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Philly Legal World Rattled By \$1M Witness Flub Sanction

By **Matt Fair**

Law360, Philadelphia (May 08, 2015, 6:30 PM ET) -- A \$1 million sanction recently leveled against Philadelphia-area defense attorney Nancy Raynor after an expert witness violated a pretrial order in a medical malpractice case has put the city's legal community on edge and prompted some to call for new guidance in how trial courts mete out punishments.

The sanction, which Judge Paul Panepinto in the Philadelphia County Court of Common Pleas **reaffirmed in a ruling** at the end of April, came after an expert witness mentioned a plaintiff's smoking history during testimony in a 2012 medical malpractice case despite an explicit ban on the subject at trial.

And as the Pennsylvania Superior Court gets set to hear an appeal challenging the sanction, attorneys in Philadelphia's close-knit legal world have raised objections to what many have characterized as an outsized punishment.

"A sanction of this size is really unprecedented," Griesing Law LLC attorney Ellen Brotman told Law360. "This penalty is basically a death sentence for her practice."

Raynor, who runs the Malvern-based Raynor & Associates PC, was tapped to represent defendants in a failure-to-diagnose suit alleging that a suspicious nodule on a chest X-ray taken of plaintiff Rosalind Wilson went unnoticed until she was diagnosed with stage-four lung cancer some 20 months later.

According to court records, Judge Panepinto signed off on an order in May 2012 precluding the mention of Wilson's history of smoking during trial. When Dr. Paul Kelly took the stand for the defense some two weeks later, however, he let slip Wilson's smoking history.

"The patient was a smoker," Kelly said in response a question Raynor posed about Wilson's cardiac risk factors, according to court records. "The patient was hypertensive. So yes, I mean, those are big risk factors."

Despite Kelly's violation of the order, the case was allowed to proceed to a verdict and Wilson's estate was awarded \$190,000 in damages.

Judge Panepinto subsequently ordered a second trial after determining that Kelly's testimony had tainted the proceedings. A jury in the second trial, which Raynor was barred from participating in, resulted in a \$2 million verdict in November.

Shortly after the second verdict, Judge Panepinto ruled that Raynor needed to pay some \$946,000 to the plaintiffs and their two law firms to cover fees and costs.

Klehr Harrison Harvey Branzburg & Ellers LLP and Messa & Associates PC were awarded

\$615,349.50 and \$160,612.50 in fees, respectively. The plaintiffs were granted \$170,235.16 to cover actual expenses.

Raynor has maintained that she explicitly told Kelly about the preclusion order in a conversation at the courthouse on the morning he was set to take the stand. Kelly, however, testified at a sanctions hearing that he'd had "a brief discussions with Ms. Raynor ... but not regarding smoking."

Raynor's claim that she told Kelly about the order was recently bolstered by a witness, trial technician Joseph Chapman, who came forward in January claiming that he explicitly overheard her remind the expert that the topic of smoking was barred at the trial. Judge Panepinto, however, rejected the witness' testimony in a ruling last month.

She is scheduled to file a brief on May 19 in an appeal to the Superior Court challenging the sanction.

Given the dispute over whether Raynor affirmatively told her expert about the pretrial order, attorneys said they were surprised at the size of the sanction she was ultimately hit with and scared that the same thing could happen to them.

"The reaction you get from most lawyers is that it's scary," said Beasley Firm LLC attorney Max Kennerly. "People are saying, 'If that was me and I didn't really mean to violate the order then, my gosh, I'd be faced with a million-dollar sanction.'"

Lawrence Fox, a partner at Drinker Biddle & Reath LLP who teaches courses in legal ethics at Yale Law School, said that the sanction ran the risk of forcing attorneys to take the fall in the event a witness makes a simple mistake.

"It is attention-grabbing and it is scary," he said. "If in fact she did tell him, we wouldn't want lawyers to have to become the guarantors that witnesses aren't going to make mistakes."

Clifford Haines, the founder of Haines & Associates and a former head of both the Pennsylvania and Philadelphia bar associations, said the sanction was unlike anything he had seen in the course of his career.

"I've been practicing law for 40 years and I've never seen anything like this," said Haines, who is representing Chapman in the litigation. "Frankly, I don't think you're going to find a judge or a lawyer in this community who thinks this was reasonable. Certainly among the judges I have talked to, both state and federal, I have not heard any support for this decision. Nor have I heard a lawyer say this makes sense, aside from the lawyer who was seeking the sanction."

Citing the ongoing litigation in the case, Klehr Harrison's Matthew D'Annunzio declined to comment Friday.

Attorneys also questioned the calculus Judge Panepinto used in determining the size of the sanction.

"How you get to that number requires a lot of inferences about the way the plaintiff characterized their costs and their fees and their time," Kennerly said. "As someone who tries medical malpractice cases regularly, I can tell you they are expensive and time-consuming, but what is the value of that?"

In court filings, however, the plaintiffs have argued that the amount of the sanction was logically founded on detailed submissions documenting both the time spent and the costs incurred in preparing for the first trial.

They argued that they were entitled "to be made whole for the attorney time invested in the futile trial."

"Plaintiff as well as her counsel were harmed by the conduct to the extent of the investment of attorney fees, costs and expenses they were forced to incur," they argued in a June 2014 brief.

In addition to costs, though, Fox stressed that intent should be a key factor for judges in calculating sanctions.

"In my view, it would all turn on intent and standard of care, and obviously the real cost," he said.

The plaintiffs argued that the facts were on their side on that front as well, arguing in a brief that Raynor's question to Kelly was "designed to elicit an answer that she knew was barred by a court order."

Judge Panepinto agreed, writing in his April opinion that "it was glaringly apparent that Raynor intentionally sought to improperly influence the outcome of the trial."

Raynor had previously been hit with a \$45,000 sanction in the case after sending a letter to the employer of one of Wilson's expert witnesses criticizing her testimony in the case.

Haines told Law360 that allowing the plaintiffs' attorneys, which court records show had accepted the case on a contingency basis, to recover fees stemming from the first trial would essentially allow them to get paid twice for the case.

"They can't collect twice," he said.

Brotman suggested that if Judge Panepinto really felt that Raynor had intentionally violated his pretrial orders, he should have referred the matter to the state's Office of Disciplinary Counsel for an investigation.

"Why not refer her to the Office of Disciplinary Counsel?" she asked. "Let the Office of Disciplinary Counsel and the Disciplinary Board of the Supreme Court make a determination here about what happened, what any potential violations of the rules are, and what the appropriate sanction is. Judge Panepinto is taking that role on."

"If he has a firm belief that a lawyer was not truthful with him and he can support it in some way, he ought to report that lawyer to the Disciplinary Board," Haines said. "But a million-dollar fine that puts a lawyer out of business and could cost a lawyer her home is just horrible."

Kennerly said he hoped the Superior Court's decision in the case would help provide trial judges with guidance when faced with similar situations.

"I think it would be useful in giving parties a better sense of how you're supposed to calculate this, and giving parties a better sense of what danger there is from this," he said. "I think the Superior Court will take a pretty close look at exactly how the trial court arrived at that number and will scrutinize it pretty carefully."

The plaintiffs are represented by Matthew D'Annunzio of Klehr Harrison Harvey Branzburg & Ellers LLP and Joseph Messa of Messa & Associates PC.

Raynor is represented by Jeffrey B. McCarron of Swartz Campbell LLC.

The case is Rosalind Sutch v. Roxborough Memorial Hospital et al., case number 090700901, in the Court of Common Pleas of the State of Pennsylvania, County of Philadelphia.

--Editing by Katherine Rautenberg and Mark Lebetkin.

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