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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

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## Nixed \$1M Sanction Sends Pa. Judges Due Process Warning

By **Matt Fair**

Law360, Philadelphia (June 16, 2016, 7:15 PM ET) -- A Pennsylvania appeals court decision on Wednesday junking an "unprecedented" \$1 million penalty against a lawyer over forbidden testimony in a medical malpractice case should provide a stern warning to trial judges to remain objective and respect the due process rights of attorneys during sanctions proceedings, experts say.

The state's Superior Court **upended the nearly \$1 million sanction** against attorney Nancy Raynor after finding that Judge Paul Panepinto in the Philadelphia County Court of Common Pleas had improperly relied on hearsay testimony, denied Raynor due process rights and levied an "unprecedented and punitive" punishment.

Attorneys on Thursday hailed the decision as a rebuke to trial judges to proceed with utmost care and objectivity when faced with contempt proceedings.

"It's very hard to rationalize what Judge Panepinto did here, and I think what the Superior Court does is say, 'Not only did you err in determining whether or not a contempt had occurred by shifting the burden and using hearsay testimony and depriving the alleged contemnor of due process, but you also erred in imposing a sanction that was wildly inappropriate,'" said Griesing Law LLC attorney Ellen Brotman.

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 as he faced questioning from Raynor.

"The patient was a smoker," Kelly said in response to 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."

When Judge Panepinto questioned the slip-up later that day, Kelly said that he didn't remember any discussion with Raynor about the ban on smoking-related testimony. Meanwhile, attorneys for Wilson's estate have contended that Raynor intentionally solicited the testimony.

Despite Kelly's violation of the order, the case was allowed to proceed to a verdict with

curative instructions about the inadmissibility of Wilson's smoking history, and her 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, presided over by a different judge who allowed mention of Wilson's smoking history, resulted in a \$2 million verdict in favor of Wilson's estate in November 2014.

Two days before the second verdict came in, Judge Panepinto ordered Raynor to pay some \$946,000 to the plaintiff and her two law firms as punishment for Kelly's violation of the order. But the Superior Court ruled on Wednesday that Judge Panepinto had improperly allowed the plaintiff's version of events to dominate contempt hearings he held over the order violation.

"Each time plaintiff's counsel brought the contempt issue before the court, they presumed what they were initially required to prove and presented their conclusions with transparent venom, bloom, innuendo and increased outrage, refreshed periodically with personal attacks on Ms. Raynor," the opinion said.

Judge Panepinto initially believed a curative instruction would resolve the violation and allowed the case to move forward without a problem, but the opinion noted that it was "only after the jury rendered its verdict ... did the court second-guess itself, with the ardent assistance of plaintiff's counsel."

W. Bourne Ruthrauff, an attorney with Bennett Bricklin & Saltzburg LLC, told Law360 that he believed the Superior Court was unhappy with the trial judge's willingness to revisit the issue after making an initial decision about the appropriate response to the flub.

"I think the court is telling all of us that they really don't think you ought to be in the position of second-guessing yourself and to sit back, take your time and make a decision you can stick with," he said.

Although a sanction hearing was held in March 2014 over the violation, the Superior Court said that Judge Panepinto gave undue credit to Kelly's statement during trial that he didn't remember being told about the smoking ban. The appeals court branded Kelly's statement as hearsay and said that Raynor's due process rights had been violated by the lack of any opportunity at trial to cross-examine her expert about his recollection.

Ruthrauff suggested that the judge's own belief about what had happened at trial may have interfered with his obligation to dispassionately view the evidence during the sanctions hearing.

"My sense is that the trial judge here was personally very disturbed by what happened and was amenable to the suggestion that it was intentional," he said. "When you step back and look at the cold record, you may come to one conclusion or another, but I don't think the party who had the burden [of proving contempt] met the burden."

The Superior Court decision would serve to remind judges to remain dispassionate even when assessing violations that occur in their own courtrooms, according to Gene Cohen, a partner at Cohen Seglias Pallas Greenhall & Furman PC and a former Philadelphia County judge.

"It reaffirms what most trial judges should know: In the imposition of a sanction for contempt against attorneys, the court must be judicious in reviewing the infraction, judicious in imposing sanctions and not appear in any way to be vindictive," he said.

Indeed, the Superior Court's opinion — in addition to outlining the reasons it believed

Judge Panepinto had erred in finding Raynor in contempt — similarly took issue with the size of the punishment.

Counsel for the plaintiff sought to recoup fees and costs stemming from their work on the first trial, but the Superior Court said the fact that they'd handled the matter on contingency meant that they assumed the risk that there would be a unfavorable outcome. The panel also questioned a portion of the sanction, roughly \$170,000, which the trial court said was intended to cover "actual expenses" for what had been "a very emotional case for [her] family."

"The award was completely arbitrary and without reasonable explanation," the opinion said. "The record provides no evidentiary support at all for this particular sanction."

Brotman said that the size of Raynor's sanction — which Raynor argued threatened to rob her of her practice and her home — was inappropriate under any circumstance.

"It's hard to believe that a sanction of that magnitude is ever warranted," Brotman said. "That sanction is a de facto decision that Ms. Raynor would have to stop practicing."

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, Brotman suggested.

"If the court felt that there was a question about whether or not an attorney who is being held in contempt should be allowed to continue practicing, the appropriate thing to do would be to refer the matter to the disciplinary board for investigation," she said. "The disciplinary board would be able to determine whether there was any conduct here that was prejudicial to the administration of justice. That would be the way that should be handled."

Attorneys for the parties did not return messages seeking comment for this story.

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

Raynor is represented by Jeffrey McCarron and Kathleen Carson of Swartz Campbell LLC and James Sargent and Maureen McBride of Lamb McErlane PC.

The case is Rosalind Sutch etc., v. Roxborough Memorial Hospital et al., case number 3494 EDA 2014, before the Pennsylvania Superior Court.

--Editing by Christine Chun and Kelly Duncan.

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