

**MAY 19, 2011 RESEARCH MEMORANDUM**

**EXHIBIT “9”**

## MEMORANDUM

TO: Rodney Snow & Robert Jeffs  
FROM: Milda Shibonis & Jeff Van Hulten  
SUBJECT: The parameters of misleading advertising  
DATE: May 19, 2011

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### INTRODUCTION

You asked us to research and analyze how courts, the FTC, and the ABA<sup>1</sup> have dealt with false and misleading lawyer advertising. The following will address how the courts and the FTC have defined misleading, the various tests that are used to determine whether an advertisement or statement is misleading, arguments for holding lawyers to a higher standard, and constitutional implications of regulating “puffing.” As you directed, we also looked at how “misleading” has been defined outside the context of lawyer advertising, so some of the cases discuss advertising for products such as food, drugs, etc.

### ANALYSIS

There are two primary justifications for regulating attorney advertising. First, the State has an interest in regulating advertising in order to protect the public from false and misleading advertisements.<sup>2</sup> Second, the State has an interest in protecting the legal profession and its institutions of justice.<sup>3</sup> Because attorney advertising is recognized as commercial speech<sup>4</sup> there are First Amendment considerations that the Bar should be mindful of in its endeavors to control attorney advertising. First, if the State regulates an

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<sup>1</sup> We researched the ABA rules governing attorney advertising; however, we did not have enough time to incorporate the material into this memo.

<sup>2</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>3</sup> *Harrell v. Florida Bar*, 608 F.3d 1241, 1269 (11th Cir. 2010).

<sup>4</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

advertisement because it is false or misleading the State does not run afoul of the Constitution because there are no First Amendment protections for false and misleading advertisements.<sup>5</sup> Second, if the State attempts to control advertising that is not inherently false or misleading the State can do so as long as it proves that it has a substantial interest in regulating the advertising, that the means chosen to regulate directly advance the interest, and that the means are no more extensive than necessary.<sup>6</sup> Drawing the distinction between misleading advertising and “puffing” is a difficult task; hopefully, the following will provide some guidance:

#### CASE LAW

The Supreme Court has stated that just because speech is “potentially misleading” this alone does not justify a ban on speech, but rather, it must be shown the speech is “*inherently* misleading.”<sup>7</sup> However, the Court has remained silent on what constitutes “inherently misleading” speech. This loose formulation has left the Court with a large amount of flexibility ranging from, ruling entire categories of speech inherently misleading,<sup>8</sup> to determining other categories as potentially confusing but not inherently misleading.<sup>9</sup>

This ad-hoc approach has caused the lower federal and state courts to formulate a hodge-podge of guidelines for particular kinds of commercial speech relating to professional services. The discussion and analysis that follow will highlight the overarching principles that guide the different courts in determining when commercial speech is inherently misleading and subject to regulation.

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<sup>5</sup> Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980).

<sup>6</sup> *Id.*

<sup>7</sup> Ibanez v. Florida Department of Business & Professional Regulation 512 U.S. 136, 146 (1994)

<sup>8</sup> See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 464 (1978)

<sup>9</sup> See Peel v. Attorney Registration & Disciplinary Commission, 496 U.S. 91, 110 (1990)

I. Commercial speech for professional services can be found inherently misleading when it contains literal falsities and is therefore “false on its face.”

First, courts have found speech is false on its face generally when the speech makes “establishment” claims asserting that “studies have shown” or “tests prove” a particular claim; or through “bald” claims where the speech has made an unsupported assertion.<sup>10</sup> More specifically, some courts have further expanded the “literally false” classification to include speech that “necessarily implicates” a claim that is literally false. This is known as the “false by necessary implication” doctrine.<sup>11</sup> Furthermore, courts have held that literally false claims can only be found in unambiguous speech<sup>12</sup> and the speech must also be a “specific and measurable claim, capable of being proved false or being reasonably interpreted as a statement of objective fact.”<sup>13</sup> The courts have found that in a literally false claim the plaintiff must only prove that the speech or part of the speech is actually false. No proof of deception or ability to mislead consumers is required when showing speech is false on its face.

A. **Literally false speech found in establishment claims and bald claims**

In general the courts have held that when speech makes a claim that expressly or implicitly puts forth a favorable fact about a product or service and such a claim is supported by a test or study, the claim is an establishment claim.<sup>14</sup> When an

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<sup>10</sup> C.B. Fleet Co., Inc. v. Smithkline Beecham Consumer Healthcare, L.P. (4th Cir. 1997) CCH 1997-2 Trade Cases ¶ 71, 998, 131 F.3d 430

<sup>11</sup> See Cashmere & Camel Hair Mfrs. V. Saks Fifth Ave., 284 F.3d 302, 310-15 (1st Cir. 2002); Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharm. Co., 290F.3d 578-88 (3d Cir. 2002); Scotts Co. v. United Indus. Corp., 315 F.3d 264, 273-76 (4th Cir. 2002); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997)

<sup>12</sup> Novartis Consumer Health v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578 (3rd Cir. 2002)

<sup>13</sup> See Pizza Hut, Inc. v. Pap Johns Int'l, 227 F.3d 489, 496 (5th Cir. 2000)

<sup>14</sup> C.B. Fleet Co., Inc. v. Smithkline Beecham Consumer Healthcare, L.P. (4th Cir. 1997) CCH 1997-2 Trade Cases ¶ 71, 998, 131 F.3d 430

establishment claim is under review it must be shown that the test or study does not actually support the claim being made within the speech in order for it to be false on its face. Moreover, courts have held that when a claim or assertion within speech does not reference a study or test for support it is considered a bald claim.<sup>15</sup> Under bald claims it must be shown that the assertion being made is itself false and therefore the speech is inherently misleading.<sup>16</sup>

For example, a New Jersey federal district court held that a multimedia ad campaign depicting Pennzoil Oil as passing a laboratory test proving that the oil ensured better engine performance and was cleaner than its competitor's, was literally false.<sup>17</sup> The court found that because the test in actuality only tested an oil's viscosity and was not an industry recognized test, the claims made within the ad were not supported by the test and were thus literally false.<sup>18</sup>

Similarly, the Ninth Circuit in *American Academy of Pain v. Joseph* held that a statute banning the use of the term "board certified" in advertisements by physicians that met the state definition of the term was constitutional.<sup>19</sup> The court held that because the term could be used in overly broad ways California's statute requiring that only physicians that have met particular requirements could use such a term in their advertisements was allowable as it protected the public from an otherwise inherently misleading term.<sup>20</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Castrol, Inc. v. Pennzoil Quaker State Co.*, 987 F.2d 939, 941 (3d Cir. 1993)

<sup>18</sup> *Id.*

<sup>19</sup> *American Academy of Pain v. Joseph*, 353 F.3d 1099 (9th Cir. 2004)

<sup>20</sup> *Id.*

In the case of attorney advertising regulations the two cases mentioned above could serve as a template for the types of regulations that could be used to regulate attorney advertisements. In the Pennzoil case the establishment claim supported by the non-industry test shows were regulation would likely be allowable. The state could have created a regulation that only industry approved test could be used in advertisements, which would have prevented the inherently misleading ad that caused competitors to file suit. Similarly, attorney ads depicting studies, or more generally suggesting, “it has been shown...” could be regulated to only allow studies or findings of a certain nature or even only allow phrases and verbiage that such studies or findings used themselves.

In addition, the use of the term “board certified” can be restricted by a statute to ensure that such a term is only used in relation to a physician of a certain grade or caliber. The regulation of the use of certification and specialties in attorney advertising has received differing treatments in different jurisdictions. The Ninth Circuit in the aforementioned case shows, however, that typically when the speech is not completely banned but rather, limited to a particular definition due to the potential confusion caused by a broader definition, uses of the phrase outside that definition can be regulated because such uses by the limited definition would then be literally false and thus inherently misleading.

**B. Literally false speech found through the “false by necessary implication” doctrine.**

Some courts have found the distinction between literal or implicit falsity is not always easily drawn. The rigid nature of this doctrine has led a few federal circuit courts to create an additional doctrine to allow for greater flexibility when handling cases that fall in-between literally and implicitly false. This doctrine is known as the “false by

necessary implication doctrine.<sup>21</sup> The doctrine essentially states, “A representation is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.”<sup>22</sup> Furthermore, the courts using this doctrine have held that in order to be found false under the doctrine, which would lead to a literally false finding, the speech cannot be “susceptible...to more than one interpretation.”<sup>23</sup>

For example, the Second Circuit ruled in *Time Warner Cable Inc., v. DIRECTV, Inc.* (2007), that an ad featuring William Shatner as Captain Kirk stating that using cable HD television services in comparison to DIRECTV’s HD television services would be “illogical,” was literally false under the false by necessary implication doctrine.<sup>24</sup> The court, in its first time using the doctrine, held that when reviewing the ad within its entire context it also featured a tagline, “for and HD picture that can’t be beat, get DIRECTV.” The tagline along with the phrase “illogical” allowed for no other possible interpretation except that DIRECTV had a better HD service than cable did and such a claim is literally false because evidence showed cable had a comparable service.<sup>25</sup>

Similarly, a North Carolina federal district court held in *Farrin v. Thigpen* (2001), an attorney television ad to be “false on its face” and therefore state regulation of the ad was constitutional. The court held that the ad depicting an insurance company discussing a claim in a “strategy session” was literally false.<sup>26</sup> The dramatization showed the senior insurance adjuster recommending a settlement upon learning the name the firm

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<sup>21</sup> John Wiley & Sons v. Palisdade Corp., No. 04-3359, 2005 WL 1390468

<sup>22</sup> *Id.* at \*6

<sup>23</sup> Scotts Co. v. United Indus. Corp., 315 F.3d 264, 273-76 (4th Cir. 2002)

<sup>24</sup> Time Warner Cable Inc., v. DIRECTV Inc., 497 F.3d 144 (2d Cir. 2007)

<sup>25</sup> *Id.*

<sup>26</sup> *Farrin v. Thigpen* 173 F. Supp. 2d. 427, 447 ( M.D.N.C. 2001)

representing the accident victim. The court held that the ad implied a result based upon name alone; and although such a claim was not explicitly made, the ad when considered in its entirety, implied such.<sup>27</sup>

In considering the regulation of commercial speech within the context of professional services the courts have provided a string of casework that has generically served as a functioning model of literal falsities in other areas of commercial speech. This model serves beneficial when seeking to regulate speech that is literally false as such a finding requires no evidence of consumer deception.

As demonstrated by the *Pennzoil* case, models of literal falsities used within product advertising have crossed over to provide useful templates for regulating speech within the professional services realm. In cases such as *American Academy of Pain* such models were applied to show that a literal falsity that is thus, inherently misleading, can be regulated and avoided when such regulations use the least restrictive means possible on limiting the speech as a whole. Furthermore, even within the complexity of determining a literal falsity vs. an implicit one, some courts like that in the *DIRECTV* case, have shown that the adoption of the “false by necessary implication” doctrine can add flexibility to an otherwise rigid doctrine that can further allow for regulation of speech that is thus literally false. The *Farrin* case highlights that this doctrine can serve a useful application when regulating the speech of professional services; although all circuits have not yet adopted this doctrine.

II. Commercial speech for professional services can be found inherently misleading when it contains an implicit falsity.

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<sup>27</sup> *Id.*

The courts have generally found that when speech has the tendency to deceive or mislead, although being literally true it can nevertheless contain an implicit falsity and qualify as inherently misleading.<sup>28</sup> Typically in the generic product advertisement model the courts require that, unlike a literal falsity, implicit falsity can only be found with empirical data supporting the argument that a particular type of speech is or will be implicitly false and therefore inherently misleading.<sup>29</sup> Such data is typically shown through consumer survey data or expert testimony.<sup>30</sup> More specifically, courts have held that consumer reports that measure actual consumer reactions vs. full-blown surveys serve as better evidentiary support.<sup>31</sup>

**A. General Rule and its application to attorney advertisement regulations.**

The difficulty that arises within the scope of implicit falsity is its application to attorney advertising in particular. Although in general the courts require evidence of consumer deception. Some courts have held within the scope of regulating attorney advertising no evidence is required to prove speech to be implicitly false.<sup>32</sup> For example, the Supreme Court of Indiana ruled in *In re Keller* that that no evidence of actual deception is required if an expression is potentially misleading.<sup>33</sup> The Massachusetts Supreme Court similarly has held, “it was not necessary to show resulting harm to the public because the “board's determination that the advertisement was inherently

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<sup>28</sup> American Home Products Corp. v. Jonson & Johnson, 577 F.2d 160, (2d Cir. 1978)

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *In re Keller*, 792 N.E.2d at 869 n.3

<sup>33</sup> *Id.*

misleading was a matter of common experience and common sense, based on the appearance and content of the advertisement itself<sup>34</sup>

The Eleventh Circuit held in *Mason v. Florida Bar*, (2000) that “common sense” is not enough evidence to assert that a speech is implicitly false and subject to regulation.<sup>35</sup> The court ruled that a Florida State Bar regulation banning an attorney from listing his rating as found in the Martindale-Hubbell National Law Directory because it could create an implicitly false and misleading view to an “unsophisticated public.”<sup>36</sup> The state failed to present any empirical evidence that such misleading was likely to occur beyond an argument of “common sense.” The court held that evidence must be presented to substantiate a claim that the potentially implied falsity will mislead consumers.<sup>37</sup>

In the case of creating regulations for attorney advertising, constitutionally defining what will implicitly be false and thus mislead consumers can at this point rely heavily upon the jurisdiction within which the regulations are being made. Most circuits have yet to adopt the “false by necessary implication” doctrine, allowing regulations to be formed under a more flexibly definition of what is literally false and subsequently releasing the state or agency of any requirement to provide evidence of misleading. Thus, with less flexibility that such a doctrine provides, jurisdiction will be a dispositive factor in formulating appropriate regulation.

Currently the Tenth Circuit follows a similar path as the Eleventh Circuit. In *Revo v. Disciplinary Board of the Supreme Court of New Mexico*, (1997), the Tenth Circuit, quoting the Supreme Court in *Peel*, held, that a direct mailer advertising a personal injury

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<sup>34</sup> *Langlitz v. Board of Registration of Chiropractors*, 486 N.E.2d 48, 53 (Mass. 1985)

<sup>35</sup> *Mason v. Florida Bar*, 208 F.3d at 957-58 (11th Cir. 2000)

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

lawyer's services, "was not inherently misleading", noting that for "a particular mode of communication to be inherently misleading, it must be incapable of being presented in a way that is not deceptive," and that the bar's disciplinary board had offered "no evidence that anyone was actually deceived" by the ads, stating that "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment"<sup>38</sup>

The tensions that have created this wide continuum within the lower courts has created a disparity in the range of regulations that courts allow certain states to apply when regulating attorney advertisements in particular. The divide likely has stemmed from a loophole found in misreading the Supreme Court's decision in *Zauderer*. In *Zauderer*, court noted that accepting a state's overall regulation without empirical evidence to support its claim would provide, "little basis for preventing the government from suppressing other forms of truthful and non-deceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising."<sup>39</sup>

The Court, however, split its decision by striking down the Ohio ban on the use of illustrations in attorney advertisements for a lack of any evidence showing such illustrations could mislead consumers; and upholding a ban on the use of the term "fees" vs. "costs" as both terms have very different meanings in a legal context and, without any evidence required, could clearly deceive the average consumer and was therefore inherently misleading.<sup>40</sup> It is the latter ruling in the Court's split that has caused some courts to take this narrow holding and expand it to apply to attorney advertisement regulations at large, essentially engulfing the overall rule in *Zauderer*.

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<sup>38</sup> *Revo v. Disciplinary Bd. of the Supreme Court of N.M.*, 106 F.3d 929, 933 (10th Cir. 1997)

<sup>39</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 625 (1985)

<sup>40</sup> *Id.* at 652-53

It is with these concepts, jurisdiction and overly expansive interpretations, that a creation of regulations on speech that contains, or will likely contain, implicit falsities be crafted with empirical data to support the assertion that consumers would likely be deceived by the speech. It is likely that with such support the courts will be more inclined to consider and uphold any regulation that is designed to regulate commercial speech of professional services that could be implicitly false and therefore inherently misleading.

**III. Commercial Speech for professional services that is found to be “Puffery” is NOT inherently misleading and therefore protected by the First Amendment.**

In general courts have defined “puffery” as subjective words that are exaggerated and non-specific claims that no reasonable consumer would rely upon.<sup>41</sup> Moreover, the courts have held that the figurative and exaggerated nature of such words make them exempt from any form of prosecution civilly, criminally, and, outside the regulation of attorney advertising, for false advertising.<sup>42</sup> More specifically however, the courts have again varied on how this precise exemption of “puffery” applies specifically to regulations on attorney advertising.

For example, The Ohio Supreme Court in *Disciplinary Council v. Furth*, (2001) held that an attorney's web site claiming to be a “passionate and aggressive advocate” violated a rule prohibiting unverifiable self-laudatory statements.<sup>43</sup> Conversely, the Oklahoma Supreme Court in *Oklahoma Bar Association v. Schaffer*, (1982), held that two print advertisements that appealed to the emotions of the consumer was mere puffery

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<sup>41</sup> *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service, Inc.* 911 F.2d 242 (9th Cir. 1990)

<sup>42</sup> *See* *Hustler Magazine*, 485 U.S. at 50; *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Watts v. United States*, 394 U.S. 705, 708 (1969); *New Kids on the Block v. News Am. Pub'g, Inc.*, 971 F.2d 302, 309 (9th Cir. 1992)

<sup>43</sup> *Disciplinary Counsel v. Furth*, 754 N.E.2d 219, 225, 231-32 (Ohio 2001)

as it, “[was] not deceptive, [but] diverts attention of potential clients from the attorney’s qualifications to extraneous and irrelevant matters.”<sup>44</sup> Some courts have attempted to strike a happy medium but overall the circuits are divided.<sup>45</sup>

The split in the lower courts again seems to stem from a misreading or blatant ignoring of the Supreme Court’s ruling in *Zauderer*. The Court specifically addressed the notion that attorney advertising is not different than general advertising by stating, “The State’s contention that the problem of distinguishing deceptive and non-deceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.”<sup>46</sup> The Court continued by stating, “Federal Trade Commission Act to eliminate “unfair or deceptive acts or practices in . . . commerce,” reveals that distinguishing deceptive from non-deceptive...” applies to, “advertising in virtually any field of commerce.”<sup>47</sup> With this precedent it becomes clear that regulations that in general would not pass in the courts should not pass simply because it regulates attorney related advertising.

In moving forward with this in mind it serves then to examine a more concise approach in securing when puffery is found in advertisements generally. The Eighth Circuit in particular has offered a concise test in determining when speech is puffery and when it is a fact that could then be examined for potentially being misleading. In *American Italian Pasta Company v. New World Pasta Company*, (2004), the court held, “If a statement is a specific measurable claim or can be reasonably interpreted as being a

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<sup>44</sup> Oklahoma Bar Association v. Schaffer, 648 P.2d 355, 358-59 (Okla. 1982).

<sup>45</sup> In *In re Felmeister & Isaacs*, the court noted that the techniques of modern advertising that make advertising most effective are often techniques of drama or image-making that grab the consumer’s attention and make an advertisement memorable. 518 A.2d at 193-94.

<sup>46</sup> *Zauderer*, 471 U.S. at 648

<sup>47</sup> *Id.*

factual claim, i.e. one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.”<sup>48</sup> Under such a test claims of being “passionate and aggressive” would likely constitute puffery and be protected by the First Amendment.

In considering regulations on attorney advertising it serves to keep in mind that although courts can vary greatly in their approaches such approaches need to be continually checked against the backdrop of the guiding precedent from the Supreme Court. With this in mind, when formulating regulations on potentially puffing typed phrases and words, although potentially unprofessional, such words should be closely examined under a test, such as the one provided by the Eighth Circuit, which ensures it is indeed a falsity not puffery or such regulations may run afoul of the First Amendment.

#### IV. Conclusion

The case law surrounding the regulation of attorney advertising is convoluted and covers a wide range of views and opinions. The methods used can be very similar but create outcomes on either ends of the spectrum depending on the particular views of any given court. The vast array of views however, congregate around several simple principles derived from roots found in Supreme Court precedent.

In considering regulation for the State of Utah it is important to view these common principles, be-it literal falsity, implicit falsity and puffery, within the scopes and bounds set forth by the Supreme Court. The Supreme Court has offered a specific scope of when implicit falsity should be applied and the Eleventh Circuit in *Mason*, currently shows the

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<sup>48</sup> American Italian Pasta Company v. New World Pasta Company, 371 F.2d 387, 391 (8th Cir. 2004)

most appropriate method in applying regulations that have empirical evidence to support the need for any regulation. The Eighth Circuit has navigated an appropriate test for defining puffery as it applies to advertising generally and the Supreme Court supports this application to attorney advertising as reiterated in *Zauderer*.

The more difficult challenge seems to come from the rigid nature of determining when speech is literally false vs. implicitly false. The Supreme Court has not yet addressed this particular issue but the Second Circuit has provided a concrete example for how such rigidity can be remedied through its recent adoption of the “false by necessary implication” doctrine. Although the Tenth Circuit has yet to apply this specific doctrine, it can still serve as a potential model in crafting regulations that can equally accomplish the goal of protecting commercial speech while regulating speech that is inherently misleading.

The aforementioned examples serve as a potential framework from within the current case law that will allow the Utah State Bar to manage issues of professionalism through tools of ethics while still maintaining the First Amendment integrity that commercial speech within professional services has been afforded.

I. **The FTC recommends regulation only when an advertisement is likely to deceive because over-regulation of truthful and non-deceptive advertising stifles competition, which in turn harms consumers**

The FTC believes that “false and deceptive” advertising by lawyers should be prohibited.<sup>49</sup> The FTC also believes that unnecessarily restricting the dissemination of truthful and non-misleading information is likely to limit competition and harm

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<sup>49</sup> Letter from Maureen K. Ohlhausen, Dir. Office of Policy Planning, Federal Trade Commission, to Richard Lemmler, Ethics Counsel, Louisiana State Bar Association, 2 (Mar. 14, 2007), *available at* <http://www.ftc.gov/be/V070001.pdf> [hereinafter 2007 letter].

consumers of legal services.<sup>50</sup> Regulation of truthful and non-misleading information harms consumers because oftentimes the attorneys who utilize advertising 1) represent plaintiffs in personal injury cases and 2) are solo practitioners or members of small firms with limited resources. Basically, they are the attorneys who serve the interests of people in the lower and middle socio-economic strata. If restrictions on advertising are overly broad and burdensome then there might be a chilling effect on the willingness of attorneys with limited resources to advertise. If attorneys cease advertising then when a less affluent person who has been injured, oftentimes by clients of firms who do not have to utilize advertising to generate business, needs to find an attorney, he or she is hindered. Further, overly burdensome regulations might harm the legal profession especially where the people in charge of the regulations compete against the attorneys who are subject to the regulations. An overly burdensome regime may also harm our institutions of justice, which depend on the adversarial process to reach fair and just results. The FTC therefore suggests that regulating bodies develop “reasonable restrictions on advertising that are specifically tailored to prevent deceptive claims in ways that preserve competition.”<sup>51</sup>

A. **General statements about the nature of legal services, the quality of legal services, and comparisons between providers of legal services are not inherently deceptive**

The FTC’s position is that statements about the nature of legal services, the quality of legal services, and comparisons between providers of legal services should only be prohibited if they are found to be deceptive.<sup>52</sup> “Self-laudatory statements and

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<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.* (FTC points out that there are inherent conflicts in having committees made up of competitors who can prohibit dissemination of advertising and recommends that licensing committees take steps to ensure compliance with antitrust laws).

<sup>52</sup> Letter from Maureen K. Ohlhausen, Dir. Office of Policy Planning, Federal Trade Commission, to Committee Secretary on Attorney Advertising, 2-3 (Mar. 1, 2006), available at <http://www.ftc.gov/be/V060009.pdf> [hereinafter 2006 letter].

claims concerning the quality of legal services are not necessarily either unfair or deceptive. While advertising fitting these descriptions could be employed to deceive consumers, many instances of non-deceptive useful advertising could fit these descriptions as well.<sup>53</sup>”

Further, comparative claims and illustrations that cannot be factually substantiated are also advertising tools that can be used to mislead. However, the FTC would advise against a broad ban against statements that cannot be factually substantiated because there are a lot of statements that provide useful information and are not misleading for which substantiation is either not possible or very difficult. Examples of these statements are claims that the firm provides “friendly,” “diligent,” “prompt,” or “convenient” service.<sup>54</sup>

The FTC believes that over zealous regulation of style and content will also likely discourage advertising, discourage competition, and therefore harm consumers.<sup>55</sup>

“Whether a slogan, musical tag, or illustration is misleading, deceptive, or unfair to consumers would depend on what it says and how it is understood, not on whether it is catchy and effective.<sup>56</sup>” What some professionals and consumers view as tacky or offensive are not seen the same way by others, and if it is not misleading or deceptive then the FTC feels that there is no harm and therefore no justification to regulate.

The FTC finds that often rules committees will restrict a wide class of claims when in fact they are really concerned with and should aim at regulating a “limited subset of that class, such as materially misleading and unfounded claims about a lawyer’s ability

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<sup>53</sup> FED. TRADE COMM’N, SUBMISSION OF THE STAFF OF THE FEDERAL TRADE COMMISSION TO THE AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING 10 (1994) [hereinafter FTC OPINION].

<sup>54</sup> *Id.* at 11.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.*

to secure relief for clients or about the relative quality of a lawyer's work product.<sup>57</sup> The FTC believes that this can be accomplished by narrower prohibitions. So, instead of banning endorsements and testimonials outright rules "might target those claims that make insupportable representations about particular results or that inaccurately imply the existence of objective substantiation."<sup>58</sup>

**B. Whether an advertisement is false, misleading, or deceptive is a fact intensive inquiry that depends on the particular circumstances**

Determining whether something is deceptive depends on context and requires an assessment of a consumer's experience and expectations.<sup>59</sup> In determining whether an advertisement is deceptive, the FTC considers the net impression of the advertisement, evaluated from the prospective of the audience to whom the advertising is directed.<sup>60</sup> Advertisements should be judged by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words.<sup>61</sup>

Typically, the FTC breaks its inquiry into the following categories: "(1) advertising containing direct representations, (2) advertising containing representations which reasonably may be said to be implied by the advertising, [and] (3) advertising

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<sup>57</sup> FED. TRADE COMM'N, SUBMISSION OF THE STAFF OF THE FEDERAL TRADE COMMISSION TO THE AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING 11 (1994) [hereinafter FTC OPINION].

<sup>58</sup> *Id.* at 12.

<sup>59</sup> *Id.* at 15.

<sup>60</sup> In *Re Pfizer, Inc.*, 81 F.T.C. 23 (1972) (often advertising is directed at the "average or unsophisticated person." Therefore, there is an argument that a commercial that repeats: "one call that's all" is deceptive because the overall effect on a person who is unfamiliar with the legal system would be that their legal problem would be solved with one phone call. Further, there is an argument that the consumers that legal advertising targets may be more vulnerable than regular consumers and might be more likely to be swayed into making an uninformed, or poorly informed, decision).

<sup>61</sup> In *Re Sterling Drug, Inc.*, 64 F.T.C. 898 (1964).

which fails to disclose material facts.<sup>62</sup>” Actual deception does not have to be shown, only that the ad had the capacity to deceive.<sup>63</sup> “In determining whether any advertisement is misleading, there shall be taken into account (among other things), not only representations made or suggested by statements, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in light of such representations, or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in the advertisement, or under such conditions as are customary or unusual.<sup>64</sup>” Under FTC guidelines advertisers are typically under a duty to reveal limitations on claims that they make, the fact that results obtained by users giving testimonials are atypical, dangers connected with the use of the product, etc. Advertisements can be misleading in a wide variety of ways the following is merely intended as an illustrative, by no means exhaustive, list:

- 1. Advertisements can be deceptive even though the statements within the advertisement are literally or technically true**

Where advertisements convey more than one meaning, one of which is false, or when material facts are omitted, advertisements may be deceptive even though every individual sentence, separately considered, is true. Advertisements can be completely misleading when they employ true statements in ways that convey false impressions. For example in *Doherty, Clifford, Steers, & Shenfiled, Inc. v. Federal Trade Com.*, 392 F.2d 921 (6th Cir. 1968), the court affirmed and enforced a cease and desist order against

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<sup>62</sup> 49 A.L.R. Fed. 16, §2[a], 15 U.S.C. § 45 (2006)

<sup>63</sup> *Gulf Oil Corp. v. Fed. Trade Comm'n*, 150 F.2d 106 (5th Cir. 1945); *Shafe v. Fed. Trade Comm'n*, 256 F.2d 661 (6th Cir. 1958); *Feil v. Fed. Trade Comm'n*, 285 F.2d 879 (9th Cir. 1960); *Simeon Mgmt. Corp. v. Fed. Trade Comm'n*, 579 F.2d 1137 (9th Cir. 1978); *In Re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

<sup>64</sup> 49 A.L.R. Fed. 16; 15 U.S.C § 55(a) (2006).

an advertising agency and manufacturer of a sore throat remedy. The product was recommended only for the relief of minor sore throat pain. The advertising portrayed a throat engulfed in flames and used unqualified claims that the product would “kill even staph and strep germs” and “help fight infection.” It then showed the prompt recovery of a person after using the product. The advertisement was found to be deceptive because even though the product could actually kill some of the germs, the advertisement gave the impression that the product would instantly remedy serious throat pain and therefore greatly exaggerated the results a person could reasonably expect. Another example of a true statement being used in a misleading manner is found in *In Re Olney*, 33 F.T.C. 73 (1941). An advertiser for a product that treated athlete’s foot stated that the product had killed athlete’s foot fungi in less than three minutes in laboratory tests. The Commission found that to a substantial portion of the purchasing public, the statement would constitute a representation that the product would kill or destroy a person’s athlete’s foot fungus almost instantly. The statement was deceptive because while the product could kill the fungi in a laboratory test in three minutes, it could not cure an actual athlete’s foot infection in three minutes.

**2. Advertisements can be deceptive when they state or imply that a product has qualities that it does not**

In *In Re Hiram Carter, Inc.*, 34 F.T.C. 514 (1942), the FTC found that advertisers had disseminated false and misleading advertisements by using an exaggerated representation of their purported place of business on their letterheads and other stationery. The illustration depicted a large two to three story building; however, their place of business was limited to two office rooms and a loft. This was deceptive because it implied to the public that they would be patronizing a large and well-established

business. The FTC noted that consumers had a preference for patronizing large well-established manufactures and dealers because consumers believed that they were more reliable, more responsible, afforded better services and offered other advantages. Implying that the business was large when it was not was deceptive in light of consumer expectations.

In *In Re Mather Hearing Aid Distributors, Inc.*, 78 F.T.C. 709 (1971) the Commission found that the use of the tradenames “Hearing Information Service” and “Western Hearing Institute” was deceptive because the names implied that the sellers of hearing aids were something other than a commercial enterprise ran solely for profit. The use of the word “institute” implied to consumers that the business conducted medical research. Further, the tradename “Hearing Information Service” could imply that the enterprise is engaged in compiling information on hearing loss and providing services regarding hearing loss to the public. This was deceptive because the only service provided was the selling of their product for profit.

Another category of deceptive advertising occurs when advertisers say that they are offering “special” prices or “sales” when in fact the product/service was sold at the price it normally is during the regular course of business. See *In Re Hiram Carter, Inc.*, 34 FTC 514 (1942). This is deceptive because the quality that the advertiser implies that the product is being offered at a discounted price when it really is not discounted at all.

Final examples of cases that fall in this category are advertisements that make implicit or explicit representations about the qualifications of sales personnel. In *In Re Goodier*, 44 F.T.C. 979 (1948) the FTC found that an advertisement was deceptive because the advertiser used the name “Doc Goodier” and thereby represented that he was

a doctor and that therefore the products sold by him were doctor approved. In *In Re Myrick*, 60 F.T.C. 1621 (1962) the FTC found that the use of the term “Certified Hernia Technologists” represented to the public that his salesmen-fitters were medically trained experts in the field of hernias. This was deceptive because none of the salesmen were medically trained experts in the field.

**3. Advertisements can be misleading when they guarantee a price without allowing the consumer to realistically take advantage of the price or when they omit material information**

It is deceptive for an advertiser to state that a product will cost x if (1) he or she does not allow a customer a reasonable opportunity to take advantage of the price or (2) if he or she omits that the price does not include additional costs that the consumer will incur as part of the transaction. In *In Re Riholz*, 46 F.T.C. 694 (1950) the Commission found that an eyeglass company’s advertising of “special offers” was deceptive because the company’s pattern of practice did not give consumers an opportunity to buy the eyeglasses at the advertised price. Once consumers would come in to take advantage of the “special offers” the seller would have a doctor examine the client and tell him or her that the discounted glasses would not remedy the client’s eyesight problem and trick the client into buying more expensive products.

Advertisements of prices have also been found to be deceptive when an advertiser omits information that is material to the transaction. In *In Re Heyman*, 49 F.T.C. 553 (1952) the Commission found that an advertiser’s representations that an initial supply of vitamins could be obtained for one dollar was deceptive. The general practice of the company was to send the capsules to a consumer through the mail. The consumer had to

pay cash on delivery fees, insurance charges, and postage fees prior to obtaining the vitamins.

**4. Advertisements are deceptive when they affirmatively represent that the use of a product or service will result in a certain outcome yet the company cannot reasonably guarantee that result**

In *Associated Laboratories Inc. v. Federal Trade Com.*, 150 F.2d 629 (2d Cir. 1945) the court found that an advertisement for a product that claimed to overcome weakness, emaciation and thinness and would restore health, strength and vigor to consumers was deceptive. The Commission proved that the tablets could not cure anything. In *In Re American Home Products Corp.*, 63 F.T.C. 933 (1963) the FTC found that an advertisement for an ingrown toenail treatment represented that the product was a complete and effective home remedy for ingrown toenails. The ad was deceptive because the product was merely a local anesthetic and could not give more than temporary symptomatic relief, i.e. it was not a complete and effective cure. In *F.T.C. v. Direct Marketing Concepts, Inc.*, 642 F.3d 1 (1st Cir. 2010), a court found that a company's advertisement that its product could cure cancer, heart disease, and autoimmune disease by making acidic bodies more alkaline was deceptive. There was no evidence to substantiate the health benefits.

**5. Advertisements are deceptive when they create an impression that a person endorses a product when in fact there is no evidence to substantiate the endorsement**

In *Stanley Laboratories v. Federal Trade Com.*, 138 F.2d 388 (9th Cir. 1943) the court found that an advertisement that contained the letters "M.D." in conjuncture with pictures of nurses or doctors would led the public to reasonably believe that the product

was endorsed by doctors. This was deceptive advertising because doctors had not endorsed the product. In *In Re Miracle Hearing Aid, Inc.*, 49 F.T.C. 1410 (1953) the FTC found that an advertisement made representations that a hearing aid had been approved by physicians. The advertisement depicted fictitiously named physicians prescribing the advertised product. This was deceptive because no physicians had endorsed the product.

**6. Advertisements are deceptive when they use testimonials that reflect atypical results or claim that the results are the client's when in fact there is no factual basis to substantiate the testimonial**

In *In Re Porter & Dietsch, Inc.*, 90 F.T.C. (1977); *affd*, 605 F.2d 294 (7th Cir.), the FTC found that an advertisement of a weight-loss tablet was deceptive because it failed to disclose that the results reflected in the testimonials were atypical. The testimonials represented weight losses from 40 to 83 pounds and when the testimonials were viewed in context with the rest of the advertisement they represented to consumers that substantially all users of the tablets would lose a significant amount of weight. This was deceptive because it was extremely rare for obese individuals to lose as much weight as the advertisements represented.

**7. Advertisements are deceptive when they make disparaging statements about competitors that cannot be substantiated**

In *In Re Jacobson*, 34 F.T.C. 494 (1942) the Commission found that an advertisement for a course that taught exercises to improve eyesight represented that glasses did not solve the problem of failing eyesight, did not correct failing eyesight, and caused eye muscles to become lazy. The Commission found that the advertisement was

deceptive because properly fitted glasses corrected many vision problems and that the use of glasses did not cause eye muscles to become lazy or function improperly.