

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA

EARLY BIRD CAR WASH, INC.,	:	
MR. BIRD'S CUSTOM CAR WASH	:	No. CV 21-00,448
EQUIPMENT, LLC, and MICHAEL J.	:	
EARLY,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	CIVIL ACTION
	:	
DEAN PIERMATTEI and RHOADS &	:	
SINON, LLP,	:	
	:	
Defendants.	:	

**OPINION AND ORDER**

AND NOW, this 18<sup>th</sup> day of September, 2023, upon consideration of the discovery motions<sup>1</sup> presently before the Court, and after argument on the same held June 20, 2023, it is hereby ORDERED and DIRECTED as explained below.

***I. BACKGROUND.***

Plaintiffs Early Bird Car Wash, Inc., Mr. Bird's Custom Car Wash Equipment, LLC, and Michael J. Early commenced this action by Complaint filed May 17, 2021. Pursuant to this Court's Order granting Defendants' Preliminary Objections, Plaintiffs filed an Amended Complaint on December 23, 2021. In their Amended Complaint, Plaintiffs allege legal malpractice against Defendant Dean

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<sup>1</sup> The Motions at issue here are: (1) Defendants' Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answers and Objections to Defendants' First Set of Requests for Admissions filed February 21, 2023; (2) Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production Directed to Dean Piermattei and Rhoads & Sinon, LLP filed May 4, 2023; (3) Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of Discovery Requests Directed to Rhoads & Sinon, LLP filed June 12, 2023; (4) Plaintiffs' Motion to Recovnene Deposition of Stephanie DiVittore and/or Corporate Representative of Rhoads & Sinon, LLP and to Order Defendant to Engage a Third Party Vendor to Secure All Electronically Stored Information ("ESI") filed June 12, 2023; and (5) Plaintiffs' Motion to Disqualify Counsel filed June 12, 2023, with Supplement to Motion to Disqualify Counsel filed June 20, 2023.

Piermattei (Count I), Breach of Contract against both Defendants (Count II), and Respondeat Superior against Defendant Rhoads & Sinon, LLP (Count III). Plaintiffs' claims arise out of Defendant Piermattei's legal representation of Plaintiffs in a prior contract dispute (the "Underlying Action").<sup>2</sup> In March of 2019, Plaintiffs fired Defendant Piermattei and hired Frank C. Botta, Esq. to represent them in the Underlying Action. Plaintiffs allege that Defendant Piermattei negligently failed to file a complaint until after the relevant statute of limitation had expired, resulting in a grant of summary judgment against them on December 13, 2019. Defendants filed an Answer and New Matter to Plaintiffs' Amended Complaint on January 20, 2022, and Plaintiffs filed a Response to the New Matter on January 31, 2022.

On January 21, 2022, Defendants filed a Complaint to Join Attorney Botta as an Additional Defendant, alleging that the entry of summary judgment against Plaintiffs in the prior action was due to the legal malpractice of Attorney Botta rather than of Defendants. In response to Plaintiffs' Preliminary Objections, the Court dismissed the Joinder Complaint by Order dated October 7, 2022. Defendants appealed to the Superior Court, but they withdrew and discontinued their appeal on December 20, 2022. Thereafter, the matter returned to this Court for subsequent proceedings.

On February 21, 2023, Defendants filed their Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answers and Objections to Defendants'

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<sup>2</sup> *Early Bird Car Wash, Inc., Mr. Bird's Custom Car Wash Equipment, LLC and Michael J. Early v. Christopher M. Smollen and Upstate Networks, Inc.*, Lycoming County Court of Common Pleas, No. CV 14-03,009.

First Set of Requests for Admissions. On May 4, 2023 Plaintiffs filed their Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production Directed to Dean Piermattei and Rhoads & Sinon, LLP. Both of those Motions were contested by the opposing parties. On June 12, 2023, Plaintiffs filed three further discovery motions<sup>3</sup> and a Motion to Consolidate all outstanding motions for argument. The Court heard argument on all outstanding matters on June 20, 2023.<sup>4</sup> After argument, the Court granted plaintiffs<sup>5</sup> and defendants<sup>6</sup> additional time to file briefs and responses. The time for filing having elapsed, the Motions are now ripe for disposition.<sup>7</sup>

## **II. LAW AND ANALYSIS.**

### **A. Legal Standard for Discovery Motions.**

"The trial court is responsible for overseeing discovery between the parties and therefore it is within that court's discretion to determine the appropriate

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<sup>3</sup> These Motions are (1) Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of Discovery Requests Directed to Rhoads & Sinon, LLP; (2) Plaintiffs' Motion to Reconvene Deposition of Stephanie DiVittore and/or Corporate Representative of Rhoads & Sinon, LLP and to Order Defendant to Engage a Third Party Vendor to Secure All Electronically Stored Information ("ESI"); and (3) Plaintiffs' Motion to Disqualify Counsel. Plaintiff filed a Supplement to Motion to Disqualify Counsel on June 20, 2023.

<sup>4</sup> The Court did not explicitly rule on the Motion to Consolidate; however, by hearing all pending matters at the same time, the Court granted the Motion, for all practical purposes.

<sup>5</sup> In addition to their Motions, Plaintiffs filed (i) Brief in Opposition to Defendants' Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answers and Objections to Defendants' First Set of Requests for Admissions filed April 26, 2023; and (ii) Plaintiffs' Omnibus Response in Support of Discovery Motions on June 28, 2023.

<sup>6</sup> In addition to their Motion, Defendants filed (i) Defendants' Answer to Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production filed June 7, 2023; (ii) Defendants' Brief in Opposition to Plaintiffs' Motion to Disqualify Counsel filed June 22, 2023; (iii) Defendant Rhoads & Sinon, LLP's Answer to Plaintiff's Motion to Reconvene Deposition of Stephanie DiVittore or Representative of Rhoads & Sinon, LLP; and (iv) Defendants' Answer to Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of (1) Requests for Admissions, (2) Interrogatories, and (3) Requests for Production filed June 22, 2023.

<sup>7</sup> On September 5, 2023, Plaintiffs filed a Motion for Leave to File Supplement to Discovery Motions and Motion to Disqualify. The Court will deny that Motion as moot, as nothing contained therein alters the Court's decision.

measures to insure adequate and prompt discovery of matters allowed by the Rules of Civil Procedure.”<sup>8</sup> Generally, discovery is liberally allowed<sup>9</sup> “in order to further the truth-determining process essential to our judicial system, prevent unfair surprises should the matter proceed to trial, enhance an attorney’s ability to strongly and effectively advocate for a client, and enable the efficient operation of our judicial system.”<sup>10</sup>

“[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”<sup>11</sup> A matter is relevant if it has any tendency to make a material fact more or less probable than it otherwise would be.<sup>12</sup>

The rules of discovery involve a standard that is necessarily broader than the standard used at trial for the admission of evidence; the purpose of allowing a broader standard is to ensure that a party has in its possession all relevant and admissible evidence before the start of trial. By allowing such broad discovery, the parties may avoid surprise and unfairness at trial.<sup>13</sup>

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<sup>8</sup> *Rohm and Haas Company v. Lin*, 992 A.2d 132, 143 (Pa. Super. 2010), *cert. denied*, 132 S. Ct. 852 (U.S. 2011).

<sup>9</sup> See, e.g., *George v. Schirra*, 814 A.2d 202, 204 (Pa. Super. 2002).

<sup>10</sup> *Office of the District Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1138 (Pa. Commw. 2017).

<sup>11</sup> Pa. R. Civ. P. 4003.1(a).

<sup>12</sup> See Pa. R.E. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action”). “Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case,” including “evidence not yet of record.” Pa. R.E. 401, *cmt.*

<sup>13</sup> *Commonwealth ex rel. Pappert v. TAP Pharmaceutical Products, Inc.*, 904 A.2d 986, 994 (Pa. Commw. 2006).



The party objecting to discovery generally bears the burden of establishing that the requested information is not relevant or discoverable,<sup>14</sup> and any doubts regarding relevancy are to be resolved in favor of relevance and discoverability.<sup>15</sup>

***B. Defendants' Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answers and Objections to Defendants' First Set of Requests for Admission.***

Requests for admission are governed by Rule 4014, Pennsylvania Rules of Civil Procedure, which permits a party to serve upon another party a written request for admission "that relate[s] to statements or opinions of fact or of the application of law to fact, including the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request."<sup>16</sup> The subject of a request for admission is admitted, unless the party upon whom the request is served answers or objects within thirty days.<sup>17</sup> "The purpose of serving requests for admissions is 'to clarify' and simplify the issues raised in prior pleadings in order to expedite the litigation process."<sup>18</sup>

Defendants complain that Plaintiff Michael J. Early did not sufficiently answer the first ten of their requests for admission. Seven of these requests ask Plaintiff to admit that he made certain statements in a deposition,<sup>19</sup> while the

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<sup>14</sup> See, e.g., *Koken v. One Beacon Insurance Company*, 911 A.2d 1021, 1025 (Pa. Commw. 2006).

<sup>15</sup> See, e.g., *Ario v. Deloitte & Touche, LLP*, 934 A.2d 1290, 1293 (Pa. Commw. 2007).

<sup>16</sup> Pa. R. Civ. P. 4014(a).

<sup>17</sup> Pa. R. Civ. P. 4014(b).

<sup>18</sup> *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 217 A.3d 1248, 1252 (Pa. Super. 2019) (quoting *Christian v. Pennsylvania Financial Responsibility Assigned Claims Plan*, 686 A.2d 1, 5 (Pa. Super. 1996)).

<sup>19</sup> The Court presumes that the deposition was taken in accordance with the Pennsylvania Rules of Civil Procedure and, therefore, under oath, Pa. R. Civ. P. 4015, although nothing contained in the documentation available to the Court so indicates.

remaining three ask Plaintiff Early to admit statements in the Complaint<sup>20</sup> in the Underlying Action. In response to each request to admit statements made by Plaintiff Early in his deposition, he objects and states that “the deposition testimony of Michael J. Early speaks for itself.” In response to each request to admit statements made in the Amended Complaint in the Underlying Action, Plaintiff Early objects and states that “the Amended Complaint ... speaks for itself.”

Subject to certain limitations, all or any part of a deposition may be used at trial for a variety of purposes.<sup>21</sup> Similarly, a complaint filed in a civil action may be introduced as evidence in another proceeding, subject to the Rules of Evidence and applicable law.<sup>22</sup> As such, the Court finds the foregoing Defendants’ Requests for Admission to be duplicative of matters already established and available for use at trial by Defendants. Accordingly, Defendants’ Motion to Determine the Sufficiency of Plaintiff Michael J. Early’s Answers and Objections to Defendants’ First Set of Requests for Admission is DENIED.

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<sup>20</sup> Plaintiff Michael J. Early signed a Verification for the Complaint, wherein he stated, subject to the penalties of 18 Pa. C.S. Section 4904 (relating to unsworn falsification to authorities), that the facts set forth in the Complaint are true and correct to the best of his knowledge, information and belief.

<sup>21</sup> Pa. R. Civ. P. 4020 (“At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of ... [the enumerated] provisions...”).

<sup>22</sup> 42 Pa. C.S. § 6106 (“Whenever provision is made by law for recording or filing in a public office any document, the record thereof made, and exemplifications of the document lawfully certified, shall be legal evidence in all matters in which the document would be competent evidence”); see also, e.g., *Commonwealth v. Mutzabaugh*, 699 A.2d 1289, 1291-92 (Pa. Super. 1997) (holding that the transcript of a previous hearing was admissible at a subsequent hearing as an official record, despite a hearsay objection); *Chaplin v. Pelton*, 423 A.2d 8, 9 (Pa. Super. 1980) (noting that “[p]roper exemplification of recorded deeds makes them available as legal evidence, and simply dispenses with the necessity of producing the original deeds in those cases where such deeds would be competent testimony”).

**C. Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production Directed to Dean Piermattei and Rhoads & Sinon, LLP.**

Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production Directed to Dean Piermattei and Rhoads & Sinon, LLP is GRANTED in part and DENIED in part, as explained below.

**1. Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories.**

Written interrogatories to a party are governed by Rule 4005, Pennsylvania Rules of Civil Procedure:

[A]ny party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or similar entity or a partnership or association, by any officer or agent, *who shall furnish such information as is available to the party.*<sup>23</sup>

Interrogatories may relate to any matter that is properly discoverable, and they may be used at trial, subject to certain limitations.<sup>24</sup> Answers to Interrogatories are governed by Rule 4006:

(a)(1) Answers to interrogatories shall be in writing and verified....

(2) Each interrogatory shall be answered fully and completely unless objected to, in which event the reasons for the objection shall be stated in lieu of an answer. ... The answering party shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories. The party submitting the interrogatories may move the court to dismiss an objection and direct that the interrogatory be answered.<sup>25</sup>

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<sup>23</sup> Pa. R. Civ. P. 4005(a) (emphasis added).

<sup>24</sup> Pa. R. Civ. P. 4005(c). See also Pa. R. Civ. P. 4005(c) (providing for use of certain discovery materials at trial).

<sup>25</sup> Pa. R. Civ. P. 4006(a).

When the answer to an interrogatory may be ascertained from records and the burden of doing so is substantially the same for all parties, the answering party may refer the propounding party to the records and afford that party access to those records.<sup>26</sup>

Plaintiffs take issue with Defendants' answers to Interrogatories Nos. 19, 20 and 25 directed to Defendant Rhoads & Sinon and with Defendants' answers to Interrogatories Nos. 29 and 37 directed to Defendant Piermattei from Plaintiffs' First Set of Interrogatories.

Interrogatory No. 19 asks Rhoads & Sinon to identify and describe certain internal communications pertaining to the Underlying Action. Rhoads & Sinon answers, "[u]nknown by Defendant Rhoads & Sinon." In its Answer to Plaintiffs' Motion, Defendant states it is not in possession of the file for the Underlying Action, as it had been transferred to another firm in February, 2017, that the file had been produced in discovery and was available for review by Plaintiffs, and that the answers sought by Plaintiff would be contained therein.<sup>27</sup> The Court finds that "unknown to Defendant" does not adequately answer the Interrogatory. Defendant is obligated to familiarize himself with the facts of the case and to supplement his answers as he becomes aware of additional information responsive to the Interrogatory. The Court finds it implausible that the client file would have been provided to Plaintiffs in Discovery but not also be available to Defendants. To the extent Rhoads & Sinon has familiarized itself with the client file, and all requested

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<sup>26</sup> Pa. R. Civ. P. 4006(b).

<sup>27</sup> Defendants' Answer to Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production filed June 7, 2023, ¶ 7.



internal communications are contained therein, Defendant should so state. Under such circumstances, such an answer concerning the file sufficiently satisfies the requirements of Rule 4006(b). If Defendant is aware of additional responsive communications that are not contained in the client file, it shall include them in its response. Accordingly, Rhoads & Sinon shall amend its answer to Interrogatory No. 19.

Interrogatory No. 29 asks Defendant Dean Piermattei about discussions he may have had with other attorneys at Rhoads & Sinon and with Defense Counsel in the Underlying Action pertaining to the statute of limitations. Defendant responds "Unknown at this time without reviewing or seeing particular records on this topic." In light of Defendant Piermattei's responsibility to familiarize himself with the facts of the case, for the same reasons set forth above, this answer does not adequately answer the Interrogatory. Defendant shall amend his answer to Interrogatory No. 29 accordingly.

Interrogatory No. 37 asks Defendant Piermattei to identify individuals with material knowledge of the facts of this case. Defendant responds by naming certain individuals and by directing the Plaintiffs' attention to the documents produced in the case. As the records are equally available to both parties, Defendant's response to these Interrogatories is sufficient in light of Rule 4006(b), subject to Defendant's ongoing obligation to supplement his answers if he becomes aware of additional responsive information.

Interrogatory No. 20 asks Rhoads & Sinon certain questions pertaining to its knowledge and actions relating to the issue of the statute of limitations in the

Underlying Action. Rhoads & Sinon responds, in part, "Objection is made to the form of Interrogatory No. 20..." Plaintiffs' contend this violates Rule 4006(a)(2) by not stating the basis of the objection. Defendant responds in its Answer with the basis for the objection and points out the question was answered after the objection was stated. Rule 4006(a)(2) states that the responding party must state the reasons for its objection. Accordingly, Rhoads & Sinon shall amend its answer to state the reasons for its objection.

Interrogatory No. 25 asks Rhoads & Sinon to identify all persons with knowledge of certain facts relating to the Underlying Action. Rhoads & Sinon responds that it amended its answer to Interrogatory No. 25 to correct an error. As the Motion to Compel does not address the amended answer to Interrogatory No. 25, the Court dismisses this objection to Defendant's response as moot.<sup>28</sup>

## ***2. Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Requests for Production.***

Requests upon a party for production of documents or things are governed by Rules 4009.1, 4009.11 and 4009.12, Pennsylvania Rules of Civil Procedure.

Rule 4009.1 permits a party to serve a request upon another party

to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and electronically stored information), or to inspect, copy, test or sample any tangible things or electronically stored information, which constitute or contain matters within the scope of [applicable Rules denoting the scope of discovery] ... and which are in the possession, custody or control of the party or person upon whom the request ... is served, and may do so one or more times.<sup>29</sup>

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<sup>28</sup> Of course, Plaintiffs may challenge the amended answer if it is unresponsive or insufficient.

<sup>29</sup> Pa. R. Civ. P. 4009.1.

Such a request may be served without leave of court,<sup>30</sup> and the opposing party must serve its answers and objections within thirty days after service of the request.<sup>31</sup>

Plaintiffs take issue with Defendants' answers to Requests for Production Nos. 5, 10, 12, 16 and 18 directed to Defendant Rhoads & Sinon and with Defendants' answers to Requests for Production Nos. 3, 6, and 13 directed to Defendant Piermattei from Plaintiffs' First Request for Production.

Document Request No. 5 asks Defendant Rhoads & Sinon to produce Defendant Piermattei's employee file. Document Request No. 12 asks Defendant Rhoads & Sinon to produce all of the firm's employee policies in effect during Defendant Piermattei's employment. Document Request No. 18 asks Defendant Rhoads & Sinon to produce all documents and promotional materials describing Defendant Piermattei's background, qualifications and expertise. In all three instances, Defendant responds that no such documents are available "because the law firm is no longer in existence." The Court finds that Defendant's answer is inadequate. Defendant should identify and account for such specific documents and categories of documents as it knows exist or existed, explain how and why the present non-existence of Rhoads & Sinon renders such documents unavailable, produce such documents as it is able to produce, and identify where responsive documents no longer in possession of Defendants may be located, if anywhere.

Document Request No. 10 asks Defendant Rhoads & Sinon to produce documents concerning the firm's policies pertaining to interactions between its

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<sup>30</sup> Pa. R. Civ. P. 4009.11.

<sup>31</sup> Pa. R. Civ. P. 4009.12.

representatives and its clients. Defendant responds by objecting for an unspecified reason and again stating “none available because the law firm is no longer in existence.” Defendant shall amend its answer to state the reasons for its objection in accordance with Rule 4009.12 and to provide an appropriate answer, as discussed in the preceding paragraph.

Document Requests No. 16 to Defendant Rhoads & Sinon and No. 13 to Defendant Piermattei asks them to produce all communications between them and their insurance carriers relating to Defendants’ representation of Plaintiffs. Both respond by objecting that the request “calls for producing information which is confidential and privileged and protected by the attorney-client privilege.” As a general matter, communications between a party and its insurance carrier are neither confidential nor privileged and are not protected by the attorney-client privilege.<sup>32</sup> Under some circumstances, however, some such communications *may* be confidential or privileged.<sup>33</sup> Neither Plaintiffs nor this Court has the ability to evaluate the sufficiency of claims of confidentiality or privilege when Defendant simply makes a blanket denial without any detail concerning which specific

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<sup>32</sup> Pa. R. Civ. P. 4003.3 (Subject to certain limitations, “a party may obtain discovery of any matter ... even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, *including his or her attorney, consultant, surety, indemnitor, insurer or agent.* The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics”) (emphasis added); Pa. R. Civ. P. 4003.4 (“Upon written request, a party is entitled to immediate receipt of a photostatic copy or like reproduction of a statement concerning the action or its subject matter previously made by that party, any other party or a witness”); 4003.5 (providing for discovery of facts known and opinions held by an expert, under certain circumstances). *See also Smith v. St. Luke's Hosp.*, 40 Pa. D. & C.3d 54 (Northn. Cnty. 1984); *Piro v. Bell*, 25 D. & C.3d 668 (Alghny. Cnty. 1981); *Potamkin v. Wolf*, 2012 WL 602251 (Phila. Cnty. 2012).

<sup>33</sup> *Id.*



communications or parts of communications Defendants claim are confidential or privileged and the basis for such claims. Accordingly, Defendants shall produce any responsive documents that it does not believe are confidential and/or privileged and shall assert specific claims of confidentiality or privilege to such specific communications or parts of communications that Defendants claim are confidential or privileged. "Documents or things not produced shall be identified with reasonable particularity together with the basis for non-production."<sup>34</sup>

Document Request No. 3 asks Defendant Piermattei to produce all written documents between himself and other employees of Rhoads & Sinon pertaining to the Underlying Action or an action in New York. Document Request No. 6 asks Defendant Piermattei to produce calendars, schedules, timesheets, billing records, and the like pertaining to his representation of Plaintiffs. In both cases, Defendant responds that any such documents are contained in the documents previously produced. Accordingly, if the requested documents are contained in the documents previously produced, Plaintiffs' objections to these responses are denied pursuant to Rule 4009.12(a)(2)(i).<sup>35</sup> If the requested documents are not contained in the documents previously produced, or if some of the documents are among the documents previously produced and some are elsewhere, Defendant shall provide an appropriate answer.

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<sup>34</sup> Pa. R. Civ. P. 4009.12(b)(2).

<sup>35</sup> Pa. R. Civ. P. 4009.12(a)(2)(i) ("Where the documents may be identified only after review of a larger group of documents, and the burden of identifying the documents would be substantially the same for the party serving the request as for the party served, the party served may afford the party serving the request reasonable opportunity to identify the documents, to examine or inspect them and to obtain copies").

***D. Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of Discovery Requests Directed to Rhoads & Sinon, LLP.***

Plaintiffs take issue with Defendant's answers to Requests for Admission Nos. 1, 2, 3, 5, 6, 7, 10, 11, 12, 13, and 14, with Defendant's answers to Interrogatories Nos. 2 and 17, and with Defendant's answers to Requests for Production Nos. 2, 3, and 4 from Plaintiffs' Second Set of Discovery Requests Directed to Rhoads & Sinon, LLP. Plaintiffs' Motion is GRANTED in part and DENIED in part, as explained below.

***1. Defendant's answers to Requests for admission.***

Pursuant to Rule 4014(b), Pennsylvania Rules of Civil Procedure, a party upon whom a request for admission is served must answer or object within thirty days after service of the request. Specifically,

The answer shall admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny.<sup>36</sup>

Plaintiffs' Request for admission no. 1 asks Defendant Rhoads & Sinon to admit that it represented Michael Early in October 2011. Defendant objects to the form of the request but then goes on to state that it made reasonable inquiry and to explain in detail that it no longer has any records concerning Plaintiffs. The Court finds Defendant's answer to be inadequate. Defendant Piermattei, in

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<sup>36</sup> Pa. R. Civ. P. 4014(b).

response to Document Request no. 6, *supra*, represented that calendars, schedules, timesheets and billing records have previously been produced. Defendant Rhoads & Sinon is reminded of its responsibility to familiarize itself with the records and documents regarding the case. Defendant shall amend its answer accordingly.

Plaintiffs' Request for admission no. 2 asks Defendant Rhoads & Sinon to admit that a Writ of Summons could have been filed after October 2011 and before July 2014 to preserve certain claims. Defendant responds by restating its response to Request for admission no. 1. Rule 4014 does not permit a request for admission that is a pure conclusion of law, but it does permit a request that is an application of law to fact.<sup>37</sup> This request is an application of law to fact and, therefore, is permitted by Rule 4014.<sup>38</sup> Defendant's position that after reasonable inquiry the information known or readily obtainable to it is insufficient for it to admit or deny Request no. 2 is untenable. Request no. 2 is a relatively straightforward application of law to fact, and Defendant certainly has enough information to serve an answer or a proper objection to it. Therefore, Defendant shall serve upon Plaintiffs an answer or a proper objection to Request no. 2 in accordance with Rule 4014(b).

Plaintiffs' Request for admission no. 3 asks Defendant Rhoads & Sinon to admit that there was nothing in law or in fact preventing a Writ of Summons from

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<sup>37</sup> See Pa. R. Civ. P. 4014(a).

<sup>38</sup> See, e.g., *Joers v. City of Philadelphia*, 190 A.3d 797, 805-06 (Pa. Commw. 2018) (holding, *inter alia*, that a request for admission requesting that an employer admit that its employee was acting within the scope of her employment at the time of an accident was a permissible application of law to fact and, therefore, was within the scope of Rule 4014).

being filed after October 2011 and before July 2014 to preserve certain claims. Again, Defendant responds by restating its response to Request for admission no. 1. Like Request for admission No. 2, this request is an application of law to fact and, therefore, is permitted by Rule 4014. Accordingly, Defendant shall serve upon Plaintiffs an answer or a proper objection to Request no. 3 in accordance with Rule 4014(b).

Plaintiffs' Request for admission no. 5 asks Defendant Rhoads & Sinon to admit that a basis existed in November 2011 to assert a breach of contract claim against certain defendants based upon Plaintiffs' position in prior litigation. Defendant responds by making some limited objections and then answering that it lacked sufficient information to admit or deny the request. The Court finds that, rather than being an application of law to fact, this Request seeks a conclusion of law<sup>39</sup> not permitted by Rule 4014.<sup>40</sup> This objection is dismissed.

Plaintiff's Request for admission no. 6 asks Defendant Rhoads & Sinon to admit that a Writ of Summons could have been filed as early as November 2011 based on Plaintiff's position in regard to certain matters in the Underlying Action. Plaintiff's Request for admission no. 7 asks Defendant Rhoads & Sinon to admit that there is nothing in law or in fact that prevented a Writ of Summons from being filed as early as November 2011 based on Plaintiff's position in regard to certain matters in the Underlying Action. Plaintiff's Request for admission no. 13 asks

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<sup>39</sup> The Court considers the question of whether the position taken by Plaintiff in the Prior Action provides a valid legal basis for a cause of action to be a pure conclusion of law, as opposed to an application of law to fact.

<sup>40</sup> See, e.g., *American Electric Power Service Corporation v. Commonwealth*, 184 A.3d 1031, 1038-39 (Pa. Commw. 2018) (holding that a taxpayer's request for an admission that it is not subject to the gross receipts tax is a conclusion of law and does not fall within the permissible scope of a request for admission under Rule 4014).



Defendant Rhoads & Sinon to admit that Michael Early's complaint to the Better Business Bureau about defendant in the Underlying Action was a basis to file suit. Plaintiff's Request for admission no. 14 asks Defendant Rhoads and Sinon to admit that the Better Business Bureau complaint was a basis to file a Writ of Summons against defendants in the Underlying Actions. As explained in the preceding paragraph, the Court finds that these requests, all of which concern whether a party's legal position is an appropriate basis for a cause of action, seek impermissible conclusions of law. These objections are dismissed.

Plaintiffs' Request for admission no. 10 asks Defendant Rhoads & Sinon to admit that on November 29, 2011 Christopher Smolen filed an affidavit in a New York case related to the Underlying Action. Plaintiffs' Request for admission no. 12 asks Defendant Rhoads & Sinon to admit certain specific language contained in an Order of Court entered in this Court in the Underlying Action. In response to both, Defendant made limited objections and then asserted that it lacked sufficient information to admit or deny the requests. The Court finds that the foregoing Requests are duplicative of matters already available for use at trial by Plaintiffs<sup>41</sup> and, therefore, denies these objections.<sup>42</sup>

Plaintiffs' Request for admission no. 11 asks Defendant Rhoads & Sinon to admit that no later than November 29, 2011 it knew that Michael Early had filed a complaint against the defendant in the Underlying Action with the Better Business

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<sup>41</sup> See 42 Pa. C.S. § 6106.

<sup>42</sup> See, *supra*, Part II.B. The Court denies these objections because they ask, respectively, whether a document was filed and whether an Opinion stated certain things. Those matters are duplicative because certified docket sheets and certified copies of documents filed in court are admissible as evidence and are the best evidence of themselves.

Bureau. Defendant responded by making limited objections and then asserting that it lacked sufficient information to admit or deny the request based upon not having records. The Court finds Defendant's answer to be inadequate<sup>43</sup> in light of the Defendant's responsibility to familiarize itself with the records and documents of the case. As explained above, Defendant shall serve upon Plaintiffs an answer or a proper objection to Request no. 11 in accordance with Rule 4014(b).

## **2. Defendant's Answers to Interrogatories.**

Plaintiff's Interrogatory no. 2 asks Defendant Rhoads & Sinon to identify the person(s) making decisions on behalf of Rhoads & Sinon in this litigation.

Defendant responds by objecting that the interrogatory seeks information protected by the attorney-client privilege and the work product doctrine. The identity of corporate decision-makers is within the Scope of Discovery set forth in Rules 4003.1 through 4003.6, Pennsylvania Rules of Civil Procedure, and is not protected by the attorney-client privilege<sup>44</sup> or the work product doctrine.<sup>45</sup> This objection is granted, and Defendant shall respond to Interrogatory no. 2.

Plaintiffs' Interrogatory No. 17 asks Defendant Rhoads & Sinon to account for the unavailability of certain documents and to identify the persons who kept

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<sup>43</sup> The Court grants Plaintiffs' objection to Request for admission no. 11 because it asks whether Defendant had *knowledge* of a particular filing. Although the filing itself is duplicative for reasons explained in the preceding footnote, whether Defendant had knowledge of the filing is a separate matter.

<sup>44</sup> See, e.g., *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011) ("[I]n Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice").

<sup>45</sup> The work product doctrine "protect[s] the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *BouSamra v. Excelsa Health*, 210 A.3d 967, 976 (Pa. 2019) (citing *Lepley v. Lyc. Cnty. Court of Common Pleas*, 393 A.2d 306, 310 (Pa. 1978)); see also *United States v. Nobles*, 95 S. Ct. 2160 (1975).

records while Rhoads & Sinon was a going concern. Defendant objects on the basis of relevance, claims the interrogatory is overly broad, and objects on the basis of Rules 4011(b) and (e). The Court agrees that this Interrogatory is overly broad and will limit the time frame to 2010 to present and the subject matter to documents relating to the specific document requests referenced in Interrogatory no. 17 and to documents pertaining to Defendants' representation of Plaintiffs. As limited by the foregoing, the Court overrules Defendant's objection and directs that it respond to Interrogatory no. 17.

### ***3. Defendant's answers to Requests for Production.***

Plaintiffs' Request for Production No. 2 asks Defendant Rhoads & Sinon to produce all communications involving the person(s) identified in Interrogatory no. 2 relating to the destruction, loss or other disposition of documents sought in certain other requests for production. Defendant objects and also responds that it is no longer in possession of Plaintiffs' file. The Court agrees that this Request for Production is overly broad and will limit the time frame to 2010 to present and the subject matter to communications relating to the destruction, loss or other disposition of documents sought in the specific requests identified in Request for Production No. 2. As limited by the foregoing, the Court overrules Defendant's objection and directs that it respond to Request for Production no. 2.

Plaintiffs' Request for Production No. 3 asks Defendant Rhoads & Sinon to produce all communications involving the person(s) identified in Interrogatory no. 2 relating to certain litigation wherein the Defendants represented the Plaintiffs. Defendant responds by referring to its response to Request for Production No. 2.

For reasons indicated previously, the Court overrules Defendant's objection and directs that it respond to Request for Production no. 3.

Plaintiffs' Request for Production No. 4 asks Defendant Rhoads & Sinon to produce all communications involving the person(s) identified in Interrogatory no. 2 relating to Dean Piermattei. The Court finds this Request for Production to be overly broad, as it is limited neither in scope nor in time, and will limit the time frame to 2010 to present and the subject matter to non-privileged communications concerning Plaintiffs or Defendants' representation of them and matters relevant to the claims made by Plaintiffs in this litigation, such as employment-related issues and the like. As limited by the foregoing, the Court overrules Defendant's objection and directs that it respond to Request for Production no. 4.

***E. Plaintiffs' Motion to Reconvene Deposition of Stephanie DiVittore and/or Corporate Representative of Rhoads & Sinon, LLP and to Order Defendant to Engage a Third Party Vendor to Secure All Electronically Stored Information ("ESI").***

Plaintiff's Motion to Reconvene Deposition of Stephanie DiVittore and/or Corporate Representative of Rhoads & Sinon, LLP and to Order Defendant to Engage a Third Party Vendor to Secure All Electronically Stored Information ("ESI") is GRANTED in part and DENIED in part, as explained below.

***1. Plaintiff's Motion to Reconvene Deposition.***

The procedure for conducting a deposition by oral examination is governed by Rule 4007.1, Pennsylvania Rules of Civil Procedure. A party may take the deposition of a public or private corporation, partnership, association or governmental agency through one or more of its officers, directors, managing



agents or certain other persons.<sup>46</sup> The organization must then designate one or more persons to testify on its behalf and may designate the matters on which that person will testify.<sup>47</sup> “The person or persons so designated shall testify as to matters known or reasonably available to the organization.”<sup>48</sup> It necessarily follows that counsel for the organization has an obligation to prepare the designated witness to testify on the matters for which the witness is designated to testify.<sup>49</sup>

Depositions provide an opportunity for a party to discover details of the opposing party’s claims or defenses and of potential witnesses anticipated trial testimony.<sup>50</sup>

Of the various discovery procedures, available to litigants, depositions provide the most effective means of investigating a claim or defense via spontaneous responses to unscripted questions since “as the inquiry proceeds, the framing of each question is dependent upon the answers to preceding questions.”<sup>51</sup>

A deposition is not intended to be scripted by counsel, and interruptions by the witness’ attorney are discouraged. A deposition “is meant to be a question-and-answer conversation between the deposing lawyer and the witness.”<sup>52</sup> Indeed, “once the deposition has begun ... the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness’s counsel.”<sup>53</sup> “There is

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<sup>46</sup> Pa. R. Civ. P. 4007.1(e).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., *Ezrin v. Hospice Preferred Choice, Inc.*, 2018 WL 4778396, at \*5 (Lacka. Cnty. 2018).

<sup>50</sup> See, e.g., *Brown v. Trinidad*, 111 A.3d 765, 774 (Pa. Super. 2015).

<sup>51</sup> *Ezrin, supra*, at \*5 (quoting *Arvonio v. PNC Wealth Management*, 35 Pa. D. & C. 5th 213, 222-23 (Lacka. Cnty. 2013)).

<sup>52</sup> *Hall v. Clifton Precision, a Div. of Litton Sys., Inc.*, 150 F.R.D. 525, 526 (E.D. Pa. 1993).

<sup>53</sup> *Daley v. Lansdowne*, 2014 WL 7174370, at \*3 (Franklin Cnty. 2014) (quoting *Hall v. Clifton Precision*, 150 F.R.D., at 528).

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 formulate answers.”<sup>54</sup>

Plaintiffs attached a copy of the transcript of the deposition<sup>55</sup> in question to their Motion to Reconvene Deposition. Counsel for the Defendants interrupted the testimony on more than three quarters of the pages of the transcript by interposing objections, instructing the witness not to answer questions and otherwise providing commentary on questions and exhibits.<sup>56</sup> Effectively, and clearly intentionally, this prevented counsel from pursuing his line of inquiry and the deposition from taking its natural course.

“Litigants and their counsel have an obligation to act reasonably in scheduling and conducting discovery depositions.”<sup>57</sup> The Court finds that counsel for the defendants’ conduct during the deposition of Ms. DiVittore was obdurate, unnecessarily acrimonious, and, ultimately, prejudiced Plaintiffs by having the deposition interrupted repeatedly and unnecessarily. To that end, the Court will direct the Defendant to submit to a repeat deposition.<sup>58</sup> Because counsel’s behavior was unreasonable, the Court further directs that the repeat deposition

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<sup>54</sup> *Hall v. Clifton Precision*, *supra*, 150 F.R.D., at 528.

<sup>55</sup> Transcript of the Deposition of Stephanie DiVittore, Esq., taken May 19, 2023.

<sup>56</sup> By the Court’s count, the transcript of testimony contains 138 pages, beginning on page 6 of the transcript, and counsel for the Defendants is speaking on 107 of those pages. Counsel objects, instructs the witness not to answer, and/or otherwise interrupts the testimony at least once on each of the following pages: 8-16, 18-20, 22-24, 26-27, 30, 34-45, 47-48, 50-57, 59-65, 68-75, 77-78, 80, 86-88, 92-112, 114-121, 123, 126-130, and 133-143.

<sup>57</sup> *Euceda v. Green*, 40 D. & C. 5th 317, 331 (Lacka. Cnty. 2014) (citing *Cravath v. Mercy Hospital*, 2013 WL 6991989, at \* 2–5 (Lacka. Cnty. 2013) (ordering re-deposition of defendant physician after defense counsel objected and instructed physician not to answer twelve separate subjects of “permissible inquiry”).

<sup>58</sup> See, e.g., *Cravath v. Mercy Hospital*, *supra*, 2013 WL 6991989.

shall be conducted at the offices of counsel for the Plaintiffs, or at such other location as counsel for Plaintiffs deems convenient, and that counsel for the Defendants shall bear the costs therefor.<sup>59</sup> The Court will not issue an award of attorneys' fees at the present time, however. The Court expects that Defendant will present one or more witnesses properly prepared to answer questions on the designated topics, and counsel for the Defendant shall keep interjections to a minimum.

**2. Plaintiffs' Motion to Order Defendant to Engage a Third Party Vendor to Secure All Electronically Stored Information.**

Plaintiffs also seek an order requiring Defendant to engage a third party vendor to secure all electronically stored information. Defendant seems to be under the impression that because it transferred its physical file to another firm and that Plaintiffs obtained that file by subpoena through discovery, Defendant is relieved of its obligations otherwise to respond to Plaintiffs' discovery requests. It is readily evident from the deposition testimony of Ms. Divittore that Defendant made no effort whatsoever to determine what happened to Rhoads & Sinon's servers and to search them for electronically stored information responsive to Plaintiffs' discovery requests.

The Court is astounded that in 2023 a Defendant *law firm* appears to be taking the position that it is under no obligation to search for electronic records responsive to discovery requests, particularly when electronically stored

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<sup>59</sup> See, e.g., *Daley v. Lansdowne*, *supra*, at \*4 ("[Where] Defense counsel objected approximately 100 times to Plaintiffs' counsel's questioning, ... a strong sanction is still required as the Defendants' counsel hindered the truth seeking process by preventing the Plaintiffs' counsel from asking appropriate questions that may have led to information, which could have led to either party seeking an amicable resolution to this case or, at the very least, relevant information for trial").

information is the subject of a specific rule of civil procedure<sup>60</sup> and when there have been numerous cases addressing the same for some years.<sup>61</sup> Defendant shall search for and, if possible, secure the servers that it used while it was operating, as well as any backup media containing information from the servers, and other media of any kind or nature whatsoever containing electronically stored information. If the servers or other media or both are located, they shall be searched for responsive materials, which shall be turned over to Plaintiffs in further response to Plaintiffs' discovery requests.<sup>62</sup> If Defendant is unable to locate its servers and other media, it shall provide Plaintiffs with a detailed explanation of the disposition of the same, as well as a detailed account of all efforts made to locate and secure them.

Plaintiffs' Motion is GRANTED in part and DENIED in part to the extent that it seeks an Order compelling Defendant to engage a third party vendor to secure all electronically stored information. As explained above, Defendant shall secure its electronically stored information, search the same, and provide any responsive documents to Plaintiffs in further response to Plaintiffs' discovery requests. If Defendant must engage a third party vendor to comply with this Court's Order, then it shall do so without further Order of Court.

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<sup>60</sup> See Pa. R. Civ. P. 4009.1

<sup>61</sup> See, e.g., *PTSI, Inc. v. Haley*, 71 A.3d 304 (Pa. Super. 2013). Ironically, counsel for the Defendant represented one of the litigants in *PTSI, supra*, wherein he argued unsuccessfully that his client was entitled to a spoliation inference due to representatives of the opposing party deleting electronically stored information routinely and not in bad faith. *Id.*, at 316-19.

<sup>62</sup> Of course, Defendant may withhold any documents that it contends are privileged or otherwise non-discoverable; however, it shall identify the documents that are withheld and state specifically the basis upon which they are withheld.



***F. Plaintiffs' Motion to Disqualify Counsel.***

Plaintiffs' Motion to Disqualify Counsel asserts that Counsel for the Defendants improperly represents both defendants despite there being an irreconcilable conflict of interest between them.<sup>63</sup> Plaintiffs point out that this Court has the power to regulate the conduct of attorneys practicing before it and that the Court must make sure that those attorneys act in accordance with applicable rules of professional responsibility.<sup>64</sup> Defendants argue in opposition that this action is premised on the alleged professional negligence of Defendant Piermattei, that the claim against Defendant Rhoads & Sinon is a vicarious liability claim, and that the interests of both Defendants are aligned in opposing the alleged negligence of Defendant Piermattei.<sup>65</sup>

This Court has the inherent authority to disqualify an attorney that the Court finds has breached an ethical standard contained in the Rules of Professional Conduct.<sup>66</sup> The burden of proving that disqualification is warranted rests on the party moving to disqualify,<sup>67</sup> and, when deciding the issue, the Court must find that disqualification is the appropriate means to enforce the rule in question and weigh

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<sup>63</sup> In support of this position, Plaintiffs point to certain alleged inconsistencies in the positions taken by the Defendants, certain indications of miscommunication or lack of communication between them, and a Writ of Summons filed by Defendant Piermattei against Defendant Rhoads & Sinon in Dauphin County Court. See Plaintiffs' Motion to Disqualify Counsel; Plaintiffs' Supplement to Disqualify Counsel. Concerning the Writ of Summons in Dauphin County, Defendants assert that it concerns a potential contractual dispute between the Defendants regarding which of them is responsible for the insurance deductible relating to the present professional liability claim, and that the parties have separate counsel for that. Defendants maintain that it does not affect their defense to the Plaintiffs' claims. Defendants' Brief in Opposition to Plaintiffs' Motion to Disqualify Counsel.

<sup>64</sup> See, e.g., *Albert M. Greenfield & Co., Inc. v. Alderman, D. & C.* 4th 96, 105 (Phila. Cnty. 2001) (quoting *American Dredging Co. v. City of Philadelphia*, 389 A.2d 568, 571 (Pa. 1978)).

<sup>65</sup> Defendants' Brief in Opposition to Plaintiffs' Motion to Disqualify Counsel, at 2-3.

<sup>66</sup> *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 80 (Pa. Super. 2005), *alloc. denied*, 903 A.2d 539 (Pa. 2006).

<sup>67</sup> *Estate of Pew*, 655 A.2d 521, 545 (Pa. Super. 1994), *app. withdrawn*, 675 A.2d 1248 (Pa. 1995)

the countervailing policies.<sup>68</sup> As the Court of Common Pleas of Lackawana County has explained,

Policy interests ... in favor of disqualification include maintaining public confidence in the bar and judicial system, preserving the integrity of legal proceedings, fulfilling former clients' expectations that attorneys will be loyal to their clients, and preventing the possibility that clients' confidential communications will be used against them.... Factors which weigh against disqualification are permitting litigants to retain the counsel of their choice and enabling attorneys to practice law without excessive restrictions....<sup>69</sup>

The Court does not believe that Plaintiffs have met their burden of proving that disqualification is warranted and will not interfere with Defendants' choice of counsel under the circumstances. The Court takes seriously its obligation to oversee the conduct of counsel appearing before it, however, and will take appropriate action should it determine that a breach of the Rules of Professional Conduct requires a different outcome in the future. Plaintiffs' Motion to Disqualify Counsel is DENIED, without prejudice.

### **III. CONCLUSION.**

For the reasons explained above, it is hereby ORDERED and DIRECTED as follows:

1. Defendants' Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answers and Objections to Defendants' First Set of Requests for Admissions filed February 21, 2023 is DENIED.
2. Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production Directed to Dean Piermattei and Rhoads & Sinon, LLP filed May 4, 2023 is GRANTED in part and DENIED in part.

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<sup>68</sup> *Jordan v. Philadelphia Housing Authority*, 337 F. Supp. 2d 666, 672 (E.D. Pa. 2004).

<sup>69</sup> *Lasavage v. Smith*, 2011 WL 2853697, at \*4 (Lacka. Cnty. 2011) (citations omitted).

3. Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of Discovery Requests Directed to Rhoads & Sinon, LLP filed June 12, 2023 is GRANTED in part and DENIED in part.
4. Plaintiffs' Motion to Reconvene Deposition of Stephanie DiVittore and/or Corporate Representative of Rhoads & Sinon, LLP and to Order Defendant to Engage a Third Party Vendor to Secure All Electronically Stored Information ("ESI") filed June 12, 2023 is GRANTED in part and DENIED in part, as follows:
  - a. The deposition of Stephanie DiVittore and/or of another witness or witnesses shall be reconvened within twenty (20) days after production of discovery required hereunder. Any such witness(es) shall be prepared to answer questions on the topics previously noticed by Plaintiffs. Said repeat deposition shall be conducted at the offices of counsel for the Plaintiffs, or at such other location as counsel for Plaintiffs deems convenient, and counsel for the Defendants shall bear the costs therefor.<sup>70</sup> Counsel for the Defendants shall minimize interruptions to the testimony, sparingly interpose only appropriate objections and direct the witness not to answer a question only after precisely stating an appropriate reason therefor.<sup>71</sup>
  - b. Plaintiffs' request for an Order requiring Defendant Rhoads & Sinon, LLC to hire a third party vendor to secure its electronically stored information is GRANTED in part and DENIED in part. Defendant shall immediately search for and, if possible, secure the servers that it used while it was operating, as well as any backup media containing information from the servers, and other media of any kind or nature whatsoever containing electronically stored information. If the servers or other media or both are located, they shall be searched for responsive materials, which shall be turned over to Plaintiffs in further response to Plaintiffs' discovery

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<sup>70</sup> Such costs shall include appearance fees for the court reporter and witness(es), transcription and other incidental costs, to include two copies of the transcript to be provided to counsel for Plaintiffs. The Court declines to make an award of counsel fees, however. The Court has not made any previous orders in this case concerning similar issues, and Plaintiffs' counsel's fees attributable to the repeat deposition are unlikely to be significant, as counsel has already prepared for the deposition and would have charged fees to obtain the required testimony in the absence of a repeat deposition.

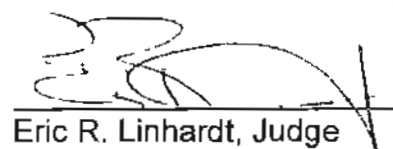
<sup>71</sup> See, e.g., *Howarth-Gadomski v. Henzes, M.D.*, 2019 WL 6354235, at \*1 (Lacka. Cnty. 2019) ("During that deposition, defense counsel may direct the defendant-physician not to answer a specific question only if that instruction is necessary to assert and protect a recognized privilege, to enforce an evidentiary limitation established by an earlier court ruling in this case, or to present a motion for a protective order based upon grounds identified in Pa. R.C.P. 4012(a)").

requests. If Defendant must engage a third-party vendor to comply with this Court's Order, it shall do so without further Order of Court. If Defendant is unable to locate its servers or other media, it shall provide Plaintiffs with a detailed explanation of the disposition of the same, as well as a detailed account of all efforts made to locate and secure them.

5. Any revised, amended or additional responses to discovery requests required hereunder shall be served within twenty (20) days after entry of this Opinion and Order.
6. Plaintiffs' Motion to Disqualify Counsel filed June 12, 2023, with Supplement to Motion to Disqualify Counsel filed June 20, 2023, is DENIED, without prejudice.
7. Plaintiffs filed a Motion for Leave to File Supplement to Discovery Motions and Motion to Disqualify filed September 5, 2023 is DENIED as moot.<sup>72</sup>
8. Should any further discovery disputes arise between the parties, prior to seeking involvement of the Court, the parties shall confer and make a good faith effort to resolve any such dispute and to narrow the issues to be presented to the Court.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/bel

cc: Frank C. Botta, Esq., David C. Weber, Esq. & Lisa R. Whisler, Esq.  
375 Southpointe Boulevard, Canonsburg, PA 15317  
Joseph J. Bosick, Esq.  
One Oxford Center, Thirty-Eighth Floor, Pittsburgh, PA 15219  
Gary Weber, Esq. (Lycoming Reporter)

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<sup>72</sup> The Court was drafting this Opinion and Order when Plaintiffs filed their Motion. Having reviewed the Motion, the Court concludes that nothing contained therein alters the Court's decision, so it denies leave to file the Supplement.