

2000 WL 825690  
United States District Court, S.D. New York.

Dennis REYNOLDS, Plaintiff,  
v.

G. GOORD, Commissioner, D.O.C.S.; Christopher C. Artuz, Supt., Green Haven Correctional Facility; Norman Selwin, MD, Faculty Health Service Director; Larry Zwilliger, Regional Health Service Administrator; Catherine Metzger, RN II; and Don Stevens, Nurse Administrator, Defendants.

No. 98 Civ. 6722(DLC). | June 26, 2000.

#### Attorneys and Law Firms

Daniel J. Beller, Paul Weiss Rifkind Wharton & Garrison, New York, NY, for plaintiff.

Tiffany M. Foo, Rebecca Ann Durden, Assistant Attorneys General, New York, NY, for defendants.

#### Opinion

### **MEMORANDUM OPINION AND ORDER**

COTE, J.

\*1 In this case, a prisoner challenges a policy created by the New York State Department of Correctional Services (“DOCS”) to address the impact of tuberculosis in the state prison system. A preliminary injunction hearing is scheduled for July 10, 2000, to decide whether the plaintiff Dennis Reynolds, who initiated this suit *pro se*, may be placed in restricted confinement known as Tuberculin Hold for his refusal, on religious grounds, to submit to the Mantoux tuberculin skin test used by DOCS to determine whether inmates have been infected with tuberculosis. The plaintiff, who is now represented by counsel, has requested that the Court appoint Dr. Ronald Shansky as its expert witness for the preliminary injunction hearing. The defendants oppose the appointment.

Dr. Shansky is a leading expert in correctional medicine in the United States, and has significant expertise in the issues in this case. Dr. Shansky has served on many prior occasions as an expert for courts, correctional systems, and as an appointed receiver. Dr. Shansky is willing to serve as a court-appointed expert in this case, and is available on the dates this matter is scheduled for a preliminary injunction hearing.

The Attorney General’s Office objects to the appointment of Dr. Shansky on the ground that Dr. Shansky was retained approximately eighteen months ago as its expert in a class action brought against DOCS by inmates infected with HIV. Although that action has been pending in the Northern District of New York since 1990, and the Attorney General’s Office has entered into a contract with Dr. Shansky, he has not yet consulted with DOCS regarding that litigation. He has neither been prepared for a deposition nor been deposed, nor has he been consulted by the State toward the preparation of an expert report. He has not yet received any confidential or privileged information from DOCS in connection with that litigation. DOCS expects to begin consulting with Dr. Shansky when it receives the plaintiffs’ final set of contentions, which may arrive within the next few months.

Having heard the defendants’ objections, the Court gave the defendants an opportunity to determine whether they wished to call Dr. Shansky as an expert witness in this case, but advised them that they should presume that the Court would appoint Dr. Shansky as its expert if the defendants declined to call him as their expert. The defendants have now notified the Court that they do not wish to use Dr. Shansky as their expert in this case.

Having considered the parties’ arguments and submissions, the Court determines that pursuant to Rule 706, Fed.R.Evid., Dr. Shansky shall serve as a court-appointed expert at the preliminary injunction hearing in this matter scheduled to begin on July 10, 2000. The defendants have offered no basis, legal or otherwise, to prevent the Court from appointing Dr. Shansky to assist in its understanding of the issues relating the containment and treatment of tuberculosis in a correctional facility.

#### DISCUSSION

\*2 Rule 706 of the Federal Rules of Evidence provides that “the court may appoint expert witnesses of its own selection.” Rule 706, Fed.R.Evid. As the Advisory Committee Notes to Rule 706 point out, “[t]he inherent power of a trial judge to appoint an expert of [her] own choosing is virtually unquestioned.” Fed.R.Evid. 706 advisory committee’s note. *See also Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993) (judges should be “mindful” of the Rule 706 power); *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930–31 (2d Cir.1962).

The defendants argue that the Court should not appoint Dr. Shansky as an expert witness in this case because his testimony is unnecessary; because of the conflict that would be created due to his prior retention by the State in

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the pending HIV class action; and because of the potential financial cost to defendants. The Court finds these arguments to be without merit.

The most important factor in favor of appointing an expert is that the case involves a complex or esoteric subject beyond the trier-of-fact's ability to adequately understand without expert assistance.

29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6304 (1997). In this regard, Dr. Shansky's testimony will undoubtedly be of assistance to the Court. This case involves complex issues of infectious disease, public health, and correctional medicine. Moreover, the significant public policy implications presented by this action highlight the importance of obtaining the perspective of an expert in medical issues unique to the correctional context. Although plaintiff and the defendants have identified their own expert medical witnesses, neither possesses Dr. Shansky's first-hand experience with correctional medicine.

There is no conflict that prevents the appointment of Dr. Shansky as the Court's expert witness in this case.<sup>1</sup> The Attorney General's Office has candidly admitted that despite their retention of Dr. Shansky as an expert in the pending HIV litigation, he has not yet been involved in that case and has not obtained any confidential information regarding DOCS' policies or any other issue at stake in this litigation. The fact that Dr. Shansky may offer testimony unfavorable to the State's position in either this proceeding or the HIV litigation does not—as the defendants argue—warrant his absence from this case. DOCS should not be permitted, by merely signing a contract with Dr. Shansky many months ago, to prevent his disclosure of relevant knowledge at any judicial proceeding in which the State is a party by arguing that they may thereafter be required to impeach their own witness. Such a policy would permit a party to deprive a court or an adversary of access to an expert's highly probative testimony without that party making any substantive use of the expert. See *E.E.O.C. v. Locals 14 and 15, Int'l Union of Operating Engineers*, 72 Civ. 2498, 1981 WL 163, at \*4 (S.D.N.Y. Feb. 11, 1981) (VLB). Ultimately, any prior statement or testimony of Dr.

Shansky's may be grounds for his impeachment in future litigation whether given in this case, in other cases, or in his learned writings; such an argument does not counsel against his appointment here. Presumably DOCS has retained Dr. Shansky because it seeks from him his unvarnished opinion on matters of public importance. That opinion cannot reasonably be expected to change because he has or has not yet spoken publicly on the issues. Moreover, despite defendants' suggestion that the Court should choose a corrections' expert who has no relationship with either party, the defendants have not offered the names of any alternative candidates, much less candidates with comparable credentials who are available at the time of the hearing.<sup>2</sup>

\*3 Finally, the Court declines to refrain from appointing Dr. Shansky on the ground that the defendants may ultimately be responsible for the cost of such an expert. Ultimately, it is as much the interest of the defendants as it is the plaintiff's to educate the Court on these issues and to obtain a fully informed opinion.

## CONCLUSION

For the reasons stated, Dr. Shansky shall be appointed to serve as the Court's expert at the preliminary injunction hearing scheduled to begin on July 10, 2000. The parties shall confer and attempt to reach agreement as to the procedures that should govern Dr. Shansky's involvement in this litigation, including what materials and questions he should be sent in preparation for his testimony. All proposals as to materials, questions, and procedures regarding Dr. Shansky must be submitted to the Court by June 23, 2000 at noon. A conference with the parties will be held on June 23, 2000, at 3:30 p.m.

SO ORDERED:

## Parallel Citations

54 Fed. R. Evid. Serv. 1286

## Footnotes

- <sup>1</sup> Despite their contention that there is an "inherent conflict posed by Dr. Shansky testifying at this hearing," the defendants fail to cite any legal authority to support this argument.
- <sup>2</sup> The date of the hearing has been chosen to allow the hearing to be completed before DOCS returns the plaintiff to Tuberculin Hold on July 14.

