

HOUSTON CHRONICLE



CITY | STATE

INSIDE

Suspect held in theft of van with 5 children aboard, but driver will face no charges.

Page B2

EDITORIAL

The University of Houston needs to boost its engagement with the Third Ward.

Page B6

Houston Chronicle @HoustonChron

Houston Chronicle | Friday, August 29, 2014 | HoustonChronicle.com and Chron.com

Section B ***

Judge finds big-time trial lawyer 'abused' court in patent case

LISA FALKENBERG
Commentary



At a critical point of trial, four days into a multimillion-dollar case for his oil drilling client, Glenn A. Ballard Jr. ran smack-

dab into a lawyer's version of the Deepwater Horizon oil spill.

Ballard, then head of litigation for the global law firm Bracewell & Giuliani, sat in a federal courtroom on that day in October 2010 and listened as his own witness gave testimony that could sink his client's patent infringement case.

His client, Tesco Corp., a Houston-based global oil services company, was suing several competitors for allegedly stealing the design of an oilfield

tool. Tesco claims it patented the device, which helps lower casing into the drilling hole, in 2006.

But attorneys for the defendants presented a Tesco marketing brochure that showed the company had been selling the tool more than a year before they applied for the patent. The witness on the stand, tool inventor Kevin Nikiforuk, examined the brochure and acknowledged it was his.

The minor point was major in the case because federal law

prohibits patenting something that's been on the market for a year or more. Ballard had a decision to make — admit his client's patent was invalid, and the case was over. Or fight.

The impeccably credentialed attorney — a 30-year veteran, past president of the Houston Bar Association, and a "best lawyer" listed in U.S. News and World Report — decided to fight.

Ballard quickly asked the federal judge for the weekend to sort things out. He came back on

Monday morning claiming his firm talked to two men who did the illustration of the tool for the marketing brochure and they assured him, "unequivocally," it was not the same tool at issue in the case.

"I think the issue has been put to bed," Ballard assured U.S. District Judge Keith Ellison, adding that both animators were prepared to swear to it in court. "... In fact, there is no doubt it's not Mr. Nikiforuk's invention."

Falkenberg continues on B2

Falkenberg: Lawyer's troubling conduct not let go with wrist slap

Falkenberg from page B1

At the time, Judge Ellison took Ballard at his word, as federal judges with heavy caseloads are sometimes forced to do. Trust is essential in a system that relies upon attorneys to produce evidence.

In fact, the judge decided this week that Ballard was lying to his face.

Ellison, known as a fair, mild-mannered jurist, imposed the so-called "death penalty" of the civil court system on Tesco and counsel. He dismissed the now-6-year-old case with prejudice, meaning it can't be refiled. And he opened the door for awarding attorney fees for the other side, which could total several million.

In his order, Ellison takes the company to task as well, writing that Tesco's misrepresentations "irrevocably poisoned these proceedings" and amount to "an abuse of the judicial system."

The judge wrote that he reached the decision with "great reluctance" and added he was "entirely confident" the attorney's troubling conduct was "out of character." But he couldn't let it go with a wrist slap.

Firm reviewing case

"(N)ot every lawyer who lies to a court will be caught," the judge wrote, "so when such deliberate and advantage-seeking untruthful conduct is uncovered, the penalty must be severe enough to act as a deterrent."

Michelle McCormick, a spokesperson for Ballard's firm, said Bracewell & Giuliani takes the situation seriously and is reviewing it internally.

"The conduct described is not in keeping with the firm's bedrock commitment to the highest standards of ethics and professional responsibility and our long established reputation for integrity," she said in a statement.

It's usually criminal prosecutors who make headlines for hiding evidence and lying to the court — and stakes for such behavior are certainly higher in criminal court. The conduct of Ballard and his team didn't result in somebody being locked up for 25 years for a crime they didn't commit.

But they abused the system just the same.

"We're already kind of a beleaguered profession," said Nicole LeBoeuf, a partner at the Shackelford law firm in Dallas who specializes in ethics and legal malpractice. "This just makes it look terrible."

Lying to a federal judge isn't common, experts say, and the lawyers who do it aren't always chronic offenders. It can be a situational decision for a competitive attorney in a tough spot, said Robert Schuwerk, professor emeritus at University of Houston law school.

"You're like the little cartoon

character who runs off the cliff but does not fall until he realizes he's run off the cliff," he said.

In the Tesco case, truth only came to light after Ellison let defense attorneys dig more after trial. A jury had found some of Tesco's claims valid. But Ellison was disturbed by inconsistencies in the verdict. And he was still concerned about whether the marketing brochure did, in fact, show that Tesco had tried to sell the oil field tool in question years earlier, thereby invalidating its patent.

Were not illustrators

Investigation by attorneys at the Houston law firm Raley and Bowick, who represented defendant National Oilwell Varco, helped show that the two men Ballard claimed illustrated the brochure in fact had not. The men said in depositions that they'd made that clear during trial to Ballard's co-counsel, John F. Luman III.

For defense attorney John Raley, his ordeal with Tesco paralleled a bit with another case he'd handled — that of Michael Morton. The Williamson County man served 25 years for the murder of his wife after a prosecutor hid evidence.

"Tesco's counsel accused us of pursuing this case with the same passion as Michael's case. We agree," Raley told me. "Lawyers should be passionate about truth."

The system can't work any other way.

This is a case the Texas Bar Association should look closely at. Any one can report it, and the judge may be planning his own referral.

If wrongdoing is confirmed, Ballard could face anything from a private reprimand to disbarment.

Lying is lying — even when a bar president does it.

lisa.falkenberg@chron.com