Presented:
38th Annual Page Keeton Civil Litigation Conference

October 23-24, 2014
Austin, TX

Winning Isn't Everything: Litigation Ethics at Trial and Deposition

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Introduction

Being honest, upfront and truthful with opposing counsel and the court is the bedrock principle of our civil litigation system. Witnesses take oaths to tell the truth when questioned. Attorneys are not just paid advocates, but officers of the court. Attorneys and clients must review and produce the relevant documents they possess in order for the truth to be known and justice to be done. As the recent decision in *Tesco Corp. v. Weatherford International Inc., et al.* demonstrates, when these principles are not adhered to, not only are costly sanctions possible, but so are case-ending dismissals.

The Texas Lawyer's Creed and the Disciplinary Rules

In the late 1980's, members of the Texas Supreme Court noticed a rise in abusive litigation tactics ranging from "lack of civility to outright hostility and obstructionism."[1] In response, the Court formed the Supreme Court Advisory Committee on Professionalism.[2] This group of legal professionals drafted a code of conduct to address these abusive tactics and promote confidence in the legal profession. On November 7, 1989, the Texas Supreme Court and the Texas Court of Criminal Appeals issued The Texas Lawyer's Creed—A Mandate for Professionalism ("the Creed"), consisting of aspirational guidelines for Texas attorneys.[3] The Creed addresses the duties a Texas attorney owes to the legal system, his clients, other lawyers, and judges.[4]

Texas lawyers must abide by the Texas Disciplinary Rules, which reflect the required minimum standard of ethical conduct. The Creed provides standards to further guide attorneys. And while the Creed is supposed to be "aspirational" or best practices, courts often look to the Creed for additional support of sanctions awards or in condemning attorney conduct.

Unethical Conduct and Litigation Wins and Losses

In *Tesco Corp. v. Weatherford International Inc., et al.*, the Court permitted post-trial discovery due to inconsistencies in the jury's verdict regarding the validity of various patents and

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[1] *See generally* The Texas Lawyer's Creed—A Mandate for Professionalism [hereinafter *The Texas Lawyer's Creed*] (adopted by the Supreme Court of Texas and the Court of Criminal Appeals Nov. 7, 1989), *reprinted in* Texas Rules of Court 803, 804-05 (West 2010).

[2] *See* The Texas Center for Legal Ethics, *History of the Texas Lawyer's Creed,* http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of--the-Texas-Lawyer-s-Creed.aspx.

[3] *See id.*

[4] *See generally The Texas Lawyer's Creed.*

"because of concern – re-enforced during the trial in no small part because of the events discussed herein – that Tesco had not produced all of the discovery that Defendants had properly requested."[5] The post-trial discovery revealed that Tesco's counsel "affirmatively misrepresented to the Court the statements of key witnesses regarding important evidence."

In particular, a case-determinative issue was whether a Tesco marketing brochure from 2002 displayed the invention at issue in the case, which would invalidate a patent.[6] During trial, Tesco's counsel asked the court for time to "find out what this rendering [in the brochure] is, where it came from."[7] A few days later, Tesco's counsel explained:

> The animators that actually did the brochure and that actually did the rendering are prepared to swear and testify that this is not [the invention at issue]; and in fact, there is no doubt it's not [the invention at issue]. . . . [T]hat is what [the animator is] going to say; and he's going to say unequivocally."[8]

The court allowed a post-trial deposition of the animator. In the deposition, the animator testified that he was "not involved in the brochure," there was "no way [he] did that brochure," he had not created the image at issue, and the statement by Tesco's counsel to the court was "not true in any way, shape, or form."[9] The animator went on to say that he had spoken to another of Tesco's counsel about the image and had told him he "had nothing to do with it."[10] He further testified that he was unable to determine whether the image depicted the invention or not because the image was poor and obscured.[11]

The court concluded that the animator's deposition testimony was "clearly and directly contrary to the representations [Tesco's counsel] made to the Court during trial," and that "this [was] not a simple case of innocent mischaracterization." Instead, the witness "said one thing, and counsel told the Court that he said something else."[12] The court further noted that if "the actual statements made by [the animator] at this critical inflection point had been reported to the Court," opposing counsel's "trial strategy would have been entirely different" and "the Court would, in all probability, have entered judgment for the Defendants forthwith."[13]

The court went on to express its "deep concern" about "Tesco's [counsel's] attitude towards its misrepresentations to the Court," noting that counsel "owes the Court a duty of complete candor at all times."[14] Noting the court's "independent obligation to safeguard its own integrity," it concluded that counsel's "advantage-seeking misrepresentations," which "irrevocably poisoned" the proceedings, "could not have been calculated to assist the Court in

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[5] No. 4:08-cv-02531 (S.D. Tex. August 25, 2014), at 3.
[6] *Id.* at 5. It was also disputed whether the brochure at issue had ever been produced. It appears that even if produced, it had never been produced in color. *Id.*
[7] *Id.* at 5.
[8] *Id.* at 6.
[9] *Id.* at 6-8.
[10] *Id.* at 8.
[11] *Id.*
[12] *Id.* at 10.
[13] *Id.* at 10-11.
[14] *Id.* at 11.

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First appeared as part of the conference materials for the
38th Annual Page Keeton Civil Litigation Conference session
"Bad Lawyering Caught on Tape"