

Attorney Sanctioned for Misconduct During Trial

By Angela Foster, *Litigation News* Associate Editor – November 19, 2014

A lawyer's misrepresentation can lead to dismissal of the case when attorney fees alone are an insufficient sanction to remedy counsel's misconduct. *Tesco v. Weatherford Int'l*. The *Tesco* decision highlights that attorneys must beware of the potential for additional court sanctions beyond attorney fees.

Mistake or Misrepresentation?

In a patent-infringement case, the coinventor of the patent testified that a marketing brochure developed prior to the filing of the patent application displayed his invention. If true, this would mean the invention was in the public domain prior to the critical filing date of the patent application, thus rendering the patent invalid and resulting in dismissal of the complaint. The inventor's attorney asked the district court for time over the weekend to find out what the brochure was and where it came from.

When the trial resumed, the attorney told the court that the brochure was created by someone else and that he could present that person as a witness. The attorney proffered that the witness would unequivocally testify that the invention in the brochure was not the inventor's device at issue in the case. The attorney also said he could produce other witnesses that would say the same.

The defendant argued that the plaintiff had not produced the brochure during discovery and only during trial did the plaintiff produce witness statements regarding the brochure. The plaintiff denied not producing the brochure. At the end of the trial, the jury rendered a mixed verdict. Because of inconsistencies in the jury verdict and the defendant's claim that the plaintiff failed to produce all requested discovery, the judge allowed limited post-trial discovery.

At a post-trial deposition, the plaintiff's witness testified, contrary to the attorney's representation during trial, that he was not involved in the creation of the brochure and that he had informed the plaintiff's attorney that he was not the creator of the brochure. The witness also testified that he informed the plaintiff's attorney that he could not tell one way or another whether the image in the brochure was the same as the inventor's device.

After numerous post-trial motions, the district court concluded that the invention was obvious and granted the defendants' motion for summary judgment but denied the defendants motion for attorney fees. The plaintiff appealed and the defendants cross-appealed, arguing that the matter

was premature because the attorney fees issue was not final. The United States Court of Appeals for the Federal Circuit agreed with the defendants and dismissed the case.

The district court allowed the parties to conduct limited discovery, this time on the question of whether the plaintiff's conduct warranted a finding of exceptional case for attorney fees under 35 U.S.C. § 285. Section 285 allows a trial judge to award attorney fees to a prevailing party in a patent infringement case if the opposing party has committed material misconduct or brought a case in bad faith.

Despite the deposition testimony to the contrary, the plaintiff's attorney stated he accurately reported to the district court because his witness first stated the image in the brochure was not the invention. Counsel also argued that any misrepresentations it may have made to the court did not make a difference because it never made them in front of the jury.

Misrepresentation an Abuse of Judicial System

The district court rejected the attorney's assertions and found his misrepresentations not only willful, but degrading to the judicial system. The court exercised its inherent authority to dismiss the case with prejudice to deter any future "deliberate and advantage-seeking untruthful conduct" that degrades judicial integrity. The district court allowed the defendants sixty days to file motions for attorney fees.

ABA Section of Litigation leaders caution attorneys to remember that they owe the court a duty of candor at all times, regardless of whether the jury is present. "As advocates, we cannot lose sight that we have a dual obligation—to be zealous advocates for our clients and a duty of candor to the court. If you lose sight of your duty to the court, you may not only get yourself in trouble, you may hurt your ability to effectively advocate for the client", says Michael P. Padden, Chicago, IL, cochair of the Patent Subcommittee of the Intellectual Property Litigation Committee of the Section of Litigation.

"The *Tesco* court concluded that plaintiff's misrepresentations amounted to an abuse of the judicial system. The court dismissed the complaint with prejudice, holding that nothing less would protect the judicial system and invited motions for attorney fees be submitted," says Ian H. Fisher, Chicago, IL, cochair of the Section's Trial Evidence Committee. "The court was clearly frustrated and angry; it is not often that a court goes so far as to find that a party's conduct 'irrevocably poisoned' a proceeding. The court recognized that dismissal is one of the harshest sanctions at its disposal; however, the court was concerned that it sufficiently punish the plaintiff to deter others from making intentional misrepresentations to a court," adds Fisher.

Simply Put

Pointing to the ABA Model Rules, Padden reminds attorneys that "it is unprofessional conduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation and knowingly make a false statement of material fact or law." ABA Model Rules 8.4(c) and 4.1(a). Padden advises attorneys to "be very careful about the representation that you make to the court. We must strongly advocate with the cards we are dealt."

“Don’t make a representation without being sure that it is accurate—notably, the lawyer who made the representations about what the witness would testify is not the same lawyer who apparently interviewed the witness,” cautions Fisher. More importantly, “if you find that a material representation was inaccurate, get ahead of it and be the first to tell the court and propose a cure,” says Fisher.