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Bracewell Penalty Proves Lying To Win Isn't Worth It

By Jeremy Heallen

Law360, Houston (August 27, 2014, 10:58 PM ET) -- A Bracewell & Giuliani LLP attorney found to have misled a court about evidence damaging to his client in a suit over a drilling patent not only lost the case but also put his reputation and his firm at risk, proving that ethical compromises made to score a courtroom win are often more costly than a loss, experts say.

Bracewell & Giuliani partner Glenn A. Ballard Jr. drew the ire of U.S. District Judge Keith P. Ellison, who threw out Tesco Corp.'s case with prejudice, calling the lawyer's mischaracterization of crucial witness testimony "an affront to this court, to the other parties and to judicial integrity."

Though lawyers are obliged to advocate a client's position with zeal, inventing or omitting facts to bolster a case crosses sacrosanct ethical boundaries and is destructive to an attorney's career and the legal system generally.

"You're an officer of the court," said LeClairRyan partner A. Neil Hartzell. "You take an oath to uphold the ethical principles of the bar. That oath does not give you a license to misrepresent things in the pursuit of claims for your client."

Ballard's transgression occurred midstream of a trial on Tesco's claim that National Oilwell Varco LP and other companies had infringed patents Tesco owned, which cover a piece of oilfield equipment known as a casing drive system.

Tesco alleged when it filed the infringement suit in 2008 that it has held patents on the system since as early as 2006. But when the case went to trial in 2010, Kevin Nikiforuk, who created the tool, testified that a marketing brochure developed by Tesco in August 2002 contained a depiction of his invention, according to the order.

Because federal law prohibits patenting an invention that has been on the market for a year or more, Nikiforuk's testimony could have resulted in a finding that Tesco's patents were invalid, Judge Ellison wrote.

Caught off guard by Nikiforuk's admission, Ballard secured a brief recess to investigate the claim, and when trial resumed the following Monday, he told Judge Ellison that he had contacted the brochure's animator, who "unequivocally" stated that Tesco's casing drive system was not what was pictured in the marketing material, the order said.

It was only after a jury handed Tesco a partial win that Ballard's alleged deceit came to light. During a post-trial deposition of the brochure animator Ballard had spoken with during trial, National Oilwell Varco learned that the witness couldn't identify what was shown in the brochure because he had not been involved with creating the pamphlet, according to the order.

When Judge Ellison was alerted to the contradictory testimony, he dropped the hammer on Tesco by dismissing its case with prejudice and admonished Ballard in a 13-page memorandum that detailed the attorney's alleged courtroom misconduct.

Strained by enormous pressure to rack up wins for their clients, lawyers can lose sight of their obligation to be open and honest with a court and even convince themselves that distorting the truth is acceptable if the ends justify the means.

But the cost of dishonesty is much higher than a possible loss that could result from telling the truth. Attorney ethics rules in every jurisdiction prohibit lawyers from misleading a court, creating a real risk of a state bar disciplinary action.

Lawyers caught in a lie also have a hard time rebuilding trust with judges, making it a challenge to effectively represent their clients.

"People tend to forget that judges used to practice law," Hartzell said. "They have seen all the tricks and are not persuaded by lawyers who they perceive as not being candid."

And the impact on colleagues is just as damaging. Lawyers who play by the rules have an enduring memory for those who don't. Developing a reputation as an unrestrained cutthroat does little to advance an attorney professionally.

Effective lawyers can work with the facts — both good and bad — to argue their client's cause, according to Dallas appellate attorney Chad M. Ruback. Early in his career, Ruback served as a briefing attorney for a Fort Worth appellate judge, who gave him invaluable advice about controlling the narrative when bad facts present themselves.

"She taught me during my first week on job that if you have bad facts or bad law, the best thing for the client is to disclose it so you can explain it to the court," he said. "Every case has a bad fact; every case has a proverbial wart. So come front and center and disclose it and point out why it's not nearly as bad as it might seem."

When the facts are so bad that a loss appears inevitable, exploring settlement or getting off the case altogether are better options than the wreckage lying can cause to a lawyer's reputation.

Hartzell recalls once receiving information in the middle of a trial that was contrary to what his client had told him. When confronted, his client hesitated about telling the truth in court but opted for honesty when Hartzell threatened to withdraw from the case.

"That's what you've got to do," Hartzell said. "It's unfortunate that this lawyer apparently didn't."

Beyond the personal harm dishonesty inflicts, an attorney's law firm can be exposed to fallout as well. In Bracewell's case, Judge Ellison has left open the possibility that Tesco may be liable for National Oilwell Varco's attorneys' fees because of Ballard's actions, putting the firm in an unenviable position with its client.

"Tesco's case isn't over," said University of Houston Law Center professor emeritus Robert Schuwerk. "Now the target has moved."

Perhaps the worst consequence of lying to gain a litigation advantage is that it undermines the adversarial process. Judges don't have time to investigate the truthfulness of every statement a lawyer makes. Without honesty, the system breaks down and public confidence is lost.

"It's destructive to the morale of the bar to find lawyers who are cheating and getting away with it," Schuwerk said. "It's very demoralizing to have a case where the law and facts are on your side and the opposing counsel is willing to break the rules to keep the truth from coming out. And as for the public's perception of lawyers, it just hammers another nail in the coffin."

Tesco is represented by Glenn A. Ballard Jr. and John F. Luman III of Bracewell & Giuliani LLP.

National Oilwell Varco is represented by John W. Raley III, Robert M. Bowick and Bradford T. Laney of Raley & Bowick LLP. Offshore Energy is represented by C. James Bushman of Bushman & Associates PC. Frank's is represented by David R. Clonts, Sarah J. Ring, Jamie L. Duncan III and Michael F. Reeder II of Akin Gump Strauss Hauer & Feld LLP.

The case is Tesco Corp. v. Weatherford International Inc. et al., case number 4:08-cv-02531, in the U.S. District Court for the Southern District of Texas.

--Editing by Jeremy Barker and Brian Baresch.

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