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Personal and Confidential

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Dear Lo:

Thank you for taking the time to read and consider this letter. Before telling you why I believe your agreeing to testify would do good, not harm, both to the medical community and to the public it serves, I share with you these few pieces of information which you may find pertinent as you reconsider your decision to "not get involved":

1. There is only one defendant in the pending case - an institution. We have not sued an orthopedic surgeon, a physician's assistant, physical therapist or nurse. We have no aim to tarnish the reputation of any medical practitioner or even any institution. An injury has been sustained which places a heavy burden on my client. I believe that burden should not be borne by him alone.

2. In conformance with Utah's Health Care Malpractice Act, a notice of intent to commence legal action was served upon the institution before suit was filed. The matter was submitted to review by a panel of three persons including an attorney (who also happened to have been an ER RN before entering the law), a registered nurse and a lay person. All three members of the panel found the claim to be "meritorious". The panel's written opinion found that the institution:

> 1. ... did owe a duty to the petitioner to assess his needs, functioning level, limitations and capabilities with respect to the use of crutches.
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> 2. ... did owe a duty to the petitioner to train him in the safe use of crutches through demonstration and/or written discharge instructions.

> 3. ... did owe a duty to the petitioner to teach him how to descend stairs on crutches, if they had determined this to be a learning need through proper assessment. [and]
>
> 4. ...did owe a duty to the petitioner to warn him against descending stairs improperly.

The panel went on to conclude that the institution:

> ... breached the applicable standard of care in this case by failing to warn the petitioner of the potential dangers of using his crutches on a stairway. The petitioner did not know at the time he received the crutches that he would have potential problems and that he needed to ask specific questions. The panel believe[s] that at minimum the [institution through its employees] had a duty to issue written discharge instructions regarding proper crutch use and technique. The evidence submitted to the panel suggests that no written discharge instructions were given, no oral instructions were given and it is unclear from the records provided whether the petitioner was observed for proper crutch use technique.
>
> ... the Panel conclude[s] that [the institution] breached the applicable standard of care and that the breach caused the petitioner additional harm. ... The claims presented to the panel for deliberation [are] found to be meritorious.

As you probably know, the findings of a prelitigation review panel are not binding on any party and may not be used in court. It may interest you to know that a recent statistical report issued by the state agency which oversees these hearings indicates that over 85% of the cases submitted for medical panel review are found by the panel to be nonmeritorious.[1]

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[1] Many members of the local plaintiffs' bar believe that "the deck is stacked against victims of medical malpractice." Although I have found that lay persons appointed to serve on these panels frequently seem less than open-minded, the medical experts on the panels generally try to do their job fairly and professionally. In my opinion, the panel reviews are very helpful and useful to both sides and often do provide answers to troubling questions, resulting frequently in the dropping of the claim.

3. There is a good possibility that this case will be settled before trial. The institution gave early indications of an inclination to settle. In response, I agreed to have my client examined and and his wife interviewed by medical and life care experts selected by the institution's counsel in southern California. The written reports of those experts are, in my view, quite favorable to my client. However, the institution has not yet made any offer of settlement. This institution has a history of contesting serious cases, even against the advice of its experts and counsel. Recently, it was tagged for a judgment far in excess of the amount at which the other side was willing to settle. The institution may have moderated its position because of this experience or because of the findings of the prelitigation medical panel in my case. At this point, I have concluded that the only way I can increase the likelihood of settlement is by demonstrating a willingness and readiness to proceed to trial. At a recent Scheduling Conference which I requested, the court indicated the case could be tried this Fall. I have been given until April 15 to designate all my trial witnesses. As you can appreciate, it is imperative that I formulate my witness list now. If I name you on my list, there is a good chance opposing counsel will want to depose you. If he does, he will pay you for the time you spend in appearing at your deposition and answering his questions. If you testify at trial, the party who calls you will compensate you for the time you consume in trial and preparation.

4. In its formal response to our suit, counsel for the institution has raised "comparative negligence" as a defense. He will contend that my client was careless or unduly venturous when he undertook to descend stairs on crutches without knowing how. That is an issue on which you would not likely be asked to opine. If the case is tried and the jury finds that claimant's own negligence did cause or contribute to his injury, the award, if any, will be reduced proportionately. If the jury finds the claimant to bear 50% or greater of the total fault, he will be entitled to no recovery whatsoever. I share this information with you solely to assure you that the "big picture" will be examined by the trier of fact and every effort will be made under the judge's direction to see that justice is done, whatever that may be.

Having addressed these preliminary considerations, I now turn your attention to your own feelings about serving or declining to serve as a witness competent to inform the jury of the standard of care expected of crutch issuers in this community. You probably feel, like most people in America, that our society is too litigious and that way too much emphasis is being placed on individuals' "rights" and too little on their "responsibilities". Believe it or not, I feel that way myself. Your natural sympathies may lie with a care-providing colleague or institution who must endure the trauma of being "accused" of causing harm to a patient. Being asked to give testimony which could be construed as a criticism of a colleague is understandably troubling, particularly when bad events occur. One might well say "but for the

grace of God, there go I". However, I ask you to put away natural sympathies and prejudices, and consider for a moment the basic purpose of the law in our country.

Tort law is based on a societal balancing of interests and needs in the face of an unfortunate mishap. Imagine in your mind a set of scales. The scale on one side contains two factors: the risk of harm from a particular activity and the gravity of that harm, if it occurs. The scale on the other side also contains two factors: the social utility of the activity and the burden of taking precautions adequate to make the activity safe. To test your appreciation for this concept, consider this hypothetical example:

Suppose a company is involved in mining silver. In order to extract silver from a mountain, it must set off dynamite. Let's assume charges are set off without the area being cleared of people. An innocent victim is injured in the blast. The victim's injuries are serious. Besides suffering disfigurement, pain and impairment, he is unable to continue working and supporting his family. He will have to incur long-term expenses far in excess of his financial resources.

The law undertakes to balance the competing interests and fairly allocate the burden of covering the losses resulting from the mishap. The risk of someone being injured from dynamite is clearly quite great. The level of harm that could result to a person standing near a dynamite charge is very grave indeed. On the other hand, silver is a precious resource for which our society has many uses and needs. The law does not want to discourage the mining of silver. It simply wants to encourage the mining of silver in as safe a way as practicable. It may be too expensive to require the mining company to erect an 8' chainlink fence around the mountain. If the law required a silver miner to take that kind of precaution, people might be discouraged from undertaking to mine silver. However, the burden of placing a few signs up to warn the public when and where blasting is being conducted is not great. That is a cost that, under the circumstances, the mining company ought to be willing to bear in order to make its mining activities safe to society. If the mining company fails to observe reasonable precautions, the law will charge it with responsibility for compensating an innocent victim for his loss. That is only fair. Tort law seeks not to punish (except in cases of egregiously malicious or reckless conduct) but to place burdens where they fairly belong.

Turning to my case, crutch issuing is indeed a beneficial activity. People need crutches to help them heal. However, crutch navigation can be dangerous. Failing to instruct or warn a patient can result in harm. As occurred here, the harm may be very grave. The burden on the crutch issuer of taking adequate precautions to guard against this grave harm is not particularly great. When that burden is not met and significant injury occurs, is it unjust for the law to require the crutch issuer to provide compensation for the victim's loss?

Now, suspending for a moment concerns about the law's role in allocating risks and burdens of unfortunate mishaps, let's consider the impact of Lo Knapp's involvement or non-involvement.

If you decline to testify as to the standard of care normally expected of crutch issuers, who will be harmed and who will be helped? Will only my client be harmed? If the institution in question is not held to the standard, will it continue with its SOP? Will it feel any obligation to institute measures to assure that other patients will receive appropriate instruction, training and warning?

Who will be helped by your sitting out? Will the institution really benefit? Is that the kind of benefit you feel good about conferring upon an institution?

On the other hand, if you consent to testify, who will be harmed? The institution? It carries insurance for the very purpose of meeting its societal obligation to compensate victims when it fails to observe the standard of care expected of it. Are you really helping the institution if you look the other way and say "that's just the sort of thing I might have done and I would hate to be in that situation myself"? Looking at it objectively, is that a responsible attitude?

Who will be helped by your testifying? My client, I hope. Other similarly situated patients, I also hope. The institution itself, I genuinely believe.

You, of all people, know that assessment and training of crutch-using patients is important. If it weren't, why would you teach it? Is there incongruity in a person who teaches crutch training taking the position that if an unassessed, untrained crutch user hurts himself while descending stairs, it's his own fault? Isn't that like saying to your students: "You have this duty to assess and train crutch users but it's no big deal if you don't do it".

Earnestly, I urge you to reconsider your refusal to provide expert information which you are perhaps in the best position of anyone in this state to give. If, upon reconsideration, you reach the conclusion that you would still prefer not to be involved, I ask only that you forgive and not take offense at my perhaps inartful and probably bothersome attempt to persuade you to change your mind.

With high regard,

Douglas G. Mortensen

DGM/DGM/Knapp.ltr