

VENABLE[®] LLP

Association Advertising and Marketing Law 101

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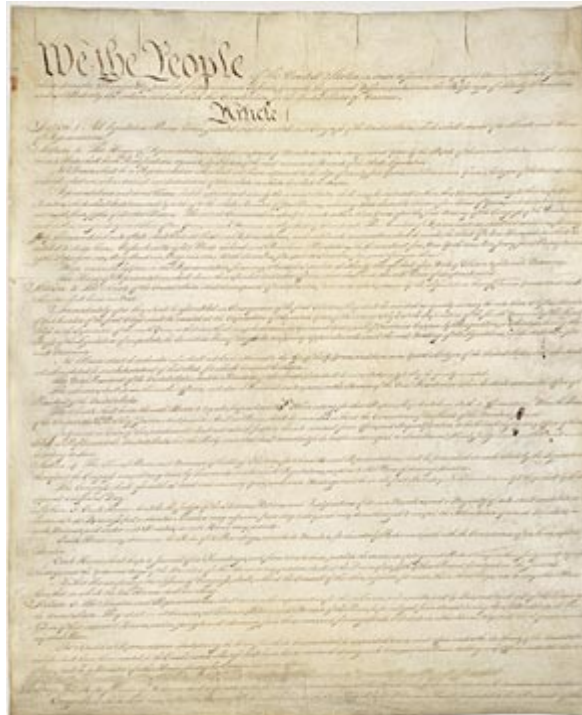


Introduction

- 1st Amendment Principles
- Federal Regulation – Federal Trade Commission
- State Regulation – State Attorneys General
- Self Regulation – NAD
- Private Litigation
- Legal Principles
 - False or Deceptive
 - Claims
 - Unfairness
 - Disclosures
- Special Areas
- Antitrust Issues
- Common Pitfalls and Do's and Don'ts



First Amendment Principles



First Amendment Principles

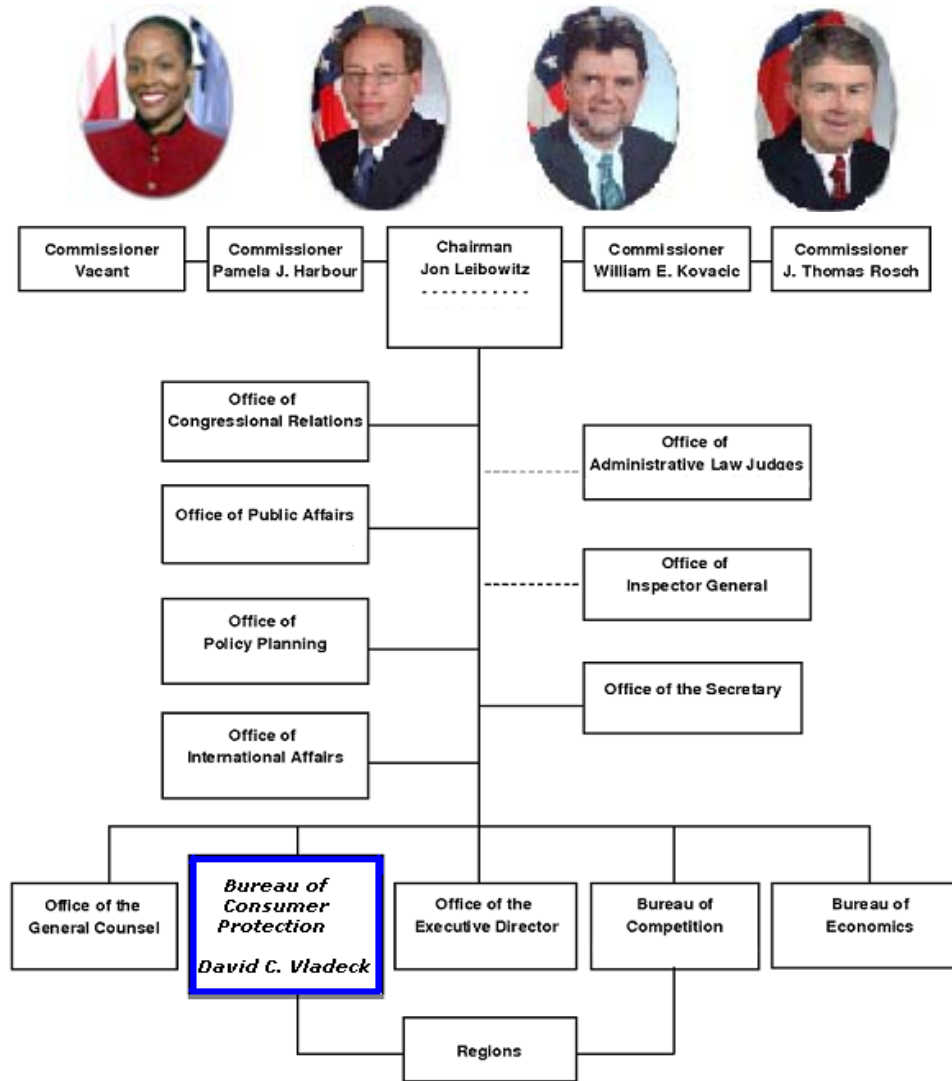
- "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
- Government has right to regulate "commercial speech" which is deceptive or misleading.
 - *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).
 - Is the expression protected by the First Amendment? For speech to come within that provision it must concern lawful activity and not be misleading.
 - Is the asserted governmental interest substantial?
 - Does the regulation advance the governmental interest asserted?
 - Is the regulation more extensive than is necessary to serve that interest?
- Considerations: Is the speech directed to consumers? Is the speech aimed at affecting legislation?



Federal Regulation – Federal Trade Commission



Federal Trade Commission Overview



Federal Trade Commission Act

- **FTC pursues deceptive practices under Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45 *et seq.*:**
 - Section 5 gives the Commission broad authority to prohibit "unfair or deceptive acts or practices"
 - Section 13(b) authorizes FTC to file suit in United States District Court to enjoin any act or practice that is in violation of any provision of law enforced by the FTC
- **Enforcement against unfair or deceptive practices**
 - Not required to prove actual deception
 - Wide array of remedies: civil penalties, injunctions, restitution, corrective advertising
- **Issues Policy Statements and "Guides" for specific industries and advertising practices**
 - Not official regulations but represent FTC's views of certain practices



FTC Guides

- Dietary Supplements: An Advertising Guide for Industry
- Guide Concerning the Use of Endorsements and Testimonials
- Guide Concerning the Use of the Word "Free"
- Guides Against Bait Advertising
- Guides Against Deceptive Pricing
- Guides for the Jewelry, Precious Metals, and Pewter Industries
- Guides for the Household Furniture Industry
- Guides for Private Vocational and Distance Education Schools
- Jewelry Guides and Information
- Joint FTC/FCC guides on Long Distance Advertising
- Refractive Eye Surgery Advertising: Guidance for Marketers
- FTC Guides for the Use of Environmental Market Claims (Green Guides)



FTC Policy Statements

- Enforcement Policy Statement on Food Advertising
- Enforcement Policy Statement on US Origin Claims (Made In USA)
- FTC Policy Statement on Comparative Advertising
- FTC Policy Statement on Deception
- FTC Policy Statement on Unfairness
- FTC Policy Statement Regarding Advertising Substantiation
- Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers
- "Made In USA" Standard - Homepage



Other FTC Related Statutes and Regulations

- Telephone Consumer Protection Act
- Telemarketing Sales Rule
- Gramm-Leach-Bliley Act
 - Privacy Rule
 - Safeguards Rule
- CAN-SPAM Act
- Fax
- FACTA Red Flags Rule



FTC Investigative and Enforcement Process

- May issue Civil Investigative Demand ("CID") requiring production of documents and information;
- May file suit in United States District Court to enjoin any act or practice that is in violation of any law enforced by the FTC;
- Frequently will pursue a temporary restraining order ("TRO") to freeze both business and personal assets;
- Propose settlement through "consent decree," often requiring the cessation of the challenged business activities, consumer restitution and more.



FTC Jurisdiction and Nonprofits

- Section 4 of the FTC Act gives the Commission jurisdiction over corporations that are operated for their own profit or that of their members. Although the Commission has successfully asserted jurisdiction over various non-profit entities, purely charitable organizations have been considered outside the Commission's jurisdiction under the FTC Act.
- Absent some other grounds for jurisdiction, the FTC has rarely opened an investigation into charities that have been granted tax-exempt status by the IRS under Section 501 (c)(3) of the Internal Revenue Code.
- The FTC has interpreted Section 4 of the FTC Act to permit it to assert its jurisdiction over any nonprofit association whose activities engender a pecuniary benefit to its members, if that activity is a substantial part of the total activities of the association, rather than merely incidental to some non-commercial activity. *American Medical Association, et. al*, 94 F.T.C. 701, 982-83 (1979), *aff'd*, 638 F. 2d 443 (2d Cir. 1980), *aff'd mem.* by an equally divided Court, 455 U.S. 676 (1982). See also *Community Blood Bank of Kansas City, Inc. v. FTC*, 405 F. 2d 1011 (8th Cir. 1969); *American Medical Association*, 94 F.T.C. at 983-85.



FTC Jurisdiction and Nonprofits (cont'd)

- Any determination of whether a corporation falls within the Commission's jurisdiction is usually made on a case-by-case basis. Although other agencies' interpretations under other statutes are not controlling, one of the factors the FTC looks at is a corporation's tax-exempt status.
- For example in *American Medical Association*, the FTC found jurisdiction over the American Medical Association a Section 501 (c)(6) organization.
- The FTC also successfully sued the National Commission on Egg Nutrition ("NCEN"), and a non-profit corporation owned by egg producers and organized to advertise the nutritional benefits of eggs. The Commission had jurisdiction because NCEN was organized for the profit of its members, even though it pursued that objective indirectly. *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976).



State Regulation – State Attorneys General



State Regulation of Advertising and Marketing

- Consumer Protection Acts (Mini-FTC Acts).
 - States have adopted "mini-FTC Acts" that prohibit unfair and deceptive practices. States typically follow FTC precedent
 - Frequently Broader Jurisdiction
 - Enforcement by State Attorney General and Private Litigants
- More Specific Statutes
 - Charitable Solicitation Acts
 - Commercial Co-Venturer Statutes
 - Others...



State Enforcement Process

- **Similar to FTC process:**
 - Power to issue CIDs;
 - May pursue temporary or permanent injunctions;
 - May pursue TROs.

- **For associations that operate in more than one state there is risk of multiple or consolidated State actions.**



Frequently Challenged Advertising and Marketing Practices

- Deceptive or misleading environmental “green” claims.
- Warranty representations.
- Nonprofit charitable giving.
- Deceptive use of testimonials, endorsements, tests, surveys, logos, demonstrations, studies, etc.
- Failure to disclose material terms and conditions or product defects.
- Deceptive “free” or pricing claims.
- Misrepresentations about product or service.



Self Regulatory Programs



Self Regulation - Theory

- **Purposes:**
 - As a substitute for Government Intervention
 - As a compliment to Government Regulation
- **“The best self-regulatory programs carry several hallmarks.**
 - First, they clearly address the problems they seek to remedy.
 - Second, they are flexible and able to adapt to new developments within the industry.
 - Third, they are widely followed by affected industry members.
 - Fourth, they are visible and accessible to the public.
 - Fifth, they are administered in a fashion that avoids conflicts of interest between the regulated firms, on the one hand, and the body doing the regulating, on the other hand.
 - Finally, they objectively measure member performance and impose sanctions for noncompliance.”

(Speech by FTC Commissioner J. Thomas Rosch)



Self Regulation – National Advertising Division of the BBB

- The **National Advertising Division** (“NAD”) is Division and service of the **Better Business Bureau** which provides a neutral forum for review and challenge of national advertising. The NAD conducts its own independent review of advertising and commences investigations of ads on its own initiative.
- The NAD also provides a forum for competitive challenges.
- NAD uses a **unique, hybrid form of alternative dispute resolution**, working closely with in-house counsel, marketing executives, research and development departments and outside consultants to decide whether claims have been substantiated. Each party to the dispute has ample opportunity to explain its position and provide supporting data.
- While NAD decisions do not have the “force of law”, advertisers who ignore their findings are reported to the FTC and the FTC does commence investigations on matters referred to it by the NAD.



A few Examples of Industry Self Regulatory Programs

- Children's Advertising – e.g., Children's Food and Beverage Advertising Initiative (a voluntary self-regulation program of food and beverage companies)
- Video Games - Entertainment Software Rating Board
- Motion Pictures - Classification and Rating Administration which works under the MPAA
- Alcohol - Code of Good Practice for Distilled Spirits Advertising and Marketing
- Direct Response Marketing - Electronic Retailing Self-Regulatory Program
- Internet Advertising - Self-Regulatory Principles for Online Behavioral Advertising



Private Litigation

- Federal Lanham Act
- State mini-Lanham Acts
- State Specific Issue Area Statutes
 - Telemarketing, Email, Fax, Charitable Solicitation
- Common Law



Lanham Act Provides a Federal Cause of Action Against False Advertising

- Congress originally enacted the Lanham Act, including § 43(a) (which is codified at 15 U.S.C. § 1125(a)), in 1946 and amended it in 1988 § 43(a). Codifies the federal prohibition on false advertising and prohibits any use of a false or misleading description or representation in commercial advertising or promotion that "misrepresents the nature, characteristics, qualities, or geographic origin of. . . goods, services, or commercial activities." Courts have formulated the following elements for a claim under § 43(a):



Lanham Act Provides a Federal Cause of Action Against False Advertising

- **Elements generally:**
 - The defendant must have made a false or misleading statement of fact in advertising.
 - That statement must have actually deceived or had the capacity to deceive a substantial segment of the audience.
 - The deception must have been material, in that it was likely to influence the purchasing decision.
 - The defendant must have caused its goods to enter interstate commerce.
 - The plaintiff must have been or is likely to be injured as a result.
- **Damages:** Injunctive relief, monetary damages or both.



Common Causes of Private Litigation Involving Advertising

- Use of Another's Trademark in Comparative or other Advertising
 - Confusion as to source, quality, affiliation
- False Representations



Legal Principles – Ex. Federal Trade Commission Act

Section 5 Prohibits:

"Unfair or deceptive acts or
practices in or affecting commerce."



Deception Standard

- **A representation, omission, or practice is *deceptive* if it is likely to:**
 - Mislead consumers; and
 - Affect consumers' behavior or decisions about the product or service.

- **Ads must be truthful, not misleading, and substantiated.**



Advertising Claims

- There are two basic forms of claims
- Affirmative claims are those product or product attribute specific claims that are susceptible to definitive proof and are likely to influence a consumer's purchasing decisions; and
- Puffery claims, those claims that are grandiose and are couched in extraordinary superlatives, that are incapable of any kind of verification, do not address any specific or absolute characteristic of the product and while they may get a consumers attention are unlikely to influence a consumer's purchasing decision.



Examples of Puffery claims

- You will look beautiful
- Your skin will look radiant
- You will not believe how wonderful you will look
- A better looking house is not possible



Affirmative claims

Affirmative claims can be made either expressly or they can be implied. Express and implied claims can be made by:

- direct affirmative statements,
- demonstration or illustration, and
- endorsements either professional or consumer or testimonials.



Types of Affirmative Claims

- Claims that recite a level of proof or that are presented by an expert in way that implies general acceptance if the expert's field or comparative claims of superiority.
- Words such as “tested,” “established,” and “proven” and “clinically proven” imply that there is a scientific foundation or establishment for the claim.
- The use of visual images such as the display of medical literature in an ad or the appearance of a physician or pharmacist or other known expert presents a claim this implies a scientific foundation that is generally accepted amongst physicians.
- Comparative claims which compare the advertised product to that of a competitor.



Examples of Implied claims

- The visual material in advertising may communicate a claim about the product or suggest a greater degree of product performance. *ITT Continental Banking*, 83 F.T.C. 865, 1105 (1973), aff'd, 532 F.2d 207 (1976), ("Wonder Bread builds bodies in 12 ways," illustrated by showing a child's growth, held to be deceptive).
- A true statement may imply a false claim. E.g. "Listerine kills germs that can cause colds" implies it helps prevent colds. *Warner - Lambert Co. v FTC*, 562 F.2d 749 (D.C. Cit. 1977).



Demonstrations must be what they appear to be to the consumer

- A mock up cannot be presented as a demonstration. *F.T.C. v. Colgate Palmolive*, 380 U.S. 374 (1965) (sand on plexiglass used as a substitute for sand paper in a demonstration of shaving creme);
- *In re Rhodes Pharmacial Co.*, 78 F.T.C. 680 (1971) (using special effects to different lighting and makeup exaggerates difference "before and after").
- Showing an orange squeezed directly into a carton to illustrate that the advertiser's juice was not made from concentrate was held to also suggest that the pasteurized product was as unprocessed as fresh-squeezed. *Coca Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312 (2d Cir. 1982).



Endorsements and Testimonials

- Endorsements may not contain any representations that the advertiser could not make directly.
- Expert endorsements must be supported by an examination or testing that would be expected by experts in the field generally.
- Celebrity endorsements must reflect the honest opinions, findings, beliefs or experience of the celebrity
- Testimonials unless qualified should present experiences that are generally obtainable.
- Current FTC Endorsement & Testimonial Guide is being Re-Written by FTC.
 - Significant changes and addresses online message boards, blogs, email, etc.



Claims that make representations about the level of support

- Claims that report “clinical tests prove” must be supported by clinical studies.
- Claims that recite “number one physician recommended” must have studies that demonstrate that the advertised product is in fact widely recommended and recommended by more physicians than any other competitive product.



Comparative Claims

- “New Wondra beats the leading Lotions”; it is “better than any top lotion”; it “relieves dry skin better than any leading lotion”; “dermatologists proved it in clinical tests. New Wondra improves the condition of rough dry skin better”; and New Wondra “works better than any other leading lotion at turning rough dry hands soft and smooth.”
- “No leading lotion beats Vaseline Intensive Care Lotion” and “you can't buy better lotions to heal winter dry skin.”
- Products made of X beat products made with Y and Z.



Unfairness Standard

An act or practice is unfair if the injury it causes, or is likely to cause, is:

- Substantial;
- Not outweighed by other benefits; and
- Not reasonably avoidable.



Disclosures

- **Disclosures must be:**
 - sufficiently clear;
 - prominent; and
 - understandable to prevent deception.
- **Other factors:**
 - clarity of language;
 - relative type size;
 - proximity to the claim being qualified; and
 - an absence of contrary claims that could undercut effectiveness.
- **Important:** A disclosure at the bottom of a page won't cure an otherwise deceptive ad.



How the FTC Interprets Ads

- From perspective of "reasonable consumer"
- Net impression of ad
- Analysis of "express" and "implied" claims
- What the ad does *not* say - that is, if the *failure* to include information leaves consumers with a misimpression about the product
- Is claim material? - important to a consumer's decision to buy or use the product
- Does the advertiser have proof *before* the ad runs? (substantiation)
- Are comparative claims based on normal use and tailored to the support for the claim?



Unique Advertising and Marketing Issues for Nonprofits and Associations

- **Sweepstakes** – regulated on the Federal level and state-by-state basis
- **Tax Considerations**
 - Expenditures of funds for a tax-exempt purpose.
 - Revenue from sale of advertising and marketing. Unrelated Business Income?
- **Fundraising**
 - Charitable Solicitation Registration
 - Claims Made
 - Use of third party contractors including fundraising consultants
 - Telemarketing and FTC TSR Compliance Requirements
- **Conflict of Interest Concerns**



Association Antitrust and Advertising and Marketing Programs Considerations

- Possible Effect on Prices
- Market Allocation
- Boycotts
- Information Exchanges
- Standardization
- Price Resale Issues
- Trade Shows
- Joint Purchasing
- B2B Joint Ventures



Common Advertising and Marketing Pitfalls for Nonprofit Organizations

- **Inadequate Claim Substantiation.**
- **Overreliance on Disclosures and Disclaimers.**
 - Dense blocks of tiny text and fleeting TV supers may not be adequate under the law. The law requires disclosures and disclaimers to be "clear and conspicuous." That means big enough for consumers to read and understand.
 - A disclosure at the bottom of a page won't cure an otherwise deceptive ad.
- **Ads with glowing consumer testimonials**
 - Under truth-in-advertising laws, advertisers must have proof that consumers who use the product at home will get the same results as the endorsers featured in the ad or they must clearly disclose the results consumers will get.
 - When you see a testimonial, ask for proof that consumers generally will achieve the level of success described or depicted.
- **Ads that suggest or imply specific product endorsement, approval or testing by a government agency, association or other nationally known firm or organization.**
 - Most government agencies do not approve or endorse specific products.
 - In some cases, it's a crime to suggest a government affiliation or misuse an official symbol.
 - The association's use of specific products or services of member companies can raise tax-exemption concerns.
- **Use of Intellectual Property:** Requires licensing, trademark / copyright clearance.
- **Failure to comply and register under state laws governing underlying activity.**
 - Sweepstakes, charitable solicitation, etc. require state-by-state compliance.
- **Use of third-party contractors that fail to comply with applicable law.**
 - Exemptions for Nonprofits do not generally apply to third-party contractors.



Best Practices and Do's and Don'ts

- Design advertising and marketing materials to comply with FTC and State laws governing deceptive practice, nonprofit organizations, etc.
- Require advertising and marketing to undergo pre-publication review.
- Educate your employees (and former employees) to immediately contact your association's attorney if they are contacted by the FTC or a State Attorney General's Office.
- Educate employees not to talk with the FTC or a State Attorney General's Office without counsel present.
- If the FTC or a State Attorney General has initiated an investigation against your company, do not destroy or alter any document.
- Use due diligence and contracts with advertisers and marketing contractors and consultants.



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