

Lawyer fights \$1M fine over banned testimony, mistrial

By **MARYCLAIRE DALE**, Associated Press 

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PHILADELPHIA (AP) — A single word of testimony at a medical-malpractice trial has cost a Pennsylvania lawyer a nearly \$1 million fine she says threatens her home, her family and her small law firm.

Insurance defense attorney Nancy Raynor says her assets have been frozen and a lien put on her home because her witness had a slip of the tongue during a 2012 trial.

A Philadelphia judge had ruled that jurors were not to hear that a deceased lung-cancer patient had been a smoker. Two weeks into the trial, Raynor asked her expert witness about the patient's cardiac-risk factors.

"The patient was a smoker. The patient was hypertensive. So yes, I mean, those are big risk factors," Dr. John Kelly replied.

The testimony caused a mistrial, and the opposing lawyers later asked the judge to sanction Raynor to cover the time and expense of retrying the four-week case. Common Pleas Judge Paul P. Panepinto Jr. agreed.

"She failed to advise Dr. Kelly of the order before she asked a question certain to elicit testimony of smoking," lawyers Matthew D'Annunzio and Joseph Messa argued in a brief.

Raynor insists the mistake was Kelly's, not her own.

"To think that someone as seasoned as I am is going to disobey a court order that was so seminal to the case is just ludicrous," Raynor, 54, of Berwyn, said last week. "A lawyer is not always able to control her witness."

A hearing Feb. 19 will determine if the sanctions will be stayed while she appeals.

"Obviously, every lawyer has an obligation to instruct every

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witness about the (court's) limitation. But \$1 million? I don't recall ever hearing of a \$1 million fine," said Lawrence Fox, a Philadelphia lawyer who teaches legal ethics at Yale Law School.

Raynor and her witness — Kelly is a former chief of staff at Einstein University Medical Center — gave vastly different statements at a 2014 sanctions hearing.

Raynor insisted that she told him about the 'smoking' ban several times, including that day, although she had not said that the day of the mishap. Her clients — an emergency room doctor and his insurance representative — said they heard the courthouse conversation.

"I think that Dr. Kelly was under pressure, he made a mistake," Raynor testified at the sanctions hearing.

Kelly said he had been surprised when his remark caused a stir.

"I did not discuss the order of smoking that morning, no," he told Panepinto.

He said he could not recall if he had received any earlier warning.

The trial continued after his May 31, 2012, utterance, but Panepinto later threw out the \$190,000 verdict and awarded the patient's family a new trial. The second jury awarded the family nearly \$2 million — even though that judge allowed testimony that she smoked.

Raynor was defending Dr. Jeffrey Geller in the trial, who was accused along with Roxborough Hospital and a second doctor of missing a suspect nodule on patient Rosalind Wilson's chest X-ray. Wilson, then 67, was diagnosed more than a year later with terminal lung cancer.

"To whop someone with unprecedented, \$1 million sanctions that are going to drive someone out of business over this testimony is ... egregious," said Raynor, who has one child still in college. "I think they were just unhappy with the (first) verdict and wanted to blame it on me."

Separately, Raynor had been hit with a \$44,000 sanction by a different judge who heard pretrial issues in the case, over a complaint she sent to the employer of a plaintiff's witness about her potential testimony.

The Pennsylvania Medical Society plans to file an amicus brief to support Raynor's appeal of the larger fine. They fear the sanctions could have a chilling effect on defense lawyers.

"It would give a lawyer pause before putting on a full-court press ... (because) it could put themselves and their

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families in jeopardy," said Dr. Scott Shapiro, an Abington cardiologist who is the medical society's incoming president.

Panepinto has not yet issued a memo to explain the sanctions. But D'Annunzio and Messa, who would share the \$946,000 judgment with Wilson's family, say the order simply compensates them for their time, and does not include punitive damages.

"The way to ensure fairness to both sides in a lawsuit is to follow the rules," Messa said Friday.