

Defense lawyer sanctioned \$1 million for smoking reference

November 11, 2014 12:00 AM

By P.J. D'Annunzio / The Legal Intelligencer

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Defense attorney Nancy Raynor has been sanctioned for close to \$1 million for allowing a defense expert to make a prohibited reference to smoking in a lung cancer-related medical malpractice case that resulted in a mistrial.

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Judge Paul P. Panepinto of the Philadelphia Court of Common Pleas, in *Sutch v. Roxborough Memorial Hospital*, sanctioned the founder of Malvern, Pa.-based Raynor & Associates, detailing her penalty for failing to instruct medical expert John J. Kelly to not mention deceased plaintiff Rosalind Wilson's smoking history.



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Ms. Raynor must pay \$615,349 in attorney fees to Klehr Harrison Harvey Branzburg, \$160,612 to Messa & Associates, and \$170,235 to Ms. Wilson's executrix, Rosalind Sutch, according to the order.

Those sanctions are on top of a \$44,693 penalty previously imposed upon Ms. Raynor in the same case for writing a letter to the employer of a plaintiff's expert witness. She was also disqualified from representing her client in the case.

Ms. Raynor told The Legal Intelligencer the decision was outrageous and an appeal would only be the beginning.

"I'm not only going to appeal the decision, I am going after everyone in this," she said, adding that she is calling for an investigation into Judge Panepinto and has met with lawyers to discuss lawsuits against Messa & Associates and Klehr Harrison.

Ms. Raynor said her insurance will not cover her in this case. "They know there is no indemnity coverage; they are willing to execute on my personal assets," she said.

She added she has received an outpouring of support from lawyers and members of the legal community, who she said also expressed anger over the sanctions.

Matthew D'Annunzio of Klehr Harrison said he was “very appreciative of the court to recognize the cost and the hardships that were imposed on our client and our two law firms by [Ms. Raynor’s] conduct. We were more than two weeks into the trial in May 2012 ... and the trial was sabotaged by testimony that clearly violated the very direct court order.”

In response to the possibility of Ms. Raynor filing suit against the plaintiff’s counsel, Mr. D’Annunzio’s co-counsel, Messa & Associates founder Joseph Messa Jr., said, “It’s almost comical. It’s outrageous that she would suggest that and I would invite it because she would be subjecting herself to additional sanctions.”

Defense attorney Gary Samms of Obermayer Rebmann Maxwell & Hippel said the sanctions against Ms. Raynor were troubling.

“This is an extremely dangerous precedent to set, and I think it’s bad for the legal community as a whole because we can’t control our witnesses all the time,” he said.

Michael Hayes, a legal ethics attorney at Montgomery McCracken Walker & Rhoads, said he could not recall another case where a lawyer was hit with sanctions as severe as those against Ms. Raynor.

“This is absolutely on the higher realm of the sanctions spectrum,” he said. “You can see sanctions in these circumstances, but it depends on what the expert says and whether the lawyer knows or should know what the expert will say.”

Gene Cohen, former Philadelphia Court of Common Pleas judge and current partner at Cohen Seglias Pallas Greenhall & Furman, said he has never seen such a serious penalty directed at an attorney in a single-plaintiff case.

“This is very unusual, and the penalty is clearly excessive under the circumstances of this particular case; however, it seems that the judge wanted to make a point — and he actually did so — that attorney misconduct will not be tolerated,” Mr. Cohen said.

“There have been sanctions like that imposed upon class action counsel for misconduct, but we have never seen anything like that in Philadelphia,” Mr. Cohen added. “It seems excessive on its face. Judge Panepinto must have been really incensed.” The case stems from Ms. Sutch’s allegations that the defendants failed to inform her mother that a chest X-ray performed at Roxborough Memorial Hospital on May 3, 2007, showed a suspicious nodule that would have required further examination, including a follow-up CT scan, Senior Judge John L. Musmanno of the Superior Court wrote in an Nov. 18, 2013, opinion upholding the grant of a new trial.

During Ms. Wilson's overnight hospitalization, no doctors informed her of the nodule in her lung, nor did they advise her to seek follow-up care, according to Judge Musmanno. Ms. Wilson did not discover the existence of the nodule until 20 months later, when she was diagnosed with stage IV lung cancer. She died July 21, 2009, over two years after the nodule was first discovered.

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