

ACI's 4th Advanced Forum on Resolving & Litigating Advertising Disputes

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The Best Offense is a Good Defense

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Tweeting about this conference?

#ACIAdDisputes



What is Advertising?

Advertising or promotion is:

- Commercial speech;
- Made for the purpose of influencing consumers to buy;
- Disseminated sufficiently to the relevant purchasing public.



The Regulators

Advertising is regulated by:

- Federal Trade Commission (“FTC”), pursuant to the FTC Act, 15 USC § 45
- State Attorneys General, pursuant to state “Little FTC Acts”
- Municipalities, Local County and District Attorneys



Other Truth-in-Advertising “Police”

- Competitors -- Section 43(a) of the federal Lanham Act; State U&D trade practices acts
- Council of Better Business Bureaus
 - NAD, CARU, ERSP
- Network Clearance/Challenge Process
- Customers/Consumers
 - Class action in state court
 - Lawyers are the real plaintiffs



The Standards

FTC Act prohibits practices that are:

- ❖ UNFAIR or
- ❖ DECEPTIVE

These standards apply to:

- ❖ ALL PRODUCTS AND SERVICES
- ❖ ALL MEDIA



Claims

Two Questions to Ask Before Running Any Ad:

1. What claims — express *and* implied — does my ad convey to reasonable consumers?
2. Do I have “competent and reliable evidence” — which, depending on the claim, may require *scientific* evidence — to support each of those claims?



Claims

CLAIM. Any statement of fact that can be proven/disproven.

SUBSTANTIATION. Proof that the claim is true.

- Written record – copy of factual study
- Must be in hand PRIOR TO PUBLICATION

PUFFERY (not subject to proof): Exaggeration, hyperbole, not subject to proof



Substantiation

Advertisers must have “reasonable” basis for all objective product claims. What’s a reasonable basis?

It Depends

- a. Type of product
- b. Type of claim
- c. Consumer benefit from a truthful claim
- d. Ease of developing substantiation (cost)
- e. Consequences of false claim (think e.g. health or safety)
- f. Amount of substantiation experts in field believe is reasonable



Types of Claims

Comparative Claim

- Claims about the advertised product as compared to another product, which may or may not be identified.
- “[Smile White] works easier and faster than other at-home bleaching products.”
- “Duracell batteries last longer than Energizer batteries.”

Monadic Claims

- Claims about the advertised product only.
- “Excedrin relieves headaches fast.”



Data Support – Key Questions



- What is to be communicated?
 - Are the benefits specific or general in nature?
 - Are the benefits anticipated from this product?
 - Is the communication monadic, comparative or competitive?
 - What are the industry standards / common practice for supporting this type of benefit?
 - How robust is the benefit to be delivered?
- Where will the claim be communicated?
- Who will be viewing the support?

Support Data – Basic Types

- Peer Reviewed Literature
- Clinical / Technical Studies
- Consumer Studies

Type of support chosen is based on the nature of the benefit

Technical

Either

Consumer



mpg – requires calculation from measured fuel consumption



Sporty 2015 model for your active life

Technical – can supply information on engine performance & aerodynamics

Consumer – can provide consumer opinion

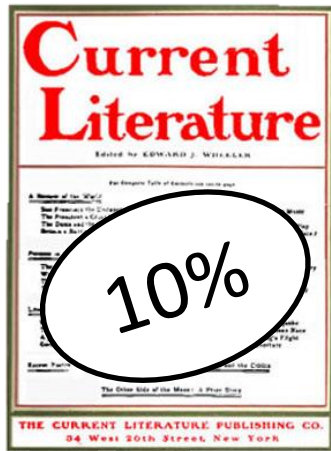


Prefer the 2015 model

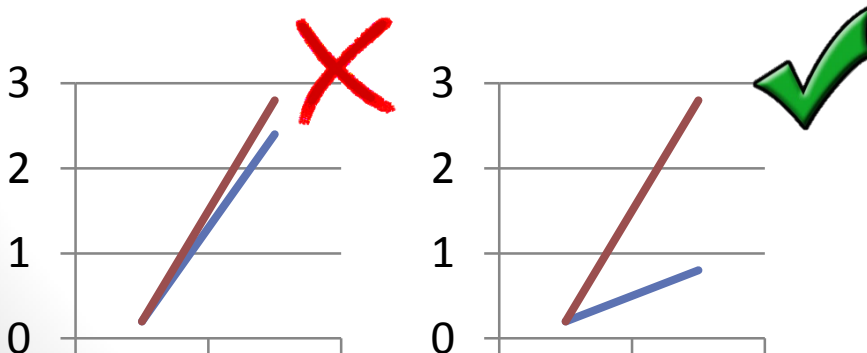
preference – relies entirely on opinion

Support Data – Basic Standards

- Relevant to the product in question



- Statistically significant results



Technical – significance with smaller panels is harder to achieve, therefore the results are more meaningful

Consumer – larger panel sizes are required to account for individual preferences & opinions

Support Data – depth of support

All claims require some level of support

Both Explicit & Implied Claims -- NOT limited to what Marketing “intended” to say

Specific claim requires closely matched protocol

“Dryer Model XL not only dries your clothes, but also irons and hangs them up”

If claim “8 hours”, need a statistically significant win at 8 hours

Unanticipated benefits require more robust support, typically multiple studies

FTC – health related claims require 1-2 well controlled, blinded clinical studies by independent experts

External agencies may have specific expectations



Know your audience's expectations

- What is the communication venue?



The Competitors

CLASS ACTION
LAWSUITS



FDA

- Who will be viewing the data?



Audience Expectations

Audience	Expectations
Advertising Pre-Clearance <ul style="list-style-type: none">• Television Networks• Publishers• Advertising Agency	Support makes sense to an educated layperson and matches the communication. No obvious outages.
Self-Regulatory Challenge <ul style="list-style-type: none">• Business to Business• NAD	Support scrutinized by scientific counterparts and lawyers with high degree of expertise. Support matches the communication. No obvious protocol flaws.
Governmental Challenge <ul style="list-style-type: none">• FTC• FDA	Support scrutinized by scientific staff. Support matches the communication and internal agency expectations. FDA additionally assesses therapeutic vs. non-therapeutic boundaries.
Legal Challenge through Courts <ul style="list-style-type: none">• Lanham Act• Class Action Lawsuits	Support scrutinized in-depth by expert witnesses and legal staff with a goal to invalidate the data.

Disclaimers: Generally

If a disclosure is necessary to prevent an ad from being deceptive, it must be “clear and conspicuous.”

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- FTC Operation Full Disclosure: Sept, 2014



Disclaimers: Other Laws & Guidelines

- Be aware of other legal obligations or regulatory standards that may apply to your advertising
 - Examples: third-party IP rights, contractual restrictions, TCPA/TSR
- Follow industry-specific rules, guidelines and best practices
 - Examples: FDA, FINRA, consumer finance laws, MMA



Compliance: Who is involved?

- Legal + Marketing, Technology, Privacy, Corporate Communications, Sales, Customer Care, etc.
- Use cross-functional internal networking to help build a business case for compliance.
- Leverage allies; discourage silos!



Compliance: Help Clients Help You

- Create a transparent review process; be accountable for following it.
- Use pre-approved templates with clear parameters & expiration dates.
- Share spreadsheets listing approved claims along with any required disclosure language.
- Participate in select client meetings to help spot legal issues early.



Compliance: Training

- Know your audience. Meet your clients where they are.
- Formal training sessions on occasion.
- “Teachable moments” as needed.
- Email alerts.
- 5-minute “hot topic” briefings during regularly-scheduled client meetings.



Compliance: Social Media Compliance

- Use it. Follow it. Speak the language.
- Develop robust training & written high-level guidelines. Refresh often.
- Be available; plan for backup.
- Get out in front of planned events.
- Monitor negative chatter and have a plan for response & engagement.



Compliance: Plan to play defense

- Identify the risks and gray areas.
- Keep the substantiation file handy; anticipate your defense “story.”
- Brainstorm: who is likely to care enough to take action against you?
- Preview costs & client time/resources that could be needed to defend.



Compliance: Don't be an ostrich

- Know your industry and its players, including your own company's strengths & weaknesses.
- You're not a fact checker! (But sometimes you're a fact questioner.)
- Monitor formal and informal customer complaints & chatter.
- Learn from customer, media and investor feedback.



Challenges: We are under attack!

- Compliance and litigation can (and must) be close friends.
- Communicate beyond marketing with all impacted teams.
- Refer back to your plan to play defense!
- Foster respectful working relationships with competitor, regulator and any other frequent flyers.



Cease & Desist Letter Response

Confirm the defense & data available
Assess the strength of your position
Assess the importance of the claim to the business

Position is weak
and/or claim is of
low importance

Respond with either the change to be
made or assurance the advertisement
has run its course.

Position is strong
and/or claim is of
high importance

Respond stating claim is fully
substantiated and either indicate data is
on file or provide a glimpse of the data.
Be prepared to go to the next step –
typically an NAD challenge.



Challenges: We need to attack!

- Pay attention to competitor ads.
- Track federal & state regulatory developments & enforcement activity.
- Position yourself as an advocate for truth & fairness.
- Pick the battles you're willing to fight; but answer every client inquiry about a competitor ad or practice.
- Engaged clients = helpful case builders.



Debunking Competitor's Claims

- What was communicated to the consumer?
 - Your perception – look at the ad from multiple angles, ask your friends and colleagues for their perceptions
 - Consumer survey – well-designed with open-end question; traditionally >20% of respondents meets criteria for a message being communicated
- What is the weakness of the claim?
 - Is there reason to believe the product does not deliver the benefit as communicated?
 - Is there reason to believe the product does not deliver on both the explicit and implied claims?
 - Is there reason to believe they have no data or have flawed data?
 - Is there reason to believe the claim would mislead a consumer?
 - Is there reason to believe the claim is denigrating?
- What will be the outcome?
 - Do we believe there will be a measurable impact on top line?
 - Do we believe the benefit achieved will exceed the cost of both internal and external resources expended?



Q & A



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