

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al

Plaintiffs,

v.

Kisling, Nestico &amp; Redick, LLC, et al

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

**Defendants' Joint Reply in Support of  
Defendants' Joint Motion for *Sua Sponte*  
Order Restricting Plaintiffs' Counsel's  
Speech**

The Defendants submit this Reply to pose the following question: how many times will Plaintiffs' counsel be permitted to mislead this Court and the public at large before being reprimanded? Most recently, in Plaintiffs' Opposition, Plaintiffs disingenuously suggest that Defendants currently seek a blanket gag order to "silence Plaintiffs' counsel," which is patently false. In fact, Defendants' Motion explicitly acknowledges Plaintiffs' First Amendment right to free speech and simply seeks to remove and prevent Plaintiffs' from publishing further unethical, misleading, and prejudicial advertisements and statements to the press and public. Plaintiffs have no right to disseminate misleading information. Given Plaintiffs' Counsel's inability to refrain from such dissemination, Defendants have no option but to seek the Court's assistance in removing such communications and sanctioning Plaintiffs to prevent further unethical and prejudicial actions.

**A. Plaintiffs' Counsel's social media post is a misleading unethical advertisement.**

Plaintiffs' post improperly suggests that Plaintiffs have proven that (1) a conspiracy exists between Dr. Ghoubrial and KNR, (2) KNR and Dr. Ghoubrial overcharged KNR's clients for medical supplies, (3) Dr. Ghoubrial administered fraudulent medical treatment, (4) funds were unlawfully charged to Dr. Ghoubrial's patients, and (5) that a class-action lawsuit exists. The only non-definitive aspect of Plaintiffs' post is whether the reader will be "entitled to recover up to and

more than \$2,000” from the “class action lawsuit based on proof[.]” The social media post lacks any characterization of Plaintiffs’ claims as unproven allegations, in fact the post fails to include any variation of the word “allege” within. Plaintiffs’ Counsel’s post is defamatory and a misleading advertisement in violation of Rule 7 of the Ohio Rules of Professional Conduct.

First, Plaintiffs’ post violates Ohio Rule 7.1. Rule 7.1 prohibits a lawyer from making or using false, misleading, or nonverifiable communications about the lawyer or the lawyer’s services. Ohio Prof. Cond. Rule 7.1. Under Rule 7.1, a “communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.” *Id.* As stated, Plaintiffs’ communication is misleading, as it makes several assumptions that are factually incorrect. As the Court is aware, Plaintiffs have not proven that a conspiracy exists between Dr. Ghoumbrial and KNR, nor have Plaintiffs’ proven that Dr. Ghoumbrial overcharged his patients or administered “fraudulent medical treatment”<sup>1</sup> to them. Additionally, Plaintiffs have not proven that any client of KNR or patient of Dr. Ghoumbrial unlawfully had funds charged to them, nor has the Court certified any class-action lawsuit that could entitle readers to recover. Critically, Defendants have made no concessions to Plaintiffs’ allegations, the Court has reached no conclusions. Nevertheless, the post lacks any indication that the present lawsuit involves *unproven allegations*, rather than definitively proven facts. Consequently, Plaintiffs’ Counsel’s post contains several material misrepresentations and omits a fact—that the lawsuit is based on unproven allegations—which was necessary to make the statement not materially misleading as a whole. Thus, the post is in violation of Rule 7.1.

Second, Plaintiffs’ post violates Ohio Rule 7.3. Rule 7.3(c) provides, in pertinent part:

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<sup>1</sup> Plaintiffs’ chosen language further demonstrates that the *unproven* allegations against Dr. Ghoumbrial are “medical claims” involving Dr. Ghoumbrial’s medical treatment subject to R.C. 1305.113’s one-year statute of limitations.

Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer reasonably believes to be in need of legal services in a particular matter shall comply with all of the following:

- (1) Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee;
- (2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;
- (3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

Plaintiffs' post is soliciting prospective clients, as it states "for more information about how to participate in this lawsuit and recover funds unlawfully charged to you, please contact our law firm[.]" Therefore, Plaintiffs' non-compliance with Rule 7.3(c)(2) and (3) constitutes a violation of the ethical rules. Initially, in violation of sub-section 2, the post disclaims and does not refrain from expressing predetermined evaluation of the merits of the case; it states that the proof already exists. Additionally, the post lacks any mention of the fact that it is advertising material in contradiction of sub-section 3. Consequently, Plaintiffs, again, are in breach of Rule 7.3.

Overall, because Plaintiffs' post lacks any suggestion that the suit has not been certified as a class action lawsuit or that the Complaint contains unproven allegations rather than definitive proof, or that Defendants have made no concessions and the Court has drawn no conclusions on such allegations, the post is misleading and in violation of Rule 7. Thus, as prior court decisions concerning similar communications have held, Plaintiffs' precertification communications are improperly suggestive and unprotected by the First Amendment. The Court should restrict such communications and sanction Plaintiffs' Counsel accordingly.

**B. Plaintiffs' misleading, unethical, and unfairly prejudicial speech is not protected.**

Given the misleading nature of Plaintiffs' social media post, the Court can and should restrict Plaintiffs' Counsel's unethical extrajudicial speech. Plaintiffs oppose the present Motion with more deception. Contrary to what Plaintiffs imply, Defendants do not request a blanket gag order barring all extrajudicial speech from the Court. Rather, Defendants simply seek the Court's assistance in removing and preventing Plaintiffs' Counsel from disseminating misleading information to the press and public, to the detriment of Defendants and the public at large. As Plaintiffs' note, the Ohio Supreme Court recognizes that attorney's speech is protected, so long as the statements "do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements." *Am. Chem. Soc'y v. Leadscope Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90 (citing Ohio Prof. Cond. Rule 3.6). Consequently, because Plaintiffs' Counsel's extrajudicial speech plainly exceeds the contours of protected speech and violates Ohio's ethical rules, it is not protected and can be restricted.

Plaintiffs reliance on cases concerning the amount of proof required to restrict attorney's speech in court filings misses the point of Defendants' Motion, which concerns extrajudicial speech, not court filings. (*See* Plaintiffs' Opposition, p. 5). Defendants do not seek to restrict access to information contained in court records at this time. Likewise, Defendants are not claiming harm from Plaintiffs' court filings. Instead, Defendants have been injured by Plaintiffs' Counsel's misleading and unethical extrajudicial dissemination of misleading information to the press and public, particularly through advertisements lacking the required designation as such.

Plaintiffs' Counsel has ethical duties to abide by. The public and press have a right not to be misled. Defendants have a right not to have their reputations and defense unfairly prejudiced by

Plaintiffs' unethical communications. Accordingly, Defendants' requested gag order is necessary and appropriate to prevent the unethical and unlawful dissemination of misleading information.

**C. Courts agree that limiting counsel's precertification speech is necessary to avoid factually inaccurate, unbalanced, or misleading statements to putative class members.**

Plaintiffs' Opposition attempts to distinguish *Katz v. DNC Servs. Corp.* by focusing on one inapplicable aspect of the misleading extrajudicial communication at play in *Katz* and completely ignoring all of the similarities between the *Katz* communication and the present communication at issue. Plaintiffs point to *Katz* to argue that the court restricted counsel's speech due to communications that expressly asked potential plaintiffs to sign a consent in order to join the lawsuit. However, the *Katz* court also relied on other aspects of counsel's communication when deciding to restrict the speech, which Plaintiffs' conveniently fail to mention.

For example, Plaintiffs' fail to address the following language from the *Katz* opinion, finding similar language objectionable and restricting it as such:

First, the first sentence of the fifth paragraph states: "The lawsuit seeks unpaid overtime on behalf of all organizers who worked directly for the DNC or who worked for any state democratic committee in the last three years." This Court finds that, as constructed, this sentence implies that Defendants' liability has been proven or is virtually uncontested as it relates to the issue of unpaid overtime. Defendants have made no concessions and the Court has yet to make any conclusions to that effect. **If counsel wants to explain the relief sought in this litigation, it must do so in a way that accurately and explicitly characterizes Plaintiff Katz's claims as allegations yet unproven.**

(Emphasis added.) *Katz v. DNC Servs. Corp.*, 275 F. Supp. 3d 579, 583, 2017 U.S. Dist. LEXIS 184442, \*8. Plaintiffs' language, "based on proof that Dr. Ghoumbrial and KNR conspired to overcharge the firm's clients for medical supplies and fraudulent medical treatment . . ." similarly implies that Defendants' liability has been proven or is virtually uncontested as it relates to the issues

of conspiracy, overcharging and fraudulent medical treatment. Yet, the communication fails to imply that Defendants have made no concessions and the Court has not made any conclusions to that effect. Plaintiffs' post does nothing to characterize the claims as allegations yet unproven. Instead, the post blatantly suggests that they are proven. Thus, the communications are misleading, objectionable, and should be restricted accordingly.

As such, Defendants respectfully move this Court for a *sua sponte* Order enjoining Plaintiffs and their lawyers, representatives and agents from engaging in the following conduct:

1. Communicating inaccurate and/or misleading information to the press;
2. Communicating inaccurate and/or misleading information to putative class members;
3. Publishing false, misleading and/or defamatory statements regarding these Defendants in or on any forum including, but not limited to, social media posts;
4. Ordering Plaintiffs and their counsel to immediately remove any and all false, misleading and/or defamatory social media posts about Defendants;
5. Ordering Plaintiffs' counsel comply with the Rules of Professional Conduct relative to his social media posts and his attempts to advertise for putative class members; and
6. Sanctioning Plaintiffs' counsel for his repeated false and defamatory social media posts about Defendants.

Respectfully Submitted,

/s/ Bradley J. Barmen

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was electronically filed with the Court and served via electronic mail on this 7th day of February 2019 to the following:

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