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Letter to Expert's Employer Not 'Sinister,' Defense Argues

A defense attorney's letter to the employer of a medical malpractice plaintiff's expert was written to alert the employer that one of its experts professed an opinion that could reflect a change in medical standards of care, the defense attorney's counsel argued in a hearing last week.

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2012-08-13 12:00:00 AM

A defense attorney's letter to the employer of a medical malpractice plaintiff's expert was written to alert the employer that one of its experts professed an opinion that could reflect a change in medical standards of care, the defense attorney's counsel argued in a hearing last week.

But plaintiff's counsel said that such an action casts "great doubt on the sanctity of the litigation system" and should be sanctioned by the defense attorney being disqualified from representing her client in any retrial of the case; by having to disgorge any fees she was paid for writing the letter; and by paying \$45,000 in the plaintiff's costs in litigating the sanctions motion.

At issue in the case is whether it's normal practice for medical malpractice defense lawyers to be in touch with counsel for local health care institutions about any of their affiliated physicians who would testify as experts in local malpractice cases.

Philadelphia Court of Common Pleas Judge Jacqueline F. Allen already entered an order in May that defense attorney Nancy K. Raynor's act of sending the letter to the General Counsel's Office for the Hospital of the University of Pennsylvania was sanctionable.

But Allen still must decide what level of sanctions to give Raynor, and she heard arguments last week to determine what impact Raynor's actions had on the case.

Plaintiff's counsel Joseph L. Messa Jr. admitted to Allen that his expert did testify at trial despite Raynor's letter.

Allen already ordered Raynor, of Raynor & Associates in Malvern, Pa., to refrain from contacting the plaintiff's experts or their employers. Allen also denied Raynor's motion for sanctions against plaintiff's counsel.

The judge said that she would not premise the sanctions on any alleged violations of the Pennsylvania Rules of

Professional Conduct because that is not within her jurisdiction.

Messa and his co-counsel at Messa & Associates and Klehr Harrison Harvey Branzburg in Philadelphia asked that sanctions be imposed because Raynor wrote to the senior counsel in the Office of General Counsel for the Hospital of the University of Pennsylvania, Mary Ellen Nepps.

Raynor wrote, according to an exhibit attached to court papers, that Dr. Stefanie B. Porges was retained by the plaintiff.

In *Sutch v. Roxborough Memorial Hospital*, the plaintiff's allegation is that Dr. Jeffrey Geller of Roxborough Memorial Hospital failed to obtain diagnostic testing that could have resulted in the timely diagnosis of Rosalind Wilson's ultimately fatal lung cancer. Raynor is Geller's counsel.

Wilson's lung cancer went undiagnosed between May 2007 and January 2009, the plaintiff's papers said.

Raynor wrote to Nepps, according to the letter, "The case involves an acknowledged failure to relay concerning X-ray findings to the patient's physicians and the patient herself, resulting in a lengthy delay in the diagnosis of her cancer. ... Nevertheless, the plaintiff has retained one of Penn's emergency room physicians ... who has offered the untenable opinion that because Dr. Geller ordered the test, it was his responsibility to follow through on obtaining the results and advising the patient of them.

"Dr. Porges has clearly overlooked the well-established concept of hand-off to an accepting inpatient team and I thought you might want to know that, if this is her position and plaintiff's attorneys become aware of it, it could expose the Hospital of the University of Pennsylvania to significant liability."

Raynor's defense counsel, George Bochetto of Bochetto & Lentz in Philadelphia, told Allen during the hearing that what Raynor was concerned with was if Porges' opinion was "changing the law of medicine and the medical doctrine of hand-off."

Messa argued that the only reason to write that HUP could face significant liability was to put pressure on the hospital in order to put pressure on Porges.

Bochetto acknowledged that Raynor has never written such a letter to a hospital before, but "these kinds of discussions and these kinds of conversations happen regularly in the industry," Bochetto said.

Messa said he has never heard of such a letter being written by defense counsel.

The letter also was written after the case was originally set for trial but was rescheduled because a defendant was hospitalized, Bochetto said.

If Raynor had "sinister motivations," she would have written the letter before the first trial, Bochetto said.

Raynor also has faced the need to engage counsel and having the case covered in *The Legal*, Bochetto said.

The letter was an "innocent situation that in no way reflects the evil or sinister intentions that plaintiff's counsel ascribes to her," Bochetto said.

The case went to trial in May. The jury found a defense verdict in favor of Geller and Roxborough Emergency Physician Associates, but the jury returned a plaintiff's verdict of \$190,000 against Dr. Melanio Aguirre and Roxborough Memorial Hospital, according to court papers.

The plaintiffs are seeking a new trial, arguing that one of Geller's experts testified that Wilson was a smoker despite an order granting a motion in limine to preclude mentioning that part of Wilson's medical history.

Philadelphia Common Pleas Judge Paul P. Panepinto presided over the trial and has jurisdiction over the motion for a new trial.

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