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Date and Time: Wednesday, May 29, 2019 10:52:00 PM PDT

Job Number: 89853853

Document (1)

1. [*Judge Sanctions Lawyer for Sexist Comment*](#)

Client/Matter: -None-

Search Terms: LNSDUID-ALM-RECRDR-1202747045548

Search Type: Natural Language

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The Recorder (California) (Online)

January 13, 2016 Wednesday

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THE RECORDER

Length: 761 words

Byline: Ross Todd

Body

SAN FRANCISCO - A federal judge in San Jose has ordered a Southern California attorney to pay up for making a sexist remark to a female attorney during a deposition.

Peter Bertling of Santa Barbara's Bertling & Clausen told opposing counsel that it wasn't "becoming of a woman" to raise her voice at him during a contentious expert deposition in October in a wrongful death suit.

The utterance didn't sit well with U.S. Magistrate Judge Paul Grewal, who sanctioned Bertling and ordered him to donate \$250 to the Women Lawyers Association of Los Angeles Foundation.

"A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common," Grewal [wrote in an order](#) issued Tuesday. "The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession."

Grewal also forced Bertling's clients to pay the plaintiffs' costs for the deposition, finding that Bertling had "repeatedly and unapologetically flout[ed] guideline after guideline" during discovery.

Bertling didn't respond to an email and voice message seeking comment.

Oakland solo Lori Rifkin, who sought the sanctions against Bertling, said that based on conversations she's had with lawyers across the country "this is something that almost every woman attorney has experienced again and again over their careers." Rifkin, who was a lawyer in the Department of Justice's Civil Rights Division from 2010 to 2013 before going into private practice, said that many women don't make an issue of comments like Bertling's for fear of being labelled "whiners."

"This is reflective of the usual course of business which needs to change," she said.

The discovery sanctions spring from a wrongful death lawsuit filed after the jailhouse suicide of Joshua Claypole. The 20-year-old stabbed and killed a taxi driver in Monterey in May 2013, then hanged himself with a bed sheet three days later at the Monterey County Jail. Lawyers for his mother, including Rifkin, sued California municipalities, law enforcement agencies, hospitals and doctors that interacted with Claypole claiming that if standard protocols

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had been followed "they would have identified Claypole's acute mental health crisis and risk factors, and intervened to protect him and the public."

Bertling, who according to [his firm's website](#) regularly defends health care providers from malpractice claims, is representing California Forensic Medical Group, the private company that provides medical services to the Monterey County Jail, and its founder, Dr. Taylor Fithian, a psychiatrist who evaluated Claypole.

Grewal's sanction order detailed a string of problems with Bertling's conduct in discovery, including a propensity toward coaching witnesses, cutting them off and answering for them in depositions. Grewal found that Bertling repeatedly failed to hand over relevant documents, including a medical expert's notes from jail visits which were delivered to plaintiffs' counsel the day after an important brief was due.

"Discovery is hard enough, even without conduct like that," Grewal wrote. Beyond awarding plaintiffs their costs for three depositions and for briefing on the sanctions order, the judge ordered that the expert hired by Bertling's client be made available for another four-hour deposition to be paid for by the defense.

It was during the expert's earlier deposition that Bertling asked Rifkin to lower her voice. When Rifkin asked him to stop interrupting her, Bertling said, "[D]on't raise your voice at me. It's not becoming of a woman or an attorney."

In a brief declaration filed in response to the motion for sanctions, Bertling wrote, "In retrospect, the proper term for me to have used in this context would have been 'attorney.' I apologize to Ms. Rifkin if I offended her by referring to her as a 'woman' instead of as an 'attorney.' " Bertling wrote that his remarks were made "in the context of Ms. Rifkin literally yelling at my client and creating a hostile environment during the deposition."

Grewal wrote that Bertling had "offered only a halfhearted politician's apology" in his written response and failed to apologize at a hearing on the matter earlier this month.

"In light of his other discovery misconduct and his failure to tender any meaningful apology-despite opportunities to do so on the papers and at the hearing," Grewal wrote, "the remark was emblematic of an unacceptably disrespectful attitude towards plaintiffs' counsel."

Contact the reporter at todd@alm.com The ruling in Claypole v. County of Monterey is posted below.

Classification

Language: ENGLISH

Publication-Type: Newspaper

Subject: LAWYERS (90%); SUITS & CLAIMS (89%); DEPOSITIONS (89%); JUDGES (88%); WRONGFUL DEATH & SURVIVAL (87%); PROFESSIONAL WORKERS (87%); US FEDERAL GOVERNMENT (74%); COSTS & ATTORNEY FEES (74%); LITIGATION (74%); MAGISTRATES (74%); DEATH & DYING (73%); GENDER & SEX DISCRIMINATION (73%); MEN (69%); JUSTICE DEPARTMENTS (69%); STABBINGS (66%); FINES & PENALTIES (66%); SUICIDE (60%); LAW ENFORCEMENT (60%); CORRECTIONS (60%); CIVIL RIGHTS (60%)

Organization: WOMEN LAWYERS ASSOCIATION OF LOS ANGELES (57%); US DEPARTMENT OF JUSTICE (54%)

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Industry: LAWYERS (90%)

Geographic: SAN FRANCISCO, CA, USA (79%); LOS ANGELES, CA, USA (79%); SAN JOSE, CA, USA (71%); SANTA BARBARA, CA, USA (56%); OAKLAND, CA, USA (56%); CALIFORNIA, USA (90%)

Load-Date: January 14, 2016

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