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Party Lines

By Peter H. Geraghty
Director, ETHICSearch

You represent a client in a contract matter. Negotiations have been proceeding slowly and you recently learned that your client has been communicating with the opposing party directly in an effort to resolve the situation.

Do you have an obligation to instruct your client to cease communication with the opposing party?

If not, what if any direction can you give to the client about the substance of the communication?

Occasionally, ETHICSearch receives inquiries from lawyers who have questions about party-to-party communications under circumstances where the opposing party is represented. Questions in this area involve Rule [4.2 Communication With Person Represented by Counsel](#), and Rule [8.4 Misconduct](#) of the ABA Model Rules of Professional Conduct. Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

An excerpt from paragraph 4 of the Comment to Rule 4.2 states as follows:

A lawyer may not make a communication prohibited by this Rule through the acts of another.

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See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

Subpart (a) of Rule 8.4 *Misconduct* states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;...

ABA Formal Opinion 92-362

In 1992, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-362 [Contact With Opposing Party Regarding Settlement Offer](#) (1992)

Opinion 92-362 discussed *inter alia* whether a lawyer could advise his or her client that the client could communicate directly with the opposing party under circumstances where the lawyer believes that opposing counsel had not communicated a settlement offer to the client. The Committee concluded that under Rules [1.1 Competence](#) , [1.2 Scope of Representation And Allocation of Authority Between Client And Lawyer](#), [1.4 Communication](#) and [4.2 Communication With Person Represented by Counsel](#) the lawyer could advise the client of his right to communicate with the opposing party, and gave the following analysis of the development of ABA Model Rule 4.2 to support its conclusions:

...In the Committee's view, fulfillment of the duties imposed by these Rules requires that the lawyer for the offeror-party advise that party with respect to the lawyer's belief as to whether the offers are in fact being communicated to the offeree-party. Likewise, the offeror-party's lawyer has a duty to that party to discuss not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party.

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We find support for this conclusion in the fact that Rule 4.2 omits the phrase "or cause another to communicate," which appeared in DR 7-104(A)(1), and in the fact that the House of Delegates in 1983 rejected an amendment that would have restored it. As reported in *The Legislative History of the Model Rules of Professional Conduct* (ABA Center for Professional Responsibility, 1987), at 148-49:

An amendment proposed by the New York State Bar Association, which would have added the phrase "or cause another to communicate," was defeated. The opponents objected to a possible interpretation of the amendment that would prevent lawyers from advising principals to speak directly with their counterparts. The Rule was not intended to prohibit such advice. To the extent the amendment would have precluded a lawyer from using an intermediary to carry a message from the lawyer to the opposing party, such conduct was prohibited by Rule 8.4(a) which prohibited a lawyer from violating a Rule "through the acts of another."

While Opinion 92-362 discussed party-to-party communication, it did so in the narrow context of communicating settlement offers. The opinion did, however, recognize the delicate situation lawyers face when advising a client that he or she can communicate with the opposing party. The last paragraphs of the Opinion states:

...there is a tension between the lawyer's latitude to advise the offeror-client about the client's right to communicate directly with the offeree and about how that communication can most effectively advance the interests of the offeror, and Model Rule 8.4(a)'s prohibition on a lawyer's doing indirectly what the lawyer may not do directly.

Rule 8.4(a) provides that:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce

another to do so, or do so through the acts of another....

The prohibition of this Rule against a lawyer's violating the Rules through the acts of another raises a number of questions about, inter alia, what a lawyer may or may not say to the lawyer's client, sufficiently broad and complex to require separate attention. Leaving for another day any opinion on that broader subject, (emphasis added) the Committee concludes that in the factual setting of this Opinion, where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation.

State Bar Ethics Opinions

There have been state bar opinions issued on this topic. Some of them address situations similar to that discussed in Formal Opinion 92-362 and agree with that opinion's conclusions. See, e.g. Connecticut Formal Opinion 93-10 (Where lawyer fears that settlement offers are not being transmitted to the opposing party, the lawyer can advise the client that he or she can communicate directly with the opposing party), South Carolina Opinion [93-16](#) (Lawyer who is having trouble reaching opposing counsel re settlement offer may advise client of his or her right to communicate with the opposing party directly). See also North Dakota Opinion [96-10](#) (1996) (Lawyer has no duty to stop client or to withdraw from representation where the client on his or her own initiative is communicating directly with a represented opposing party). But, compare State Bar of Michigan Opinion [RI-171](#) (1993) in which the Michigan Committee, while recognizing the client's right to communicate directly with the opposing party rejected Formal Opinion 92-362's interpretation of the significance of the omission of the phrase "or cause another to communicate," from Rule 4.2 and stated that Rules 4.2 and 8.4 when read together prohibit a lawyer from advising his client that he or she can communicate with the opposing party directly:

The Rules set parameters for the conduct of lawyers,

and not clients. The lawyer is responsible for the lawyer's behavior and not that of the client. Admittedly, there is a tension between the competing interests of informing one's client and the knowledge of what the client will do with that information. As noted in [CI-920](#), even if the lawyer knows the client may share the draft settlement document with the opposing party, the lawyer does not violate the Rules if the lawyer does not advise or encourage the client to tender the offer.

A lawyer's telling a client that the lawyer believes a settlement offer has not been conveyed by opposing counsel, advising the client that the lawyer may not contact the opposing party directly, and finally advising the client that the client is free to contact the opposing party directly, as condoned in ABA Op 92-362, is tantamount to an invitation to the client to contact the opposing party.

The Michigan opinion stated further that if the lawyer believes that opposing counsel is not transmitting a settlement offer to his client, he should report him to the appropriate disciplinary authority.

Illinois State Bar opinion 04-02 (2005) reached a conclusion similar to that of the Michigan opinion, although it did so partly because of a significant difference between the ABA and Illinois versions of Rule [4.2](#). Opinion 04-02 recognized that parties have an absolute right "to negotiate directly and sign agreements without his or her lawyer's presence or consent" but concluded that:

Lawyers, however, may not suggest the client contact the other party. Nor may they assist the client in contacting the represented party. Illinois Rule [4.2](#) unlike the ABA Model Rule forbids lawyers from "caus[ing] another to communicate" with a represented party."

Other state bar opinions discuss some aspects of the questions that Formal Opinion 92-362 left for another day, i.e., the extent to which a lawyer can counsel a client regarding the substance of a party-to-party communication. See, e.g. California State Bar Opinion [1993-131](#):

...When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule [2-100](#). Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney. An attorney is also prohibited from sending the opposing party materials and simultaneously sending copies to the party's counsel. Providing copies to opposing counsel does not diminish the prohibited nature of the communications with the opposing party.

An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney.

When the content of the communication to be had with the opposing party originates with and is directed by the client, it is permitted by rule 2-100. Thus, an attorney may confer with the client as to the strategy to be pursued in, the goals to be achieved by, and the general nature of the communication the client intends to initiate with the opposing party as long as the communication itself originates with and is directed by the client and not the attorney.

Rule 2-100 specifically contemplates that communication between an attorney and an opposing party represented by counsel is appropriate with the consent of the opposing counsel. Therefore, prudent attorneys concerned about anticipated communication between parties on disputed issues should attempt to reach an understanding with opposing counsel as to the standards that will apply to counsel's involvement in such communication.

See Also The Association of the Bar of the City of New York Opinion

[2002-3](#) (2002). This opinion considered the question of the extent to which a lawyer can advise his client about the substance of party to party communications under circumstances where the client conceives the idea of communicating directly with the adverse party. This opinion withdrew an earlier New York State Bar Opinion [1991-2](#) (1991) that had concluded that:

...(1) A lawyer may not encourage or "cause" a client to communicate with a represented party, without the consent of opposing counsel or legal authorization; and (2) even in situations when the client independently decides to contact a represented party, the lawyer should advise the client that, without opposing counsel's consent, the lawyer cannot assist or advise the client in these communications.

In 1999, [DR 7-104](#) of the New York Code of Professional Responsibility and the accompanying Ethical Considerations were amended. Subpart (B) was added to the Rule that reads as follows:

Notwithstanding the prohibitions of DR7-104[1200.35] (A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place. DR 7-104(B).

Ethical Consideration 7-18 was also amended to read as follows:

EC 7-18 further provides that a lawyer may advise his or her client to communicate directly with a represented person, "including by drafting papers for the client to present to the represented person," so long as the attorney gives "reasonable advance notice" that such communications will be taking place. EC 7-18 defines "reasonable advance notice" as "notice provided sufficiently in advance of the direct client-to-client

communications, and of sufficient content, so that the represented person's lawyer has an opportunity to advise his or her own client with respect to the client-to-client communications before they take place."

The Opinion also cited to the Restatement (Third) of the Law Governing Lawyers § 99C, comment (k) (2000) that states as follows:

"... the anti-contact rule does not prohibit a lawyer from advising the lawyer's own client concerning the client's communication with a represented nonclient . . . Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer."

Interpreting DR 7-104 as amended, the Committee concluded:

This Committee concludes that where the client conceives the idea to communicate with a represented party, DR 7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.

Case Law

There is case law on point stating that lawyers may not orchestrate the substance of a client's communication with a represented party. See, the annotations following Rule 4.2 from the 2003 edition of the *ABA Annotated Model Rules of Professional Conduct* (**Note**: the new 2007 edition of the *ABA Annotated Model Rules* will be available later this

summer.) that states as follows:

... OPPOSING PARTIES MAY SPEAK TO EACH OTHER

A party to a matter is free to speak directly to other parties and witnesses, even when those parties and witnesses are represented by counsel. Rule 4.2, Cmt. [4]. See, e.g., *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, 2002 WL 1433717 (N.D. Ill., July 2, 2002) (no ethics rule prevents officer of one company from directly contacting officer of opposing party); ABA Formal Ethics Op. 92-362 (1992) (lawyer who has serious doubts whether settlement offer he made to opponent's lawyer has been communicated to offeree may not ask offeree, but may tell client that he himself is free to ask).

The lawyer may not, however "mastermind" the communication between the lawyer's client and a represented person. See *Trumbull County Bar Ass'n v. Makridis*, 671 N.E.2d 31 (Ohio 1996) (personal injury plaintiff's lawyer suggested her client call defendant about client's anticipated trial testimony just before trial; during call, plaintiff handed telephone to lawyer, who continued the conversation but then withdrew as plaintiff's counsel; public reprimand); *New York City Ethics Op. 2002-3* (2002) (if client "conceives of the idea" of communicating with a represented party, lawyer may advise client about it but must avoid helping client either elicit confidential information or encourage other party to proceed without his or her counsel); cf. *Ex parte Lammon*, 688 So. 2d 836 (Ala. Civ. App. 1996) (plaintiff suing his mother for injuries suffered on her property had his lawyer accompany him on visit to the mother in nursing home though they knew she was represented; lawyer disqualified). See generally Zoghby, *The Prohibition of Communication with Adverse Parties in Civil Negotiations: Protecting Clients or Preventing Solutions?*, 14 *Geo. J. Legal Ethics* 1165 (2001); Kleiman and Hofstein, *Ethical Concerns Relating to Communications with*

Represented Parties, 33 Fam. L. Q. 349 (1999).

See also *Holdren v. General Motors Corp*, 13 F. Supp. 2d 1192 (1998) (lawyer who advised client about obtaining affidavits from other employees in employment suit and showing client how to draft affidavit “stepped over [the] line”), *In Re Pyle*, 91 P. 3d 1222 (Kan 2004) (Lawyer who prepared affidavit for opposing party and encouraged his client to deliver it to him knew that the client would obtain opposing party’s signature without opposing party’s consent.)

Conclusion

Ethics opinions and case law in this area agree that parties have the right to communicate with each other directly, and that lawyers may not “mastermind” the substance of the party to party communication. There is however some disagreement as to whether lawyers can inform their clients of the right to do so. As is typical of these types of questions, it is crucial to check the ethics opinions, rules of professional conduct and case law that have been adopted or issued in the applicable jurisdiction.

[ETHICSearch](#) is intended to stimulate awareness of ethical problems and illustrate the varying approaches of different jurisdictions. It is not intended as legal advice. The ABA Model Rules of Professional Conduct and the opinions discussed are advisory only; the ethics rules, laws and court decisions of your jurisdiction may dictate a different result.

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ABA adopts new policy on mandatory retirement and encourages law student volunteers

The ABA House of Delegates, the association's policy-making body – consisting of some 550 members from state and local bar associations across the country as well as from ABA affiliates – met August 13 and 14 to consider policy recommendations.

The House adopted recommendations that called for law firms to discontinue mandatory age-retirement policies and replace them with individual evaluations of senior partners; encouraged law schools to help provide opportunities for law students to participate in law-related volunteer service programs; and encouraged law practice contingency planning. Contingency planning calls for designating another lawyer who is willing and able to assume another lawyer's practice should the first lawyer have any physical or mental disability that impairs his or her ability to practice law.

The House also addressed the issue of torture and detainees, urging that those detained are treated in a manner consistent with the U.S. Army Field Manual; adopted policy supporting procedures whereby civil cases are not dismissed solely on the state secrets privilege; and urged the appointment, retention and replacement of U.S. Attorneys so that they are able to exercise their professional judgment and discretion insulated from improper partisan political considerations.



ABA President William H. Neukom and immediate past ABA President Karen J. Mathis present U.S. Supreme Court Justice Anthony M. Kennedy, a known baseball fan, with two baseballs, one signed by Hank Aaron and the other signed by Barry Bonds. Laurel Bellows, chair, House of Delegates, looks on.

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The House also adopted a resolution in response to the recent Supreme Court decision in the Ledbetter pay discrimination case, urging Congress to ensure that in claims involving discrimination in compensation, “the statute of limitations runs from each payment reflecting the claimed unlawful disparity.” Additional policy adopted by the House may be found at www.abanet.org/leadership/2007/annual/.

During the Annual Meeting, members of the House also witnessed the presentation of the ABA Medal to Supreme Court Associate Justice Anthony M. Kennedy by immediate past ABA President Karen J. Mathis. In addition to the ABA Medal, Mathis presented Justice Kennedy, a known baseball fan, with a baseball signed by Hank Aaron, and ABA President William H. Neukom presented Justice Kennedy with a baseball signed by Barry Bonds.

In addition members of the House heard remarks by Mathis and Neukom and from ABA Executive Director Hank White.

If you were unable to attend the Annual Meeting, please visit www.abavideonews.org/ABA435 to view significant portions of the meeting online.

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Planning, organization and financials, oh my! Law practice requires more than the law

When it comes to setting up a law practice, lawyers often think that knowing the law is all they need.

According to a panel of lawyers and legal consultants who work with general and solo practitioners, knowing the law is just the beginning. The panel offered a business boot camp for members of the General Practice, Solo and Small Firm Division at the recent ABA Annual Meeting.

The panelists outlined five business areas that they believe are critical to the success of any lawyer venturing into solo practice. The first area is planning. "It's easy to minimize the importance of planning," said Jim Calloway, director of the management assistance program of the Oklahoma Bar Association.

Nerino Petro, practice management advisor with the State Bar of Wisconsin, agreed, saying, "Law school teaches about the practice of law, but not the business of law."

The five panelists pointed out that there are three types of plans: strategic, business and disaster. A strategic plan guides the direction of the firm, addressing such questions as type of law, number of clients and financial goals.

A business plan focuses on the day-to-day operations, including budgeting and taxes as well as hours of operation, physical location and other details.

Calloway pointed out that a plan must be written down. "Until you write it down, it's only a dream."

For disaster planning, Ross Kodner, CEO and Senior Legal Technologist of Microlaw, Inc., in Milwaukee, said to store electronic

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back up of files offsite. He recommended photocopying or scanning every document as an additional precaution so back up is available in paper form and electronically.

The second area of focus was business organization. Panelists suggested considering the legal form, whether a sole practitioner, partnership, corporation or limited liability organization. They stressed the importance of knowing and meeting all filing requirements.

Petro said, "Everyone gets paid before you do and first in line is Uncle Sam."

Panelists gave the IRS Web site (www.irs.gov) as a resource for planning, forms, applications and other small business information.

Financial considerations were the third area discussed. While each of the panelists had a favorite accounting program, they agreed that having a way to track time through billing was critical.

The panel members discussed good collections policies. Jeff Allen, Graves & Allen, Oakland, Calif., said that collecting fees was an important skill if lawyers do not want to do all their work *pro bono*.

Allen also suggested in the operations area that small firm lawyers consider establishing a relationship with a professional staffing agency. "Initially, lawyers might have to pay a higher hourly rate, but someone else will figure employment taxes and provide benefits, plus you will be able to quickly add or subtract staff as your work requires."

The final area covered by the panel was attracting and retaining clients. Sandy Bautch, legal technology consultant, Easy Productive Solutions, Winterset, Iowa, noted that a plan with a sense of direction can set the framework for marketing.

The other panelists suggested that blogging is a good way for solo and small firm lawyers to promote their practice specialties.

Kodner said that blogging helps establish a lawyer as a subject expert, noting search engines favor blogs by putting them high in lists of search results. Allen cautioned that unless a lawyer enjoys writing, a blog can take more time than the lawyer wants to spend.

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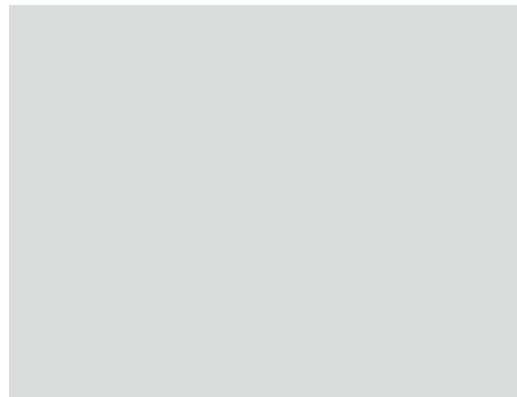
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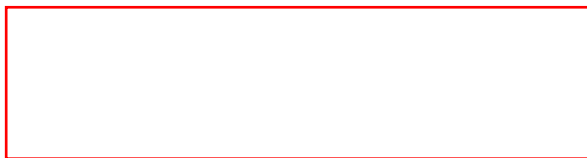
More information on how setting up a law practice is available at <http://www.abanet.org/genpractice/resources/startafirm.html>

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Does nanotechnology offers threats Or promises? The jury is still out

Does nanotechnology promise a series of innovations in healthcare, consumer products and industry or does it offer the threat of unknown potential for environmental and individual risks?

That was the underlying question at a session – “Nanotechnology: Will Big Legal Problems Come in Very Small Packages?” – presented at the recent Annual Meeting in San Francisco.

On one hand, representatives of the FDA and the chemical industry point out existing safeguards under consumer protection laws. They also note that because nanotechnology deals with a different form of existing chemicals these chemicals are covered by current laws. The suggestion from the FDA is to wait and see how nanotechnology is used to determine what types of legislation or regulation might be needed.

Not good enough, said George Kimbrell, staff attorney for the International Center for Technical Assessment. Today firms are

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spending \$9 billion a year on research and development in adapting nanotechnology to new and existing products, he said. By 2015, Kimbrell estimated that that amount will grow to \$1 trillion.

"Paints and coatings, packaging, personal care products, cosmetics and sunscreens are all areas where nanotechnology is being used today," he said.

Because of their extremely small size nano-particles can go places other chemicals cannot. For example, nano-materials from sunscreens can enter the body through the skin and move from blood into tissues. No one knows the long-term implications, said Kimbrell.

His organization has filed a petition against the FDA for failing to regulate the health and environmental hazards of nanotechnology. The ICTA would like a recall of all sunscreens containing nano-particles until the safety is assured.

Paul Howard of the FDA pointed out that the FDA is actively studying nanotechnology for health and safety. The FDA regulates 25 percent of the nation's commerce, and Howard noted that the agency not only looks at products on a case-by-case basis, but just completed a report on nanotechnology that was released in July 2007.

From a company perspective, Mark Duvall, management counsel for Dow Chemical, said the question is how to balance risks versus benefits. "Good tests are years away. We don't want to hold up products." At the same time, Duvall said his company does not want to endanger employees or the public.

"We actively comply with all FDA regulations and work with government review of new products." He explained that knowing when something is new can be a challenge because often nano-particles are extremely small versions of existing chemicals. "The FDA regulates the molecular or chemical structure, not the physical properties, of a product. We are left to wonder if we are working with a new product."

John Pendergrass of the Environmental Law Institute looked at another facet of nanotechnology: the impact of nano-particles on plants, animals and natural resources. Co-author of a report – *Where Does the Nano Go? End-of Life Regulation of Nanotechnologies*, published by The Pew Charitable Trust – Pendergrass said that

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although nano-particles are extremely small, they have extensive surfaces that can interact with the environment.

He raised the question of whether wastes from nanotechnology processes should be considered solid wastes under RCRA (Resource Conservation and Recovery Act) and CERCLA (Comprehensive Environmental Response, Compensation and Liability Act), or Superfund.

Pendergrass's group is working in a joint partnership with E.I. du Pont de Nemours and Company to evaluate risks.

All panelists agreed that products incorporating nanotechnology are already on the market making the need to know more about possible effects on humans and other parts of the natural world critical.

They emphasized the positive implications of nanotechnology. For example, a scaffold of carbon nanotubes can help restore severed spinal cords so that people with certain injuries can walk again.

Further information is available at www.NanoRiskFramework.com, www.nanotechproject.org, and www.fda.gov/nanotechnology/taskforce/report2007.html.

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Louis Vuitton to Chewy Vuiton: famous marks and the brands they stand for

When the luxury luggage and accessories company Louis Vuitton learned about high-end dog accessories being marketed as Chewy Vuiton products, they sued under the Federal Trademark Dilution Act of 1995, enacted in 1996.

The 1995 FTDA both strengthened and narrowed trademark protection in the United States so that companies with original marks – words or symbols, colors or trade dress could ensure the integrity of their brands against infringement and dilution.

Trademark infringement is use of a mark that causes or is likely to cause confusion among consumers regarding the origin of the goods and services offered for sale. Dilution creates an association with a senior mark, lessening its distinctiveness.

According to Bobby Ghajar, a lawyer with Howrey LLP, who served as a panelist discussing “What Everyone Should Know about Famous Marks and the Brands that Would Dilute Them” at the recent ABA Annual Meeting, “Dilution is a death by a thousand cuts.”

Louis Vuitton Malletier, S.A., claimed dilution against Haute Diggity Dog LLC, manufacturer of Chewy Vuiton products.

Under the FTDA of 1995, the law sought to create uniform protection for distinctive and famous marks. It also acknowledged that a mark or name in one geographic area or industry might not be famous in another. To prove dilution under the FTDA, companies need to show actual tarnishment or loss of sales.

In the case of an adult store called Adults R Us, a judge ruled dilution by tarnishment in favor of Toys R Us. In the case of another adult products store named Victor's Secret, later Victor's Little Secret, the court held that the name did not tarnish or dilute the name of Victoria's

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Secret as the women's lingerie chain had suffered no adverse financial impacts.

Then there was a 2006 suit by Milbank Tweed, a New York law firm dating back to 1866, that began marketing itself as Milbank. A real estate company in Los Angeles, MRE, renamed itself in 2002 as Milbank Real Estate. The law firm Milbank sued for dilution. However, Milbank Real Estate received a summary judgment in its favor because Milbank Tweed had failed to show that Milbank was a famous mark in 2002 when the real estate company adopted the same name. The court additionally ruled that both companies occupy different market segments.

In the Louis Vuitton v. Chewy Vuiton case, the court ruled in November 2006 that the Chewy Vuiton products are clearly a parody and are protected under the First Amendment.

Katherine Basile, panel moderator and also a lawyer with Howrey, LLP, said that Louis Vuitton is appealing.

Two other panel members, James R. Cady, an IP lawyer with Howrey, LLP and formerly in-house trademark counsel for Red Bull GmbH in Austria, and Tuan Le, senior trademark counsel with Intel Corporation, offered advice on protecting trademarks.

Le said, "First find out how to make the mark famous and then protect it." Le told the audience about how Intel worked to create a demand for its processors after the company was ordered to share its technology with competitors.

Cady described the process of establishing the Red Bull brand internationally and the vigilance required to keep companies imitating their packaging off the shelves.

More information on trademarks, infringement and dilution is available at the ABA Section of Administrative Law and Regulatory Practice www.abanet.org/adminlaw/

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Appellate mediation: how, where and why?

“Appellate Mediation: What Makes It Different and Why Does It Work?” was the topic of discussion during an Annual Meeting program.

Senior Judge Dorothy Nelson, U.S. Court of Appeals, 9th Circuit, Pasadena, Calif., outlined the program by posing several questions that a panel of experts would address. What is appellate mediation, and what are the benefits? How is appellate mediation different from pre-trial mediation? What kinds of cases lend themselves to appellate mediation?

In addition to Judge Nelson, the panel included Claudia Bernard, chief circuit mediator for the Ninth Circuit Court of Appeals; Pamela Dunn, with Dunn Koes LLP, Pasadena, Calif.; Jon Eisenberg, a civil appellate practitioner with Eisenberg & Hancock LLP; Ignazio Ruvolo, presiding justice of the California First District Court of Appeals, Division Four; and John A. Toker, San Francisco lawyer, mediator and arbitrator.

Toker explained that, as a young lawyer, he was told that appellate mediation was an oxymoron, but he believes that statement is no longer true. Bernard weighed in, saying that courts want appellate mediation for a simple reason: it works. And, Judge Nelson reiterated its benefits by saying that it brings quick resolution to cases.

Bernard brought somewhat of a human element to the discussion of arbitration, saying that – like other mediation – the mediator provides an opportunity for the individuals involved to tell someone what they really need, want and what their interests are. Often people just want their story to be heard.

Eisenberg addressed the definition of appellate mediation: in an appellate situation, the judge has already spoken; lawyers may have come to hate each other; and appeals can take a long time, can generate unwanted publicity and can exhaust all parties.

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There's a presumption of corruption in appellate cases, continued Eisenberg, and there are limits on issues that can be raised.

A lively discussion ensued about the advantages and disadvantages of mandatory versus voluntary mediation, and panelists weighed in with their own experience about a hybrid of the two. The program also provided a forum for the panelists to discuss the rate of success of appellate mediation, and also the degree of willingness of both local and federal government to participate.

The ABA Section of Dispute Resolution sponsored the program.

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Resume critique session offers law students opportunity to meet potential employers

More than 250 students attended a Law Student Division Career Fair during the ABA Annual Meeting. Structured as a table-talk event, the fair gave students an opportunity to learn more about a firm, agency or organization, as well as to make a positive impression and leave a resume. The session provided students with the opportunity to meet with potential employers without the stress of a formal on-campus interview.

The law students chatted animatedly with each other as they waited for their appointments to meet with one of six professionals at the career session.

According to Patricia Brennan, division director, approximately 75 students took advantage of the service during the division's inaugural career fair, with each spending between 15 and 30 minutes with a lawyer or legal recruiter to receive resume advice. This advice was available to all ABA Law Student Division members.

In addition to hearing advice about how to create the best possible first impression through a resume, students were able to speak with representatives from 18 law firms, non-profit associations and governmental agencies.

Law students who attended the career fair received a first chance at luncheon tickets to the Career Panel Lunch and Learn, cosponsored by the ABA Tort Trial and Insurance Practice Section as well one sponsored by the ABA Labor and Employment Law Section.

According to Brennan, the division is very pleased with the success of the event, and it expects to make the Career Fair an annual event.

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Clicking "I Agree" means a contract – or does it?

In the Annual Meeting session on “Web Site Agreements: I Didn't Agree to Those Terms, Did I?” presented by the Committee on Cyberspace Law of the Section on Business Law, participants learned that online agreements can be more or less than they seem.

Critical to whether online terms are binding are placement of the terms, and whether or not a person has the opportunity to review and understand the terms. In other words, a page cannot time out before a typical person can read all terms and conditions listed.

Terms and conditions need to be clearly marked and available. Juliet Moringiello, professor at Widener University School of Law in Harrisburg, Penn., explained that the terms don't need to be a click-through page, but need to be clearly accessible. She noted that the physical placement on the page, the color and the size of font are all relevant in showing a viewer how to locate the terms and conditions.

She said in *Hubbert v. Dell*, the court found that the color of the link – the blue that has come to signify a link on the web - and its placement on each page gave adequate notice. In *Sprecht v. Netscape*, the court found that the notice was insufficient as it was “below the fold” and a user might not know to scroll down.

Clear notice of terms includes presenting conditions during registration, having a scroll box appear, ensuring a hyperlink is clearly visible or requiring the user to click on the screen with terms before proceeding.

Kathleen Porter, business partner and co-chair of the Intellectual Property and Technology Group at Robinson & Cole LLP, discussed giving a viewer a meaningful opportunity to review terms.

She pointed out that terms and conditions must follow generally

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accepted practices for paper documents, such as font size and conspicuousness. In addition, as noted, viewers must be able to read at their own pace, be able to go back and forth within the document and have more than one opportunity to review.

The Federal Trade Commission requires that language be clear and jargon-free. Moreover, FTC Dot-Com Guidelines disapprove of a pop-up box that disappears after one viewing so that the consumer has no chance to later review or compare the terms.

Porter said there cannot be an agreement to something the individual did not see.

Notice of terms must precede the consent although consent can take several forms, said Christine Kunz, professor of law at William Mitchell College of Law in St. Paul, Minn. "Express consent can involve clicking an icon, clicking words or typing specified words while continuing to the next page, submitting a query, downloading software or perhaps just using the site can imply assent."

The challenges for both companies and consumers are changes to the terms and conditions. For example, if a company changes its privacy policy to sell customer data or posts a notice that it is increasing fees, those changes might not be binding. While the user may have agreed initially, he or she did not have a chance to agree or disagree with the revised terms and was not able to negotiate with the company.

As a result, even the term "subject to change without notice" may not be enforceable.

This presentation and related materials are available at www.ababusinesslaw.com.

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Judges learn mediation techniques from peers

A standing-room-only crowd of lawyers – many of them sitting or retired judges – listened intently as several of their peers discussed mediation and settlement conferences during "Dispute Resolution Principles and Techniques for the Bench" during the recent ABA Annual Meeting.

The panel of experts addressed such questions as the judge or mediator's responsibility and the expectations of clients coming before them; the difference between how a judge versus a mediator should act in a case; what the judge needs from the parties, and how the judge closes a deal.

Judge Wayne Brazil, of Oakland, Calif., emphasized the importance of understanding the local culture where the case is being brought, and having some sense of expectations of the people appearing before the judge. A pre-settlement conference call can assist in helping to learn about those expectations. Mary Alexander, San Francisco, echoed the benefits of the pre-settlement conference call.

Think about your priorities, Brazil stressed, and avoid distractions. She continued by listing possible priorities, culminating with the need to "demonstrate commitment to the integrity of the process. Listen to, and be respectful of, the people before you. Eschew your own ego," said Brazil.

Alexander, in response to the question of what the judge needs from the parties, said that the judge or mediator should have the settlement brief or statement in hand as early as possible before the case. "Read the brief," said Alexander, "and show that you have." It's beneficial to give an overview of the case to the people before you to show that you've done that homework. It also helps instill trust, she added.

In order to close the deal, Judge Ellen Sickles James of Walnut Creek, Calif., said, "Sometimes you can talk to lawyers separately. If you

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need to walk away, try to walk away with the door open, not slammed shut.”

The CLE program was sponsored by the Judicial Division and cosponsored by several additional ABA entities. The session was the first of three panels focused on dispute resolution Friday afternoon.

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Helping lawyers understand jurors

Understand your audience – the jurors – and meet them where they are, said Tara Trask of Tara Trask and Associates, in opening the program, "Litigation Skills Session: How Jurors Think – Crafting a Jury-Friendly Case from Start to Finish," during the recent ABA Annual Meeting in San Francisco.

Intellectual property lawyers think very differently from jurors, and that is particularly challenging to the IP lawyers, continued Trask.

The program, sponsored by the Section of Intellectual Property Law and co-sponsored by the Young Lawyers Division, covered such issues as characteristics of any jury, current jury trends and how to use technology in telling a story.

In addition to Trask, the session featured Eve Henson of Sayles Werbner and Greg Glass, Point MultiMedia LLC; Yoncha Kundupoglu of Hogan and Hartson served as moderator.

Juries are uncomfortable with the adversarial system of the trial, said Trask. Further, they only hear what they understand. Most people are visual learners who relate well to PowerPoint presentations with words, continued Trask.

Glass explained how graphics can help you tell your story to the jurors. You benefit when the jurors see that you are trying to help them understand. Consider using video if you have it, continued Glass.

Earlier in the program, Trask mentioned the impact that television and such shows as CSI and Boston Legal have had on the public's perception of lawyers and the legal system.

Henson presented details on selecting a lawyer's trial team, which may include client representatives, IP lawyers, trial lawyers and local counsel. In addition, depending on the case, a lawyer may want to

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consider a jury consultant and/or graphics consultant.

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Weaving a trial theme

During “Trial Themes: How to Weave Your Trial Theme into the Entire Trial,” the audience served as jurors for a mock abridged trial concerning a politician who is accusing a journalist of slander relating to the death of a young college student.

The lawyers acting as representatives for the plaintiff and defendant utilized trial themes described prior to the mock trial. Marlo Leach of Atlanta opened the explanation, noting that too often, lawyers fail to use themes. “Lawyers think to themselves, ‘I’m a good lawyer. I know the facts and evidence,’” continued Leach. But failing to use a theme places a heavy burden on jurors. “Jurors are not emotionally involved,” she said, unlike the lawyer who has been working the case for several months.

For lawyers, it is critical to choose a theme that jurors can understand and relate to, such as accountability or being a good neighbor, explained Leach. A lawyer should start thinking about a possible theme early in the discovery process and then see if the evidence supports that theme as work on the case continues.

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While preparing for the case, a lawyer should pick out the evidence that supports the theme developed, and then begin conveying it early on in the trial. But, Leach warned, “Don't do overkill. It's the worst thing you can do. Instead, pepper your theme throughout.”

Judge Susan Illston, of San Francisco, served as judge during the mock trial. L. Lin Wood, Atlanta, and Charles L. Babcock, Houston, served as advocates during the session while Perrin Rynders, Grand Rapids, Mich., was moderator.

At the conclusion of the mock trial, Illston complimented the lawyers and said that, from her experience, themes were too rarely used. She also pointed out – addressing many young lawyers in the audience – opening statements were meant to be statements and not argumentative.

The program was sponsored by the Tort Trial and Insurance Practice Section.

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Three Rs of building a practice: rainmaking, retention and referral

A panel of business-building experts offered tips for lawyers interested in growing their practices. Presented by the Committee on Young Lawyer Forum of the ABA Section of Business Law, the panelists agreed that rainmaking, retention and referrals all begin with satisfied clients.

“You need to build your client's trust that you are on top of his or her legal problem,” said Sarina Butler, ABA associate executive director, Communication Group, who began the discussion.

“The number one complaint about lawyers is that they don't return phone calls and the number two complaint from clients is that they have no clue about what their lawyer is doing. Lawyers need relationship skills to build trust and create value in the minds of their clients,” she said.

She noted the top ten rules of the road for rainmaking:

1. Set realistic goals and develop a specific plan.
2. The heart of rainmaking is relationships.
3. Distinguish yourself from your competitors.
4. The illusion of success is critical.
5. Become active in organizations.
6. When you exchange business cards, make follow up contacts.
7. Don't burn your bridges.
8. Provide your clients with four-star service.
9. When you achieve success, tell the story.
10. Don't forget to close the sale.

Most critical are skills in creating rapport. “There can be no rainmaking without building effective relationships,” she said.

Jim Calloway, director, Management Assistance Program of the Oklahoma Bar Association, agreed. In his presentation, “Client

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Satisfaction: Keep 'Em Happy and Coming Back for More," he discussed retaining existing clients.

Although law is a profession, he said, what makes clients happy with service is what makes just about everyone happy. "Client satisfaction depends on how well their lawyer met their expectations."

He pointed out that it is far less expensive to retain clients than it is to find new ones. He suggested that lawyers start at the beginning of each client relationship to manage expectations by securing agreements regarding the following areas:

1. The ultimate result or range of possibilities.
2. The cost for work.
3. Speed (or slowness) of process.
4. Risks and uncertainties.
5. Preferred method of client communication.
6. Handling confidential matters via fax or email.
7. Back-up plan for when lawyer is not available.

Calloway explained that although lawyers, who depend on precedents, typically use office systems from the 1950s, while their clients have different standards. "Lawyers are trained to disregard the irrelevant, but when it comes to clients, if it's important to them, it should be important to their lawyer. Client perceptions become the lawyer's reality."

He also recommends sending closing letters at the end of each case outlining what was done for the client, sending clients clippings about their or their family's accomplishments, sending brochures or booklets with information the client might find helpful and doing the same things over and over again.

Carolyn Dillinger of Irvine, Calif., had suggestions for building a referral network. Like her co-presenters, she had a list of steps to taking in creating a strong network for referrals.

1. Take a look at current practice, evaluating current and future clients.
2. Consider how to change a current practice to include more desired clients.
3. Determine target markets and client profiles.
4. Match referral partners to target markets.
5. Build a team of referral partners.

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6. Create a referral marketing plan.
7. Track communication with each referral partner.
8. Track referrals sent.
9. Track referrals received.
10. Review and revise lists as necessary.

Dillinger included a handout that provides working tips for each step. The tips are based on her experience in wanting to grow her transactional business among investors, small business owners and commercial real estate investors.

That handout, as well as handouts from Butler and Calloway, can be found at the www.ababusinesslaw.org website.

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Playing in dirt: residential real estate law basics

When a panel of ABA experts in residential real estate gathered to share tips and techniques during the recent Annual Meeting, they emphasized that while they could offer an overview, local laws are very specific. They suggested that lawyers interested in learning about their own locations might want to work with a lawyer who has an established real estate practice to avoid elementary mistakes.

The session was presented by the Committee on Career and Practice Development of the Section on Business Law, the Standing Committee on Lawyers Title Guaranty Fund and the Young Lawyers Division.

Panel members included practicing lawyers, insurers and the head of a title company. Each explained his or her role in the real estate process. Elizabeth Bleakley of Chicago gave an overview of the purchase process, from initial contract through closing.

She cautioned that knowing – and meeting – key dates is critical to the success of the deal. Property inspections before the contract is final are essential. She also noted the forms for lead paint declarations, home energy reports and others are important pieces. The lawyer should also check that the address of the property matches the physical description on the contract.

Bleakley said she does not tell her clients how to proceed but does make sure they receive all the information they need to make decisions. For example, she said homebuyers think they can save some money by skipping a home inspection or by not purchasing title insurance. In those instances, she asks them to sign a release saying that she had advised them to obtain a home inspection or purchase title insurance and that they were not doing so against her advice. She notes that when she asks for the release, clients usually decide to follow her advice.

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Susan Pesner of Vienna, Va., discussed the federal parts of real estate transactions under the Real Estate Settlement Procedures Act. One of the provisions of the act is the HUD-1 closing statement that delineates credits from the seller and the buyer for the purchase.

She cautioned that since money laundering is a threat to honest people in real estate, if anyone shows up with several thousand dollars in cash saying they did not have time to stop by their bank, the lawyer should call his or her own banker alerting them to a person who needs a cashier's check. Pesner said, "If you take the cash, you will be the one reported for making a cash deposit."

Richard Patterson, CEO, Connecticut Attorney Title Insurance Company, explained that title insurance is the only insurance that pays out for events that happened in the past. It protects the homebuyer against judgments and liens against a previous owner that stay with the property.

Kathleen Hopkins of Seattle, Wash., talked about some of the quirky things that show up in real estate transactions and gave guidelines on what to watch for. "Make sure the seller whose name is on the purchase agreement is the owner of the property," she said.

Hopkins also noted that limitations from old deeds should be discussed with the client. "These can be mineral rights, restrictions on livestock or easements," she said, telling the group about one case where a previous owner held onto mineral rights when selling land. When the current owners wanted to sell gravel, the original owner's grandson turned up and claimed the proceeds.

Homeowners associations require special consideration, she pointed out. The dues for the overall association may be small, but with dues for smaller segments down to a street association covering landscaping, tot lots, refuse removal and other services, the homeowner may end up paying far more than he or she intended.

Hopkins also suggested that lawyers caution their clients about architectural requirements. "Some associations dictate the kinds of mailboxes or screen doors so lawyers need to warn their clients," she said.

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Aurora Abella-Austriaco, Chicago, discussed potential traps in real estate transactions. “Make sure you send out an engagement letter with what the client needs to provide and what you will do. Make sure you docket your deadlines and ask the client to notify you when he or she has completed designated tasks, such as applying for a mortgage or securing a home inspection.”

She said that lawyers need to point out to their clients that any modification to a signed purchase agreement can undo the deal. She also said that condo sales require another layer of review as the buyer needs to understand the financial footing of the association as well as all documents regarding the sale. “Mortgage fraud is rampant. As much as you want to be careful, you really have to see and review everything.”

More information, including the handout material, is available at the Section of Business Law at www.ababusinesslaw.org.

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Panel asks who owns your genes?

Hint: it isn't necessarily you

During a panel discussion on "Who Owns your Genes: How Gene Patents are Trampling Individual Rights," at the recent ABA Annual Meeting in San Francisco, law professor and popular author Lori Andrews told the audience about her inhaler.

"I have asthma. I am one of three out of 10 people in the United States who benefit from this inhaler. The company who makes this inhaler has a patent on the test for the gene that determines whether or not this inhaler is effective. They have an exclusive right for 20 years to help people suffering with asthma to find out whether or not this inhaler is right for them. But they're not going to do that. They're going to hold onto their patent and do nothing so physicians will continue to prescribe this inhaler to their patients on a let's-see-if-it works basis. And, they have the legal right to do that," said Andrews.

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Andrews is a professor at the Chicago-Kent School of Law and director of the Institute for Science, Law and Technology at Illinois Institute of Technology. In addition to writing popular fiction and scientific books and articles, she is the co-author of two new books on the implications of genetic engineering.

Author, film producer, film director and medical doctor Michael Crichton was also on the panel. He told the audience that one-fifth of the human genome is covered by patents. He said as a well-known author (*Jurassic Park*), he is a great believer in the protection of intellectual property.

But he said that patenting parts of the human body creates issues that need to be considered on an intellectual, practical and emotional level. "We live in a society with numbers of options, but only one of those options is in the best interests of society," he said.

"A test for women who have a specific breast cancer gene can be done for \$30 to \$100. Patients and their insurance companies are paying at least \$3,000 for this test because the patent holder is able to keep the cost up and block any innovations involving that particular gene. Women without insurance or means to pay for the test may not learn until their cancer is far advanced that they have this gene," Crichton said. "How is society served?"

Michelle Goodwin, professor of law at DePaul University, directs DePaul's Health Law Institute. She pointed out that all people want to benefit from new discoveries and technologies. She discussed a case in which a patient's cells were used without his permission and when he sued to recoup some of the income from sales of the product made with his cells, but without his knowledge, he was denied.

Goodwin pointed out the similarities to slavery when people did not own their bodies.

Intellectual property lawyer Lester Savit said there are four misconceptions about gene technology:

1. Gene patents cover features of the natural world.
2. Gene patents reward lazy scientists.
3. Gene patents block innovation
4. Congress should get involved and decide what is and what is not patentable.

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Discussion with the audience followed with many believing that Congress needs to act to protect the public since in most cases tax dollars were involved in the research. Other members of the audience believed that free market conditions should prevail and that the inventor has the right to the benefits of his or her discovery.

More information is available from Susan Fogal, program moderator, who is co-chair of the ABA Health Rights and Bioethics Committee, at sbfogel@pacbell.net.

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