

## Ga. Judge Slams State's Bid To Depose Clerk In Election Case

By **Rosie Manins**

*Law360 (March 21, 2022, 7:49 PM EDT)* -- A Georgia federal judge has admonished as an "unwarranted intrusion" into her decision-making a request by state election officials to depose a former law clerk in a long-running dispute over Georgia's voting methods.

U.S. District Judge Amy Totenberg on Friday denied a bid by Georgia Secretary of State Brad Raffensperger and other state election officials to depose or get an affidavit from the former judicial clerk who had assisted her in the case.

Judge Totenberg said in her order that it was "extraordinary" and "backhanded" for the state defendants to now seek information from the unnamed clerk about communication with some plaintiffs attorneys in late 2020 regarding an emergency hearing that was sought by some of the plaintiffs and promptly denied.

"This is an unwarranted intrusion into the court's decision making that makes no sense, and one the court will not authorize," Judge Totenberg said. "Nothing in the court's procedure for identifying the proposed subject matter of the Curling plaintiffs' hearing request justifies the state defendants' extraordinary request now, 15 months later, for discovery from the court itself, through its former law clerk."

Judge Totenberg laid out in her order the reasons she denied the emergency hearing request, which came on the afternoon of Dec. 23, 2020, in the midst of election recount and runoff activity over the previous month's general election in Georgia. She said she would have needed extraordinary reasons from Georgia voter Donna Curling and associated plaintiffs to conduct the conference during the Christmas holiday.

"Simply put, the Curling plaintiffs' request was not supported by sufficient or exceptional cause to conduct a hearing regarding an election that was ongoing at that very moment," Judge Totenberg said.

Plaintiffs in the case, including civil rights organizations, have challenged the security and reliability of Georgia's voting system since August 2017.

Judge Totenberg said the Curling plaintiffs sought the emergency conference for an "important and time sensitive issue," and wanted it restricted to two counsel for each party, their expert witness, and the chief technology officer and counsel for Dominion Voting Systems.

Georgia's use of Dominion voting equipment is part of the plaintiffs' case.

All counsel were copied on the initial email sent to the clerk by David D. Cross of Morrison & Foerster LLP, the lead attorney for the Curling plaintiffs who sought the conference. The clerk responded to all counsel via email, advising that the court would be closed the following day, and asking Cross to separately provide her more information about the nature of the requested hearing.

Counsel for the state defendants and other plaintiffs responded, indicating they wanted to be included in any further correspondence from Cross, but his subsequent email to the clerk with additional details about his request was only copied to his co-counsel.

Judge Totenberg said the clerk responded to Cross' second email, copied to his co-counsel, on Dec. 24, 2020, and asked if he was available to talk briefly with her that day. The clerk called Cross that afternoon, to advise him that the hearing request had been denied, then sent an email to all counsel in the case, informing them of Judge Totenberg's decision.

The judge said neither the attorneys for the state defendants nor the other plaintiffs sought an explanation from the court or any further information from Cross about the conference request, until the issue was raised by the defendants amid discussions in March over discovery disputes.

Judge Totenberg said she made her decision quickly on Dec. 24, 2020, as it was "not a close call" and she didn't want to leave counsel or their clients hanging over the Christmas holiday. She said her decision should not have alarmed the defendants, who have argued throughout the case that the court should not interfere with an ongoing election.

The state defendants could at any time ask Cross to provide information about the conference request, so they won't be prejudiced because the clerk won't testify, Judge Totenberg said.

Cross told Law360 that Judge Totenberg's frustration with the defendants is well-placed, "given the absurdity of this request and the baseless implication of impropriety by the judge or her former clerk." He said he'd never before seen such a request.

"It's especially improper given I already shared with the state everything there was to share before they presented this issue to the court," Cross said Monday. "We took no position but made clear to the state that there was no more information to be had here and nothing improper occurred. I even offered to provide a sworn affidavit myself at their request but they persisted with this."

The plaintiffs are waiting on a ruling from Judge Totenberg in their effort to get \$1.8 million in attorney fees and costs and nearly \$300,000 in sanctions, after a ruling in their favor with respect to Georgia's old voting machines that are no longer in use.

Cross and some plaintiffs said the delay is financially devastating for the plaintiffs attorneys at small law firms, and sends a message to lawyers trying civil rights cases that financial ruin is a risk even when prevailing on claims.

"It's now been almost three years since we earned those fees, and they still have not been paid," Marilyn Marks, executive director of plaintiff Coalition for Good Governance, told Law360 on Monday. "Our very small [law] firms are waging a David and Goliath battle here. We're absolutely running on fumes, and it's going to be very hard for us to continue this case."

Marks said the coalition, a civil rights nonprofit, is gravely concerned about the May primary and November general election in Georgia this year, given the inadequacies of the state's voting system.

Ari Schaffer, a spokesperson for Raffensperger's office, said some of the plaintiffs had "substantive ex parte communications" on the same day that the state was moving to dismiss a separate elections case, brought by attorney L. Lin Wood.

"Those communications should have never occurred in the first instance, but when they do, any party to any proceeding has a fundamental right to know what happened," Schaffer said Monday.

Judge Totenberg has stayed aspects of the case, pending appeals to the Eleventh Circuit and examination of evidence by the U.S. Cybersecurity and Infrastructure Security Agency.

The plaintiffs are represented by Bruce P. Brown of Bruce P. Brown Law LLC, Robert A. McGuire III of Robert McGuire Law Firm, Cary Ichter of Ichter Davis LLC, David D. Cross, Hannah R. Elson, Lyle F. Hedgecock, Mary G. Kaiser, Robert W. Manoso, Tamara R. Wiesebron, Zachary D. Fuchs and Veronica Ascarrunz of Morrison & Foerster LLP, Halsey G. Knapp Jr. and Adam M. Sparks of Krevolin & Horst LLC, William B. Ney of Ney Hoffecker Peacock & Hayle LLC, and Eric R. Havian of Constantine Cannon LLP.

The defendants are represented by Alexander F. Denton, Brian E. Lake, Carey A. Miller, Joshua B. Belinfante, Vincent R. Russo Jr., Melanie L. Johnson and Javier Pico-Prats of Robbins Alloy Belinfante Littlefield LLC, Bryan P. Tyson, Bryan F. Jacoutot, Diane F. LaRoss, James A. Balli, Jonathan D. Crumly Sr. and Loree A. Paradise of Taylor English Duma LLP, and Cheryl Ringer, David R. Lowman, Kaye W. Burwell and Nancy L. Rowan of the Office of Fulton County Attorney.

The case is Curling et al. v. Raffensperger et al., case number 1:17-cv-02989, in the U.S. District Court for the Northern District of Georgia.

--Editing by Kelly Duncan.