

*This is your Release #16 (April 2020)*

# **Advertising and Commercial Speech**

## **A First Amendment Guide**

*Second Edition*

**Steven G. Brody**

*Morgan, Lewis & Bockius LLP, New York City*

**Bruce E.H. Johnson**

*Davis Wright Tremaine LLP, Seattle*

This release for Brody & Johnson's *Advertising and Commercial Speech* brings you the latest developments with respect to advertising and the commercial speech doctrine. Among the many topics discussed in the release are the following:

**Promotion of movies, books, and the like:** According to a California federal district court, where a Lanham Act false advertising claim was filed against NutriSearch and the author of the *NutriSearch Comparative Guide to Nutritional Supplements*, based on statements in the *Guide*, the statements were consumer product reviews protected by the First Amendment and also nonactionable statements of opinion (*Ariix, LLC v. NutriSearch Corp.*). See § 2:4, at note 125.3.

**Advertising in rideshare vehicles:** Reversing the district court, the Second Circuit upheld New York City's ban on in-vehicle advertising in rideshare vehicles (*Vugo, Inc. v. City of New York*). Regarding the exception that allowed regular taxis to use "Taxi TV" advertising, the court said that "the exception neither reflects discriminatory intent nor renders the ban ineffective at improving the in ride experience for millions of New York City residents and visitors. The Taxi TV exception reflects the City's reasonable decision that the costs of permitting advertisements in taxicabs were outweighed by the benefits of compensating taxicab owners for the expense of installing new equipment that facilitated credit card payment and improved ride data collection." See § 11:3.2[A], at note 46.9.

**Compelled commercial speech—cell phones:** In *CTIA—The Wireless Association v. City of Berkeley*, the Ninth Circuit panel reaffirmed its position upholding Berkeley's ordinance that required cell phone retailers to inform prospective purchasers that carrying a cell phone in certain ways may cause them to exceed FCC guidelines for exposure to radio-frequency radiation. The court noted that "the prevention of consumer deception is not the only governmental

*(continued on reverse)*

Practising Law Institute  
1177 Avenue of the Americas  
New York, NY 10036  
**#290340**

interest that may permissibly be furthered by compelled commercial speech,” and that the governmental interest in furthering public health and safety is sufficient, so long as it is “substantial,” which means “more than trivial.” Dissenting Judge Friedland said that the ordinance required businesses to make false and misleading statements about their own products, in violation of the First Amendment. See § 12:10, at note 146.14.

**On-site business signs—obscenity and immorality:** In *Broke Ass Phone v. Boardman Township Zoning Board of Appeals*, plaintiff sought to use its legally trademarked name on a commercial street sign in front of its repair shop. It contended the township’s denial of its application violated the First Amendment. Reversing the trial court, the Ohio Court of Appeals ruled that, in context, the signage did not expose the municipality’s residents to obscene, pornographic, or immoral words or statements. According to the court, when used in a phrase like “Broke Ass Phone,” the term “ass” is a slang term indicating that the phone is “really” or “badly” broken. The sign is simply advertising that the company will fix your “really badly broken phone.” See § 13:2.1[B][26], at note 201.6.

**Cannabis:** In *New Mexico Top Organics-Ultra Health, Inc. v. Kennedy*, a nonprofit cannabis company alleged unconstitutional viewpoint discrimination because of restrictions imposed on its exhibitor application to the New Mexico State Fair. The plaintiff had sought unsuccessfully “to display certain items and images at its State Fair booth to support its educational message pertaining to medical cannabis.” The New Mexico federal district court concluded that the proposed display involved “a noncommercial educational message regarding medical cannabis” and thus was not commercial speech. Moreover, the State Fair was a “limited public forum” and the governmental restriction on the plaintiff’s display of educational photographs of cannabis plants was unreasonable. See § 14:14, at note 233.1.

**Plant-based meat products:** An Arkansas federal district court granted Tofurky’s motion for a preliminary injunction in a lawsuit challenging an Arkansas food-labeling law that explicitly restricted the marketing of “plant-based meats.” The court analyzed the Arkansas statute under the *Central Hudson* test, and found that all four prongs of the test were easily met. However, the court declined to decide whether, as plaintiff alleged, the “true purpose” of the Arkansas law was “not to protect consumers, but to stoke confusion in order to benefit the economic interests of the meat industry” (*Turtle Island Foods SPC v. Soman*). See § 14:20, at note 442.59.

**Engineers:** Mississippi prevents anyone from using the term “engineer” commercially unless licensed by the state as an engineer. In *Express Oil Change, L.L.C. v. Mississippi Board for Professional Engineers & Surveyors*, the Fifth Circuit ruled that the state’s engineering board could not constitutionally regulate Express Oil Change, which used a long-standing trademark on the term “Tire Engineers” and operated several “Tire Engineers” automotive service centers in Mississippi. See § 14:34.5, at note 1029.5.

In addition, this release includes an updated **Table of Cases, Defendant-Plaintiff Table, and Index**.

Thank you for purchasing *Advertising and Commercial Speech: A First Amendment Guide*. If you have questions about this product, or would like information on our other products, please contact customer service at [info@pli.edu](mailto:info@pli.edu) or at (800) 260-4PLI.

# FILING INSTRUCTIONS

## Advertising and Commercial Speech

**Release #16  
(April 2020)**

**REMOVE OLD PAGES  
NUMBERED:**

- Title page to xxi
- 2-1 to 2-44
- 11-1 to I-8

**INSERT NEW PAGES  
NUMBERED:**

- Title page to xxi
- 2-1 to 2-45
- 11-1 to I-9

Practising Law Institute  
1177 Avenue of the Americas  
New York, NY 10036  
**#290340**

