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PERSPECTIVE

How Does a Lawyer Know Who Speaks for a Corporate Client?

Can a lawyer follow the specific directions of what appears to be an authorized client representative in a competent fashion and still be sued for malpractice and even for fraud? One would think not, and yet unfortunately that is what the 9th U.S. Circuit Court of Appeals appears to have ruled in *Mindy's Cosmetics Inc. v. Sonya Dakar, et al.* 2010 DJDAR 10457. In this case there is both good and bad news for lawyers. The good news is that in an appeal from denial of an anti-SLAPP motion, the anti-SLAPP statute can apply to legal malpractice suits if the gravamen of the claim is a protected activity under Code of Civil Procedure Section 425.16. But while Judge William A. Fletcher, writing for a unanimous panel, did find that filing a trademark application by a lawyer is a protected activity and subject to the anti-SLAPP statute, for some reason the court then bent over backwards to "credit the evidence submitted by Mindy's Cosmetics" against the attorney defendant Kia Kamran to somehow find that this doubtful claim of misappropriation of a trademark was "legally sufficient and supported by a sufficient prima facie showing of facts..." How disappointing!

Mindy's Cosmetics was a family business founded in 1994 and run by the Dakar family, comprised of a father, mother and four children. The company also owned several trademarks using the family name.

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Kamran was hired in 2006 by one of the children, Yigal Dakar, "on behalf of the family business." In 2007, Kamran noticed that a trademark of the family business — the Sonya Dakar mark, named after Yigal's mother — had expired, and so Kamran dutifully informed Yigal and recommended re-registering the mark. Yigal and his two sisters, Donna and Mimi, told Kamran to consult with their mother Sonya about what to do about the registration of the trademark. Sonya instructed Kamran to register two marks in her name, which Kamran did. But in 2008, the father, Israel, and the other son, Natan, on behalf of Mindy's Cosmetics, sued Kamran as well as Sonya and Donna. They accused Kamran of not only legal malpractice, but fraud and conversion in connection with the registration of the trademarks in Sonya's name, rather than in Mindy's Cosmetics. Although the attorney represented only Mindy's (and no other party so there was never any conflict of interest), it turned out that Sonya was not a shareholder and Yigal, Donna and Mimi were minority shareholders, not controlling shareholders. Israel, the father and founder, contended that while these family members may have been employees, they did not actually have authority to give instructions to Kamran. The plaintiffs contended that "Kamran never inquired whether Yigal, Donna, or Mimi, who were shareholders, had actual authority to act on behalf of the company." So per the plaintiffs, Kamran, who followed the directions of employees, stockholders, family members, and ostensibly authorized agents of Mindy's Cosmetics, was sued for malpractice and fraud for filing a trademark application because he followed the wrong family members' directions. How ridiculous.

Kamran filed an anti-SLAPP motion before Judge Stephen V. Wilson of the Central District because the alleged malpractice was that Kamran filed a trademark registration of two of Mindy's marks in Sonya's name. Kamran argued that filing a trademark application with the U.S. Patent and Trademark Office is a protected act, and that the suit arose from his filing. But Judge Wilson disagreed and found that the suit did not "arise from" the filing of the applications and also that Mindy's Cosmetics had made a prima facie case of fraud and malpractice. The district court relied on two California cases that held legal malpractice cases are not "slappable," since the claims were not because the lawyer is petitioning the government but rather because the lawyer was incompetent in rendering services. The district court then went to the second prong of the anti-SLAPP test and concluded that Mindy's had proffered sufficient admissible evidence of Kamran's negligence to support a claim. Thus, Judge Wilson denied the motion because he found both prongs of the test had not been met: Kamran's activities were not protected activity and plaintiffs made a prima facie case. Kamran appealed.

Acknowledging the matter was a "close question," the 9th Circuit — instead of reversing and throwing this case out, which it should have done — affirmed but oddly based its ruling only on the second prong. First, Judge Fletcher wrote that Judge Wilson did err in concluding that the claims did not arise from protected activity. The court opined that filing a trademark application is not a ministerial act but an affirmative effort to obtain rights — i.e., a petitioning of the government — and found that Mindy's claims arose "not out of a general breach of duty but out of Kamran's act of filing the trademark application in Sonya's name." Obviously this ruling offers further precedent for bringing anti-SLAPP motions in legal malpractice cases and lawyers should cheer. The analysis is less than perfect — it wasn't really the trademark filing that was the gravamen, as the court held, but rather that the filing was done negligently, at least according to plaintiffs. But beggars can't be choosers and lawyers should take the precedent and use it!

One wonders exactly what standard the court is setting up for lawyers to meet — how many people do you have to ask before you know if you have the correct corporate representative to listen to?

On the other hand, the 9th Circuit affirmed because it accepted Mindy's Cosmetics' far-fetched claim that Kamran did wrong by following corporate representatives, which included the one that had hired him plus three others, because another corporate representative claimed they lacked authority. It is simply unreasonable on this evidence to determine a prima facie case. Kamran followed the directions of not one, not two, not three, but four family members who legitimately appeared to be company representatives and at least three of whom unquestionably were! What exactly does a lawyer have to do to determine which company representatives to follow? The court gives no guidance on that. After all, it doesn't have to represent anyone. One wonders exactly what standard the court is setting up for lawyers to meet — how many people do you have to ask before you know if you have the correct corporate representative to listen to?

Family spats are certainly some of the worst, and well-meaning attorneys can get caught up in them. But when a lawyer acts reasonably and ethically and is understandably fooled by the confusion of family machinations, we hope that a court will in a "close question" give the lawyer the benefit of the doubt. To quote another bench officer writing the dissent in the Manatt, *Phelps & Phillips LLP v. Franklin Mint Co.*: "I hope there is not a diminishing appreciation by the judiciary for the increasing hazards and pitfalls faced by those in private legal practice." As stated in past articles, this lawyer hopes so too.