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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

IRIS PARKER,)	3:06-CV-0518-ECR (VPC)
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
UPSHER-SMITH LABORATORIES, INC.,)	
)	
Defendants.)	

Before the court is the emergency motion of defendant Upsher-Smith Laboratories, Inc. (“defendant”) for sanctions for plaintiff’s interference with the court’s discovery order authorizing *ex parte* communications with treating physicians (#73). Plaintiff, Iris Parker (“plaintiff”) opposed (#80), defendant replied (#83), and this court held a hearing on the motion on February 12, 2009.

I. Procedural History

Plaintiff brings this products liability action against defendant alleging that her husband, Arthur L. Parker, died as a result of injuries sustained from ingesting amiodarone, an anti-arrhythmic drug manufactured by defendant (#34). The court established monthly case management conferences in this action, given that it has been pending since September 2006, and the parties anticipated extensive discovery. Fact discovery is closed, the close of expert witness discovery is March 16, 2009, and dispositive motions are due April 15, 2009 (#65). The court advised that no further extensions of this most recent scheduling order would be granted (#66).

On February 3, 2008, this court held the monthly case management hearing, and in anticipation of that hearing, the parties filed case management reports (#s 71 & 72). Present on behalf of plaintiff were Mr. South and Mr. Whitehead, and Mr. South presented argument for the plaintiff. The parties

1 advised that an issue had arisen concerning whether defendant is entitled to interview certain treating
2 physicians identified in plaintiff's disclosures to discuss their opinions and their care and treatment of
3 the decedent. Plaintiff's position is that Nevada law prohibits defense counsel from having *ex parte*
4 communications with a plaintiff's treating physician, and that Nev. Rev. Stat. § 49.245(3) only waives
5 the privilege as to written medical or hospital records (#72). Defendant's view is that *ex parte*
6 interviews of non-retained treating physicians are a proper part of the discovery process, and that
7 plaintiff expressly waived the physician-patient privilege by bringing this action and authorizing release
8 of the decedent's medical records (#71).

9 A second issue concerned whether the Health Insurance Portability and Accountability Act of
10 1996 (HIPAA) permits a physician to engage in *ex parte* interviews with defendant's counsel where the
11 plaintiff has authorized disclosure under HIPAA regulations. It was undisputed that plaintiff executed
12 a HIPAA authorization to allow physicians to disclose plaintiff's medical information. Defendant
13 contends that once a HIPAA authorization is executed, *ex parte* interviews between plaintiff's treatment
14 providers and defense counsel are permitted, and plaintiff takes a contrary view. Plaintiff disagrees
15 and asserts that HIPAA does not pre-empt Nevada's physician-patient privilege, which only provides
16 for a written waiver of medical records.

17 At the February 3, 2009 case management conference, the court heard oral argument from
18 counsel on these issues and ruled in favor of defendant, as more fully set forth in its minute order (#75).
19 In summary, the court held that defendant may engage in *ex parte* interviews of those treating physicians
20 not designated as expert witnesses, and specifically authorized defendant's counsel to interview six
21 physicians. *Id.* The court further directed counsel to meet and confer as to the scope of interviews, and
22 if they could not resolve this issue, they were directed to file notices with the court, and a hearing would
23 be scheduled to decide this matter. *Id.*

24 The court also found that HIPAA permits a physician to disclose a patient's medical information
25 once a patient has executed a valid authorization. *Id.* Counsel reported that plaintiff executed the
26 HIPAA authorizations in this proceeding, but they had expired, and plaintiff's counsel indicated he
27 would not advise his client execute new authorizations; therefore, the court ordered that notwithstanding
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1 this refusal, the court's order authorized the defendant's *ex parte* interviews of the physicians identified
2 in the order. *Id.*

3 On February 5, 2009, plaintiff filed a document styled, "plaintiff's position regarding scope of
4 defendant's *ex parte* communications with physicians" (#74). In it, plaintiff renewed her argument that
5 *ex parte* interviews of the treating physicians are improper. *Id.* Plaintiff concluded by requesting that
6 defendant's physician interviews "be limited only to the decedent's treatment for atrial fibrillation and
7 his subsequent development of pulmonary difficulties." *Id.* Plaintiff was silent concerning any
8 communications she had with decedent's treating physicians concerning the February 3, 2009 order.

9 Defendant did not immediately file a status report concerning counsel's efforts to resolve their
10 dispute concerning the scope of the anticipated *ex parte* interviews with treating physicians; rather,
11 defendant filed the pending motion for sanctions because plaintiff's counsel sent twenty letters to the
12 decedent's treating physicians, including Mr. Parker's cardiologists, pulmonologists, family care
13 physician, surgeon, and other physicians who treated Mr. Parker in the hospital prior to his death (#73).

14 The letters, dated February 4, 2009, are identical and state:

15 I represent Iris Parker and the estate of her deceased husband, Arthur Parker, in
16 connection with litigation brought against Upsher-Smith Laboratories. It is our
17 contention in the lawsuit that Mr. Parker developed interstitial lung disease and died as
18 a result of his taking amiodarone for treatment of an atrial fibrillation.

18 Notwithstanding the requirements of HIPAA and the fact that the authorization
19 previously provided to you has expired, Upsher-Smith, through its attorney, has
20 requested that the court allow its attorney to contact Mr. Parker's treating physicians to
21 discuss his case and treatment as it relates to his development of interstitial lung disease
22 and ultimate death.

21 I am writing this letter to inform you of the court's decision and also to advise
22 you that even though the court has permitted counsel for Upsher-Smith to speak with you
23 outside our presence, you are free to decide whether or not you wish to meet privately
24 with defense counsel. There is legal authority which provides that neither HIPAA-
25 compliant authorizations nor a court order can force a healthcare professional to
26 communicate with the attorneys. *See, Arons v. Jutkowitz*, 9 N.Y.3d 393, 880 N.E.2d 831
(N.Y. 2007); *Moreland v. Austin*, 284 Ga. 730, 670 S.E.2d 68 (2008).

25 If you decide to meet privately with counsel for Upsher-Smith, we would
26 appreciate your advising us of your decision so that we may have an opportunity to meet
27 privately with you as well.

1 authorizations releasing the decedent’s medical records, HIPAA was not an obstacle to
2 the *ex parte* interviews that defendant requested?

3 5. Was it your understanding on February 3, 2009, that when the court was advised that the
4 HIPAA authorizations had expired, and plaintiff’s counsel declined to have plaintiff
5 execute new authorizations, the court ordered that notwithstanding that refusal, this
6 court’s order would serve as authorization?

7 6. Is it correct that at the February 3, 2009, hearing, there was no discussion concerning
8 whether physicians solicited for defendant’s *ex parte* interviews could be compelled to
9 participate?

10 Counsel acknowledged they understood what the court ordered, as set for above, with the exception of
11 Item 3. Although defendant’s counsel, Mr. Moore, understood that the interviews would be deferred
12 until the scope of the interviews was established, Mr. South told the court that he did not have that
13 understanding. Both counsel also agreed that there was no discussion at the hearing concerning whether
14 treating physicians could be compelled to attend interviews with defendant’s counsel.

15 The court asked Mr. South to explain why he sent the twenty letters to treating physicians, and
16 he replied that he felt it necessary to inform them that based on his further legal research after the
17 February 3, 2009 hearing, he determined that they were entitled to notice that they were not compelled
18 to attend any *ex parte* interviews. Mr. South told the court that he did not believe his letter violated the
19 terms or the intent of the court’s order, and that it was not a pre-emptive attempt to insure that physicians
20 who received his letter would refuse to engage in *ex parte* interviews with defendant’s counsel. As
21 stated in plaintiff’s opposition to the motion for sanctions, “Plaintiff had a right to inform the physicians
22 about the purpose of the interviews and that they were not obligated to meet privately with Upsher-
23 Smith’s counsel,” (#80, page 12, lines 3-4). Mr. South took the position that despite the court’s order,
24 he had an independent right to notify the treating physicians immediately that they were not compelled
25 to submit to interviews with counsel.

23 **III. Discussion**

24 **A. Sanctions Pursuant to the Court’s Inherent Authority**

25 The federal court has inherent power to levy sanctions, including attorney’s fees, for “willful
26 disobedience of a court order . . . or when the losing party has acted in bad faith, vexatiously, wantonly,
27 or for oppressive reasons. . . .” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). In *Chambers*
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1 F.2d 1365, 1369 (9th Cir. 1980)), enter a dispositive ruling (*G-K Properties v. Redevelopment Agency*
2 *of the City of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978)), or it may treat the failure to obey its order as
3 a contempt of the court (*Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992)).
4 The court is not limited to the sanctions listed in Rules 37(b)(2), and may make an order that it deems
5 “just.” *Valley Engineers, Inc. v. Electric Engineering Co.*, cert. denied, 526 U.S. 1064 (1999) (justice
6 is the central factor in a sanctions order under Rule 37(b)).

7 **C. Sanctions under 28 U.S.C. § 1927**

8 28 U.S.C. § 1927 states:

9 Any attorney or other person admitted to conduct cases in any court of the
10 United States or any Territory thereof who so multiplies the proceedings
11 in any case unreasonably and vexatiously may be required by the court to
satisfy personally the excess costs, expenses, and attorneys’ fees
reasonably incurred because of such conduct.

12 Although Section 1927 has a clear compensatory purpose because it permits an award of attorney’s fees
13 and costs, “it is in reality a penal statute designed to discourage unnecessary delay in litigation by
14 requiring attorneys ‘or other persons’ to compensate personally other litigant who incur excess costs due
15 to their misconduct.” GEORGENE M. VAIRO, RULE 11 SANCTIONS 765 (3d ed. 2003), citing *Roadway*
16 *Express*, 447 U.S. at 759-62 (Noting the importance of Section 1927 sanctions in that “lawyers who
17 multiply legal proceedings [are] taxed with the extra ‘costs’ they generate.”).

18 To warrant sanctions pursuant to Section 1927, a court must find the attorney acted with
19 recklessness or subjective bad faith. *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).
20 Section 1927 sanctions may only be imposed on attorneys and *pro se* litigants. *Wages v. Internal*
21 *Revenue Serv.*, 915 F.2d 1230, 1235-36 (9th Cir. 1989). Because imposition of Section 1927 sanctions
22 are penal in nature, it requires the court to make specific findings of fact. *Trulis v. Barton*, 107 F.3d 685,
23 692 (9th Cir. 1995).

24 **D. Sanctions pursuant to Local Rule IA 4-1**

25 The court’s Local Rules of Practice also provide for a mechanism for imposition of sanctions.
26 Rule IA 4-1(d) provides, “A court may, after notice and opportunity to be heard, impose any and all
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1 appropriate sanctions on an attorney or party appearing in *pro se* who, without just cause, [f]ails to
2 comply with any order of this court.”

3 **IV. Findings**

4 Based upon the papers filed herein and oral argument at the February 12, 2009 hearing, the court
5 makes the following findings of fact:

- 6 1. At the conclusion of the February 3, 2009, hearing, Mr. South understood that this
7 court’s order allowed defendant’s counsel to conduct *ex parte* interviews of the
8 decedent’s treating physicians not designated as expert witnesses.
- 9 2. At the conclusion of that hearing, Mr. South understood that counsel for the parties were
10 to meet and confer concerning reasonable limitations about the scope of the *ex parte*
11 physician interviews and report back to the court if issues remained in dispute.
- 12 3. Mr. Moore, defendant’s counsel, understood that based on the directive to meet and
13 confer on this issue, any physician interviews would be deferred until this issue was
14 resolved.
- 15 4. Mr. South represented to the court on February 12, 2009, that this was not his
16 understanding; therefore, he felt compelled to send twenty letters to the decedent’s
17 treating physicians on February 4, 2009, to advise them about the court order and to tell
18 them that they were not required to meet with defendant’s counsel.
- 19 5. The court does not find credible Mr. South’s understanding that the physician interviews
20 were not deferred until the scope of the interviews was resolved between the parties or
21 by the court.
- 22 6. Mr. South, with Mr. Whitehead’s knowledge, sent the twenty letters to treating
23 physicians on February 4, 2009, yet on February 5, 2009, Mr. Whitehead, was ostensibly
24 engaged in the meet-and-confer process this court ordered. Even though he knew Mr.
25 South had already sent the letters on February 5, 2009, he disclosed nothing to
26 defendant’s counsel during these discussions.

- 1 7. Neither Mr. South nor Mr. Whitehead ever asked defendant’s counsel to confirm that
2 there would be no attempt to arrange or conduct physician interviews until the meet-and-
3 confer process concluded, nor did they disclose the results of Mr. South’s legal research
4 concerning whether such interviews could be compelled.
- 5 8. Just as plaintiff’s counsel failed to disclose that Mr. South had sent the letters to
6 physicians, they also failed to disclose this fact to the court in their February 5, 2009
7 report to the court about the scope of the interviews (#74).
- 8 9. If Mr. South had a sincere concern that defendant’s counsel might attempt to contact
9 treating physicians before the scope of the interviews was resolved, he or Mr. Whitehead
10 could have easily communicated those concerns to defendant’s counsel, particularly since
11 Mr. Whitehead was already discussing the scope of the interview with defendant’s
12 counsel. Mr. Whitehead did not do so.
- 13 10. If Mr. South had a sincere concern that communications with defendant’s counsel would
14 somehow not resolve this issue, Mr. South had leave to file an emergency motion with
15 the court to address this issue and seek a stay of any interviews until further order of the
16 court. He did not do so.
- 17 11. The court finds that Mr. South, with Mr. Whitehead’s acquiescence, did not do so
18 because he intended to eviscerate the effect of this court’s order and discourage these
19 physicians from participating in the interviews with defendant’s counsel.
- 20 12. The timing of Mr. South’s letters – only one day after the February 3, 2009 hearing – as
21 well plaintiff’s counsels’ failure to discuss their concerns with opposing counsel or raise
22 them with the court, support the court’s finding that Messrs. South and Whitehead acted
23 in bad faith.
- 24 13. Mr. South’s letter to decedent’s treating physicians implicitly challenged this court’s
25 February 3, 2009, order permitting the *ex parte* physician interviews and implied that
26 the court’s order was inconsistent with HIPAA (“Notwithstanding the requirements of
27 HIPAA and the fact that the authorization previously provided to you has expired . . .”).

- 1 14. Mr. South made these representations in his letters, even though he knew the court had
2 resolved this very issue at the February 3, 2009, hearing.
- 3 15. Mr. South knew or reasonably should have known that these physicians would have
4 serious concerns about speaking with defendant's counsel if there were any question
5 whether HIPAA prohibited the interviews.
- 6 16. Mr. South stated in the letter that he, on behalf of the plaintiff, had objected to
7 defendant's request as improper, and because his client holds the physician-plaintiff
8 privilege, the implicit message to the physicians was that they should not speak to
9 defendant's counsel.
- 10 17. Mr. South further stated in his letter that pursuant to New York and Georgia case
11 authority, the physicians were free to refuse to speak with defendant's counsel, even
12 though Mr. South knew this issue had never been raised with defendant's counsel or the
13 court.
- 14 18. In doing so, Mr. South undertook to advise these physicians of their rights when he is not
15 retained as their counsel, and he also usurped the role of the court to fully consider this
16 issue after notice and hearing. Rather than raising this issue with the court, Mr. South
17 took it upon himself to unilaterally decide how the court's ruling should be implemented.
- 18 19. The fact that Mr. South sent copies of the twenty letters to defendant's counsel *after they*
19 *were sent* in no way excuses Mr. South's misconduct. By the time defendant's counsel
20 received the letters, so had the physicians.
- 21 20. Messrs. South and Whitehead were not without legal remedies in the face of the February
22 3, 2009, with which they disagreed. They could have objected to the order pursuant to
23 LR IB 3-1, they could have moved for reconsideration pursuant to Fed.R.Civ.P. 59(e),
24 and under either option, they could have also asked for a stay of the order until their
25 objection or motion for reconsideration was resolved. Although plaintiff subsequently
26 filed an objection to the February 3, 2009 order pursuant to LR IB 3-1 (#78), this does
27 not excuse plaintiff's counsels' prior misconduct.

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21. Plaintiff’s counsel contend that the letters to the physicians were not as damaging as defendant claims, since it is highly unlikely that most physicians would agree to such interview under ordinary circumstances. The court finds this argument disingenuous because, if true, why send the letter in the first place?
22. Trial counsel owe an undivided allegiance to their clients, but they also owe important duties candor and honesty to the court and opposing counsel.
23. If a lawyer disagrees with an order of the court, that lawyer does not have leave to disregard or circumvent that order; his or her recourse is to take appropriate steps to test the validity of that ruling pursuant to Local Rules of Practice and the Federal Rules of Civil Procedure.
24. Based upon the facts described herein, including the timing of the letters, their content, Mr. South’s failure to meet and confer with counsel or seek relief from the court, Mr. Whitehead’s failure to disclose to defendant’s counsel any concerns about attempts to meet with physicians during his own meet-and-confer discussion with defendant’s counsel, and all facts recited herein, the court finds there is clear and convincing evidence that Mr. South and Mr Whitehead acted in bad faith or conduct tantamount to bad faith with the intention to undermine the court’s order and insure, to the extent possible, that no physician who received Mr. South’s letter would agree to an interview with defendant’s counsel. *Roadway Express*, 501 U.S. at 766; *Chambers*, 501 U.S. at 36; *Fink v. Gomez*, 238 F.3d at 992. Mr. South’s conduct in sending the letters to physicians, and Mr. Whitehead’s complicity in failing to disclose their intention to send the letters, was done for the improper purpose of influencing these witnesses not to cooperate with defendant’s counsel in *ex parte* interviews, and it was done to gain a tactical advantage; that is, to subvert the court’s order and insure any physician inclined to be interviewed would not do so.
25. Based upon the foregoing, the court further finds that Mr. South and Mr. Whitehead acted recklessly and with an improper intention. *Fink v. Gomez*, 238 F.3d at 993.

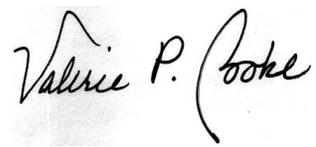
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IT IS HEREBY ORDERED:

1. Pursuant to the court's inherent power, 28 U.S.C. § 1927, and LR IA 4-1, plaintiff's counsel shall pay all defendant all attorney's fees and costs incurred in connection with the motion for sanctions (#73). Defendant's counsel shall file statement of attorney's fees and costs pursuant to LR 54-16.
2. Pursuant to the court's inherent power and LR IA 4-1, plaintiff's counsel, not the plaintiff, are sanctioned the sum of \$4,000.00, payable to the Attorney Admission Fund within thirty (30) days of the date of this order.
3. The court reserves imposition of additional sanctions until disposition of plaintiff's objection (#78) to the District Court.

IT IS SO ORDERED.

DATED: February 18, 2009.



UNITED STATES MAGISTRATE JUDGE