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## Sanctions For Pa. Atty Send Warning On Taboo Tactics

By **Dan Packel**

Law360, Philadelphia (November 21, 2016, 5:54 PM EST) -- A Pennsylvania court's recent approval of sanctions against an embattled defense attorney who contacted an opposing expert's boss is being welcomed by ethics experts who reject the lawyer's claim that such conduct "happens all the time" and say the court had to impose a heavy penalty that draws a clear line in the sand.

Suburban Philadelphia defense attorney Nancy Raynor last week saw the state's Superior Court **uphold a punishment** of disqualification and over \$44,000 in sanctions over the letter, five months after the court **scotched a separate \$1 million sanction** over another facet of the medical malpractice case, in which Raynor represented a doctor accused of failing to inform a woman of a nodule found on an X-ray two years before her lung cancer diagnosis.

At a sanctions hearing in front of a trial court judge, Raynor defended her decision to send a letter to the general counsel for the Hospital of the University of Pennsylvania, in which she attacked the anticipated testimony of an emergency room doctor, saying it could ultimately expose the hospital to substantial liability. When called before Judge Jacqueline Allen, the attorney was unrepentant, comparing her message to an exchange at a "lunch or a cocktail party."

But the Superior Court was unpersuaded, as were a number of attorneys and law professors contacted by Law360.

"I have never heard of such a thing," said Dan Tabek, the co-chair of the ethics committee at Cohen & Gresser LLP. "The attorney's defense that this happens all the time is not so well taken."

Jane Moriarty, a Duquesne University Law School professor who specializes in expert evidence, also said Raynor's conduct was a first for her.

"It is a remarkable action that she took, in my opinion, and I cannot find any justification of her doing this, other than affecting the willingness of the witness to testify," she said. "It seems very heavy-handed."

Fox Rothschild LLP co-chair Abe Reich said that he couldn't rule out the existence of similar efforts.

"But to say it happens all the time, she must live in a very different world than I do," he added. "It's totally treacherous to do this."

Indeed, of six ethics experts who spoke to Law360, only one could offer an analogue to Raynor's move. St. Louis-based ethics lawyer Mike Downey said the case reminded him of a matter before the Ninth Circuit, *Erickson v. Newmar*, where a pro se plaintiff saw a defense lawyer hire his expert witness for another case just before a deposition. The federal appeals court ultimately called that move tampering.

Downey, like the appeals court, was struck by the fact that Raynor had an associate pepper the plaintiff's attorneys with four follow-up communications about whether they would be naming a new expert, a move that ran contrary to her "cocktail party" comparison.

"When a judge sees a lawyer engaging in overly aggressive practice, it's the type of judgment that can be reinforced by other existing things," he said.

Downey was referring to another misstep in the course of the litigation. The case had to be retried after an expert for Raynor, in violation of a court order, revealed that the patient was a smoker.

That testimony led Judge Paul Panepinto to impose a nearly \$1 million sanction on Raynor when he concluded that she ignored his order and did not properly warn the witness about the restriction.

While Judge Panepinto's penalty, later overturned by the Superior Court, did not come until after the smaller sanction and disqualification inflicted by Judge Allen, the latter judge was aware of the issues surrounding the first trial. She reached her decision against the backdrop of motions that a mistrial should have been granted.

On appeal, Raynor's client, physician Jeffrey Geller, fought her disqualification, seeking to overturn the second jury verdict of nearly \$2 million, while Raynor herself fought the sanction. Observers, however, found little to question in the Superior Court's conclusion that both were appropriate.

Griesing Law LLC member Ellen Brotman, who represents attorneys in disciplinary proceedings, noted that the disqualification on its own essentially counted as a "punitive sanction," adding that it reinforced the notion that trial courts have the discretion to control their courtrooms and also made clear that certain conduct can lose an attorney the privilege of appearing in a certain action. While she acknowledged the \$44,000 sanction was "harsh," she added it was not "outside the range of what's reasonable."

The ruling, in a case that's been closely watched by the region's bar, undoubtedly sends a message.

"It's a good warning to lawyers: if you decide to take a very aggressive approach to a case, if something goes wrong, you'll lose the good graces of the judge and the good graces of opposing counsel," Downey said. "If you've been a jerk to me, I'm not going to grant you a lot of favors."

And Raynor's travails are not over. Several observers suggested that an inquiry by the state's Disciplinary Board is likely forthcoming if it is not already underway. In the opinion, the Superior Court noted that Raynor's tampering violated three professional rules. Most matters that wind up in front of the board are initiated by clients, but there are exceptions.

"Based on the opinion, it seems that there will be an obligation on the court and the lawyers to report this to the disciplinary body," Moriarty said.

Meanwhile, the state's Supreme Court beckons. While Raynor's attorney would not

comment on whether she would appeal last week's opinion, plaintiff Rosalind Sutch has already petitioned the court to reinstate the \$946,000 sanction handed down by Judge Panepinto.

Reich, who has represented one of Sutch's attorneys for years, said that it would be logical for the court to combine the two appeals, especially as the two Superior Court panels ruled in opposite directions.

In upending Judge Panepinto's decision, the court ruled that he overstepped his authority with his sanction, but in last week's ruling, the court affirmed Judge Allen's own exercise of discretion.

The high court can be sure that, if it takes the cases, Philadelphia's lawyers will be listening.

--Additional reporting by Matt Fair. Editing by Philip Shea and Brian Baresch.

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