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Plaintiffs Allege Something's Afoot, Point to Photo of Touching Tootsies

By Brenda Sapino Jeffreys
Texas Lawyer
August 30, 2010

Two plaintiffs in an insurance-coverage suit pending in federal court in Florida allege Houston litigator Kenneth G. Engerrand coached a witness when he touched her foot with his foot during a deposition.

Two of three plaintiffs in *Peter Halmos, et al. v. Insurance Company of North America, et al.* filed a motion asking U.S. Magistrate Judge Stephen T. Brown to strike the deposition, revoke Engerrand's *pro hac vice* privileges to represent defendant Insurance Company of America (INA) in the suit, and disqualify his firm, Brown Sims, from the insurance-coverage suit, among other things.

"What occurred is just wrong," the two plaintiffs allege in the July 30 motion.

"INA's response shows not only its true colors, but also how it views its duties to the court. There was no mistake here. This was out and out witness tampering, followed by good ole misrepresentations of what had occurred. For sure, the old adage of a picture being worth a thousand words applies here."

In the motion, plaintiffs International Yachting Charters (IYC) and High Plains Capital refer to a cell-phone photo taken during the deposition by a paralegal with the firm representing them — Rasco Klock Reininger Perez Esquenazi Vigil & Nieto — that allegedly shows Engerrand's loafer-clad foot touching the sandal worn by Connie Dennis, the INA employee who testified during the deposition. The plaintiffs reproduced the photo in the "footer" on each page of the July 30 motion and attached it as an exhibit.

In an Aug. 9 response, INA alleges the plaintiffs' motion is "meritless" and the request to disqualify Engerrand and Brown Sims is "clearly a tactical device and is undoubtedly meant to harass both counsel and INA."

Engerrand, a shareholder in Brown Sims, did not return two telephone calls seeking comment. Frank Sioli, a Brown Sims shareholder in Miami who filed INA's response to the plaintiffs' motion, did not return a telephone call.

John Roth, an assistant general counsel with Philadelphia-based INA who attended the deposition, says he cannot comment on pending litigation due to a company policy.

The deposition at issue occurred July 12 in Wilmington, Del. In the fourth amended complaint in *Halmos*, Florida resident Peter Halmos and two companies he owns, IYC and High Plains Capital, bring causes of action including breach of contract, fraudulent inducement and fraud against INA, among other things, for allegedly failing to cover fully losses caused by damage to a yacht owned by Halmos, who is pro se in the suit.

INA denies the allegations.

As alleged in IYC and High Plains Capital's July 30 motion, their attorney, Juan Carlos Antorcha of Miami, could not attend the deposition in Wilmington because his pregnant wife was near her due date. Instead, the plaintiffs allege, Rasco Klock paralegal Johnathan Burke attended the deposition to provide witness Connie Dennis with exhibits, and Antorcha questioned her over the telephone.

In their motion, the plaintiffs allege Burke heard a "clicking sound" during the deposition and "noted that Mr. Engerrand was tapping the foot of Witness Dennis at different points after questions were asked."



The plaintiffs reproduced this photo in the "footer" on each page of their July 30 motion and attached it as an exhibit.
Image: Jonathan Burke

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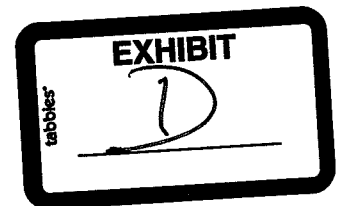
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Burke took a photo of the "foot tapping" and e-mailed it to Antorcha. Antorcha, a partner in Rasco Klock, questioned Dennis and Engerrand about the "foot-tapping," and then Antorcha terminated the deposition.

According to a transcript of the deposition attached as an exhibit to the plaintiffs' motion, Engerrand told Antorcha he didn't realize he was tapping Dennis' foot, he thought he was touching a pillar under the table, and he offered to move away from her. Dennis told Antorcha that Engerrand was tapping her foot — but not the "entire time" — and she assumed Engerrand thought he was touching a "pillar or something underneath the table."

The plaintiffs note in their motion that instead of "apologizing" for the incident, INA filed a motion on July 26 asking for a protective order from resumption of the Dennis deposition.

INA further alleges the plaintiffs attempted to use the "incidental contact" as a delay tactic in the litigation.

The two plaintiffs allege in their July 30 motion that they are not asking for "anything that would delay the matter."

"The issue here is Mr. Engerrand coaching the witness by tapping her foot. That is it," they allege. "As to Mr. Engerrand, perhaps the Eastern District of Texas countenances such behavior, but this District surely does not."

IYC and High Plains allege in their motion that Engerrand should lose his privileges to work on the litigation "because he has abused them and dishonored this Court and because his client, INA, with its in-house attorney present and observing, chose to take the low road intentionally."

However, INA alleges in its July 26 motion that the plaintiffs have "manufactured a controversy."

"Ms. Dennis already testified that she thought that Mr. Engerrand believed his foot was in contact with a pillar under the table and she [was] not paying attention to Mr. Engerrand, but rather was concentrating on the questions being asked," INA alleges in the motion.

INA also alleges that the photograph of Engerrand's and Dennis' feet does not show that Engerrand's foot is tapping Dennis' foot or show witness coaching.

"It reflects a natural position for parties sitting for hours of cross examination. Unless the parties remained perfectly still for the duration of the cross examination, any movement or stretch of the legs could result in this inadvertent contact," INA alleges.

Halmos, who like Antorcha questioned Dennis over the telephone during the deposition, did not return a telephone call seeking comment at his office in West Palm Beach, Fla. Antorcha declines comment.

Joseph Klock Jr., a partner in Rasco Klock who represents IYC and High Plains, says, "I don't take any particular pleasure in filing something like this against another lawyer."

Brenda Sapino Jeffreys is on Twitter at www.twitter.com/BrendaSJeffreys.



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