though it was not the publisher of the article, holding that it the article "contained a balanced report of both parties' arguments and defenses"[55]. Three justices dissented, one writing that he would not have applied the "balanced report" defense to any defendant except a publisher[56].

At oral argument upon NYT's Motion to Dismiss, a lengthy exchange occurred between Judge Graham and Hill concerning whether and how NYT's statements that others made charges of misconduct were false, how the article implied that Croce was guilty of the charges, why certain portions did not equally imply that Croce was found not guilty of the charges, and why the article as a whole was defamatory[57]. Hill responded that "[i]f the statement is false, it's false. If it's false and defamatory, it doesn't become less so because there's a larger-a discussion of a larger issue or saying the plaintiff denies it"[58]. Hill denies the applicability and even the existence of a "balanced report" defense except as provided by Ohio Revised Code 2317.05, limited to reporting on legal proceedings[59]. Hill argued that because the NYT republished Sanders' false statements about Croce, it was liable to Croce regardless[60]. Hill also argued that comments by readers posted on the NYT's website should inform the court as to what "reasonable readers" would take away from the article[61]. At the end of this exchange, the Court asks Hill if he wants to file an amended complaint, to which he replies that "I'm beginning to think I need to..."[62].

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[51] *American Chemical Society v. Leadscope, Inc.,* 133 Ohio St. 3d 366, 2012-Ohio-4193.
[52] *Id.* at ¶¶ 78-86.
[53] *Id.* at ¶ 86.
[54] *Id.* at ¶¶ 86, 95.
[55] *Id.*
[56] *Id.* at ¶¶ 107-109.
[57] Exhibit 8, Transcript, December 11, 2017, p. 27, line 17-p. 36, line 25.
[58] Exhibit 8, Transcript, December 11, 2017, p. 41, lines 18-21.
[59] Exhibit 8, Transcript, December 11, 2017, p. 37, lines 8-17, p. 38, lines 9-10.
[60] Exhibit 8, Transcript, December 11, 2017, p. 43, line 6-44, line 4.
[61] Exhibit 8, Transcript December 11, 2017, p. 35, line 3-p. 36, line 1.
[62] Exhibit 8, Transcript, December 11, 2017, p. 45, lines 21-25.

In his opinion[63], Judge Graham notes that the article itself is 14 pages, about 90 paragraphs. The article, the opinion continues, "...reports on the 'quotient of controversy' which has become attached to Dr. Croce, specifically 'allegations of data falsification other scientific misconduct'." "The claims made by Dr. Croce's critics are recounted, as is Dr. Croce's response denying any wrongdoing. Varying explanations (from critics, Dr. Croce and other observers) are offered for the alleged bad data and errors—ranging from "falsification" to "reckless disregard" to "sloppiness" to "honest errors." The Article reports that Dr. Croce has not been sanctioned for misconduct by any oversight agencies or by Ohio State, which cleared him in at least five cases. The Article raises the concern that Ohio State has a financial incentive to overlook problems with Dr. Croce's work, but it adds a statement from Ohio State saying that the University evaluates complaints of misconduct on the merits and without regard to a researcher's grant money."

Reading and analyzing the article as a whole does not take a great deal of time. Use of experts to gain an understanding of the scientific details are certainly necessary or helpful to the lawyer but only to the degree necessary to determine if the article as a whole presents a balanced report of the controversy. Upon reading the article, at least as concerns scientific misconduct and data falsification, it is as Judge Graham describes it, fairly presenting both sides of the controversy and not taking a position on the merits of the controversy.

By May 31, 2017 KBHR had billed $627,583.75 in time charges[64]. These charges include as much as[65]: 419 hours researching the law; 28.5 hours meeting with two experts suggested by Dr. Croce; 83.5 hours drafting and amending the complaint against Sanders; and 244.75 hours drafting the complaint against NYT. This also includes as many as 53 hours chronicling every defamation suit filed against the NYT. I believe this is excessive and was neither reasonable nor necessary for the tasks of investigating the merits of a defamation suit. Even setting that issue aside, there can be no doubt that KBHR would or should have located and thoroughly analyzed each of the Ohio Supreme Court's and federal court decisions concerning the elements of proof required in an Ohio defamation case against a publisher by any class of plaintiff (private person, limited purpose public figure), including the *American Chemical* decision.

American Chemical plainly holds that if a "reasonable reader" who considered the article "as a whole" would understand the positions of both sides to the controversy, it is not defamatory as a matter of law, and that this applies to the publisher and even to those who are quoted in the article, such as Sanders[66]. The holding in *American Chemical* is not limited to legal proceedings, as Hill contended it was and it contains no such limiting language.

Applying *American Chemical* to the article itself, it is my opinion that there was little to no chance that Croce could survive a dispositive motion by the NYT *or* by Sanders based upon the article. And it is my opinion that Croce should have been told just that-there is little or no chance that you can prevail in showing the Statements were defamatory and false-allowing him to choose whether he would like to spend more money on a case that would never accomplish his and Hill's stated goal of protecting his reputation[6768], much less realizing

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[63] *Croce v. New York Times Co.*, 345 F. Supp. 3d 961, 972 (S.D. Ohio, 2018).

[64] Exhibit 12, Invoices, -December 22, 2016-June 12, 2017.

[65] Because of "block billing" it is difficult to ascertain the precise hours spent on each task, see infra.

[66] *Leadscope.*, at 74-89.

[67] Exhibit 9, Deposition of Croce, p. 47, lines 7-9.

[68] Exhibit 3, Deposition of Hill, p. 19, line 22-p. 20, line 2.

any net recovery.

While a lawyer is not a guarantor of results, he owes a duty of ordinary care to make the determinations necessary to reasonably inform his client. In discharging his responsibility, "[t]he duty of an attorney to his client is to...exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent..."[69]. The elements of legal professional negligence in Ohio are these: 1) that the attorney owed a duty or obligation to the plaintiff; 2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and 3) that there is a causal connection between the conduct complained of and the resulting damage or loss[70].

The dismissal upon dispositive motions in these cases was foreseeable and overwhelmingly likely, viewed from the perspective of a reasonably prudent attorney exercising ordinary care. The failure in this case to inform Croce of the unlikelihood that he could accomplish his goal of protecting his reputation is in my view a breach of the standard of ordinary care, and negligent. It results in the failure to secure his informed consent. Had he been so informed, it is my opinion that a reasonable client, including Croce, would have elected a course of action other than litigation. Obviously the fees he incurred in litigation would not have been incurred in that circumstance.

4. KBHR's fees include excessive, unreasonable, and unnecessary fees.

With respect to the provision of legal services, the terms of an attorney's compensation are typically established by contract prior to employment and formation of the fiduciary relationship between attorney and client. An attorney has a professional duty not to charge a "clearly excessive fee." *Prof.Cond.R. 1.5(a).* Accordingly, "[w]here, prior to employment, the attorney and client have reached an agreement as to the hourly rate to be charged and the amount of the retaining fee, but the agreement fails to provide for the number of hours to be expended by the attorney, in an action for attorney fees the burden of proving that the time was fairly and properly used and the burden of showing the reasonableness of work hours devoted to the case rest on the attorney. Furthermore, a trial court must base its determination of reasonable attorney fees upon [the] actual value of the necessary services performed, and there must be some evidence which supports the court's determination.". *Caparella-Kraemer & Assoc. v. Grayson,* No. CA-2019-11-184, 2020-Ohio-3498, ¶¶ 25-28; *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter,* 100 Ohio App. 3d 323-324 (10th Dist. 1995).

In cases of fee-shifting, the Ohio Supreme Court instructs that the starting point for determining attorney fees is the lodestar: " 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.' "*Phoenix Lighting Group v. Genlyte-Thomas Group, LLC,* 160 Ohio St. 3d-32, 2020-Ohio 1056, ¶¶ 25-28 "A reasonable hourly rate is the prevailing market rate in the relevant community...given the complexity of the issues and the experiences of the attorney". *Id.* "The product of reasonable hours times a reasonable rate does not end the inquiry. "The trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B) now Prof.Cond.R. 1.5(a) *Id.*

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[69] *McCarty v. Pedraza,* 2nd Dist. App. No. 2013-CA-42, 2014-Ohio 3262, ¶8.

[70] *Environmental Network Corp. v. Goodman Weiss Miller L.P.,* 119 Ohio St. 3rd 209, 2008-Ohio-3833, ¶ 13.

Rule 1.5, *Prof.Cond.R*, provides that:

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent.

(b) The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in writing.

"The detail and specificity of the communication required by [Rule 1.05 (b) will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis of the rate or fee...In a new client relationship...an understanding as to fees and expenses must be established promptly". Rule 1.05, *Oh. R. Prof. Cond*, comment 2.

A further point is warranted in light of KBHR's practice of "block billing" which arises in determining the hours reasonably expended. The Ohio Supreme Court instructs that "[w]e...exclude "hours that are excessive, redundant, or otherwise unnecessary."[71] In that case, the Supreme Court writes, "[t]his task is made extremely difficult in this case by counsel's use of block billing, i.e., "lumping multiple tasks into a single time entry [citation omitted]. Block billing is disfavored by many clients and courts [citations omitted] because 'there is simply no way to assess whether the time spent on each of those tasks was reasonable when they are lumped together' [citation omitted]. Some courts reject attorney-fee applications containing block-billed time entries [citations omitted]. Others apply across-the-board cuts to account for time unreasonably billed [citation omitted]. We take this opportunity to clarify that this court will no longer grant attorney-fee applications that include block-billed time entries. Future fee applications submitted to this court should contain separate time entries for each task, with the time expended on each task denoted in tenths of an hour. Applications failing to

[71] *State Ex. Rel. Harris v. Rubino*, 156 Ohio St. 3rd 296, 2018-Ohio 5109, ¶¶ 5-12.

meet these criteria risk denial in full." Accordingly, "block billing" are insufficient evidence of what actually is a reasonable and necessary attorneys' fee for any particular task.

A. Analysis of the factors considered in determining a reasonable fee.

I acknowledge that the fees being customarily charged by KBHR are the "market" rate[72]. However if Gleaves was billed at more than the $240.00 typical billing rate, that should be reduced to $240.00 per hour.

I question whether $485.00 is a fair rate for Hill given the lack of any experience in a defamation case for a plaintiff, the sometimes excessive time spent, and the amount involved and results obtained. Hill is very experienced as a litigator of 35-plus years with some excellent results. The 95th percentile hour rate for Downtown Columbus lawyers is $555.00, and the 75th percentile is $375.00[73]. Hill's rate of $485.00 is just above the median between those two. But in this case I believe a fair rate for Hill is closer to the rates for Fuhrer, $375.--$400.00 per hour given those factors, before any other reductions for excessive fees.

B. The quarter-hour billing increment results in an unreasonable, excessive fee.

KBHR bills in quarter-hour increments. The Engagement Agreement states that the rates are "per hour" but does not communicate the quarter-hour-billing practice. A "reasonable client" would understand the "per hour" rate to mean "per actual hour" unless informed otherwise, and would not anticipate that time would be billed in quarter-hour increments. A "reasonable client" would be justified in expecting that his actual charges correspond to the agreed rates.

Numerous federal courts, including the Sixth Circuit Court of Appeals, find that quarter-hour-billing results in over-billing thus inviting downward adjustment of the reasonable number of hours by 15%-60%. E.g., *Yellowbook, Inc. v. Brandeberry*, 708 F. 3d 837 (6th Cir. 2013)(quarter-hour-billing increment may warrant fee reduction of not more than 60% relative to tenth-of-an-hour billing); *Bench Billboard Co. v. City of Toledo*, 759 F. Supp 2d 905, 914 (N.D. Ohio 2010) (quarter-hour billing generates a fee that is 15% higher than tenth-of-an-hour billing).

Failing to communicate the quarter-hour-billing practice is misleading to the client as to the basis and rate of the fees contracted and likely violates Rule 1.05 (b) because it raises the effective hourly rate beyond that which the client agreed to pay. I am not aware at this time whether Croce was informed during prior representation by KBHR of this billing practice but if he was not it would be my opinion that KBHR misled Croce as to the rate and basis of the fees and exceeded the contracted rate/billing increment by between 15% and 60%, warranting a commensurate reduction of at least 15% or $240,107.25, or more (60% would amount to a $960,429.00 reduction) to ensure that Croce is not charged more than the rates that he agreed to pay by use of the quarter-hour billing method. This reduction still assumes that KBHR could use a tenth-of-an-hour billing increment.

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[72] Exhibit 15, KBHR Timekeeper Legend.

[73] 2019 The Economics of Law Practice in Ohio in 2019 (Ohio St. Bar Assn.); Exhibit 47.

It is also my opinion that KBHR's practice of "block billing" conceals the actual extent of the over-billing preventing the client from understanding the basis and rate of the fees which he is charged, and whether it conforms to the Engagement Agreement.

C. Clearly excessive, unnecessary, and unreasonable time expenditures.

By May 31, 2017 KBHR had billed $627,583.75 in time charges[74]. These charges include as much as[75]: 419 hours researching the law; 28.5 hours meeting with two experts suggested by Dr. Croce; 83.5 hours drafting and amending the complaint against Sanders; and 244.75 hours drafting the complaint against NYT. This also includes as many as 53 hours chronicling every defamation suit filed against the NYT. From June 2017 to June 2018 KBHR billed another $973,131.25[76]. These charges included as much as another 454.5 hours of research, 276.25 hours drafting the initial response to NYT's Motion to Dismiss, and 105.5 hours spent preparing for oral argument on the Motion to Dismiss.

My review of the Invoices reveals that the number of hours worked was unreasonably multiplied by constant "churning" of data and work product between two partners and one associate, amongst others. The same work could have been done by a single experienced associate reporting to one partner without redundant and extended review and revision by multiple persons. Evidence of the effects of this "churning" appears when one analyzes the time spent on a given project.

It simply does not require 873.5 hours of legal research-almost half of the annual billing requirement for KBHR associates[77]-to understand the law governing Croce's case, and to research any new issues presented in a Motion to Dismiss (all of which should be foreseen before suit was filed). Gleaves billed most of the research hours at a rate that appears to be $306.00. The legal research cost calculated at Gleaves' rate is therefore $267,291.00. In my view, something closer to 100-150 hours is within the range of reasonable to do the research necessary to understanding the law governing Croce's case. It is my opinion that a reasonable fee for the legal research at Gleaves' rate would be not more than $45,900.00. Accordingly, I believe that Croce's costs for legal research are excessive, unreasonable and unnecessary and should be reduced by at least $221,390.00. The reduction may be higher depending upon how KBHR explains the time spent on each task that was "block billed" along with others.

It does not require 244.75 hours to draft the NYT complaint, particularly after spending "only" 83.5 hours drafting the Sanders complaint. In my view something closer to 40 hours would be at the higher end of what is reasonable for drafting either complaint after spending hundreds of hours researching both the law and the facts. Again using the blended rate of $356.00 per hour, Croce was charged over $87,000.00 to draft two lawsuits. In my opinion, a reasonable fee for drafting the complaints would be not more than $28,480.00. Accordingly, I believe that Croce's costs for drafting of complaints are excessive, unreasonable and unnecessary and should be reduced by at least $58,520.00. The reduction may be higher depending upon how KBHR explains the time spent on each task that was "block billed" along with others.

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[74] Exhibit 12, Invoices, -December 22, 2016-June 12, 2017.

[75] Because of "block billing" it is difficult to ascertain the precise hours spent on each task.

[76] Exhibit 12, Invoices,

[77] Exhibit 5, Deposition of Gleaves, p. *, line *

It does not require 276.25 hours to draft the response to the Motion to Dismiss. In my view, up to 60-80 hours would be reasonable and necessary. Using the blended rate, Croce was charged approximately $98,000.00 for the response. It is my opinion that a reasonable fee for drafting the response would be not more than $28,480.00. Accordingly, I believe that Croce's costs for drafting the response were excessive, unreasonable and unnecessary and should be reduced by at least $69,520.00. The reduction may be higher depending upon how KBHR explains the time spent on each task that was "block billed" along with others.

It does not require 105.5 hours to prepare for oral argument on the Motion to Dismiss. Using the blended rate, Croce was charged about $38,000.00 for preparation for oral argument. By the time KBHR had extensive research in hand and reviewed it time and again while drafting the complaints and responding to the Motion to Dismiss, it should have a solid grasp of the legal issues and anticipate which are critical to surviving the motion. Most of the time spent preparing for oral argument was Hill's, 76.5 hours at $485.00 per hour, or $37,102.50. I believe that no more than 25-30 hours could reasonably be necessary for Hill to prepare for oral argument at this stage, with perhaps some additional time by others to prepare a power point and engage in mock argument. It is therefore my opinion that a reasonable fee for Hill's preparation for oral argument, at Hill's rate of $485.00, is not more than $19,400.00. Accordingly I believe that Croce's costs for his lawyers to prepare for oral argument are excessive, unreasonable and unnecessary and should be reduced by at least $17,600.00. The reduction may be higher depending upon how KBHR explains the time spent on each task that was "block billed" along with others.

D. "Science" hours are unnecessary.

It appears that at least 170.25 hours were expended in order to understand the underlying scientific data that was challenged by the Statements[78]. Gleaves spent 44.5 hours, Fuhrer spent 108.5 hours, and Hill spent 17.25 hours. As noted above, there were 28.5 hours spent by Fuhrer with the two experts suggested by Croce. It is my view that 170.25 hours is excessive and unnecessary to the task of understanding if the Statements were false and defamatory, which required little more than reviewing the article and researching the law as applied to the article. I do believe that the 28.5 hours spent with the experts was reasonable and necessary. Therefore it is my opinion that 141.75 hours were not necessary. Using the "blended" rates of $356.00 per hour, it is my opinion that Croce is entitled to a reduction in the amount of at least $50,463.00. Due to the pervasive practice of "block billing", however, this reduction may be higher based upon how KBHR explains the time spent on each task and how the ultimate fact-finder resolves the difficulty of parsing out various tasks.

E. Discovery hours are excessive.

At least 296.5 hours are billed for discovery-related tasks[79]. Fuhrer billed 189.25. Gleaves billed 80.5 and Hill billed 26.75. It is my understanding that no depositions were ever taken in either Croce vs. Sanders or Croce vs. NYT, and that while initial disclosures were done by KBHR in Croce vs. Sanders, no initial disclosures were ever done in Croce vs. NYT. Initial written discovery was served by KBHR for Croce in Croce vs. NYT, but were nearly identical for each party to whom served. While responses to the initial discovery requests were forthcoming from both Sanders and the NYT, no meaningful follow-up was required as

[78] Exhibit 16, Science Hours Data.
[79] Exhibit 17, Discovery Hours Data.

the parties were awaiting a decision from Judge Graham on the Motion to Dismiss and subsequent discovery was temporarily stayed between the parties by agreement pending that decision.

It does not take 296.5 hours to do the work necessary to this discovery. In my view no more than 60-80 hours was necessary to perform this work. Again, using the "blended" rate of $356.00 per hour, I believe a reduction of $77,074.00 is due for 216.5 hours that were not reasonable amounts of time to expend on discovery. The reduction may be higher depending upon how KBHR explains the time spent on each task that was "block billed" along with others.

F. Expenses may be non-chargeable.

An Ohio lawyer may not charge separately for the lawyer's general office and overhead expenses. *Restatement (3d) of the Law Governing Lawyers,* §38 (3) (a).

Expenses were charged for "Outside Storage"(also known as "Everlaw") and "Computer Assisted Legal Research" ("CALR") (Bloomberg, possibly Westlaw and Lexis Advance). "Outside Storage" charges were $11,147.00 and CALR was $17,084.07[80].

It is unclear to me whether these expenses were simply a "pass-through" to the client of an actual cost incurred and related to his case, or is an overhead expense allocated by the firm amongst clients and/or "marked up" and billed to the client. If an overhead expense either allocated or marked up and billed, the expense charge would violate the rule cited above. Therefore, to the degree these charges are not a pure "pass-through", it would be my opinion that they are not properly chargeable to the client and Croce would be entitled to reduce the expenses to the amount actually paid by KBHR and attributable only to Croce's case only.

G. Conclusion.

It is my opinion that Croce has been sued for far more than the reasonable and necessary fees that could be incurred by KBHR during the representation. KBHR was negligent in failing to apprise Croce of the near-certainty that that the Statements were not defamatory despite being unwelcome to Croce, and that he was overwhelmingly like to lose on a dispositive motion and to have nothing that would assist to protect his reputation, his primary goal. While expense was Croce's secondary concern behind the concern for his reputation, if one can only incur expense and do nothing to protect his reputation, he would not spend the money. The billed fees do not conform to the Engagement Agreement because of the clearly questionable practice of quarter-hour billing. It is impossible to establish through the Invoices the actual amount of time spent on tasks as a result of both the billing increment and the unacceptable practice of "block billing". The time charges for numerous categories of work are clearly excessive as either unnecessary or unreasonable or both. The charges for certain expenses are also in question. At the end of the day, Croce is entitled to have his account substantially reduced by the ultimate factfinder to address these many shortcomings.

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H. Supplementation.

I reserve the right to supplement and refine my opinions and the figures described as additional information is received. I have today received KBHR's opposing expert report and will supplement this report following my review.

Very truly yours,
CARL J. KOLB, P.C.

Carl J. Kolb

CJK/mlm
Enclosures