

**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' Opposition to the KNR Defendants' Motion for Protective Order regarding the Rules of Professional Conduct
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Defendants Kisling Nestico & Reddick LLC, Alberto Nestico, and Robert Redick (the “KNR Defendants”) have moved the Court for a protective order prohibiting the Plaintiffs from asking questions at deposition about violations of the Rules of Professional Conduct alleged in the Fifth Amended Complaint. The KNR Defendants argue that the Rules do not independently support a private right of action, and that the Ohio Supreme Court has exclusive jurisdiction over proceedings to determine whether a sanctionable violation of the Rules has taken place. According to the Defendants, the combination of these facts means that deposition testimony about the Defendants’ breach of the Rules neither has relevance to the alleged claims nor can lead to discovery of relevant proof.

The Plaintiffs, however, are not pursuing claims directly predicated upon the Rules of Professional Conduct. They instead cite these provisions in the Fifth Amended Complaint as evidence of the duties owed by the KNR Defendants in their professional capacity, which in turn relate to the substantive counts set forth in the pleading.

For example, the Plaintiffs cite ethical rules and opinions regarding their claim that the KNR Defendants unlawfully double-charged clients for basic administrative services.

Fifth Amended Complaint (“FAC”), ¶¶133–135. This allegation pertains to the Plaintiffs’ claims for fraud (Claim 1), breach of contract (Claim 2), breach of fiduciary duty (Claim 3), and unjust enrichment (Claim 4) based on an investigation fee KNR deducted from the Plaintiffs’ settlement proceeds.

The Fifth Amended Complaint also cites Prof. Cond. R. 1.7, which governs conflicts of interest, and Prof. Cond. R. 7.3, which governs solicitation of clients. FAC ¶¶28, 30. The Plaintiffs are not suing for violation of these provisions. Instead, Rule 1.7 and Rule 7.3 relate to claims for breach of fiduciary duty (Claims 5 and 6) against the KNR Defendants for the narrative fee paid as a kickback to preferred chiropractors in conjunction with the “quid pro quo relationship” between the parties, which the KNR Defendants then deducted from the Plaintiffs’ settlements. FAC ¶¶ 221, 227.

The Plaintiffs have every right to question witnesses at deposition about the KNR Defendants’ alleged non-compliance with the Rules of Professional Conduct. In *Euclid Med. Sys. v. Johnston*, 9th Dist., No. 2254, 1987 WL 19527 (Nov. 4, 1987), the Ninth District held that disciplinary rules constitute “evidence” of a lawyer’s “duties” to his client in a civil action, even if only the Supreme Court can ultimately decide whether a violation has taken place. *Id.* at *4-*5.

Other precedent similarly recognizes that disciplinary rules “provide useful guidance” in civil litigation “as to the duties that an attorney owes to his client.” *Deutsche Bank Nat. Trust v. Gillium*, 151 Ohio Misc. 2d 36, 2009-Ohio-2394, 907 N.E.2d 809, ¶10 (Hamilton Cty. C.P.). The Preamble to the Rules of Professional Responsibility itself recognizes that since the Rules “establish standards of conduct by lawyers, a lawyer’s violation of a rule may be evidence of breach of the applicable standard of conduct.” Prof.Cond.R. Preamble, ¶20.

In *McCarty v. Pedraza*, 2014-Ohio-3262, 17 N.E.3d 71 (2nd Dist.), the court cited the Rules of Professional Conduct to establish the duties owed by counsel in a legal malpractice case. *Id.* at ¶8. It then analyzed evidence of the defendant's actions in light of those duties. *Id.* at ¶9-¶13. Meanwhile, in *David v. Schwarzwald, Robiner, Wolf & Rock*, 79 Ohio App. 3d 786, 607 N.E.2d 1173 (8th Dist. 1992), the court held that a witness for the plaintiff in a malpractice case "should have been permitted to testify regarding defendant's conduct, in relation to the Disciplinary Rules of the Code of Professional Responsibility." *Id.* at 802. *See also McCoy v. Gartrell*, 5th Dist., No. 2000AP60049, 2000 WL 1663608 at *2 (Oct. 31, 2000) (violation of disciplinary rules resulting in damage can serve as basis for civil liability); *Cecil & Geiser, LLP v. Phymale*, 10th Dist Franklin No. No. 12AP-398, 2012-Ohio-5861, ¶ 9 ("Just as private contracts are executed in the context of binding state and federal statutes, contracts between lawyers are executed in the context of the Ohio Rules of Professional Conduct. ... [T]he Ohio Rules of Professional Conduct trump any terms of an agreement between or among lawyers.").

Thus, it is clear that the Rules of Professional Conduct do not represent some forbidden topic in civil litigation. Parties may rely on them to establish the standards governing their lawyers' conduct. In such instances, evidence of counsel's actions "in relation to" the applicable rules becomes relevant. *David*, 79 Ohio App. 3d at 802. Here, the Rules are relevant to, and put Defendants on notice of, their duty to avoid the self-dealing alleged in the Fifth Amended Complaint, and the Plaintiffs deserve every opportunity to probe these topics at deposition. No grounds exist for barring any examination concerning the KNR Defendants' alleged violation of the pertinent ethical rules, and Defendants' argument to the contrary appears calculated to justify continued obstruction at the

deposition of Defendant Nestico (since postponed) that was scheduled to take place four business days after Defendants filed their motion.¹

The Ohio cases cited by the KNR Defendants does not refute this conclusion, given the disparate facts they address. In *Smith v. Kates*, 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976), private parties attempted to prosecute disciplinary proceedings against attorneys and a judge. In *Mentor Lagoons v. Rubin*, 31 Ohio St. 3d 256, 510 N.E.2d 379 (1987), the Supreme Court considered whether violation of disciplinary rules could justify exclusion of an attorney's testimony at trial. *Cargould v. Manning*, 10th Dist., No. 09AP-194, 2009-Ohio-5853, concerned an attempt to disqualify counsel in a divorce action based on an alleged conflict of interest. In *Hackett v. Moore*, 160 Ohio Misc. 2d 107, 2010-Ohio-6298, 939 N.E.2d 1323 (Hamilton Cty. C.P.), the court held that Rules of Professional Conduct defined a public policy that vitiated a contract between attorneys regarding the division of legal fees.² These decisions simply do not speak to the issue raised by the Motion for Protective Order—whether the Plaintiffs have the right to question witnesses at deposition about violations of the Rules of Professional Conduct that reflect upon their various claims.

Under Civ. R. 26(C), parties may obtain a protective order “for good cause shown,” for purposes of protecting them from “annoyance embarrassment, oppression, or undue burden or expense.” The KNR Defendants have failed to make any such showing in this

¹ Nestico's deposition has since been rescheduled for February 7 and 8, due in part to the need to resolve the instant motion, as well as the need for a Court order barring speaking objections as set forth in Plaintiffs' motion for a protective order filed on Dec. 20, 2018.

² The KNR Defendants also cite *Kutnick v. Fischer*, 8th Dist, No. 81851, 2004-Ohio-5378, which holds that violations of disciplinary rules do not create a private right of action. *Id.* at ¶17. The case does not consider whether plaintiffs may invoke the rules to prove the duties owed to them by counsel.

case. The Court should deny their Motion for Protective Order to preclude inquiry at deposition about alleged violations of the Rules of Professional Conduct.

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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.

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