COMMERCIAL & BUSINESS LITIGATION
SECTION OF LITIGATION

Summer 2021, Vol. 22, Issue 4

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Commercial & Business Litigation Committee
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Six Ethics Rules Every Young Lawyer Must Know

By Michael S. LeBoff

Being a lawyer is hard. And the early years may be the hardest. You lack control over your day-to-day work, as assignments are handed out by senior attorneys. Young lawyers are often competing against more experienced and confident lawyers. Financially, younger attorneys tend to make less than experienced lawyers, yet may be saddled with law school debt, trying to purchase a first home, or dealing with other post-law-school expenses. Yes, being a young lawyer is hard. The ethical rules, however, do not care. Young lawyers must strictly comply with the same set of ethical rules as more experienced lawyers—or risk ending a promising career before it fully gets off the ground. While all lawyers must know and adhere to all ethical rules, this article highlights six ethical rules every young lawyer must know.

Rule 1.1: Competence

Model Rule of Professional Conduct 1.1 (and its state law counterparts) is the quintessential ethical rule. It applies to young and old lawyers alike. Short and sweet, Rule 1.1 states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Even as younger attorneys learn their trade, they are obligated to act competently and devote necessary time to the representation. Young lawyers are often far more competent than they believe and will develop confidence over time. But young lawyers must also know their limitations and avoid getting in over their heads.

Young lawyers are often asked to take on more than they can handle. Young lawyers need to recognize when they are becoming overwhelmed to the point where it can adversely affect the clients. When this happens, young lawyers need to have the courage to say no to certain assignments or know whom in their firm to go to for support.

Young lawyers also have a responsibility to ensure they get proper training, supervision, and mentoring. This means young lawyers cannot be afraid to ask for help from supervising attorneys. If a firm is not providing training and mentoring, then consider changing firms. There are many firms willing to invest in developing younger lawyers. Find one.

Rule 1.4: Communications

As an attorney who frequently handles legal malpractice cases, I find poor communication is the leading cause of malpractice cases. Model Rule of Professional Conduct 1.4 governs an attorney's ethical duties to communicate with clients. It reads:

> (a) A lawyer shall:
>
> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> >
> > (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> >
> > (3) keep the client reasonably informed about the status of the matter;
> >
> > (4) promptly comply with reasonable requests for information; and
> >
> > (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

There are many things attorneys should discuss with clients on a regular basis, such as deadlines, budgets, significant case developments, and settlement offers. It is easy to give clients good news. It is much harder to give clients bad news. That is part of the job. It is not easy, but it has to be done.

The duty to communicate also comes into play when attorneys make a mistake. All attorneys make mistakes, and young attorneys make many. Fortunately, most mistakes are correctable if you acknowledge the error and promptly correct it. This includes coming clean to the client. Many lawyers, acting out of fear or embarrassment, however, are not up-front with clients about mistakes. Rather than address and fix a mistake, some attorneys wishfully hope the mistake will simply go away. When it does not, expect the malpractice lawyers to appear.

Rule 3.4: Fairness to Opposing Party and Counsel

A recent California case discusses the importance of treating the court and opposing counsel with integrity and respect. In *Moore v. Superior Court*, the California Court of Appeal affirmed a contempt order against an attorney found to have been rude and unprofessional during a settlement conference. According to the opinion, the attorney persistently yelled and interrupted others, accused opposing counsel of lying without any supporting evidence, and refused to engage in settlement discussions. In addition to fining the attorney, the court referred him to the

state bar. Even worse, there is now a published opinion that will follow this attorney throughout the remainder of his career.

Young lawyers must learn from others' mistakes and remember there are consequences for incivility in the practice of law. Model Rule of Professional Conduct 3.4 states:

> A lawyer shall not:
>
> > (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
> >
> > (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
> >
> > (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
> >
> > (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
> >
> > (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
> >
> > (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
> >
> > > (1) the person is a relative or an employee or other agent of a client; and
> > >
> > > (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Young attorneys may find themselves being pressured by an unscrupulous client or partner to violate this ethical obligation. But the system depends on attorneys resisting that pressure. It is critical that young lawyers learn the importance of doing the right thing when nobody is watching.

Rule 5.2: Responsibilities of a Subordinate Lawyer

Model Rule of Professional Conduct 5.2 is one of the few rules specifically addressed to younger lawyers. It provides:

> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

It means that being a young or subordinate attorney is not an excuse for violating the ethical rules. And, except for arguable questions of professional duty, "just following orders" will not excuse ethical violations. Given this, young attorneys need to take responsibility for their own ethical compliance.

Rule 8.4(g): Misconduct

In one of the newer additions to the Model Rules, Model Rule of Professional Conduct 8.4(g) reads:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Despite great contributions by some, prior generations of lawyers have not done a great job at eliminating bias in the legal profession. The responsibility now falls on the current generation of attorneys. It starts by adopting a zero-tolerance policy on discrimination and harassment and by bringing such misconduct to light.

Preamble Subsection 7

The preamble to the ABA Model Rules contains multiple subparts, all of which are important and worth reviewing. Subsection 7, however, is of particular interest to young lawyers. Subsection 7 reads:

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer

> should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

This subsection summarizes the purpose of the ethical rules, which sets the floor for ethical conduct—not the ceiling. In other words, the ethical rules do not replace your own personal judgment and value systems. The ethical rules cannot possibly cover every situation that you will face as an attorney. It is, therefore, important for young attorneys to be true to their own personal set of values and to continue to develop a sense of how to practice this profession.

Conclusion

As stated above, being a lawyer is hard. As you develop and grow into the profession, it is critical to start your legal career on the right ethical foot. Ethical lapses early in your career may have consequences that follow you forever. Keeping these six rules in mind will start young lawyers down the right path for a long and rewarding career.

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American Bar Association, Litigation Section
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Summer 2021, Vol. 22, Issue 4

Tips for Navigating a Privilege Dispute Between LLC Managers and Members

By David Roper and James D. Abrams

Limited liability companies (LLCs) are hybrid business entities that borrow characteristics from corporations and partnerships, but they are understood to have unique benefits for their owners, who are called members. *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1181 (D. Nev. 2008). Like individuals and corporations, LLCs are generally protected from the involuntary disclosure of communications with their legal representatives. *Ryskamp ex rel. Boulder Growth & Income Fund v. Looney*, 2011 WL 3861437, at *4 (D. Colo. Sept. 1, 2011) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). Further, the LLC is the ultimate beneficiary of the attorney-client privilege—not the managers or the members at large. *See generally Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 425 (N.Y. Sup. Ct. 2006) (discussing an LLC as a legal entity distinct from its membership for purposes of deciding a question of attorney-client privilege). But LLCs cannot speak directly to their lawyers or assert the attorney-client privilege on their own behalf. *Ryskamp*, 2011 WL 3861437, at *4 ("a corporation cannot speak directly to its lawyers . . . [so it] can only act through its officers, directors, agents, and employees"). This means the attorney-client privilege must be exercised through the members who are responsible for the operation of the LLC, also known as managers. Applying the attorney-client privilege to an LLC is complicated when the managers object to disclosing their communications with counsel to their own members.

LLC Operating Agreements May Control Whether Communications Can Be Shielded from Members

Most jurisdictions defer to the organizers of the LLC when its organizing documents (including the articles of organization and the operating agreement or bylaws) clearly establish the rights and obligations of its managers and members. *See, e.g.*, *ULQ, LLC v. Meder*, 666 S.E.2d 713, 721 (Ga. Ct. App. 2008) ("It is the policy of this state with respect to limited liability companies to give maximum effect to the principle of freedom of contract and to the enforceability of operating agreements." (citations omitted)). The organizing documents may provide all LLC members with broad access to documents or even limit manager access to specific documents. *In re Mehra v. Teller*, 2020 WL 1230285 (Del. Ch. Mar. 11, 2020) (allowing a director's access to company information to be limited by agreement ex ante); *Obeid v. Gemini Real Estate Advisors, LLC*, 2018 WL 2714784, at *4 (Del. Ch. June 5, 2018) (discussing an operating agreement that allowed any member to inspect and examine company books and records during reasonable

business hours and granting an aggrieved member access to the documents he sought). A proactive understanding of an LLC's organizing documents can preempt an expensive privilege dispute between managers and members.

Generally, LLCs that operate more akin to well-organized corporations than loosely affiliated partnerships enjoy greater protection against requests for privileged information made by their minority members. *Montgomery*, 548 F. Supp. 2d at 1188 (denying a minority member's request to access the LLC's privileged material). A well-defined management structure, clearly established LLC procedures (through bylaws or other internal organizing documents), and well-drafted articles of organization filed with the state may act as a shield against member requests for the LLC's attorney-client communications. *Id.* at 1179–83.

State Law May Provide Members with Broad Access to LLC Documents via Default Statutory Rules

Every state has default organizing rules for an LLC when its operating agreement is silent on the rights and obligations of the managers and members. *See, e.g.*, *Retina Assocs. of Greater Phila. v. Retinovitreous Assocs.*, 176 A.3d 263, 273–74 (Pa. Super. Ct. 2017) (discussing 1994 Pa. Laws § 8904, which provides general rules for LLC organization and allocation of liability); *ULQ*, 666 S.E.2d at 720 (discussing Ga. Code Ann. §14-11-305(1), which provides the statutory duties owed by members to their LLC). In most jurisdictions, the right to access LLC communications and documents is narrower for members as compared with managers. *Kortüm v. Webasto Sunroofs, Inc.*, 769 A.2d 113, 119–20 (Del. Ch. 2000) (discussing 8 Del. Code § 220(c), which imposes a higher standard on corporate shareholders seeking corporate records than on the directors of the same corporation); *see also In re Mehra*, 2020 WL 1230285, at *1 (providing that shareholders and directors are analogous to managers and members for purposes of allocating rights to company information).

Some states, however, may require LLC managers to allow members to access documents containing privileged material. *See, e.g.*, *Janousek v. Slotky*, 980 N.E.2d 641, 650–51 (Ill. App. Ct. 2012) (allowing a former member of an LLC to inspect books and records during the period of his membership pursuant to 805 Ill. Comp. Stat. 180/10-15 (2010)). Further, some states impose a set of quasi-fiduciary rules on managers and members alike for their conduct related to the operation of the LLC. *Retina Associates*, 176 A.3d at 277 (summarizing the duties of members of a manager-managed LLC, including potential breaches of those duties if a manager squeezes out or expels another member, appropriates benefits by exercising or selling control, fails to disclose a self-dealing transaction, or appropriates LLC property for personal use); *Bridlington Co., LLC v. S. Disposal Servs., LLC*, 216 So. 3d 219, 225 (La. Ct. App. 2017) ("La.

R.S. 12:1314 provides that managers and members of an LLC have fiduciary duties to one another").

In the absence of statutory guidance of clear precedent, courts use "reason and experience" to ascertain whether an LLC's management may successfully claim the attorney-client privilege. *Roberts v. Heim*, 123 F.R.D. 614, 622 (N.D. Cal. 1988) (citing *Trammel v. United States*, 445 U.S. 40 (1980)). Such "reason and experience" borrows from other areas of corporate law to settle disputes between LLC management and members. *Montgomery*, 548 F. Supp. 2d at 1181 ("A number of states have . . . applied corporate law to LLCs"). Corporate law from multiple states, along with federal common law, may arise in an interstate dispute involving an LLC with a regional or national footprint. *See, e.g.*, *id.* at 1179 (discussing Nevada, California, and federal common law in deciding whether an LLC should be treated as a corporation or partnership for purposes of the attorney-client privilege); *Delta Financial Corp.*, 819 N.Y.S.2d at 811–12 (applying Delaware law, which borrows from federal common law, in a New York court's adjudication of a privilege dispute involving an LLC).

An LLC's Attorney-Client Privilege Is Not Absolute and May Be Overcome with a Showing of Good Cause

In a privilege dispute between managers and members, good cause may exist if the members can allege that the managers are acting "inimically" to the interests of the LLC. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103–4 (5th Cir. 1970). The privilege is less likely to apply if the LLC's managers are accused of acting illegally by a large share of the members. Members will help their cause to obtain the attorney-client communications with specific descriptions and a showing that the purportedly privileged information cannot be obtained from another source. Courts are less likely to order the production of trade secrets or other confidential information that the LLC has an interest in for reasons other than the attorney-client privilege. Most importantly, courts will not reward members with the LLC's attorney-client communications if the members are engaged in a fishing expedition in support of a frivolous claim. *Id.*

Conclusion

In sum, the question of whether the members of an LLC may obtain privileged communications of the entity depends on the provisions of the LLC's operating agreement and other governance documents, the specific statutory provisions of the state whose law governs, and how the courts apply analogous principles from corporate or partnership law to the context of an LLC.

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American Bar Association, Litigation Section
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Deception, Dissembling, and Dishonesty in Negotiation: Even If You Can, Should You?

By Joan Stearns Johnsen

Everyone knows everyone lies in negotiation, true or false? The truth about lying in negotiation is a bit more nuanced. Lying, even in a negotiation, can get you into ethical trouble. And even when you are not technically violating an ethical rule, is lying the best negotiation option?

The ABA Model Rules of Professional Conduct directly proscribe lying to third parties. Model Rule 4.1, Truthfulness in Statements to Others, makes it a violation to make a false statement of material fact to a third person. Rule 4.1 also imposes an affirmative duty to correct a misimpression that you or your client helped create. There is no exception to this prohibition against lying in the Model Rules, and there are no special rules for negotiation. If the negotiations are made during a mediation or settlement conference with a magistrate judge, lying during negotiations could also implicate Model Rule 3.3, Candor Toward the Tribunal, which governs statements to the court. This article focuses on negotiating directly with third parties, conduct governed by Rule 4.1, but litigators should be aware of other rules, such as Rule 3.3, that could be implicated by lying.

The recognition of dissembling as a common negotiation practice can be found solely in the comments to Rule 4.1. If your jurisdiction has not adopted the comments (and New York has not), you have no enunciated exception for lying in a negotiation.

The comments to Rule 4.1, specifically paragraph [2], provide:

> Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category. . . .

Notably, this comment to Rule 4.1 does not condone lying; rather, it states only that certain types of statements during negotiation could be considered puffery or something other than a statement of a material fact. Therefore, you still may not lie as to material facts. In some jurisdictions—Florida is an example—the rule is not limited to material facts and there is no exception for materiality. To comply with Rule 4.1, you cannot lie about whether you have competing offers as you negotiate the sale of a business. Also, even if the valuation of the company was accurate when you provided it to the prospective buyer, if you discover errors in your initial analysis, you have an affirmative duty to correct the misimpression you created.

Lying in a negotiation is not limited to opinions of value or price or your "bottom line." You may say no in response to the question "Would your client accept $8 million to settle?" You may say no even if your client would happily accept 8 million. Maybe you choose to respond this way because the other side posed this question at an exploratory phase of the negotiation? Maybe your objective is to explore an even better result?

Although these lies are technically permissible, they present potential risks to you and your client. If you lie and say, "My client would never take 8 million," you may at some point lose credibility when you ultimately do settle for $8 million or possibly even less. Going back on your bluff will broadcast that your word cannot be trusted. This will damage your credibility and have an impact on your reputation in future negotiations, with opposing counsel, the opposing party, and the mediator.

An even greater risk involved with lying about opinions of value or bottom lines is that you might be believed. If you say, "My client would never settle this lawsuit for 8 million," although you know he would, and the other party believes you, the other party may walk away from negotiations and your client may lose the opportunity for a deal it would have found acceptable. The possibility exists that the other side will not engage with you when it otherwise might have. If you lose the deal at 8 million, you may not run afoul of Rule 4.1, but you may be in violation of Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer.

An alternative and better approach than lying is to practice blocking or framing techniques. A blocking technique is to sidestep the question. Instead of answering the question directly, you might pose another question and refocus the discussion. When done deftly, this technique shifts the conversation without your adversary even realizing it. Another approach is to frame your answer in a way that, though not untrue, allows you to protect your bottom line while leaving the door open as the negotiation progresses. For example, instead of saying that your client will not accept 8 million, you might say, "My client would not accept 8 million *at this time*" or "*I could not advise* my client to take 8 million," or you might say, "You know this lawsuit is worth more than 8 million." Although subtle, the differences are significant. They protect not only your bargaining position; they also protect your reputation.

Therefore, from a negotiation skills standpoint, although it may be permissible to lie, it may be prudent for you, and better for your client, to decide not to lie and to hone alternative negotiation tactics instead.

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Summer 2021, Vol. 22, Issue 4

Is It Useful to Protect Litigation Hold Letters from Discovery?

By Siobhan Briley

As a general matter, litigation hold letters (also called legal hold letters, litigation hold notices, legal hold notices, and document retention notices) are not discoverable. Most courts that have addressed the issue consider these letters privileged as attorney-client communications or protected by the work-product doctrine. *See, e.g.*, *Radiation Oncology Servs. of Cent. N.Y., P.C. v. Our Lady of Lourdes Mem'l Hosp., Inc.*, 69 Misc. 3d 209 (N.Y. Sup. Ct. 2020); *In re eBay Seller Antitrust Litig.*, No. C 07-01882 JF (RS), 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007); *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116 (N.D. Ga. 2007); s*ee also* Paul W. Grimm, Michael D. Berman, Leslie Wharton, Jeanna Beck & Conor R. Crowley, "Discovery about Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?," 37 *Univ. Balt. L. Rev.* 413, 420–23 (Spring 2008) (citing cases). Some courts have held that they are not protected by any privilege or as attorney work product but are nonetheless not discoverable because they are irrelevant. *See, e.g.*, *Bagley v. Yale Univ.*, 318 F.R.D. 234, 240 (D. Conn. 2016). Nonetheless, litigants are entitled to inquire into the facts about what steps their opponents took to ensure that all relevant evidence has been preserved. *In re eBay Seller Antitrust Litig.*, 2007 WL 2852364, at *2.

When there has been a preliminary showing of spoliation of evidence, however, courts generally require that litigation hold letters be produced. *See, e.g.*, *Radiation Oncology Services*, 69 Misc. 3d at 210. Courts likely order production of litigation hold letters in the case of spoliation because an inadequate litigation hold letter is a factor some courts consider when determining whether sanctions for spoliation are warranted. *See, e.g.*, *BankDirect Capital Fin., LLC v. Capital Premium Fin.*, No. 15 C 10340, 2018 WL 1616725, at *3 (N.D. Ill. Apr. 4, 2018). But by the point the parties are litigating over spoliation—as many litigators have experienced—it is too late to do anything to address the inadequacy of the legal hold letter.

Viewing a litigation hold letter as privileged and protected attorney work product makes sense: It is communication between an attorney and a client, it was prepared specifically for litigation, and it contains the attorney's mental impressions. *But see Bagley*, 318 F.R.D. at 240 ("the predominant purpose of that communication was to give recipients forceful instructions about what they must do, rather than advice about what they may do"). However, our system of discovery requires, for instance, the plaintiff to define the universe of evidence available to the defendant to defeat the plaintiff's claims and vice versa. Obviously, each side wants to ensure that the other side has access to the most limited set of information possible, while obtaining for

itself the most robust set of information. Because neither side has any input into the contents of the other's litigation hold letter, it is not possible to ensure that some relevant evidence will be excluded from what is preserved. Further, when something goes wrong and evidence is not preserved, the party whose attorney drafted the instructions for preservation suffers the consequences.

What if litigators were to change these procedures? What if the plaintiff were required to draft the litigation hold letter to be sent to the defendant and the defendant's employees, and the defendant had to do the same for the plaintiff and its employees? While this would not eliminate all possible claims for sanctions for spoliation, it certainly would vitiate any claim that the hold letter itself failed to require preservation of potentially relevant information.

This method would require the parties to negotiate the breadth of discovery for each side, but that happens anyway in large cases with significant amounts of electronically stored information. No doubt some will argue that having the opposing party draft your litigation hold letter will result in the revelation of that attorney's mental impressions about the case or telegraph that side's theory to the other. I do not see this as a big problem. The contents of a litigation hold letter are similar to discovery requests, which, of course, are not privileged: They are expressly directed to the other side. Others may argue that this suggested approach will result in over-preservation. Perhaps. But given the prevalence of discovery disputes about spoliation of evidence, over-preservation seems a small price to pay. Agreeing to preserve information does not vitiate objections to specific discovery requests; and, certainly, it does not transform information into admissible evidence. In cases with gigabytes or terabytes of electronically stored information, a balancing test easily can address any significant additional cost arising from such preservation.

Litigation has reached a point in this county where parties spend more and more time fighting over the fight. As a result, courts are overwhelmed and cases are not resolved for years, sometime decades. Perhaps it is time to consider how to minimize discovery disputes so we can focus on the actual cases? Disclosing litigation hold letters, or negotiating their content from the beginning, could be one step in that direction.

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PRACTICE POINTS

Trademark Litigators: Congress Reinstated the Presumption of Irreparable Harm in Lanham Act Cases

By Kyle R. Kroll

In the fall of 2020, Congress passed the COVID-19 stimulus package as part of the Consolidated Appropriations Act. Although stimulus checks received the bulk of press coverage, the bill included amendments to the Lanham Act, referred to as The Trademark Modernization Act of 2020, that established a *presumption* of irreparable harm for violations of the Lanham Act—effectively overruling the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006), holding that there is no presumption of irreparable harm in patent infringement cases, which several courts had extended to trademark infringement actions.

The statutory language now reads:

> The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title. A plaintiff seeking any such injunction *shall be entitled to a rebuttable presumption of irreparable harm* upon a finding of a violation identified in this subsection in the case of a motion for a permanent injunction or upon a finding of likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order.

15 U.S.C. § 1116(a) (emphasis added).

This new presumption of irreparable harm became effective in December 2020. Yet, in the over nine months since then, the majority of courts ruling on motions for injunctive relief in Lanham Act cases have not noted this change and have instead continued to apply *eBay*. Had movants in these cases notified their courts of the statutory amendment in moving for relief, it is likely the results in several would have been different.

In fact, in at least three cases (as of the date of this writing), the courts determined the movant had not sufficiently shown irreparable harm and denied injunctive relief. *See, e.g.*, *Dynatemp Int'l, Inc. v. R421A, LLC*, No. 5:20-CV-142-FL (E.D.N.C. July 30, 2021); *Sec. USA Servs., LLC v. Invariant Corp.*, No. 1:20-CV-01100-KWR-KRS, 2021 WL 2936612, at *5 (D.N.M. July 13, 2021); *Zamfir v. Casperlabs*, No. 21-CV-474-GPC(AHG) (S.D. Cal. Mar. 26, 2021). In these

cases, the courts did not acknowledge the statutory presumption—perhaps because they were unaware of the change.

It is likely that had movant argued for application of the presumption and made it known to the court, the results in these cases would have been different, and the courts would have issued injunctions (instead of denying them). Indeed, courts explicitly taking note of the presumption have overwhelmingly granted injunctive relief. *See, e.g.,* *Bisous LLC v. The CLE Group, LLC*, No. 3:21-CV-1614-B (N.D. Tex. Aug. 16, 2021); *SoClean, Inc. v. Sunset Healthcare Solutions, Inc.*, No. 1:20-CV-10351-IT (D. Mass. Aug. 13, 2021); *Tee Turtle v. Christina Swartz*, No. 2:21-CV-01771 (S.D. Ohio June 9, 2021).

The key insight for practitioners in Lanham Act cases is this: Congress has established a potent presumption of irreparable harm that applies to trademark infringement and false advertising cases. Those who move for injunctive relief would do well to point to this presumption in support of their motions. Those who oppose injunctive relief will likely need to expend additional efforts either rebutting the presumption of irreparable harm, or in more forcefully countering the movant's showing of a likelihood of success on the merits—the linchpin for application of the statutory presumption. Knowing this and taking proactive steps to address the changed landscape—whichever side you're on—will increase the odds of success.

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