

Ethics and Implications of Infringement Allegations

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The Premise

- **You Believe a Competitor is Selling Dozens of Infringing Products. Now What?**
 - **Pre-filing Investigation**
 - **Complaint**
 - **Infringement Contentions**
 - **Discovery**
 - **Trial**

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The Premise – a hypothetical

- Many cell phone models
- All have a screen
- Screens are a commodity (many manufacturers)
- You have screen patents (and licensees)
- Can't just look at screen and determine infringement



Pre-Filing Investigation:
What, and how much, do you need to do?

Pre-Filing Investigation– Options

1. **Internet Research only**
2. **Buy and analyze one product**
 - Product A
3. **Buy and analyze one of each product**
 - Products A to Z
4. **Buy and analyze every “version” of every product**
 - Product A, versions 1-10; Product B, versions 1-5, and so on

PRO TIP: #4 costs a LOT of money

QUESTION: How much “analysis” is required?

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Pre-Filing Investigation– Be Reasonable

- By presenting [a paper]. . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after **an inquiry reasonable under the circumstances** [] the factual contentions **have evidentiary support** or, if specifically so identified, will **likely have evidentiary support** after a reasonable opportunity for further investigation or discovery.
 - ***Fed. R. Civ. P. 11(b)(3) (emphasis added)***
- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer **reasonably believes** that there is a basis for doing so that is not frivolous.
 - ***Tex. Disciplinary R. Prof. Conduct 3.01***

Question: So, what is “reasonable”?

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