What do you do when you find out the key piece of evidence used to win at trial was fabricated – ahh, totally made up?

Why, you follow the rules, of course.

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The Case

- LBDS Holding Company, LLC v. ISOL Technology, Inc., 6:11-cv-428
- Before the Honorable Judge Leonard Davis

LBDS v. ISOL

- Filed on August 16, 2011, LBDS sued ISOL for its breach of contract in failing to integrate LBDS's proprietary software into a generic 1.5 Tesla MRI that ISOL manufactured in South Korea to convert it to a cardiac capable MRI.
- It was alleged that ISOL had also misappropriated the LBDS software to create ISOL's own cardiac capable MRI and was already marketing the finished product.
- ISOL was sued for Breach of Contract, Trade Secret Misappropriation, Civil Conspiracy, Common Law Unfair Competition/Misappropriation, and Common Law and Statutory Theft of Trade Secrets.

LBDS – The Party

- LBDS Holding Company was a local software developer based out of Richardson, Texas
- LBDS specialized in an improved cardiac imaging technology for magnetic resonance imaging systems ("MRIs")
- LBDS was initially referred by another attorney
- The attorney was well known and had represented LBDS in the past

LBDS Principals

- Two of the Principals of LBDS were West Point graduates
  - Albert "Bert" Davis — Chief Executive Officer ("CEO")
  - David "Dave" Hernon – Chief Operating Officer ("COO")
  - They were Army Rangers and met at West Point

LBDS Principals

The other Principals of LBDS involved were:

- Suresh Reddy – Chief Technology Officer ("CTO")
- David Tayce – Chief Financial Officer ("CFO")

ISOL's Contract with LBDS

- LBDS and ISOL had entered into a Technology Service and Product Supply Agreement.
- ISOL effectively agreed to provide all services and products necessary to integrate LBDS's proprietary software into the software that ran ISOL's generic MRI to create a dedicated cardiac MRI – something only GE, Siemens, Toshiba and Philips had previously mastered.

ISOL's Contract with LBDS

- The Agreement contained Section 7.1 which imposed a "Standard of Care" upon ISOL.
- Pursuant to this Standard of Care, ISOL had contractually committed to integrate LBDS' Proprietary Software into the ISOL MRI system, thereby achieving cardiac imaging capability.
- ISOL had to make it work or it was in breach.

LBDS's Contract with Cerner Corp.

- As proof of lost profits under the Breach of Contract causes of action, LBDS offered into evidence a Distribution Agreement between LBDS and Cerner Corp.
- This Distribution Agreement obligated Cerner to a "minimum purchase" of 345 cardiac capable MRI machines over a three year period for an approx. sales price of $302,000,000.00

LBDS's Use of False Domain for Email

- LBDS formed a company called Cerner, Inc. in Texas and then registered @cernerinc.com as a domain on Go Daddy.
- LBDS cropped the artwork and signature block used by Cerner's VP/Director of Business Development and used this to forward ISOL an email purporting to be from Cerner's VP/Director assuring LBDS that Cerner was still committed to the minimum purchase requirements (i.e., 345 cardiac capable MRIs) under its Distribution Agreement with LBDS.

The Creation of Ansel Capital Partners

- In 2009 and 2010, LBDS forwarded to ISOL e-mails from Ansel Capital Partners, an angel fund investor in healthcare technology.
- Dr. Gary Ansel stated that Ansel Capital Partners needed to review the ISOL/LBDS contracts and to observe a successful demonstration of the LBDS MRI system before Ansel Capital Partners would agree to funds LBDS's efforts.

Ansel Capital Partners Did Not Exist

- LBDS formed a company called Ansel Capital Partners in Colorado.
- LBDS registered a domain @anselcapital.com with Go Daddy.
- LBDS's principals used this to create the impression they were receiving e-mails from an angel fund investor in the healthcare technology space, but in fact were sending the communications to themselves.

The Case is Tried

- Jury selection and trial started on March 3 and the verdict was returned on March 12, 2014.
- The verdict returned a single finding of breach of contract for $25,174,761.00 and dismissed ISOL's CEO Dr. Lee.

The Whistleblower Comes Calling

- Jim Walker was contacted by an anonymous whistleblower asking that he call an FBI agent about the case.
- One call led to another and soon ISOL had affidavits from Cerner Corp. swearing the contract used at trial was fake, and another from Dr. Gary Ansel disavowing any involvement with any entity involved in healthcare finance, let alone one named Ansel Capital Partners.

Counsel for ISOL and LBDS Began The Process of Responding

- ISOL sent a draft Motion for Sanctions to vacate the jury verdict and award ISOL all attorneys' fees and costs incurred in the case to LBDS's counsel.
- LBDS's counsel secured a conference with their client representatives to ascertain the merits of the draft sanctions motion.

First Motion – Motion to Withdraw

- Motion to Withdraw filed by LBDS's Counsel invokes Texas Disciplinary Rule of Professional Conduct 3.03, Candor Toward the Tribunal.
- Rule 3.03(b) provides: If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

Second Motion – Emergency Motion for Sanctions

- LBDS's counsel were allowed to withdraw in light of the disclosures contained in their Motion to Withdraw invoking Texas DR 3.03(b). The withdrawal was not opposed.
- ISOL's Emergency Motion for Sanctions was later heard and granted by Judge Leonard Davis.
- The jury verdict was vacated, the case was dismissed with prejudice, and ISOL was awarded attorneys' fees of $738,706.47 against LBDS.

Counsel Acting as Officers of the Court

- At no time was it suggested that LBDS's counsel knew of the fraud perpetrated by their client LBDS.
- There was not a scintilla of evidence to suggest they did.
- All counsel understood the critical need to respond professionally and ethically in fulfillment of their common role as Officers of the Court.

Eastern District Local Rule AT-3

- **LOCAL RULE AT-3 Standards of Practice to be Observed by Attorneys**
- Attorneys who appear in civil and criminal cases in this court shall comply with the following standards of practice in this district:

(a) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

Eastern District Local Rule AT-3

(b) A lawyer owes candor, diligence, and utmost respect to the judiciary.

(c) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

Eastern District Local Rule AT-3

(d) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(e) Lawyers should treat each other, the opposing party, the court, and court staff with courtesy and civility and conduct themselves in a professional manner at all times.

Eastern District Local Rule AT-3

(f) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(g) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor ward opposing lawyers.

Concluding Observations

- Walker: "I've never had to break a rule to win a case. I've never lost a case for following the rules."
- Warren: "In the end, the Justice System and the Rules worked just as they should have."
- Everingham: "The case is a great example of Rule AT-3 and the Lawyer's Creed—from the time we went to trial until the conclusion of the withdrawal and the sanctions motion, the lawyers never said a single cross word to each other."