

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. CV-2016-09-3928</p> <p>Judge James A. Brogan</p> <p>Plaintiffs' Motion to Compel the Continued Deposition of Defendant Alberto R. Nestico</p>
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I. Introduction and Statement of Facts

At the deposition of KNR's owner and managing partner, Defendant Alberto R. Nestico, on February 7 and 8, 2019, Mr. Nestico, on the advice of counsel, repeatedly refused to answer questions on numerous subjects that are relevant and subject to discovery in this litigation, including the following:

- KNR's advertising to and solicitation of potential clients, the extent of the resources expended by Defendants to draw clients into their high-volume business model, and the firm's support for its claim in advertising material that it "remains on the cutting edge of its field." Nestico Tr. at 76:2–77:17; 127:24–128:7; 146:13–25.
- The reasons why KNR closely tracks referrals to and from medical providers. *Id.* at 209:3–210:10; *See also id.* at 58:1–3 (where Nestico's counsel instructs him not to answer questions calling for information he deems to be "proprietary").
- Mr. Nestico's factual knowledge about the testimony Julie Ghoumbrial provided, in her divorce case with Defendant Sam Ghoumbrial, M.D., about the allegations in this lawsuit. *Id.* at 471:10–475:13.
- KNR's decision to file a lawsuit, including tortious interference claims, against chiropractor James Fonner, with whom the firm had a referral relationship, and who countersued KNR based on allegations that the firm "has a scheme in place whereby it sends clients who were allegedly injured in motor vehicle accidents to its 'preferred chiropractors,'" who were required to "follow [KNR's] demands and requests as it relates to treatment, billing, and reducing bills." *Id.* at 644:24–645:9; 666:21–667:6; *See also Kisling, Nestico & Redick, LLC v. Fonner*, Franklin County C.P. No. 15-CV-003216, Sept. 15, 2015 Counterclaim of Dr. James E. Fonner at ¶ 2–5.

- KNR's respective termination of and separation with former attorneys and key witnesses Robert Horton and Paul Steele, including litigation filed by KNR against Horton pertaining to Horton's communications with Plaintiffs' counsel about this lawsuit, and threats of litigation against Steele relating to the firm's relationship with chiropractors, related allegations that Horton and Steele had violated confidentiality agreements with KNR, and the settlement agreements between the firm and these former employees. Nestico Tr. at 645:10–649:11.
- Nestico's awareness of the well-known racist stereotype regarding black people and fried chicken, which pertains both to (1) his acknowledgement that "the majority" of KNR's clientele comes from "lower socioeconomic backgrounds," and (2) his email to all KNR attorneys stating, "Next time get Popeye's Chicken," in response to an email about how one of the firm's clients had tried to sell, at a Youngstown-area pawn shop, a \$25 Macaroni Grill gift card distributed by the firm along with the client's settlement proceeds. *Id.* at 477:11–19; 572:11–583:10.¹
- The KNR Defendants' counterclaims against the Named Plaintiffs, which Defendants voluntarily dismissed without prejudice a few days before Nestico's deposition, and which were apparently intended to intimidate the Plaintiffs and chill other former clients and witnesses from participating in the lawsuit, as well as to manipulate venue. *Id.* at 658:1–659:16; 662:8–663:15.

There is simply no legitimate basis for Nestico's refusal to answer these questions. Thus, as explained further below, the Court should issue an order requiring Mr. Nestico be resumed so that he may be questioned on these and related relevant subjects.

II. Law and Argument

Under Civ.R. 26(B)(1), information is discoverable as long as it "appears reasonably calculated to lead to the discovery of admissible evidence." Under Civ.R. 30(C)(2), "[a] person may

¹ If Nestico were truly unaware of the fried chicken stereotype, he could have simply said so, and perhaps at least acknowledged the unfortunate appearance created by his Popeye's email. Instead, he indignantly refused to answer any further questions on the subject, while his attorneys demanded the question be retracted and accused the undersigned of "outrageous," "offensive," "pathetic," and "unprofessional" conduct, and having "gone off the reservation," merely for having asked it. *Id.* at 572:11–583:10. Defense counsel also threatened that the undersigned will "pay the price" for having done so, including by "answering questions to the ethics board." *Id.* at 581:4–5, 582:5–21. The combined intensity and baselessness of these objections, accusations, and threats are directly proportional to the relevance and probative value of this email by Nestico to this case alleging mass fraud and self-dealing by a high-advertising high-volume law firm against a socioeconomically disadvantaged clientele.

instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by a court, or to present a motion under Civ.R. 30(D).” Civ.R. 30(D) provides that a court may end or “limit the scope” of a deposition “upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.” Finally, Local Rule 17.02(5)(B) provides that an attorney “may instruct a witness not to answer a question” if the question is “not relevant; not likely to lead to the discovery of admissible evidence; and counsel has a good faith, reasonable belief that his or her position will be sustained by the judicial officer with jurisdiction over the case and can explain in detail and on the record at the time he or she instructs the witness not to answer the basis or bases for the instruction not to answer.”

Under Evid.R. 401, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under Evid.R. 404(3), evidence of a witness’s credibility is admissible,” and under Evid.R. 607(A), and 608, “the credibility of a witness may be attacked by any party,” including “on cross examination” about “specific instances of conduct ... clearly probative of ... untruthfulness.”

Additionally, it is well-settled that the attorney-client privilege “protects only attorney-client ‘communications’ from disclosure,” and not “the underlying facts,” thus, a party may not hide factual information from discovery simply because an attorney was the source of the party’s knowledge. *Pales v. Fedor*, 2018-Ohio-2056, 113 N.E.3d 1019, ¶ 23 (8th Dist.). Moreover, the privilege “is not ... absolute,” but rather applies “only where necessary to achieve its purpose,” and “cannot stand in the face of countervailing law or strong public policy,” but rather “should be strictly confined within the narrowest possible limits underlying its purposes.” *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-3358, 790 N.E.2d 817, ¶ 26 (8th Dist.)

These standards require that Defendant Nestico be ordered to appear for a continued deposition to provide testimony about issues that are relevant to this lawsuit. Where the above-listed subjects do not go directly to the truth of the allegations at issue in this case, they go profoundly to the credibility of Mr. Nestico and the KNR Defendants, as well as former KNR attorneys who were threatened by lawsuits by the firm, and, in Mr. Horton's case, have provided affidavits to KNR for use in this lawsuit after having been sued by the firm.

III. Conclusion

As the court aptly stated in *Hunter v. GEICO Gen. Ins. Co.*, E.D.La. No. 17-05070, 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.²

Contrary to these well-founded principles, Nestico's attorneys littered his transcript with hundreds³ of baseless objections and interjections of their own opinions and suggestions about the questions posed by Plaintiffs' counsel. They should not also be permitted to unilaterally determine, on the flimsiest bases, that obviously relevant subject matter is immune from deposition discovery in this

² See also *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.").

³ A simple "control-F" search of Nestico's deposition transcript yields 542 results for the term "object" and 411 results for the term "objection."

case. The Court should thus order that Mr. Nestico's deposition be resumed so that he may be questioned on these and related subjects as required by the Civil Rules and the Rules of Evidence.

Respectfully submitted,

/s/ Peter Pattakos

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Certificate of Service

The foregoing document was filed on February 28, 2019, using the Court's e-filing system, which will serve copies on all necessary parties.

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