

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUSSEX COUNTY COURTHOUSE  
GEORGETOWN, DE 19947

September 14, 2010

Michael D. Carr, Esquire  
The Law Offices of Michael D. Carr  
19716 Sea Air Avenue, Suite 2  
Rehoboth Beach, Delaware 19971

Mason E. Turner, Esquire  
Prickett Jones & Elliott, P.A.  
1310 King Street  
P.O. Box 1328  
Wilmington, DE 19899

Bradley J. Goewert, Esquire  
Monica A. Horton, Esquire  
Marshall Dennehey Warner Coleman & Goggin  
1220 North Market Street, 5<sup>th</sup> Floor  
P.O. Box 8888  
Wilmington, Delaware 19899

RE: ***Marion W. Neal as Executrix of the Estate of Fred L. Neal v. Roberto Scaffidi, M.D., Cardiology Consultants, P.A. and Bayhealth Medical Center, Inc.***  
C.A. No. S09C-02-004 RFS

Date Submitted: July 16, 2010

Dear Counsel:

I have reviewed the arguments concerning the amount of money that Defendants should pay for taking the deposition of Plaintiff's expert, Dr. Setaro.

Defendants are responsible for payment of a reasonable fee. Plaintiff bears the responsibility to present information on what this figure would be. In many cases, this is not overly difficult; affidavits and other information from experts are supplied routinely.

The situation here is different. In this medical malpractice action, Plaintiff had to find a qualified expert to opine on (1) the applicable standard of professional care and (2) that health care provider(s) deviated from the standard and proximately caused personal injuries. Without this, Plaintiff would not be able to make a *prima facie* case. Dr. Setaro was found through the use of a referral agency, Pennsylvania Physicians for Legal Review, Inc. (“PPLR”).

Under its contract, arrangements for Dr. Setaro’s reports and deposition have to be made through PPLR with payment of its fees and expenses. Plaintiff paid an initial deposit of \$2000, which did not cover deposition time. When Dr. Setaro’s deposition was requested by the defense, PPLR demanded prepayment of \$4500 for a four-hour block of Dr. Setaro’s time.

To hold the deposition, Plaintiff paid \$1500 and the two Defendants made up the difference of \$3000. The money was paid to PPLR. The understanding between the litigants was that the Court would decide what the reasonable cost would be. The deposition was taken in Connecticut, among other reasons because Dr. Setaro is affiliated with Yale University Hospital. The deposition lasted approximately one hour and fifty minutes.

My conclusions are as follows:

(1) The expenses of expert service organizations are part of the legal environment. Under Superior Court Civil Rule 26(b)(4) these charges must be reasonable.<sup>1</sup>

(2) The demand for \$4500 for the reserved time comes to \$1125 per hour. The actual fee charged by Dr. Setaro for clients is \$500 per hour. He received less than his usual rate because PPLR retained \$25 per hour. With Dr. Setaro receiving \$475 per hour, PPLR was demanding \$650 per hour for its surcharge. This amount is unreasonable.<sup>2</sup>

(3) Defendants knew that Plaintiff used PPLR to find Setaro. Part of Plaintiff’s reasonable expenses for Dr. Setaro’s deposition should be paid by the defense. Otherwise, Plaintiff would suffer manifest injustice if all of the cost had to be absorbed.<sup>3</sup>

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<sup>1</sup>*Mclaughlin v. Dover Downs, Inc.*, 2008 WL 795311, at \*2 (Del. Super.).

<sup>2</sup>A similar situation was presented in *Engleman v. Bakhru*, 2007 WL 1247253 (Conn. Super.). The expert found by PPLR charged \$4500 for 4 hours of testimony. The hourly rate of \$1125 (4500 ÷ 4) was excessive, and the court allowed an hourly rate of \$600 for the medical expert.

<sup>3</sup>Super.Ct.Civ.R. 26(b)(4)(C).

(4) The defense estimated that Dr. Setaro's deposition would last two hours. While the estimate was accurate, it was not unreasonable to schedule additional time because examinations may last longer than anticipated.

(5) The defense request obviously required Dr. Setaro to prepare for the deposition.

(6) There is little information on what a reasonable surcharge would be for a referral agency like PPLR. In this regard, PPLR has stood on its contract with the demand for the \$4500 fee without detail. Case law suggests that expenses up to 20 percent can be reasonable, and up to \$80 per hour has been allowed for advisory services when an expert is deposed.<sup>4</sup>

(7) Ultimately, the Court has discretion to set a reasonable amount. Consequently, a four-hour period of time for Dr. Setaro's deposition is reasonable which includes preparation and lost work opportunities. Dr. Setaro's customary hourly charge is \$500 and is reasonable. He is highly credentialed. A fee of \$475 per hour is well in line. An hourly charge of \$80 for PPLR's services is awarded, which is less than what has been ordered elsewhere. The combined figure is \$555. The defense is responsible for \$2220 (\$555 x 4) and shall be reimbursed \$780 (\$3000 - \$2220). Plaintiff shall pay each Defendant \$390 within 30 days.

**IT IS SO ORDERED.**

Very truly yours,

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<sup>4</sup>In *New York v. Solvent Chemical Co., Inc.*, 2002 WL 31190938 (W.D.N.Y.), Solvent contracted with an agency to testify for Solvent on a third-party claim. After the third party deposed the expert, the agency billed Solvent \$255 per hour for the expert's time. Solvent sought payment from the third party. The District Court found nothing unfair about the third party paying the expert's fee, which was shown to be reasonable. Forcing Solvent to pay the \$80 difference between what the agency charged and the expert was paid would be an "unfair burden" and contrary to the intent of Federal Rule 26(b)(4)(C), which is to "avoid the unfairness of requiring one party to provide expensive discovery for another party's benefit without reimbursement." The Delaware Rule and policy are substantially the same.

On the other hand, additional compensation of \$140 per hour charged by an expert witness agency was found not to be reasonable in a patent infringement case. *Fiber Optic Designs, Inc. v. New England Pottery, LLC*, 2009 WL 4693836 (D.Colo.).

Certainly, in medical malpractice litigation, a plaintiff has difficulty in locating experts. Reliance upon technical advisory services is necessary and reasonable for a plaintiff to seek relief from alleged malpractice in the courts.

Richard F. Stokes

cc: Prothonotary