

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.	:	Case No. CV-2016-09-3928
	:	
Plaintiffs	:	Judge James Brogan
	:	
vs.	:	
	:	MOTION FOR PROTECTIVE ORDER
KISLING, NESTICO & REDICK, LLC,	:	
et al.	:	
	:	
Defendants	:	

Come now Defendants Kisling, Nestico & Redick, LLC (“KNR”), Alberto Nestico (“Nestico”), and Robert Redick (“Redick”) (collectively, the “KNR Defendants”), and herewith move for a Protective Order with regard to the ongoing discovery depositions being taken in this matter.

Respectfully submitted,

/s/ George D. Jonson
 GEORGE D. JONSON (0027124)
 MONTGOMERY, RENNIE & JONSON
 36 East Seventh Street, Suite 2100
 Cincinnati, Ohio 45202
 Tel: (513) 768-5220
 Fax: (513) 768-9220
gjonson@mrjlaw.com

/s/ Jonathan E. Coughlan
 JONATHAN E. COUGHLAN (0026424)
 COUGHLAN LAW FIRM
 81 Mill Street, Suite 300
 Columbus, Ohio 43230
 Tel: (614) 934-5677
JEC@coughlanlegal.com

Counsel for Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico, and Robert Redick

MEMORANDUM

In Plaintiffs' Fifth Amended Class Action Complaint, Plaintiffs allege that KNR has "unlawfully grown its business by systematically violating the Ohio Rules of Professional Conduct * * *." (Fifth Amended Class Action Complaint ("Compl.") at ¶ 1.) Plaintiffs allege: "[S]pecifically, Nestico, Redick, and KNR have developed unlawful quid pro quo referral relationships with a network of healthcare providers * * *." (Compl. ¶ 2.) Plaintiffs' further allege: "[T]he KNR Defendants circumvent Ohio's prohibition against direct client-solicitation by unlawfully communicating through chiropractors to solicit car-accident victims without disclosing the quid pro quo nature of that relationship." (Compl. ¶ 3.) In conjunction with these factual conclusions, Plaintiffs assert specific alleged violations of Rule 1.7 of the Ohio Rules of Professional Conduct Compl. ¶ 3o), Rule 7.3 (Compl. ¶ 28), and Comment 5 to Rule 7.3 (Compl. ¶ 30). Plaintiffs rely on two Advisory Opinions, Opinion 2004-9 (Compl. ¶ 30) and Opinion 94-11 (Compl. ¶ 151).¹ Finally, Plaintiffs' cite to a disciplinary case as authority for the proposition that "Ohio law expressly prohibits attorneys from charging basic administration services, like KNR's 'investigation' or 'sign up' fee as a separate case expense." (Compl. ¶ 133.)

In setting forth alleged common factual issues present in the proposed classes, (Compl. ¶ 180), Plaintiffs ask whether "Defendants maintained arrangements with the chiropractors by which Defendants would use the chiropractors' representatives to

¹ The Advisory Opinions were issued by the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, now known as the Supreme Court's Board of Professional Conduct. These Opinions are informal, nonbinding advisory opinions which are rendered in response to prospective or hypothetical questions.

circumvent the Ohio Rules of Professional Conduct by directly soliciting KNR clients on KNR's behalf." (Compl. ¶ 180.B.ii.)

None of these references to the Ohio Rules of Professional Conduct, the Advisory Opinions or the disciplinary case law are appropriate in a civil suit and none of them form the basis of a claim for monetary relief in the Complaint.

Section 2(B)(1)(g), Article IV of the Ohio Constitution provides that the Supreme Court shall have original jurisdiction with regard to the admission to the practice of law, the discipline of persons admitted to practice law, and all other matters relating to the practice of law.

Gov. Bar R. V Section 2(A) of the Rules for Government of the Bar states, in pertinent part:

Exclusive Jurisdiction. Except as otherwise expressly provided in rules adopted by the Supreme Court, all grievances involving alleged misconduct by * * * attorneys * * * shall be brought, conducted, and disposed of in accordance with the provisions of this rule.

Smith v. Kates, 46 Ohio St.2d 263, 266, 348 N.E.2d 320 (1976), involved two civil complaints filed against a lawyer, purporting to invoke jurisdiction pursuant to the Ohio Constitution and O.R.C 4705.02, and seeking to remove him from the practice of law due to his conviction of two counts of willfully and knowingly failing to file federal income tax returns. *Id.* at 263. The Ohio Supreme Court, noting that neither complaint complied with Gov. Bar R. V (*Id.* at 264), stated that "* * * R. C. 4705.02 is of no force and effect with regard to our jurisdiction over the discipline of attorneys. Our authority is exclusive and absolute. A disciplinary proceeding may be initiated only by compliance with Gov. R. V." *Id.* at 266.

The Preamble to the ORPC states, in pertinent part: "Violation of a rule in the Ohio Rules of Professional Conduct (ORPC) should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." The rules "are not designed to be a basis for civil liability." (ORPC Preamble, ¶ 20.) Only the Ohio Supreme Court has jurisdiction to determine violations of the ORPC. Further, "Violation of a rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. (ORPC Preamble, at ¶ 20.) See, *Cargould v. Manning*, 10th Dist. Franklin No. 09AP-194, 2009-Ohio-5853. As the Eighth Appellate District stated in *Kutnick v. Fischer*, 8th Dist. Cuyahoga No. 81851, 2004-Ohio-5378:

*An attorney's professional obligations under the disciplinary rules do not necessarily translate into tort duties the attorney owes to his or her client which, if breached, may be the subject of a malpractice claim. The purpose of the disciplinary rules is to protect the public interest and ensure that members of the bar are competent to practice their profession. Fred Siegel Co., L.P.A. v. Arter & Hadden (1999), 85 Ohio St.3d 171, 1999 Ohio 260, 707 N.E.2d 853. These purposes are different from the purposes underlying tort law, which provides a means to redress a person harmed by tortious conduct. Id. Thus, the only authorized sanctions for violation of the disciplinary rules is a disciplinary action, which may result in reprimand, suspension, or disbarment of the subject lawyer by the Ohio Supreme Court. The rules do not create a claim for civil liability. American Express Travel Related Services Co. v. Mandilakis (1996), 111 Ohio App.3d 160, 166, 675 N.E.2d 1279. "It is well established that the violation of a disciplinary rule does not create a private [**10] cause of action." Montali v. Day, Cuyahoga App. No. 80327, 2002 Ohio 2715, at P35.*

Id. at ¶ 17.

Similar analysis has been applied by the Ohio Supreme Court with regard to lawyers providing testimony on behalf of their clients. While Rule 3.7 (previously DR5-102) governs when a lawyer may act as an advocate in a trial in which he is likely to be a necessary witness, that rule does not render an attorney incompetent to testify.

Rather, the employment as counsel goes to the weight, not the competency, of the lawyer's testimony. *Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St. 3d 256, 510 N.E.2d 379 (1987). Similarly, it has been held that a contract term that violates the Ohio Rules of Professional Conduct does not automatically make the contract unenforceable. *Hackett v. Moore*, 160 Ohio Misc. 2d 107, 2010-Ohio-6298, 939 N.E.2d 1321.

This concept is widely accepted across the country. “* * * As a general rule, there is no private right of action for violation of a New York Disciplinary Rule.” *Karas v. Katten Muchin Rosenman*, 2nd Cir. No. 07-1545-cv, 2008 U.S. App. LEXIS 27038 (Jan. 8, 2008), citing *William Kaufman Org. v. Graham & James, LLP*, 703 N.Y.S.2d 439, 442, 269 A.D.2d 171 (N.Y. App. Div. 2000). “Plaintiffs cannot base a securities fraud or other misrepresentation claim on a violation of an ethical rule. The rationale for these rulings is clear. The ethical rules were intended by their drafters to regulate the conduct of the profession, not to create actionable duties in favor of third parties.” *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991).

The Alabama courts, state and federal, have never addressed the issue of whether a breach of a Disciplinary Rule under the Code of Professional Responsibility provides the basis for a private cause of action. However, courts in other jurisdictions which have confronted this issue have expressly held that a violation of a Disciplinary Rule does not create a private cause of action. *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver, & Harris, P.A.*, 655 F. Supp 1573 (S.D. Fla. 1987); *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978), *aff'd mem.*, 590 F.2d 341 (8th Cir. 1978); *Noble v. Sears, Roebuck & Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973); *Spencer v. Burglass*, 337 So. 2d 596 (La. App. 1976), writ denied, 340 So. 2d 990 (La. 1977); *Martin v. Trevino*, 578 S.W. 2d 763 (Tex. Civ. App. 1978); *Bob Godfrey Pontiac, Inc. v. Roloff*, 291 Or. 318, 630 P. 2d 840 (1981); *Tingle v. Arnold, Cate, & Allen*, 129 Ga. App. 134, 199 S.E. 2d 260 (1973); *Brainard v. Brown*, 91 A.D. 2d 287, 458 N.Y.S. 2d 735 (1983). We find these cases to be dispositive in deciding the case at bar. The Code of Professional Responsibility is designed not to create a private cause of action for infractions of disciplinary rules, but to establish a remedy solely disciplinary in nature. *Bob Godfrey Pontiac, Inc. v. Roloff, supra*.

Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So.2d 22 (Ala. 1988).

At the recent depositions of Brandy Gobrogge (taken on October 16 and 17, 2018), Plaintiffs' counsel engaged in extensive questioning related to the referral practices of the KNR Defendants. As stated above, these practices do not form the basis of a claim for monetary relief for Plaintiffs. Further, even if the referral policies did violate the ORPC, which Defendants deny, that violation could not be the basis for civil liability.²

Questions seeking to establish a violation of the ethical rules will not—indeed, cannot—lead to the discovery of admissible evidence. The KNR Defendants therefore request a protective order prohibiting Plaintiffs' counsel from inquiring at the depositions of Nestico, Redick or any employee of KNR into alleged violations of the Ohio Rules of Professional Conduct, including, but not limited to, questions relating to “unlawful quid pro quo referral relationships with a network of healthcare providers” and “direct client-solicitation by unlawfully communicating through chiropractors to solicit car-accident victims without disclosing the quid pro quo nature of that relationship.”

Respectfully submitted,

/s/ George D. Jonson
GEORGE D. JONSON (0027124)
MONTGOMERY, RENNIE & JONSON
36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202
Tel: (513) 768-5220
Fax: (513) 768-9220
gjonson@mrjlaw.com

² The KNR Defendants have recently addressed these references to the ORPC, Advisory Opinions, and disciplinary case law in their Answer.

/s/ Jonathan E. Coughlan

JONATHAN E. COUGHLAN (0026424)

COUGHLAN LAW FIRM

81 Mill Street, Suite 300

Columbus, Ohio 43230

Tel: (614) 934-5677

JEC@coughlanlegal.com

*Counsel for Defendants Kisling, Nestico
& Redick, LLC, Alberto Nestico, and
Robert Redick*

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ George D. Jonson

GEORGE D. JONSON (0027124)