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Atty Sanctions Axed In Opioid MDL, Allowing Doc's Testimony

By **Jeff Overley**

Law360 (April 26, 2019, 9:29 PM EDT) -- An Ohio federal judge on Friday scrapped attorney sanctions that would have barred testimony from a high-profile pain doctor in the multidistrict opioid litigation, calling the discipline "too extreme" despite a galling failure by plaintiffs' attorneys to divulge a deal with the doctor.

The ruling by U.S. District Judge Dan Aaron Polster clears the way for testimony at a bellwether trial by Russell Portenoy, a onetime advocate of looser opioid prescriptions who reached a settlement with local government plaintiffs and has supplied an unflattering perspective on drugmakers' promotional practices.

Although plaintiffs' attorneys committed an "egregious" failure to disclose a settlement with Portenoy during discovery, they appear to have made an "honest mistake" that doesn't warrant excluding the doctor's testimony, Friday's ruling said.

"The court concludes Dr. Portenoy's testimony is too important to the [bellwether] trial, and that exclusion of his testimony is too extreme a sanction under these circumstances," Judge Polster wrote in rejecting sanctions that a special master **approved earlier this month**.

As a milder sanction, Judge Polster said that the plaintiffs' attorneys must pay for a deposition of Portenoy and "a small amount" of related depositions to rebut any claims he makes about allegedly misleading marketing by drugmakers.

Portenoy has been described in bellwether lawsuits filed by Ohio local governments as a "key opinion leader" who was paid by OxyContin seller Purdue Pharma LP and other drugmakers as part of a supposed campaign to "deceptively promote opioid use." But in a recent declaration, Portenoy wrote that "drug companies portrayed an excessively positive message about opioids" and should have changed their messaging more promptly when severe addiction risks became clear.

"We are glad Judge Polster understood the need for the public to hear Dr. Portenoy's admissions that what Purdue and he did was wrong and it led to this epidemic," Hunter Shkolnik of Napoli Shkolnik PLLC, a top plaintiffs' lawyer in the MDL, told Law360 on Friday.

Drug companies **have complained** that they should have been able to depose Portenoy earlier, and that a deposition at this point would distract them from preparations for the bellwether trial in October. But Judge Polster on Friday was unpersuaded, writing that "there is still time for defendants to cure the surprise" they experienced when learning of Portenoy's settlement in January.

Attorneys for the drug companies could not immediately be reached for comment on Friday.

In a separate development on Friday, a lawyer for Portenoy said in a letter to Judge Polster that the doctor has an agreement with "certain plaintiffs' firms with cases pending in the MDL," but that he remains a defendant in other MDL cases and is still engaged in resolution talks.

The cases are County of Cuyahoga v. Purdue Pharma LP et al., case number 1:17-op-45004, County of Summit et al. v. Purdue Pharma LP et al., case number 1:18-op-45090, and In re: National

Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

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