

TOP STORY

Doctored Evidence Leads to Rare Sanctions Against Plaintiff

By Anna E. Mallen – February 2, 2023

A trial court dismissed a lawsuit and awarded almost half a million dollars in fees and costs to the defendants after the plaintiff attached fabricated evidence to its complaint. The court found that this outcome was justified based upon the plaintiff's repeated attempts to mislead the court and the parties, and the plaintiff's failure to take ownership of its misconduct. [ABA Litigation Section](#) leaders warn litigators to take client misconduct seriously, understand their own ethical obligations, and take prompt corrective action to avoid harsh sanctions.

Plaintiff Fabricates Images to Support Complaint

In [For Life Products, LLC v. Virox Technologies, Inc.](#), the plaintiff sued multiple defendants for trademark infringement and unfair competition. In response to a counterclaim by one of the defendants, the plaintiff filed an amended complaint, attaching various exhibits in support of the claim that it had continuously sold certain products since 2016. The exhibits included copies of the plaintiff's product catalogs from 2016 through 2020 and an image from Amazon.com, all of which purported to show that the plaintiff marketed and sold the disputed products prior to the defendants securing ownership of their federal trademark registrations for similar products.

Upon receipt of the plaintiff's new filing, the defendants hired a forensic photographic expert to review the exhibits attached to the plaintiff's amended complaint. The expert reported that the plaintiff had altered nearly 30 of the product catalog images, including replacement of product labels that did not match the reflection of the label in the image. The expert also concluded that the Amazon.com image was an altered PDF image of an Amazon.in (India) website. Per the court, the expert noted that "the Indian flag had been erased from the search bar and the domain suffix was altered from '.in' (India) to '.com' (United States)." The defendants moved for sanctions based on their expert's findings and requested dismissal of the plaintiff's claims, along with an award of fees.

Plaintiff's Bad Faith Leads to Dismissal of Claims

In the court's analysis of the sanctions request, it relied heavily upon the plaintiff's culpability and bad faith. The court noted that even when the evidence pointed to bad faith, the plaintiff did not take responsibility for its actions but instead continued to mislead the court. In defense of its conduct, the plaintiff argued that it mistakenly filed the images and that it sufficiently remedied the misconduct when it asked to file another amended complaint which removed the disputed exhibits and reduced the number of trademark infringement claims against the defendants. The district court did not find either argument credible.

Rather, the court found that the plaintiff's alteration of the images was "not just purposeful but clearly tailored to gain a litigation advantage." Moreover, the court concluded that the plaintiff's "no harm no foul" argument demonstrated a lack of respect for the judicial system. In addition, the plaintiff offered no suggestions to the court for an alternative sanction and merely offered up its belief that dismissal of the case was too severe. The court held that the gravity of the plaintiff's conduct, and its lack of explanation and ownership of its actions, warranted dismissal and assessment of fees and costs.

The defendants sought a total of \$706,177 in fees and costs. After reducing the requested hourly rate and hours expended, the court awarded a lodestar attorney fee figure of \$274,860. The court then increased its award by \$91,620 (one third of the attorney fee amount) based solely on the exceedingly rare and exceptional result obtained by the defendants: dismissal of the plaintiff's claims. Finally, the court awarded the full amount of the defendants' requested expert fees and costs, for a [total award](#) of \$405,112.33 to the defendants.

Try to Minimize the Damage

"It is rare to see this type of sanction," remarks [John M. Barkett](#), Miami, FL, cochair of the Litigation Section's [Ethics & Professionalism Committee](#). "Never underestimate the jurisprudence of anger," he adds. When facing a situation like this, "correct the deceit immediately, take actions to correct any prejudice that has occurred, be humble, apologize to the court, come totally clean before the judge, and hope you can keep the case alive by advocating for a limitation on sanctions to an attorney fee award only," Barkett counsels.

While litigators need to recognize the impact that client misconduct may have on their case, ethical issues must also be considered. "When lawyers are confronted with client misconduct, they need to consider not only their obligations to their client but also the obligations placed on them by the Rules of Professional Responsibility in their states," expounds [Paula M. Bagger](#), Boston, MA, cochair of the Section's [Commercial & Business Litigation Committee](#). In

determining their ethical responsibilities, “lawyers should give special consideration to their state’s ethical rules governing candor to the tribunal as well as any exceptions to client confidentiality,” advises Bagger.

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- Brian A. Zemil, “[Tug of War over Authority for ESI Spoliation Sanctions](#),” *Litigation News* (Feb. 27, 2020).
- Amber Davis-Tanner, “[A Young Lawyer's Perspective on Upcoming Changes to the Federal Rules of Civil Procedure](#),” *Com. & Bus. Litig.* (May 20, 2015).