

Ga. Voters Oppose State Officials' 'Attack' On Fed. Judge

By **Rosie Manins**

Law360 (April 12, 2022, 2:46 PM EDT) -- Georgia voters challenging the state's election methods say state officials publicly attacked the integrity of the federal judge overseeing the case after she criticized what she said was an attempt to depose her former law clerk.

The plaintiffs expressed their opposition Monday to a motion by state election officials for U.S. District Judge Amy Totenberg to clarify or modify her March order slamming the state defendants' bid to get information from the clerk.

Judge Totenberg admonished Republican Secretary of State Brad Raffensperger and other election officials for what she described as an "unwarranted intrusion" into her decision-making, over communications between the voters' counsel and the clerk in late 2020.

The state officials said in their motion that they never sought the court's permission to depose the clerk, asking Judge Totenberg to amend her order to "correct" that and other related issues.

Donna Curling and other voters, known in the case as the Curling plaintiffs, said Monday that the state defendants' motion for clarification is a personal, public attack on their counsel, the court and its former clerk that is "premised on sanctionable misrepresentations."

"This was wholly unnecessary and a colossal waste of already-highly constrained resources," they said. "The court should deny the motion to reach new and different findings that would contradict reality and impugn the integrity of Curling plaintiffs' counsel and the court's former clerk."

The case, claiming Georgia's election methods and equipment is unreliable and prone to hacking, has been before Judge Totenberg since August 2017. Some issues on appeal to the Eleventh Circuit are scheduled for oral argument in May; parties are yet to prepare summary judgment briefing in the trial court.

Judge Totenberg said in her March order that there was nothing wrong with the way the court handled, just days before Christmas in 2020, a request by the Curling plaintiffs for an emergency conference, which was promptly denied. The plaintiffs were concerned about vulnerabilities their expert had identified in Georgia's election system, ahead of a runoff election in early January 2021 for Georgia's two U.S. senators.

The unnamed law clerk who was assisting in the case at the time asked the lead attorney for the Curling

plaintiffs to email her about the nature of the requested conference, and later called him to say Judge Totenberg had denied it. She then emailed all counsel in the case, informing them of Judge Totenberg's decision, the judge said in her order.

Raffensperger and the other state defendants claim it was improper for the clerk and lawyers for the Curling plaintiffs to undertake "substantive ex parte communications" to which they and counsel for the other plaintiffs were not privy. The officials say the Curling plaintiffs refused to disclose what was communicated, so they made their bid for more information.

The defendants also said the counsel's private email to the clerk included "unwarranted attacks" on them and their lawyers as a basis for excluding them.

"This is an issue counsel wishes never had to be addressed," the defendants said. "However, it is not a problem of state defendants' making. Indeed, the underlying communications never should have occurred in the first place, but considering that it did occur and was withheld from state defendants even after a court order, any reasonable litigant would be justifiably concerned."

In response, the Curling plaintiffs said that the defendants' request for the court to find the communication was improper "defies the facts and the law." And the state officials' request that the court find they did not seek to depose the law clerk is "patently untrue," they said.

"This motion is a frivolous distraction from the merits of this case," they said. "Secretary Raffensperger and his office have engaged in a campaign of public attacks on plaintiffs and this court, which his lawyers have effectuated in this case with tactics such as this."

A spokesman for Raffensperger's office told Law360 it is the plaintiffs who are trying to distract the court.

"Plaintiffs' counsel spends 40 pages in an irrelevant attempt to excuse and distract from the fact that they admitted to engaging in substantive ex parte communication with the court," the spokesman said in an email Tuesday. "That is not allowed."

David D. Cross of Morrison & Foerster LLP, lead attorney for the Curling plaintiffs, said the defendants have "dragged this case out with obstruction, vexatious tactics, and many misrepresentations." He said lawyers for the officials have been hostile since 2019 in an attempt to frustrate the plaintiffs' efforts and discredit the case publicly.

"Secretary Raffensperger has publicly criticized Judge Totenberg on multiple occasions, wrongly dismissing her as biased when she actually has exhibited extraordinary patience with a lot of poor conduct from the secretary's office and his lawyers," Cross told Law360 Tuesday. "Some of his lawyers have not been particularly professional in this case in a long time, which destroyed any real diplomacy with the state long ago."

Cross said the defendants have no rebuttal to the findings of the plaintiffs' expert in regard to the alleged vulnerabilities of Georgia's election system, and instead chose to attack the integrity of the plaintiffs, their expert and counsel, and the court.

"That they filed the motion for clarification at all was shocking given how trivial this issue is and given the motion misstates the facts," Cross said. "They probably were embarrassed by how ridiculous their

request to depose the clerk was, and so they're trying to run from that now. But this is really about undermining public confidence in the court and painting themselves as victims of unfair treatment, which is highly misleading and inappropriate."

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 Rhein LLC, Eric R. Havian of Constantine Cannon LLP and Russell T. Abney of Watts Guerra 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 Fulton County Office of the 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 Brian Baresch.