IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	:	Case No. CV-2016-09-3928
	:	
Plaintiffs,	:	Judge James A. Brogan
	:	
vs.	:	**KNR DEFENDANTS' MOTION**
	:	**FOR LEAVE TO FILE REPLY IN**
KISLING, NESTICO & REDICK, LLC, et al.	:	**SUPPORT OF MOTION FOR**
	:	**PROTECTIVE ORDER**
	:	
Defendants	:	

Come now Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico, and Robert Redick (collectively, the "KNR Defendants") and herewith move this Court for leave to file, *instanter*, the attached Reply Memorandum of their Motion for Protective Order. This brief Reply Memorandum is necessary to point out the deficiencies in the case law cited in Plaintiffs' Opposition to the KNR Defendants' Motion for Protective Order.

Respectfully submitted,

/s/ George D. Jonson

GEORGE D. JONSON (83926)
MONTGOMERY, RENNIE & JONSON
36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202
513-241-4722
513-241-8775 (fax)
Email: gjonson@mrjlaw.com

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

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

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2019, 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

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MEMBER WILLIAMS, et al.,	:	Case No. CV-2016-09-3928
	:	
Plaintiffs,	:	Judge James A. Brogan
	:	
vs.	:	
	:	**REPLY IN SUPPORT**
KISLING, NESTICO & REDICK, LLC, et al.	:	**OF KNR'S MOTION FOR PROTECTIVE ORDER**
	:	
Defendants	:	

Consistent with their pattern of presenting conflicting arguments as the moment suits, Plaintiffs claim they "are not pursuing claims directly predicated upon the Rules of Professional Conduct," but instead:

> [C]ite 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.

(Plaintiffs' Opposition to KNR Defendants' Motion for Protective Order Regardin ghte Rules of Professional Conduct ("Opposition") at 1, *emphasis* added.) Despite this exercise in semantic gymnastics, it is evident Plaintiffs' reliance on the Ohio Rules of Professional Conduct ("ORPC") contradicts their previous, emphatic denials that their causes of action are for legal malpractice as to avoid application of the one-year statute of limitations for such claims.[1] Indeed, all of the cases Plaintiffs cite in their Opposition

[1] Plaintiffs' continued assertion that their claims are not legal malpractice claims is likely based on the fact that if Plaintiffs admitted the true nature of their claims, they would also have to concede that their claims are time barred and/or not certifiable. Nevertheless, Plaintiffs cannot simultaneously contend that their claims are not malpractice claims, yet rely on cases arising in a legal malpractice context to argue they should be allowed to inquire about violations of the ORPC.

involve legal malpractice claims, and, thus, if the Court were to take Plaintiffs' assertions at face value, they would be inapplicable to this case.

Simply stated, Plaintiffs cannot have it both ways, and either their claims sound in legal malpractice or they do not, in which case KNR is entitled to the protective order prohibiting Plaintiffs' counsel from inquiring about alleged violations of the ORPC that are irrelevant to the causes of action Plaintiffs claim to assert. Further, two of the legal malpractice-related decisions cited in Plaintiffs' Opposition were based on the language of the then-controlling Code of Professional Responsibility ("CPR"), which was replaced by the ORPC on February 1, 2007.

In *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.*, 79 Ohio App. 3d 786, 607 N.E.2d 1173 (8th Dist. 1992), the plaintiff' asserted in his cross-appeal that "The trial court erred in prohibiting plaintiff from questioning defendant concerning the Code of Professional Responsibility." In addressing this assignment of error, the court stated:

> Further, while the preliminary statement of the ABA Code of Professional Responsibility (1976) indicates that the "[t]he Code makes no attempt to prescribe either disciplinary procedure or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct," the Preface of the Code of Professional Responsibility which governs the attorneys of this state does not contain this statement.
>
> Accordingly, we hold that Zashin should have been permitted to testify regarding defendant's conduct, in relation to the Disciplinary Rules of the Code of Professional Responsibility.

(*Id.* at 1183, internal citations omitted, emphasis added.)

By contrast, the ORPC does contain language similar to that of the ABA language cited in *David*:

> "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.) So the reasoning of the *David* decision is not applicable to the current case.

Similarly, the court in *Euclid Medical Systems, Inc. v. Johnston*, 9th Dist. Wayne C.A. No. 2254, 1987 Ohio App. LEXIS 9459, 1987 WL 19527 (Nov. 4, 1987), addressed the use of the CPR in a legal malpractice action:

> Both the trial court and EMS failed to understand the proper function of the Code [of Professional Responsibility] in an action for legal malpractice. This topic has been the object of national debate. See *Dahlquist*, The Code of Professional Responsibility and Civil Damages Actions Against Attorneys (1982), 9 Ohio Northern U.L.Rev.1. We find the case of *Woodruff v. Tomlin* (C.A. 6, 1980) 616 F.2d 924, certiorari denied (1980), 449 U.S. 888, persuasive in this regard. In *Woodruff*, the Sixth Circuit Court of Appeals held that the Tennessee Code of Professional Responsibility, while not dispositive in an action for legal malpractice, does constitute "some evidence of the standards required of attorneys." *Woodruff*, supra [13]

Euclid at 8, 9. Again, the Code of Professional Responsibility is not at issue in this case, and, therefore, the *Euclid* decision is not persuasive authority.

In *Deutsche Bank National Trust v. Gilliam*, 151 Ohio Misc. 2d 36, 2009-Ohio-2394, 907 N.E.2d 809, the Hamilton County Common Pleas Court acknowledged that a violation of a Disciplinary Rule does not necessarily give rise to a malpractice action, but went on to state that "in the case at bar, the complaint alleges conduct that not only violates the Disciplinary Rules, but also constitutes malpractice." *Deutsche Bank* at 39, 40. As stated above, because Plaintiffs contend there are no allegations of legal malpractice in their case, *Deutsche Bank* does not support their position.

Conclusion

There can be no claim that the KNR Defendants are liable to Plaintiffs for violating the ORPC, as such a violation cannot be the basis for civil liability. And there can be no claim that the alleged violations of the ORPC are somehow relevant to prove legal malpractice, as Plaintiffs insist the allegations in the Complaint are not allegations of legal malpractice.

For these reasons, the KNR Defendants are entitled to a protective order prohibiting Plaintiffs' counsel from inquiring at the depositions of Nestico, Redick or any employee of KNR about alleged violations of the Ohio Rules of Professional Conduct, including, but not limited to, questions relating to the allegations of an "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."

Alternatively, if the Court disagrees and finds the ORPC relevant to Plaintiffs' asserted causes of action and probative of "***duties owed by the KNR Defendants in their professional capacity***," KNR requests that the Court call the case what it is, a claim for legal malpractice subject to a one-year statute of limitations.

Respectfully submitted,

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GEORGE D. JONSON (83926)
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36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202
Tel: (513) 241-4722
Fax: (513) 241-8775
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