

**Plaintiff's Response to Defendant's Motion to Bar Evidence of Damages**

Best Practices Inpatient Care, Ltd., One of its attorneys, [Michael T. Trucco](#), [Matthew J. McDonald](#), Stamos & Trucco LLP, One East Wacker Drive Third Floor, Chicago, IL 60601, Tel (312) 630-7979, Fax (312) 630-1183.

The sanction that Defendant, Pramila Kasturi, M.D. seeks to impose on Best Practices Inpatient Care, Ltd. is wholly disproportionate to the conduct of which she complains. Her motion makes no mention of the 5 trial date continuances that have been granted to accommodate her and her attorney's schedules. More importantly, however, Dr. Kasturi offers no explanation as to how she has been prejudiced and makes no attempt to justify her failure to review the documents that have been available to her since April 28, 2009.

***Background***

On February 27, 2009 Best Practices issued its Second Supplemental Response to Dr. Kasturi's Interrogatories and provided Dr. Kasturi with its calculation of damages. The cover letter to those responses informed Dr. Kasturi that those calculations were based, in part, on summaries of its monthly billing and collections activity. The other information produced was calculated by Best Practices from claims data subpoenaed from Dr. Kasturi's own billing service. These summaries were produced with Best Practice's Supplemental Responses and clearly articulated the charges and receipts for Dr. Kasturi and Best Practices during the relevant time period. Best Practices also informed Dr. Kasturi that the source information for those summaries was maintained in electronic form and accessible through a separate software program. A copy of the cover letter, interrogatory response, and billing and collection summaries is attached hereto as Exhibit A.

The deposition of Best Practices' principal, Jeffrey Kreamer, M.D., was scheduled by agreement for April 29, 2009 on the issue of damages. While preparing for his deposition, Dr. Kreamer learned that the source information for the billing and collections summaries were also stored in hard copy format as "daily close sheets." Best Practices sent Dr. Kasturi's attorney a letter on April 28, 2009 immediately informing him of this fact, a copy of which is attached as Exhibit B. Dr. Kasturi proceeded to take the deposition of Dr. Kreamer the following day, choosing not to reschedule so that she could review the daily close sheets. The daily close sheets have been available for Dr. Kasturi's inspection since April 28, 2009. Indeed, Dr. Kasturi's attorney asked for the opportunity to review those source documents at Dr. Kreamer's deposition and stated that he would ask for a continuance of the trial in order to do so. Counsel for Best Practices again agreed to cooperate to make those documents available at Dr. Kasturi's counsel's convenience and stated that he had no objection to the continuance. Having not heard from Dr. Kasturi's counsel about an inspection of the documents, Best Practices' counsel wrote him on May 5, 2009 offering for the third time to make those documents available. A copy of that letter is attached as exhibit C. Dr. Kasturi chose not to avail herself of the opportunity to review these documents and has instead filed the present motion.

***Argument***

Because the purpose of a Rule 219 sanction is to effect discovery rather than to punish conduct, a just order under that rule “is one which, to the degree possible, ensures both the accomplishment of discovery and a trial on the merits.” *Buffington v. Yungen*, [322 Ill.App.3d 152, 154 \(2nd Dist. 2001\)](#). “Drastic sanctions should be resorted to only when a lesser measure such as a continuance would be ineffective.” *Phillips v. Gannotti*, [327 Ill.App.3d 512, 519 \(1st Dist. 2002\)](#). In fashioning a sanction, the trial court must consider: “(1) the surprise of the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party’s objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence.” *Adams v. Bath and Body Works, Inc.* [358 Ill.App.3d 387, 395 \(1st Dist. 2005\)](#).

Point-by-point, the undisputed facts related to the disclosure of the daily close sheets make clear that barring Best Practices from presenting evidence concerning damages is unwarranted. The imposition of such a drastic sanction would run directly counter to the law’s preference for a trial on the merits, especially when considering that any prejudice can be resolved by a continuance of the June 8, 2009 trial date. The inequity of the sanction sought by Dr. Kasturi is apparent considering that the daily close sheets were made available to her 6 weeks prior to the presently scheduled trial date and she has made no effort whatsoever to ascertain whether and to what extent the information disclosed in these documents will affect her defense of this lawsuit. For these reasons, as more fully set forth below, Dr. Kasturi’s motion should be denied.

### **1. Lack of Surprise**

Dr. Kasturi cannot claim to be surprised by the data contained in the daily close sheets for several reasons. First she has been aware since February 27, 2009 that Best Practices’ damages calculations were based upon summaries of its billing and collections activity. These summaries simply put the information contained in the daily close sheets in an accessible and easily digestible format. Second, Best Practices’ disclosure of the existence of the daily close sheets was made 6 weeks prior to the presently scheduled trial date. This provided Dr. Kasturi with ample time and opportunity to review and analyze these documents. Best Practices should not now be punished because Dr. Kasturi has not availed herself of that opportunity.

### **2. There Is No Prejudicial Effect**

Dr. Kasturi seeks to bar the introduction of evidence concerning Best Practices’ damages because of what she claims was Best Practices’ “failure to disclose” the daily close sheets. This is misleading because Best Practices has not “failed to disclose” anything. While Dr. Kasturi may claim that these documents should have been produced sooner, there can be no dispute that they were made available sufficiently in advance of trial to permit a review of their contents. Indeed, Dr. Kasturi does not explicitly complain that she has been prejudiced and acknowledges that Best Practices disclosed the existence of the daily close sheets 6 weeks prior to June 8, 2009 trial date. Any prejudice suffered by Dr. Kasturi is of her own making and is the result of her failure to avail herself of the opportunity to review the

documents which support the summaries provided to her in February 2009. Even assuming that these documents should have been produced before April 28, 2009, it would be manifestly unfair to sanction Best Practices for the prejudice that Dr. Kasturi has caused herself by not reviewing these documents despite having ample opportunity to do so.

### **3. *The Nature Of The Evidence***

As discussed above, Best Practices produced the summaries of its billing and collection activity in February 2009. The existence of the daily close sheets were disclosed on April 28, 2009 and contain the data contained in those summaries. If Dr. Kasturi reviewed the daily close sheets she would quickly learn that they do not contain complex calculations or require any particular expertise to digest and understand. Instead, they are rather mundane business records whose meaning and significance can be easily ascertained and which have already been tabulated in the summaries produced in February 2009. There is nothing about the nature of the daily close sheets that support the imposition of the sanction that Dr. Kasturi seeks.

### **4. *The Timeliness Of Dr. Kasturi's Objection To The Daily Close Sheets***

Dr. Kasturi has known that since February 27, 2009 that a portion of Best Practices' damage calculations were based on summaries of its billings and collection activity. Dr. Kasturi did not object to Best Practice's reliance on these summaries at that time, even though she knew of the existence of the electronic source data that was the basis for those summaries. Nor did Dr. Kasturi initially object to the production of the daily close sheets once they were disclosed. She chose instead to proceed with Dr. Kreamer's deposition on the issue of damages without having reviewed the daily close sheets despite their being available for her inspection.

At Dr. Kreamer's deposition, counsel for Dr. Kasturi stated: "I'm going to want to see that, the information behind the summaries." (Kreamer Dep. pg. 26, attached as Exhibit D). Indeed, there) was a discussion off the record that ensued in which counsel discussed that the documents were available for inspection and that Dr. Kasturi might ask to continue the trial date. Best Practice's counsel agreed to cooperate in making the documents available and indicated that it would have no objection to a continuance to allow Dr. Kasturi to review the documents. Instead of availing herself of the opportunity to review these documents, Dr. Kasturi filed this present motion 3 weeks after the documents had been made available to her and 3 weeks before the June 8, 2009 trial date. Dr. Kasturi's decision to allow 3 weeks to pass before raising her objection to the production of these documents is not timely, especially considering that she has made no effort to review them in the interim.

### **5. *Best Practices Acted In Good Faith***

Dr. Kasturi does not claim that Best Practices acted in bad faith by making the daily close sheets available for her review 6 weeks in advance of trial. Best Practices' failure to produce the daily close sheets prior to April 28, 2009 was an oversight due to Dr. Kreamer's misunderstanding of whether his biller maintained paper summaries or whether the data was kept only in electronic form. It immediately sought to remedy this oversight by making the daily close sheets available for Dr. Kasturi's review. These records, as the data source for

the previously produced summaries, contain no information that Best Practices has any interest in withholding from Dr. Kasturi. Indeed, the daily close sheets simply confirm the accuracy of the summaries on which Best Practices relies. While Best Practices acknowledges that the daily close sheets are responsive to Dr. Kasturi's document requests, its April 28, 2009 disclosure was not made in bad faith. Instead, that disclosure was made immediately upon Best Practices' having discovered its oversight and sufficiently in advance of trial to eliminate any concern of prejudice.

**6. Any Prejudice Suffered By Dr. Kasturi Could Be Resolved By Allowing A Continuance Of This Two Witness Bench Trial**

As discussed above, any prejudice suffered by Dr. Kasturi of her own making and is the result of her failure to review the daily close sheets despite having ample opportunity to do so. However, even if Dr. Kasturi has been prejudiced by Best Practices' disclosure of these documents 6 weeks prior to the June 8, 2009 trial date, such prejudice can be resolved by the granting of a continuance of this 2 witness bench trial.

Among the factors to consider when ruling on a Rule 219(c) motion is whether a lesser measure such as a continuance could be effective. *Phillips*, [327 Ill.App.3d at 518-519](#). In *Phillips*, like the case at bar, the opposing party raised no argument as to why she would be prejudiced by a delay for a continuance which would have allowed her to depose a witness concerning his supplemental opinions. *Id.* The court accordingly ruled that it was an abuse of discretion to bar that opinion where there would have no prejudice if a continuance had been granted. *Id.* Here, a continuance would permit Dr. Kasturi to review the daily close sheets that have been available to her since April 28, 2009 and allow her to test the accuracy of the summaries on which Best Practice's damage calculations are based. Indeed, Dr. Kasturi raises no objection to the continuance of the presently scheduled trial date and claims no prejudice in the event that this Court decides to grant one.

**Conclusion**

The facts surrounding Best Practices' disclosure of the daily close sheets do not support the imposition of the drastic sanction that Dr. Kasturi seeks. While Best Practices does not object to Dr. Kasturi's request for a continuance of the June 8, 2009 trial date, it notes that no continuance would be necessary had she availed herself of the opportunity to review these documents once their existence was disclosed. Any prejudice that she now claims to suffer is the result of her decision not to review these documents and it would be manifestly unfair to punish Best Practices for the consequences of that choice, especially when any prejudice could be ameliorated by a short continuance. Best Practices therefore respectfully requests that Dr. Kasturi's motion to bar evidence of damages be denied and that this case be allowed to proceed to a trial on the merits on a date mutually acceptable to the Court and the parties. BEST PRACTICES INPATIENT CARE, LTD.

By: <<signature>>

One of its attorneys

Michael T. Trucco

Matthew J. McDonald

STAMOS & TRUCCO LLP  
One East Wacker Drive Third Floor  
Chicago, IL 60601  
Tel (312) 630-7979  
Fax (312) 630-1183