NYSBA FALL 2005 | VOL. 23 | NO. 2

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

To the Members of the Corporate Counsel Section:

As Chairperson of the Section, I would like to share with you some of the recent activities which the Section has been engaged in, as well as some upcoming events and other points of Section interest.

Recently, the Section co-sponsored a spring CLE Program with the Commercial and Federal Litigation Section at the Gideon Putnam Hotel, in Saratoga Springs, New York. The program examined how juries perceive corporations and how best to select a jury in a commercial case. A mock jury was impaneled, deliberations were observed and two jury consultants provided analysis. A panel of experts discussed electronic techniques for communicating to and persuading juries. The final segment provided a panel review and discussion of developments in antitrust litigation. One of the Meeting highlights was the keynote speech by Robert Kerrey, President of New School University, Co-Chair of the 9/11 Commission and formerly Governor of and United States Senator from Nebraska. The attendees earned 7 CLE credits and met with colleagues and judges from across the state.

Looking ahead to the second half of 2005, the Section will sponsor the first NYSBA "Corporate Counsel Institute," which will be held on September 22 and 23 at the Princeton Club in New York City. Hotel rooms in the area will be made available at a discount for attendees. The Institute, designed as a comprehensive two-day program covering a multitude of topics of particular interest to corporate counsel, will be combined with the Section's popular annual Ethics for Corporate Counsel program. Day one will be devoted to five separate plenary sessions (the practice areas include employment, compliance, litigation, law department management and intellectual property). The second day will begin with Ethics for Corporate Counsel in the morning, followed by afternoon breakout workshops on subjects related to the first day's plenary sessions. Attendees will obtain 14.5 CLE credits, including 4 credits in ethics. For more information or to register, please visit our website: www.nysba.org/corporatecounselinstitute.

The Section's Executive Committee has recently re-established the standing committee format. We chose to set up six committees, which will be very useful to the membership of the Section going forward. Those six are: CLE Programs and Annual Meeting; Corporate Governance; *Inside*; Internship; Membership; and Pro Bono. The committees are chaired by three past Section Chairs and three current Section Officers. We need you to consider getting involved in Committees of your choice. Committee membership and involvement can be your give-back to the Association and the profession, an opportunity to network with other attorneys with similar interests and lay the groundwork for possible leadership positions in our Section and the Association.

Inside

We need your ideas, your talents and a little bit of your time. We need the enthusiasm of our younger members, the drive and ambition of those in mid-career and the experiences and depth of knowledge of our more senior members. The time commitment is not great and most Committee meetings can be attended by telephone conference. Over the next two months, I will be sending to our members a more detailed description of the six Committees, including a mission statement and recruitment message from the respective Committee Chair. In the meantime, should you wish to learn more about any of the Section's Committees, please contact the Committee Chairs listed below.

CLE Programs & Annual Meeting—Steven Nachimson; 914-935-5375; steven.nachimson@compass-usa.com

Corporate Governance—Iskah Cavell Singh; 201-894-2754; iskahsingh@unilever.com

Inside—Bonni Davis; 212-808-2080; bdavis@fnly.com

Internship—Barbara Levi; 201-894-2766; barbara.levi@unilever.com

Membership—Tom Reed; 212-722-3610; thomas.reed@verizon.net

Pro Bono—Steven H. Mosenson; 212-356-1224; steven.mosenson@nyu.edu

Once again, this issue of *Inside* reflects the many areas of our members' interests. Included are three excellent articles, on three different practice areas, all of interest in some way to in-house generalists. The topics range from teaching law students the skill sets necessary for in-house counseling, the ins and outs of drafting contracts with international consequences and a comparative advertising update.

I hope you enjoy this issue of *Inside*, and that through it, you become more involved in the activities of the Corporate Counsel Section. On behalf of the Executive Committee and officers of the Section, we encourage your interest, and welcome your participation in the activities of the Section and look forward to meeting you at upcoming Section-sponsored events.

Mitchell F. Borger

Available on the Web
Inside
www.nysba.org/corporate

Back issues of *Inside* (Corporate Counsel Newsletter) (2000-present) are available on the New York State Bar Association Web site

Back issues are available in pdf format at no charge to Section members. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

Inside Index

For your convenience there is also a searchable index in pdf format. To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

Can This Stuff Be Taught?

By Janice Handler

Once upon a time, a beautiful princess was promoted from her job as a regulatory lawyer in a big legal department to General Counsel in a small legal department of an international cosmetics company. She was happily engaged in windexing her big shiny new desk when the phone rang, and it was the highly distraught sales manager for Eastern Europe. Apparently some mascara that had been shipped into Poland had separated—a criminal offense in Poland—resulting in arrest warrants for the company's senior management. What should be done, she was asked. Studying the Windex bottle as if it were a crystal ball, she offered, "For now, tell our managers to stay out of Poland."

It was actually the right answer (and with years of experience now behind me, I couldn't come up with a better one today). The bad news is that there is no foolproof way for anyone moving up through the ranks to get up to speed quickly in the many areas a General Counsel must master.

I became General Counsel of an international cosmetics company after years of serving as the regulatory specialist in a medium-sized legal department. The company had a two-person legal department to minister to the needs of an international sales organization manufacturing and selling products in 142 countries. While I was an ace at negotiating product claims with the Federal Trade Commission, I had never done a sales office lease, purchase or sale agreement, employee firing, or trademark search. Talk about learning curves!!

So when I retired from that job four years ago, I developed a course for a New York City-based law school to fill in the gaps, to teach aspiring in-house counsel some tools of the trade and rules of the road. Those of us who practiced trial and error and rolodex law are undoubtedly rolling our eyes and thinking "Can this stuff be taught?"

So how does one choose amongst the 150 topics that comprise corporate lawyering (with Sarbanes-Oxley)? How are corporate counsel different from their law firm, government, or academic counterparts? I teach my students that the substantive specialties are pretty much the same—what differs is process and presentation.

Corporate lawyers manage a function and are utterly responsible not just for a specific matter or outcome but to ensure that the day-to-day legal affairs of their companies run smoothly and that business results are secured without undue legal risk or expense. Therefore, we must order priorities, evaluate risks, present options to management, execute decisions—all the while practicing preventative law and triaging limited resources.

What are some of the other characteristics of Corporate Counsel?

1. We are "Jills of all trade."
2. We must prevent legal problems—not just fix them.
3. We deal primarily with non-lawyers.
4. We manage other people.
5. We perform non-legal roles in the organization.
6. Our clients often did not choose us.
7. We must know the business as well as the law.
8. We are not only the legal counsel for the company, but often its conscience, history and institutional memory as well.

"Corporate lawyers manage a function and are utterly responsible not just for a specific matter or outcome but to ensure that the day-to-day legal affairs of their companies run smoothly and that business results are secured without undue legal risk or expense."

These unique functions require unique skill sets. Corporate lawyers must not only know their substantive areas cold, they must be able to present legal options to businessmen in a practical and business-oriented way (i.e., "don't tell me what I *can't* do; tell me what I *can* do"). They must write clear and concise documents. They need fact-finding and investigative skills. They must be prepared to handle everything from the toilet paper contract to the sale of the business and go back and forth at the turn of a dime. And they must do all of the above without spending a penny more than someone with little knowledge of legal issues has budgeted for the task.

These are the skill sets I try to teach. The bedrock of my course is problem solving—mostly through the vehicle of short research papers on core topics that are ubiquitous to all corporate counsel. Identifying these

"core" topics is no easy task. What does an attorney for Con Edison have in common with one for Disney? My core topics are: contracts and transactions, employment law, intellectual property and marketing/regulatory law. I chose these topics because they arise in virtually every corporate legal department and constitute the bread and butter of corporate daily life. I season these with "capsules"—short lectures presented by outside experts in various specialties. I have included specialists in M&A, patents, commercial real estate leases, ethics and litigation. I chose these topics scientifically (I have friends who owe me favors). I also devote several classes to process issues unique to corporate legal departments such as ethics, internal investigations, negotiation, litigation and privilege.

This is not a textbook or casebook course. While there is an excellent sourcebook available (Basri, *Corporate Legal Departments*, PLI) which has a chapter on just about every topic a corporate lawyer would need, there is only one way of learning these skills—by doing.

So my students "do." They write five (yes, five!) papers, each on a core subject comprising a typical kind of corporate problem. They try to structure a transaction for purchasing (or licensing) a new cosmetic component from a supplier, to execute a corporate headquarter's RIF, to review claims for a hotly competitive new beauty product, and to develop a crisis management plan. I chose these problems scientifically since they all happened to me. For their final paper, I update each of these problems with new information, and my students must go back to the drawing boards and update their advice.

To do these projects, the students do not need to spend hours in the library. What they need to do is familiarize themselves quickly with a usually new area of law, triage the priorities, and present a clear, concise and "can-do" recommendation to a corporate officer. They need to do it quickly; they need to be practical; and they need to conserve resources. Sound familiar?

Some of my students complain that they are required to write papers on unfamiliar topics without first being "taught" the material. I reply that they learn the material by writing the papers. I once had a graduate student in my class who was already a corporate counsel. "Stop whining" he told them. "This is what corporate counseling is." Sound familiar?

The exercise doesn't end with the writing of the memo. (Does it in real life?) My students become employment lawyers, marketing counsels or General Counsels defending their advice to Marketing Directors, Personnel VPs or CEOs. Anything can happen in these role-playing exercises. Only one thing is for sure—whoever is playing CEO becomes arrogant, demanding and unbending. Sound *very* familiar?

Some of my students are night students who work in "real" jobs during the day. Some are entrepreneurs, some are paralegals in corporate legal departments, and some have business roles. It can be rewarding to see what I teach them put to immediate use. One of my teaching tools last year was an article on adding to legal department value by truly understanding the goals and objectives of the CEO and business management. Next class, one of my students came in beaming. "I had my performance review and tossed around that jargon, and got a very good raise."

The give and take with students is a two-way street. Because so many have business or legal experience, staying one step ahead of them is a challenge. I have had patent agents, M&A specialists, medical doctors and CEOs in my class. This kind of student is bright, focused and no shrinking violet. Once, I was discussing "whereas" clauses with my class, using an agreement I had drafted as a model. I was surprised to find that I was the only one in the class who was a fan of the "whereas" clause. When I asked my students why they disliked such clauses, one responded, "Well, maybe if this clause were better drafted, it might be useful." (Other than that Mrs. Lincoln, how did you enjoy the play?) But it is such dialogue that keeps *me* bright and focused and on my toes. If my class learns from doing, I learn by teaching.

A number of in-house counsel have expressed interest in teaching. I would encourage you all to go for it, with a couple of caveats:

- Make sure that they do *your* evaluation before you do *their* grades
- Remember that your students don't know much about what corporate counsels really do, and with a little luck they may not notice that you don't either.
- If you are asked a question you cannot answer (like how oil and gas contracts are regulated or how HIPAA changes the duties of health insurers), just tell them that the whole legal area is being re-evaluated post Sarbanes-Oxley.

And as to the question we began with: Can this stuff be taught? If you can teach the triage skills of ER, the wisdom of Judge Judy, the wit of Dr. Phil, and the charm of Oprah, sure it can!

Be Adroit with UNIDROIT—Drafting International Contracts with Confidence

By Laurence Beckler

Transacting business across national borders can be a daunting and frustrating task for businessmen and attorneys who do not understand the laws of a foreign locale. In legal terms, contracts between parties from different nations may be thought of as "international" in name alone; commonly, the party with greater bargaining power would impose its standard terms and its national law upon its opposite number—not exactly a recipe for global economic harmony. Especially when the contracting parties originate from dissimilar legal cultures (for example, from civil law in Germany, and from common law in the United States), comprehending and bargaining even basic terms can prove to be exceedingly difficult. In response to the need for a unifying set of legal principles under which private companies may conduct business with confidence, the member countries of UNIDROIT currently offer a set of uniform principles that may govern private commercial transactions.

Founded in 1940, The International Institute for the Unification of Private Law ("UNIDROIT") operates as an independent intergovernmental organization whose purpose is to modernize, balance and coordinate international commercial law as among the member nations, which include the United States and Germany. At its annual session (April 19–21, 2004) UNIDROIT's Governing Council unanimously adopted the 2004 edition of the UNIDROIT Principles of International Commercial Contracts (the "Principles"). Compared to the 1994 edition, the Principles addressed the most recent innovations in international business law such as the validity of electronic contracting. Other additions included chapters devoted to Authority of Agents; Third-Party Rights; Set-off; Assignment of Rights, Transfer of Obligations and Assignment of Contracts (Limitation Periods), as well as updated sections on Inconsistent Behavior and Release by Agreement.

On the whole, the UNIDROIT drafters placed less emphasis on the strict rules of contract construction and choice of law, and more on the spirit and the supporting purposes that determine the outcomes of commercial disputes. The drafters understood that private industry would employ the Principles only if businesses had confidence that they could be used to resolve real-world business quarrels and could function as an accurate predictor of the outcomes of commercial conflicts. Such a comfort level would enable businesses to apportion the risks and rewards of a particular international transaction. Using these assumptions, the UNIDROIT members drafted the Principles with a focus on the potential outcomes of real-life commercial disputes rather than staid legal theory.

Employing the Principles, the following rules apply to basic contract formation. These requirements mirror the common law fundamentals: (1) communicated offer and acceptance, (2) consideration, (3) capacity, and (4) legality. Signatures on a contract are preferred but not required. Without entering into an excess of detail regarding contract formation, note that once an offer to contract has been extended, acceptance of such offer must be adequate. Under the Principles, the conveyance of adequate acceptance must comply with the following guidelines: acceptance can only be made (a) as a verbal or written communication, (b) with serious intent, (c) with effective communication to the offering party, (d) not under duress, and (e) not as a result of undue influence. Acceptance of an offer may be rescinded by both parties as a result of a mutual mistake, but once made, acceptance cannot be rescinded unilaterally unless the other party knew, or should have known, of the accepting party's mistaken understanding of the terms.

When drafting an international contract, an attorney should include the following terms—in accordance with the Principles and for practical considerations—to reduce possible ambiguity between the contracting parties:

1. Clearly state the time of performance of the obligation; the manner in which the performance is to be conducted; the amount and currency of payment and the place where performance and payment will occur;
2. Specify the party bearing the transportation costs;
3. Identify the party bearing the risk of loss and hardship conditions that may excuse performance;
4. Draft limitation of liability clauses that allocate shipment and currency rate fluctuation risk. Also, be sure to incorporate a detailed but open-ended *force majeure* clause to cover unanticipated risks;

5. Add a price escalation clause if the contract takes place over a number of years;
6. Include a governmental approval clause, if appropriate;
7. Insert mediation or arbitration clauses, if appropriate;
8. Declare a specific choice of law (or the Principles) and forum;
9. Designate the language that will control interpretation of the contract; and
10. Indicate the basis upon which an analysis of a contract may be made (e.g., a merger clause declaring that the agreement stands alone regardless of all prior representations and agreements).

Before accepting the Principles as the governing law of an international contract, it is recommended that a business analyze the guidelines by which the Principles direct a court of competent jurisdiction to interpret the terms of the contract. The Principles set forth a specific order of interpretation that governs such analysis. First, the court must consider the contract's common or plain meaning. Initially, external factors will not be considered in determining the outcome of a dispute. Second, if the common or plain meaning is not self-evident, the court must consider the entirety of the circumstances that led to the creation of the contract, such as the relationship between the parties and the actions of the parties after execution of the contract. If such circumstances are not determinative, the court must take a third step and delve deeper into the parties' relationship by considering prior contracts and dealings. Finally, after exhausting the prior three steps, the court must focus on trade usage and custom to determine the validity and the terms of the disputed contract. Note that this hierarchy of contract interpretation differs greatly from United States ("US") laws and customs. In the US, the courts promote validation of the agreement by immediately and exhaustively searching for the true intent of the parties, rather than using a step-by-step process that affords equal weight to a possible dissolution of the contract.

Should the contract be validated by the court, the Principles set forth a general course of action for the application of remedies involving breach of contract. However, rather than focusing on awarding an aggrieved party with damages, as do US courts, the Principles utilize performance devices such as cooperation, cure and assurances, which are designed to promote performance of the contract rather than its failure. Conversely, in the US, specific performance is viewed by the courts as an extraordinary remedy, only to be used in cases where damages would prove inadequate. By employing a preference for specific performance, the Principles appear to provide the disappointed party with precisely what was promised but not performed. However, it has been noted that the practical effect of such specific performance mimics the outcomes of disputes governed by damage clauses, and the Principles offer many exceptions to such orders to perform. In fact, the Principles support the enforcement of damage clauses when such cure is (1) impossible in law or in fact, (2) unreasonably burdensome or costly, (3) of a uniquely personal character, or (4) available through contracting with a third party.

Upon the occurrence of an impediment to performance, the Principles initially favor a temporary suspension of contractual obligations rather than a blanket termination of the agreement. In these occurrences, enforcement would serve to either enforce the legitimate purpose of the contract or to avoid a situation in which one of the parties would be unjustly enriched by such failure to perform. The Principles place such burden to communicate its inability to perform squarely on the shoulders of the party that is unable to comply with the contract's terms, and such party will be held responsible for a failure to communicate in a timely manner with the aggrieved party. On the other hand, after the aggrieved party has learned of the breach, the Principles shift the onus to the aggrieved party to seek a remedy promptly, by bringing the matter before a court and by making some effort to mitigate the damages.

In conclusion, the member nations of UNIDROIT have crafted a set of rules and guidelines that are neither entirely familiar nor totally foreign to private business interests. Because they do not exist as a strict set of international laws, the Principles possess a unique ability to adapt to the changing trade winds of the global economy. For this reason, if for no other, businesses should give strong consideration to drafting an international agreement with an eye towards employment of the UNIDROIT Principles.

Laurence Beckler primarily practices corporate law, focusing on general business and commercial matters. Mr. Beckler represents a broad range of clients, both domestic and international, including publicly-held companies, small to mid-sized businesses, and sole proprietorships in the full range of business issues. In particular, the firm's current activities include preliminary and transactional due diligence exercises, advising on various matters such as securing financing and/or investment, negotiating factoring agreements, real estate leases and subleases, product licenses, employment agreements and other transactions.

Dare to Compare

By Laurence Beckler

In today's competitive economic environment, consumers are bombarded daily by advertisements which tout a certain product as "Number One in Its Field" or "Better than Any Other Product on the Market." Although such advertisements seem commonplace, comparative advertising is a relatively recent phenomenon used to extol the virtues of a certain product in comparison with a competing product in the same market. When used properly, comparative advertising is considered an important tool in promoting competition; however, if such claims are patently false or shed a misleading light on a competing product, a company making the claim can leave itself open to lawsuits and damages that would destroy the value created by the advertisement. This article briefly reviews the current state of the law on comparative advertising and suggests certain strategies that companies should consider when employing an advertising campaign based on comparative advertising to prevent litigation.

"When used properly, comparative advertising is considered an important tool in promoting competition; however, if such claims are patently false or shed a misleading light on a competing product, a company making the claim can leave itself open to lawsuits and damages that would destroy the value created by the advertisement."

Comparative advertising has been encouraged by the Federal Trade Commission (FTC) since the late 1960s and early 1970s by its statements and by adopting a hands-off approach to complaints from aggrieved competitors. The reason was that comparative advertising, if not misleading, increased the consumer's knowledge about alternative products, brands and services which encouraged competition among businesses. According to the FTC, "Comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information."[1] The first company generally credited with employing comparative advertising to promote brand awareness and increase sales is Avis with its "We try harder" television ads that did not specifically mention Hertz as the leading rental car service at that time. The "We try harder" campaign created a relative, believable and compelling strength for Avis, eroding Hertz's dominance in the rental car business and becoming the "right choice" in the mind of the consumer.

Should a plaintiff wish to bring suit against a defendant that has executed a comparative advertising campaign in which false or misleading claims about the plaintiff's product have been made, the plaintiff may contact the FTC to address the controversy. However, a plaintiff seeking redress from the FTC has often found the process to be slow and frustrating. Generally, the FTC will not take a case unless it has a high profile or concerns sensitive issues such as health, public safety or fraud. Plaintiffs should also keep in mind that complaining to the FTC could expose its own advertising practices to scrutiny by the FTC, thereby increasing the possibility of further harm and expense.

Rather than complain to the FTC, most competitors who seek redress for false or misleading advertisements file civil lawsuits in federal court under Section 43(a) of the Lanham Act (the "Act"). The Act provides for the following relief:

> any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial or advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

In a civil action, plaintiffs would be eligible to receive the following remedies for breach of the Lanham Act, including (1) immediate relief by means of an injunction to remove the misleading advertising from general circulation, whether as a temporary restraining order or as a cease and desist order. (2) obligating the defendant to run corrective advertising by way of an affirmative disclosure order, and/or (3) the award of damages to the plaintiff for lost profits and various

expenses incurred as a result of the misleading advertisement. In one or two rare cases, punitive damages have been awarded to a plaintiff where the false or misleading advertising campaign was found to be malicious, egregious and willful.[2] Plaintiffs seeking such punitive damages must understand that their ability to recover such damages is highly unlikely.

"[D]espite the probability that a plaintiff will not achieve an award of damages or an injunction under the [Lanham] Act, legal disputes brought under the Act are frequent."

The Lanham Act initially appears to afford the plaintiff with an adequate forum in which to pursue its claims, but actions filed under the Act generally have not afforded plaintiffs with a great deal of satisfaction. Should a plaintiff initiate a claim under the Act, the court would place the initial burden of proof upon the plaintiff to establish the false or misleading nature of the defendant's advertisement. The plaintiff must show that: (1) the defendant made false or misleading statements of fact concerning his own product or another's; (2) the statement actually or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it would likely influence the deceived consumer's purchasing decisions; (4) the advertisement was used in interstate commerce; and (5) some causal link exists between the misleading statements and harm to the plaintiff. The plaintiff can support its claims by employing consumer surveys that clearly show how consumers interpreted a particular advertisement and subsequently their purchasing choices; however such surveys are costly and time consuming.

If a plaintiff is successful in meeting its burden, defendants may avail themselves of certain affirmative defenses such as claiming "puffery." Puffery can be defined as an exaggeration, bluster, or boasting upon which no reasonable buyer would rely upon, or general claims of superiority that are so vague that it is understood only as a matter of opinion. Such a defense will seek to categorize the defendant's claim as an opinion and therefore non-actionable. Finally, the cost of initiating a lawsuit in federal court can be expensive and time consuming, thereby acting as additional barriers to prospective plaintiffs. It is interesting to note that, despite the probability that a plaintiff will not achieve an award of damages or an injunction under the Act, legal disputes brought under the Act are frequent.

Should a plaintiff seek redress for a misleading or false claim made in an advertisement being run in the State of New York, Article 22-A of the New York State General Business Laws titled, "Consumer Protection from Deceptive Acts and Practices" functions largely in the same way as the Act to provide a plaintiff with certain remedies and protections. This state law functions similarly to the Act in that the plaintiff must meet a similar burden of proof, which a defendant may contend with a variety of affirmative defenses. Note that New York State courts rarely impose damages on cases of this nature.

An alternative to litigation, a plaintiff can challenge a comparative advertising campaign by filing a complaint with the National Advertising Division ("NAD") of the Council of Better Business Bureaus. The NAD was formed by the major trade organizations within the advertising industry and boasts a compliance rate of over 95 percent for decisions involving false or misleading advertising complaints. It is important to note that challenges made under the NAD rarely result in a complete termination of an advertising campaign; however, should the NAD find for the plaintiff, defendants usually modify their ads to remedy the outstanding problems. A plaintiff should also consider employing the NAD to hear a dispute because the proceedings are generally less expensive than full-blown litigation and such a proceeding will not open the plaintiff's advertising practices to public scrutiny through counterclaim. Finally the NAD has no authority to impose damages, so plaintiffs must be content with forcing a competitor to alter its ads.

Prior to commencing an advertising campaign based on comparative claims regarding the value, performance or efficacy of the product or service, consider implementing the following guidelines that should minimize exposure to potentially harmful and embarrassing litigation.

- Have an attorney, expert in advertising law, examine the advertisement or campaign to spot and correct potential problem areas before they result in litigation.
- Compare goods and services with comparable features and purposes.
- Disclose any material limitations on the supporting data used to make the claim.
- Do not present false or misleading statements about the competition's products or services.
- Respect the competition's trademarks and service marks.
- Do not infer that a joint venture or other partnership has been created with the competitors displayed in the advertisement.

- Double check the data and methodology used as the basis for comparison.
- Make sure that the superiority claims on the products and services are pertinent to circumstances in which the product or service is used by the consumer.

Please note that in addition to the preceding guidelines, a business initiating an advertising campaign based on comparative ads can also limit its liability exposure contractually with its advertising agency or by procuring business insurance. When hiring an advertising agency, a business can negotiate an indemnification clause in which the advertising agency agrees to indemnify the business for any and all litigation resulting from the comparative ads. Absent such a clause, the business being sued by a competitor could claim that its agency was negligent in creating the advertising campaign, which could relieve it from liability. Finally the business can procure insurance either as part of its general business policy or on a project-by-project basis under which it will be covered.

Comparative advertising is an effective advertising tool, provided that the claims being made are truthful, substantiated and not misleading. Such campaigns do come with greater risks but can also lead to greater rewards. Assume that all campaigns will be monitored closely by the competition; therefore, a business should take care to follow the guidelines set forth above as a strategy to avoid potential litigation.

Endnotes

1. Statement of Policy Regarding Comparative Advertising, Federal Trade Commission, Washington, D.C., August 13, 1979.
2. *U-Haul International Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986).

Laurence Beckler primarily practices corporate law, focusing on general business and commercial matters. Mr. Beckler represents a broad range of clients, both domestic and international, including publicly-held companies, small to mid-sized businesses, and sole proprietorships in the full range of business issues. In particular, the firm's current activities include preliminary and transactional due diligence exercises, advising on various matters such as securing financing and/or investment, negotiating factoring agreements, real estate leases and subleases, product licenses, employment agreements and other transactions.

Corporate Counsel Section Executive Committee Members

Lawrence D. Chesler
1327 North Dearborn Parkway
Unit 3
Chicago, IL 60610

Bonni G. Davis
Finlay Fine Jewelry Corporation
529 Fifth Avenue, 6th Floor
New York, NY 10017

Donna M. DeGrandi
201 West 72nd Street
New York, NY 10023

Albert W. Driver, Jr.
The Metropolitan Corporate Counsel
1180 Wychwood Rd.
Mountainside, NJ 07092

Alan J. Flink
Federated Dept. Stores Inc.
Law Office, 13th Floor
151 West 34th St.
New York, NY 10001

Jeffrey L. Futter
Con Edison
4 Irving Place, 1625-S
New York, NY 10003

Janice Handler
The Association of the Bar of the City of NY
42 West 44th Street
New York, NY 10036

Fawn M. Horvath
Federated Department Stores, Inc.
Legal Dept, 13th Floor
151 West 34th Street
New York, NY 10001

Barbara M. Levi
Unilever U.S. Inc.
700 Sylvan Avenue
Englewood Cliffs, NJ 07632

Jay L. Monitz
Federated Dept. Stores Inc.
Law Office, 13th Floor
151 West 34th Street
New York, NY 10001

Conal E. Murray
196 Croton Avenue
Mount Kisko, NY 10549

David B. Perlman
Citizen Watch Co. of America
15 Country Club Lane
Scarborough, NY 10510

Michael J. Pisani
167 Rockaway Avenue
Garden City, NY 11530

Gary F. Roth
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019

Rachelle Stern
Federated Dept. Stores Inc.
151 West 34th St.
New York, NY 10001

Catch Us on the Web at WWW.NYSBA.ORG/CORPORATE

Submission of Articles

Inside welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3½" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information. Please submit articles to:

Bonni G. Davis
Finlay Fine Jewelry Corporation
529 Fifth Avenue
6th Floor
New York, NY 10017

Inside

Inside is a publication of the Corporate Counsel Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. Each article in this publication represents the author's viewpoint and not that of the Editors, Section Officers or Section. The accuracy of the sources used and the cases, statutes, rules, legislation and other references cited is the responsibility of the respective authors.

ISSN 0736-0150

Corporate Counsel Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155