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Letter to Expert's Employer Gets Lawyer Disqualified

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Of the Legal Staff

A Philadelphia judge has ordered that a defense attorney who wrote a letter to the employer of a plaintiff's expert witness be disqualified from representing her own client.

The defense attorney, Nancy K. Raynor of Raynor & Associates in Malvern, Pa., was also ordered to pay the plaintiff's costs and attorney fees in litigating the motion, which the judge said in her order was \$44,693.25.

Raynor said in an interview that she does not think Philadelphia Court of Common Pleas Judge Jacqueline F. Allen has the authority to disqualify her from representing medical malpractice defendant Dr. Jeffrey Geller and Roxborough Emergency Physician Associates LLC. Raynor said her client wants her to remain in the case and she plans to stay on the case.

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"The order is absolutely outrageous, without any basis in fact and law," Raynor said in an interview. "It's a complete witch hunt and it imposes punitive damages without any basis."

Raynor also questioned why the costs of litigating the sanctions motion was so high.

"The sheer amount of \$45,000 for one motion is astounding," Raynor said.

In *Sutch v. Roxborough Memorial Hospital*, the plaintiff's allegation is that Geller of Roxborough Memorial Hospital failed to obtain diagnostic testing that could have resulted in the timely diagnosis of Rosalind Wilson's ultimately fatal lung cancer.

Raynor wrote to the senior counsel in the Office of General Counsel for the Hospital of the University of Pennsylvania, Mary Ellen Nepps.

Raynor wrote, according to an exhibit attached to court papers, that Dr. Stefanie B. Porges was retained by the plaintiff.

Raynor wrote to Nepps, according to the letter, "The case involves an acknowledged failure to relay concerning X-ray findings to the patient's physicians and the patient herself, resulting in a lengthy delay in the diagnosis of her cancer. ... Nevertheless, the plaintiff has retained one of Penn's emergency room physicians ... who has offered the untenable opinion that because Dr. Geller ordered the test, it was his responsibility to

follow through on obtaining the results and advising the patient of them.

"Dr. Porges has clearly overlooked the well-established concept of hand-off to an accepting inpatient team and I thought you might want to know that, if this is her position and plaintiff's attorneys become aware of it, it could expose the Hospital of the University of Pennsylvania to significant liability."

Porges did testify at trial, which Raynor said in an interview showed there was "absolutely no harm caused by the letter I wrote to Penn."

One plaintiff's attorney, Matthew D'Annunzio of Klehr Harrison Harvey Branzburg, said Raynor's argument of "no harm" really focuses on any damage that may have been caused, and Allen's order focused on awarding the costs required to address in court Raynor's actions in contacting HUP.

While there are a number of legitimate ways to challenge expert opinion, D'Annunzio said, "to interfere with the witness' employment relationship is just out of bounds and a serious infraction."

Another plaintiff's lawyer in the case, Joseph Messa of Messa & Associates, said he did not find Raynor's argument credible that conversations are regularly held between defense lawyers and the general counsel of local health-care providers about their affiliated physicians who testify as expert witnesses. Allen's order shows that "this type of behavior is outside the bounds of behavior," Messa said.

Raynor also said that it was inconsistent

for the judge to order sanctions against her but not to order sanctions against the defense counsel for hand-delivering motions to the defense expert witness.

The plaintiff's post-trial motion included motions for sanctions and for contempt against Raynor, her client and the defense expert.

Defense expert witness Dr. John Kelly was hand-delivered the plaintiff's post-trial motion, as well as the reply in support of the post-trial motion, Raynor said.

Plaintiffs counsel are seeking a new trial, arguing that Kelly testified their client was a smoker in response to a question if she had cardiac risk factors — despite an order granting a motion in limine to preclude mentioning that part of her medical history.

Raynor said seeking sanctions against her expert witness was "outrageous," that it was intended to try to put fear of economic damages into him, and that opposing counsel should have had confidence that she would have communicated all relevant information to Kelly.

D'Annunzio said that "we're required to give him notice. It's due process and it's a motion filed for action by the court."

Messa said motions were specifically sought against Kelly and "he has a constitutional right to respond and to have counsel and to be heard and the way for him to do that is to have notice separate and apart from counsel."

Allen also entered an order assessing costs against co-defendant Dr. Melanio D. Aguirre. While the plaintiff had sought more, Allen

entered an order for \$24,494.22 in out-of-pocket costs such as expert fees for preparing for trial and travel expenses.

The case had been on the eve of trial last winter, but it was postponed because of the sudden admission of one of the other defendants to the hospital.

After the case was tried in May, the jury entered a defense verdict in favor of Geller and Roxborough Emergency Physician Associates, but returned a plaintiff's verdict of \$190,000 against Aguirre and Roxborough Memorial Hospital, according to court papers.

D'Annunzio said that under civil procedural rules parties must bear their own costs for continuances sought before "the call of the list" but that, when parties are convened for trial, the rules set out that the side that requests a continuance must pay for the other side's costs if "there is prejudice from such a late continuance."

"I am disappointed that the court awarded any costs to plaintiff in this situation, where the trial was postponed due to my client's hospitalization," said Joseph G. Zack, Aguirre's attorney and the managing partner with Post & Post, in an email. "However, I was gratified that Judge Allen obviously scrutinized plaintiff's claims, and granted only a small fraction of the costs and attorneys' fees that had been requested."

Plaintiffs counsel had requested a total of \$161,464.

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