

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS, <i>et al.</i> , Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, <i>et al.</i> , Defendants.	Case No. 2016-CV-09-3928 Judge James Brogan Plaintiffs' Motion for a Protective Order Barring Speaking Objections at Depositions
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At Plaintiffs' recent depositions of KNR Operations Manager Brandy Gobrogge and Defendant Ghoumbrial's employee Richard Gunning, M.D., counsel for the Defendants repeatedly lodged improper speaking "objections" that suggested answers to and essentially testified for the witnesses. Examples of this misconduct are set forth below, the egregiousness of which require the Court to enter an order barring speaking objections and providing that Defendants will be sanctioned if this practice continues, both monetarily and through any other relief the Court deems proper.¹

1. Ohio law strictly prohibits the use of speaking objections during a deposition.

Under Civ.R. 30(C), objections asserted at a deposition are not proper unless "stated concisely in a nonargumentative and nonsuggestive manner." As such, "[s]peaking objections which refer to the facts of the case or suggest an answer to the deponent are improper and shall not be made in the presence of the deponent." Summit County L.R. 17.02 (b)(4). When counsel makes speaking objections or otherwise "engages in disruptive or irresponsible behavior at the deposition, the court may order sanctions or other remedies." L.R. 17.02(c). The court may also award

¹The transcripts of Gobrogge's and Gunning's depositions were filed with the Court concurrently with this motion. *See* Notice of Filing, Dec. 20, 2018.

substantive sanctions against the offending party, including precluding the party from disputing facts or evidence throughout the remainder of the litigation. *See, e.g., Wilson v. Sundstrand*, N.D. Ill. Nos. 99-C-6944 and 99-C-6946, 2003 U.S. Dist. LEXIS 14356, at *47-48 (Aug. 25, 2003).

“Conduct that is not permissible in the courtroom during the questioning of a witness is ordinarily not permissible at a deposition.” *Hunter v. GEICO Gen. Ins. Co.*, E.D.La. No. 17-05070, 2018 U.S. Dist. LEXIS 155335, at *24-25 (Sep. 12, 2018). Accordingly, “[i]nstructions to a witness that” the witness “may answer a question ‘if they know’ or ‘if they understand the question’ are raw, unmitigated coaching, and are *never* appropriate.” *Cincinnati Ins. Co. v. Serrano*, D.Kan. No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, at *12 (Jan. 5, 2012) (emphasis in original). It is the sole duty of the witness—not the defending attorney—to request clarification on a question when the witness needs it to respond. *Id.* at *13. Counsel should be sanctioned for “interposing improper objections and improper instructions not to answer” or “making demeaning comments to opposing counsel.” *JSR Micro, Inc. v. QBE Ins. Corp.*, N.D.Cal. C-09-03044, 2010 U.S. Dist. LEXIS 40185, at *31-32 (Apr. 5, 2010); *See also Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559, 561 (N.D.Okla.1995) (“Counsel’s statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.”); *Garner v. Mohave Cty.*, D.Ariz. No. CV-15-08147-PCT-PGR, 2016 U.S. Dist. LEXIS 12530, at *2-3 (Jan. 29, 2016) (“An objection that is argumentative or which suggests an answer to the deponent is an improper speaking objection”); *Alexander v. FBI*, 186 F.R.D. 21, 52 (D.D.C.1998) (“It is highly inappropriate for counsel for the witness to provide the witness with responses to deposition questions by means of an objection, rephrase or alter the question, or engage in an argument with opposing counsel.”); *Cordero v. City of New York*, E.D.N.Y. No. 15 CV 3436 (JBW) (CLP), 2017 U.S. Dist. LEXIS 80556, at *18-19 (May 12, 2017) (Counsel’s “extraneous comments, such as that questions called for speculation, were vague, leading or had been asked and answered ... seemed to be suggesting answers to the witness” and warranted sanctions); *Cincinnati Ins.*

Co., 2012 U.S. Dist. LEXIS 1363, at *13-15 (“An objection that a question is ‘vague’ is usually, and in this instance was, a speaking objection disguised as a form objection.”); *Hunter*, 2018 U.S. Dist. LEXIS 155335, at *24-25 (Sep. 12, 2018) (“A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record.”); *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (“Depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of the strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the [civil rules]: to find and fix the truth.”).

2. Defendants repeatedly interposed improper speaking objections at Ms. Gobrogge’s and Dr. Gunning’s depositions.

Attorneys Brad Barmen, David Best, and Tom Mannion, as counsel for the KNR Defendants, Defendant Ghoubrial, and Ghoubrial, Inc., variously, have flagrantly engaged in such prohibited conduct at the depositions of Ms. Gobrogge and Dr. Gunning. They have repeatedly made suggestive speaking objections, unnecessarily interrupted the depositions to argue with Plaintiffs’ counsel, again in a suggestive manner, and have lodged shockingly unprofessional personal insults at Plaintiffs’ counsel. As discussed in greater detail below, Plaintiffs are entitled to a protective order to prevent defense counsel from engaging in such conduct at future depositions.

a. Defense counsel repeatedly engaged in speaking objections during Ms. Gobrogge’s deposition.

Throughout Ms. Gobrogge's two-day deposition, counsel for the KNR Defendants, Mr. Mannion, routinely interrupted and made speaking objections that suggested answers and otherwise coached Ms. Gobrogge on how to respond to questions posed by Plaintiffs' counsel. As shown below, Mr. Mannion repeatedly made lengthy objections that instructed Ms. Gobrogge how to evade the substance of Plaintiffs' questions and suggested responses that were immediately reflected in Gobrogge's testimony. For example:

Q: What was Stan paying you, by the time you had a –

MR. MANNION: What does that have to do with this case, what Stan was paying her?

Q: -- what was your salary at Stan's –

MR. MANNION: -- you don't need to answer that question.

MR. PATTAKOS: Tom, it's relevant.

MR. MANNION: *How is it relevant?*

MR. PATTAKOS: It's relevant to how much she's making now.

MR. MANNION: No, it's not. You don't have to answer that question. ... Let me ask you: Brandy, do you feel comfortable giving him your salary with what you were making at Aronson?

THE WITNESS: No. ...

Q: *Why don't you feel comfortable giving me that information?*

A: *I don't feel that it's relevant.*

Gobrogge Tr. at 15:1-16:12.

Q: Several times a day, though, wouldn't be unusual?

MR. MANNION: Objection. Asked and answered. Go ahead.

A: I mean, like I said, there are days I don't talk to him at all. There are days I have conversations. I don't count. I don't pay attention to how many.

Q: Okay. You have never take[n] action on behalf of the law firm unless you believed that it was what Rob Nestico wanted for the firm, correct?

MR. MANNION: I'm going to object to form on that. *That's pretty broad there. But go ahead, if you can.*

A: Can you rephrase that, please?

Q: No, I can't.

A: Well *I don't know how to answer that question.*

Id. at 35:8–36:13.

Q: I'm trying to understand what the investigator is being paid for here.

MR. MANNION: And I've told you, again, *this isn't the person to ask.* But go ahead and tell him what you know.

A: Everything is on a case-by-case basis ... *[Y]ou'd have to talk to the attorney* who worked on that case.

Id. at 198:10–15.

Q: -- what does that have to do with why he would want to refer all Akron cases to ASC this month?

MR. MANNION: *Ask him.*

A: I think *you would have to ask Rob.*

Id. at 274:20–24.

Q: Do you know why Gary Petti was terminated?

MR. MANNION: Objection. Go ahead. *If you know, go ahead.*

A: *I don't remember* the specific details surrounding Gary Petti's termination.

Id. at 494:20–25. *See also Id.* at 71:12–72:6 (marked as “confidential” by Defendants, thus subject to filing under seal).

Additionally, Mr. Mannion would object specifically to the meaning of a particular word or phrase, suggesting a significance that was immediately reflected in Gobrogge's responses:

Q: You would never take action on behalf of the law firm unless you believed that it was what Rob Nestico wanted for the firm, correct?

MR. MANNION: Well, *I'm going to object by what you mean by "Action on behalf of the law firm."* But to the extent you can answer, go ahead.

A: I – I'm – *I don't know like what you mean when you're asking that.*

Id. at 35:8-36:13.

Q: To the best of your knowledge, did you actually make all of the communications that are attributed to you in the complaint?

MR. MANNION: *I'm going to object to "Attributed."* But go ahead.

A: Are you – are you asking the emails, that say they were from me in the complaint, were they actually from me?

Id. at 55:22-56:5.

Q: Now, would you agree that it was firm policy to send the investigator to sign the client up on the same day as the client first communicated with the firm?

MR. MANNION: *Objection, as to "Firm policy."* Go ahead.

A: *I wouldn't say that it's a policy. ...*

Q: But it was the firm's policy to sign the client up with the investigator on the same day, unless there was some reason not to, correct?

MR. MANNION: Objection. *She's not here, again, to testify as to what the firm policy is.* But you can answer the question to the best of your knowledge.

A: *It was not a policy.*

Id. at 151:20-152:6.

Q: I'm asking you if this email accurately reflect – let me rephrase it. Let me just ask you: Does this email accurately reflect KNR policy at this time or not?

MR. MANNION: *Objection as to, "Policy."* Go ahead.

A: So *I wouldn't say this is a policy.*

Id. at 169:5-12.

Q: And the firm was involved with that lending company, correct?

MR. MANNION: *Objection as to, "Involved."* But go ahead.

A: *Yeah, I wouldn't say, "Involved."*

Id. at 478:23-479:3.

While the mere use of such speaking objections is alone improper, his conduct is made worse because Ms. Gobrogge's testimony repeatedly mirrored Mannion's speaking objections. Though just a sample of the extent to which Mr. Mannion engaged in improper speaking objections at Ms. Gobrogge's deposition, the above excerpts show why a protective is necessary to prevent such objections from continuing in the future.

b. Defense Counsel repeatedly engaged in improper speaking objections during Dr. Gunning's deposition.

Like the conduct displayed at Ms. Gobrogge's deposition, Mr. Mannion, Mr. Barmen, and Mr. Best engaged in the same tactics during Dr. Gunning's deposition, by (1) making speaking objections that instructed Dr. Gunning how to answer questions; (2) demanding that Plaintiffs' counsel explain the relevance of certain questions before allowing the witness to answer, (3) lodging personal attacks and insults at Plaintiffs' counsel, including accusations that counsel is "psychologically impaired." Thus, as with the Gobrogge objections above, Plaintiffs are entitled to a protective order so that such improper and inappropriate conduct does not continue.

First, throughout Dr. Gunning's deposition, defense counsel engaged in improper speaking objections as a matter of course, interrupting the witness and suggesting testimony, despite the requests of Plaintiffs' counsel for such objections to cease. For example:

A. ... Dr. Ghoumbrial said, "You sometimes need to realize, these people are needle-phobic and" -- or not -- I don't know if I said, "Needle-phobic," "but don't like needles and sometimes you have to approach these patients a different way." And --

MR. BARMEN: *You answered it.*

THE WITNESS: Okay.

MR. PATTAKOS: Why are you interrupting the witness, while he's giving testimony, Brad?

MR. BARMEN: *He answered your question.*

Gunning Tr. at 34:1–13.

Q: The truth, Dr. Gunning, is that the reason you told me about this conversation ... was because Nestico, Ghoumbrial, and Lazzerini were laughing at the notion that Nestico's sister would receive the same treatment that the KNR clients received from Dr. Ghoumbrial's personal injury practice. Isn't that true?

MR. BARMEN: Objection to your --

A: You're reading into my context.

MR. BARMEN: Wait a minute. Objection. Your predicate -- the question assumes the truth is inappropriate.

MR. PATTAKOS: Why are you making speaking objections?

MR. BARMEN: Because you're asking inappropriate, ridiculous questions.

MR. PATTAKOS: Review the local rules. That's inappropriate.

MR. BARMEN: Okay. [Inaudible] your questions.

BY MR. PATTAKOS:

Q. Dr. Gunning, please --

MR. BARMEN: Don't assume facts not in evidence. Don't make false assumptions in your questions. Just ask the question.

Id. at 51:25–52:15.

Q. Dr. Gunning, did you or did you not, when we spoke on October 2, say that Dr. Ghoubrial constantly told you that the practice didn't make money if you didn't administer the shots?

MR. BARMEN: Objection. Asked and answered. *Tell him again.*

Id. at 31:18–25.

Q: Why else would you have told me that, Dr. Gunning?

MR. BARMEN: Objection.

MR. MANNION: Objection. *Again, assumes facts not in evidence. He said he didn't remember.*

A: Well, *I don't remember* why I said that.

Id. at 53:15–22.

Q: During our conversation, Dr. Gunning, you also provided detail about your own relationship with Dr. Ghoubrial ... Isn't that correct?

MR BARMEN: Objection. *You can answer to the extent that you recall* telling him that.

Id. at 55:23–56:6.

Q: Who could it have been?

MR BARMEN: Objection. Don't guess. He doesn't remember.

Q: Well, there's only so many people that work in that office, correct?

A: There's thirty people who work in that office.

Q: Okay. Well who could it have been likely to be that was back in whatever area you were where this was happening?

MR. BARMEN: Objection. Wait a minute. He's not going to guess or speculate. *If he knows, he'll tell you what he knows. If he doesn't know, that's his answer. He's not going to guess.*

MR. PATTAKOS: He can narrow down probabilities for me, Brad.

MR. BARMEN: He's not going to guess. He told you—he answered the question. He told you he doesn't recall who was there, period ...

Q: Do you have any recollection at all, Dr. Gunning, of who else would have been there?

MR. BARMEN: Objection. Asked and answered. Tell him again.

A: Erin was there. Dr. Ghoubrial was there. I can't — like I said, I would be guessing —

MR. BARMEN: Don't guess.

A: -- so I won't, yeah. I mean —

MR. BARMEN: *That's it. You're done.*

Id. at 79:20–81:8.

Q: -- or were patients of Dr. Floros? Let's put it that way.

MR. BARMEN: Same objection.

A: *Can I answer?*

MR. BARMEN: *Yeah, yeah, yeah, if you know.*

Id. at 110:13–18.

Q: --but you at least suggest it to get that information. Isn't that correct?

MR. MANNION: Objection.

MR. BARMEN: Objection. Asked and answered. He already told you that's not the case. Why do you keep asking him the same question?

Id. at 153:23–154:4.

Q: Why didn't he like the personal injury clinics?

MR. BARMEN: Objection. To the extent you know.

Id. at 175:15-18.

Q: Do you recall that that happened, that some of the ladies in the back office would have overheard you complaining to Dr. Ghoubrial about sneaking needles into the patient's backs or pressuring you to administer these injections?

MR. BARMEN: Objection. Wait a minute. Wait a minute. You're asking him whether it's possible that other people overheard conversations.

MR. PATTAKOS: No. I'm asking him whether he specifically remembers that and knows that.

MR. BARMEN: How –

MR. BEST: *He's already explained what those whole discussions were about.* I don't know why we're going back to almost five hours ago.

MR. BARMEN: Right. And *how would he know whether he overheard something or not?* I don't understand how he can –

MR. PATTAKOS: We'll find out.

A: *I don't know. I don't recall.* I'm sorry.

Q: You have no memory of whether Nicole or Erin or Samantha would have overheard you complaining to Dr. Ghoubrial about the injections?

MR. BARMEN: Same objection.

MR. BEST: Objection. He just answered that question. He said he didn't recall.

MR. BARMEN: *Tell him one more time.*

Id. at 178:6-179:14. The frequency of Mr. Barmen's improper speaking objections and their impact on Dr. Gunning's testimony is further demonstrated by the fact that Dr. Gunning began to ask for Mr. Barmen's permission before answering questions from Plaintiffs' counsel. *See, e.g., Id.* at 110:16 ("Can I answer?") and 148:9-10 ("Is it okay to answer?").

Additionally, defense counsel repeatedly demanded explanations as to why Plaintiffs' counsel had chosen to ask Dr. Gunning certain questions, or why this subject matter was "relevant," further signaling to the witness as to how to respond:

Q. During our conversation, you also provided detail about your own relationship with Dr. Ghoubrial and how you have wanted to leave his practice, but for various reasons have found it difficult to do so. Isn't that correct, Dr. Gunning?

MR. BARMEN: Objection. Wait a minute. Again, I don't see how that's in any way relevant to the issues of class certification, TENS units, trigger point injections. His personal relationships are not in any way relevant. Can you explain to me why they are?

MR. PAT'TAKOS: It goes to his credibility and the credibility of this testimony today as well as the appropriateness of your purported representation.

MR. BARMEN: My, "Purported representation"?

MR. PAT'TAKOS: Yes.

MR. BARMEN: That's cute. You're adorable sometimes, with your little comments. Tell me why this is relevant, before I decide whether to let him answer the question.

MR. PAT'TAKOS: I just told you, it goes to his credibility --

MR. BARMEN: No.

MR. PAT'TAKOS: -- and the pressure that he's under here to testify today -- in testifying today.

MR. BARMEN: Well, then ask him that question rather than these roundabout things that are really hard to figure out where you're going.

Id. at 54:1–55:9.

Q. You said that in 2011, you interviewed for a job with Walid Lababidi, but ultimately did not take that job because you believed that if you did, Ghoubrial would destroy both of you, both you and Dr. Lababidi. You used the word, "Destroy." Is that correct, Dr. Gunning?

A. I --

MR. BARMEN: Objection. Again, Peter, how is this relevant to the claims for class certification? Wait --

MR. PAT'TAKOS: Are you instructing the witness not to answer the question?

MR. BARMEN: I'm asking – I'm trying to decide. I'm asking you to explain to me how this is in any way relevant to class certification or the claims against my client.

Id. at 61:8–24. *See also Id.* at 27:13–31:25, 42:7–8, 46:13–15, 56:11–59:25, 86:3–11, 93:20, 106:13–16, 140:5–21, 141:19–20, 147:10–11, 149:5–7, 154:1–4, 156:23–157:3, 157:19–22, 169:23–170:7, 223:22–24, 225:9–10.

Finally, defense counsel further violated L.R. 17.02(c) by repeatedly launching personal attacks and insults at Plaintiffs' counsel. *Id.* at 39:3–12, 41:7–9 (MR. BEST: "You are out of your natural – there is something mentally wrong with you. Do you have medical care? Do you need medical care, because you are obviously unstable? You need to have someone reign you in. ... There's something desperately wrong with your brain. You really need psychological care. ... you are psychologically impaired and you are doing inappropriate things in a legal proceeding."); *See also, e.g., Id.* at 54:21–22, 156:23–25, 189:5–11.

Conclusion

By coaching Ms. Gobrogge and Dr. Gunning through constant interruptions and objections during their respective depositions, Defendants' attorneys have violated both the spirit and the letter of the Civil and Local Rules. Unless a protective order and sanctions are entered, this proceeding will continue to be marred by such misconduct and Plaintiffs will continue to be obstructed in their efforts to obtain truthful testimony and relevant evidence. Thus, a protective order should be entered before any further depositions take place in this matter, and the Court should issue sanctions against defense counsel, including an award of attorneys' fees incurred in preparing this motion and any other relief the Court deems appropriate.

Respectfully submitted,

/s/ Peter Pattakos

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Certificate of Service

The foregoing document was filed on December 20, 2018, using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos

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