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Dueling Sanctions Motions Filed Over Letter to Plaintiff Expert's Employer

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Opposing counsel in a Philadelphia medical malpractice case have filed dueling motions for sanctions after a defense attorney wrote a letter to the general counsel for a plaintiff's expert's place of employment.

Plaintiff's counsel Joseph L. Messa Jr. and Jenimae Almquist of Messa & Associates said in court papers that defense attorney Nancy Raynor of Raynor & Associates in Malvern, Pa., 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 the underlying case of *Sutch v. Roxborough Memorial Hospital*, the plaintiff's theory 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.

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."

Messa & Associates called the letter to Nepps "outrageous and defamatory," according to court papers. As well, the plaintiff's counsel argued that Raynor's letter was intended to prompt Nepps to discourage Porges from testifying.

Messa said in an interview he learned from Porges about the letter, and that he did not seek sanctions against Raynor lightly.

"I believe the conduct was so outrageous, in representing my client appropriately I had no other alternative other than to file a motion to bring the conduct to the attention of the court," Messa said.

In response, Raynor and Judy May Packett of Raynor & Associates said Messa & Associates should be sanctioned \$5,000 for "improper, unprofessional, vexatious, spurious and libelous conduct" in filing the first motion for sanctions.

"Plaintiff's motion was intended only to bully and harass Dr. Geller into settlement as well as to malign the name and damage the professional reputation of defense counsel in the legal community as well as to the public," Raynor & Associates counsel said.

Raynor & Associates said in court papers that it is "standard practice" for defense counsel in medical malpractice cases to advise hospitals in the region of expert testimony to be given by staff physicians against local defendants. Raynor was acting as an officer of the court by putting the hospital's counsel on notice of possible exposure, Raynor & Associates said in court papers.

The letter also was appropriate under Raynor's free speech rights, Raynor & Associates argued.

"The letter was written in good faith and for the purpose of putting HUP on notice of the opinions being advanced by one of its physicians," Raynor & Associates counsel said in court papers. "Notwithstanding plaintiff's attempts to characterize this communication as somehow egregious, inappropriate or even unlawful, this type of communication among trial counsel and institutional counsel takes place routinely and is violative of no ethical rule, discovery rule or other applicable Rule of Civil Procedure or other law."

Raynor said in an interview that it's common practice for counsel to talk with local health care institutions if their physicians are going to testify in cases. However, Raynor said she did not contact Porges directly.

If Porges is convinced enough of her opinion to undergo cross-examination, "she should be able to defend her opinion to her institution," Raynor said.

Messa said in an interview that, while Raynor asserts that defense counsel contact the employers of expert witnesses as a regular measure, he does not think

that is true.

Messa said he has friends in the defense bar, and they have not reported to him that they would have "extrajudicial communication with the opposition witness's employer."

While Porges is still his expert and has "conviction in her opinions," Messa said the contact can only be interpreted as an attempt to put pressure on his expert and should not be countenanced by the court.

The defense must have been concerned about the strength of Porges' opinion and having a University of Pennsylvania doctor testify against another regional physician, Messa said.

Raynor, however, said, "I had no intent at all to remove her from the case. I think her position is untenable. I'm hoping to have the opportunity to cross-examine her."

Raynor said Porges' opinion is untenable that an emergency room physician, who has handed off a patient to another service within the hospital, had a responsibility to follow up on test results.

"If she feels strongly enough about that position then she should be able to go into a courtroom, not back down from it and subject herself to cross-examination on that issue," Raynor said.

Messa & Associates requested that Raynor be ordered to not contact Porges, or Porges' employer, HUP; to retract the letter; to apologize to Porges; to pay \$10,000 in sanctions; or be disqualified as counsel for defendant Geller, according to court papers.

"In an impermissible attempt to intimidate a legitimate medical witness, Ms. Raynor inexplicably wrote to Dr. Porges' employer and criticized Dr. Porges' involvement as an expert witness in this matter," Messa & Associates attorneys said in court papers.

"The fact that it is often difficult for plaintiffs to obtain such highly qualified local experts to testify against their peers makes Ms. Raynor's shameless attempt at bullying a physician in this community all the more intolerable, and her misconduct casts a grave shadow upon Ms. Raynor and the entire legal profession," Messa & Associates attorneys said in court papers.

Plaintiff's counsel also said a full evidentiary hearing "to determine the frequency with which Ms. Raynor uses this witness interference as a pretrial tactic in not just this case, but also other actions pending in the Philadelphia Court of Common Pleas," according to court papers.

The case previously was on the eve of a trial, but it was postponed because of the sudden admission of one of the other defendants to the hospital, Raynor & Associates attorneys said in court papers.

Both sanctions motions are still pending. Philadelphia Common Pleas Judge Jacqueline F. Allen has scheduled a hearing on the plaintiff's motion for sanctions for 11 a.m. on April 19, according to the court docket.

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