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Lewis Brisbois Partner Sanctioned for Showing Jury Inadmissible Evidence. Was It Deliberate?

The sanction fight is salacious since one side claimed in court documents that the evidence in question was a \$2,300 credit card charge for oral sex from a Houston strip club, which is something the other side denies.

BY ANGELA MORRIS

A partner in Lewis Brisbois Bisgaard & Smith argues that a judge's \$5,000 sanction against him was too harsh, because he only accidentally showed a jury a piece of unadmitted evidence that the judge had ruled was not for the jury's eyes.

But the opposing side countered that the disclosure by Houston lawyer Earl Touchstone was purposeful, and the sanction necessary.

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Attorneys in the case expect a ruling this week about the sanction, but Touchstone isn't

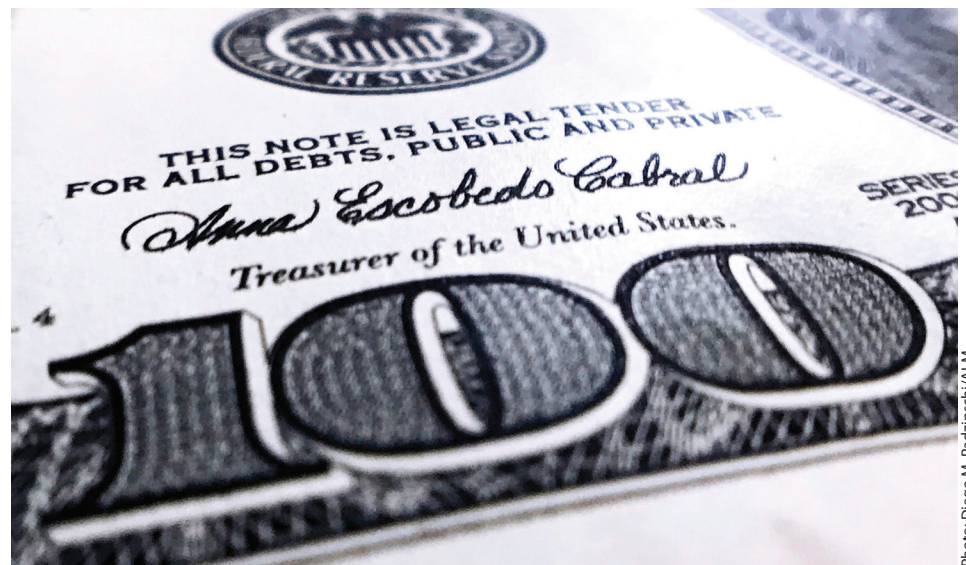


Photo: Diego M. Radzinski/ALM

waiting for that. He also filed a notice of appeal to Beaumont's Ninth Court of Appeals on Wednesday.

The sanctions dispute concerns Touchstone's punishment by Judge Vince Santini of Montgomery County's 457th District Court, who oversaw a jury trial in April, where the jury awarded a \$32 million verdict to Garrett

Gagliano in a business partnership dispute with Lee Burkett.

Repeated violations

The court's April 30 sanction said that Touchstone's violation was one of many examples of his attorney misconduct during the jury trial.

The judge had already warned Touchstone that he would get sanctioned for further violations,

the order said. Santini, the judge, wrote that the sanction was necessary to deter more misconduct.

Touchstone, who didn't respond to a call seeking comment, was one of Burkett's attorneys. Kenna Seiler of Seiler Mitby in The Woodlands, who represented Burkett in the motion to reconsider Touchstone's sanction, declined to comment.

"Mr. Gagliano appreciated the court running a fair and orderly courtroom throughout the course of trial proceedings," said Corey Wehmeyer, who represented Gagliano. "In Mr. Gagliano's opinion, the sanctions were appropriate and should be affirmed."

Touchstone argued in a motion to reconsider the sanction that the credit card statement he showed on accident wasn't covered by a limine order.

According to Touchstone, he believed the court had admitted the document, and once he realized that he made a mistake he took it down, said the filing.

"Mr. Touchstone's error was inadvertent and unintentional, and neither benefited nor prejudiced any party," said the motion.

Gagliano's request countered that there were at least 10 examples where Touchstone and his witnesses introduced evidence that the court had barred from the jury.

'Radioactive'

Gagliano's response includes more information about the motion in limine. Touchstone's client, Burkett, had allegedly used his and Gagliano's company funds to pay for a company client to get oral sex at a strip club, the response said. There was a credit card statement showing charges of about \$2,300 where the strip club's name had been altered.

It was incriminating evidence, and Touchstone pushed for—and won—the motion in limine to stop the jury from hearing about Burkett's strip club charge, or about prostitution and oral sex, the response said.

That statement "was one of the most radioactive, fought-over pieces of evidence in this entire case dating back multiple years," said a response to a motion to reconsider Touchstone's sanction. "As a legal professional hired to represent clients in a trial it was Touchstone's obligation to know the

exhibits in evidence and not in evidence."

The response said Touchstone violated a limine order within 10 minutes of opening statements. By the time the court issued the \$5,000 sanction, Touchstone and his witnesses had committed at least 10 other violations—some were "intentional and calculated"—during the April 9 to 20 jury trials, said the response.

"As Touchstone continuously violated the court's limine orders throughout the course of trial, the court repeatedly warned him to cease his violative conduct and to instruct his witnesses to do so," said the response.

However, Touchstone claimed that Gagliano's arguments over the \$2,300 charge are a "red herring" because he was trying to show the jury a separate charge on the statement. The filing also said that depositions in the case said "there was no payment for sex or sexual acts of any kind."

The reply added that both Burkett and Gagliano had taken the same customer to the same strip club at different times, "and no illegal activity occurred on either occasion."