

Table of Contents

Tribute to Cam DeVore and Bob Sack	v
About the Authors	vii
Table of Chapters	ix
Table of Contents	xi
Acknowledgments	xxi

Chapter 1 Introduction: The First Commercial-Speech Doctrine

§ 1:1	Regulation of Advertising.....	1-1
§ 1:2	Commercial Speech.....	1-3
§ 1:3	The First “Commercial Speech” Doctrine.....	1-5
§ 1:3.1	<i>Valentine v. Chrestensen</i>	1-5
§ 1:3.2	The Rule in <i>Valentine</i> : Justice Douglas Dissents.....	1-7
§ 1:3.3	<i>New York Times Co. v. Sullivan</i>	1-9

Chapter 2 Distinguishing Commercial from Noncommercial Speech

§ 2:1	Introduction: What the Distinction Is and Why It Matters	2-2
§ 2:2	The Evolution of the Constitutional Definition: The Supreme Court Cases.....	2-8
§ 2:3	Lower Court Cases Considering “Combination” Advertising	2-14
§ 2:4	Lower Court Cases on Promotion of Movies, Books, and the Like	2-31
§ 2:5	The Expansive Treatment of Professional Marketing.....	2-41

**Chapter 3 Creation and Consolidation:
The Commercial-Speech Doctrine from
Bigelow to Central Hudson**

§ 3:1	Emergence of the Modern Commercial-Speech Doctrine	3-2
§ 3:2	<i>Valentine v. Chrestensen</i> in the Courts.....	3-4
§ 3:3	Emerging Constitutional Protection for Advertising: The <i>Pittsburgh Press</i> Decision	3-5
§ 3:4	<i>Bigelow v. Virginia</i>	3-7
§ 3:5	<i>Virginia Pharmacy</i>	3-11
§ 3:6	<i>Carey v. Population Services International</i>	3-15
§ 3:7	<i>Linmark Associates v. Willingboro</i>	3-16
§ 3:8	<i>Bates v. State Bar of Arizona</i>	3-16
§ 3:9	In-Person Solicitation; <i>Ohralik</i> and <i>Primus</i>	3-19
§ 3:10	<i>First National Bank of Boston v. Bellotti</i>	3-22
§ 3:11	<i>Friedman v. Rogers</i>	3-23
§ 3:12	<i>Central Hudson</i> and the <i>Utilities</i> Cases.....	3-24

**Chapter 4 Age of Anxiety: The Commercial-Speech
Doctrine from Metromedia to Posadas**

§ 4:1	Turbulence.....	4-2
§ 4:2	<i>Metromedia, Inc. v. San Diego</i>	4-3
§ 4:3	<i>In re R.M.J. and Zauderer</i>	4-11
§ 4:4	<i>Bolger v. Youngs Drug Products Corp.</i>	4-14
§ 4:5	<i>Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico</i>	4-17

**Chapter 5 Fits and Starts: The Commercial-Speech
Doctrine from San Francisco Arts to Ibanez**

§ 5:1	Introduction	5-2
§ 5:2	<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Committee</i>	5-3
§ 5:3	<i>Shapiro v. Kentucky Bar Association</i>	5-4
§ 5:4	<i>Board of Trustees of the State University of New York v. Fox</i>	5-10
§ 5:5	<i>Frank v. Minnesota Newspaper Association, Inc.</i>	5-14
§ 5:6	<i>Peel v. Attorney Registration & Disciplinary Commission of Illinois</i>	5-15
§ 5:7	<i>City of Cincinnati v. Discovery Network, Inc.</i>	5-20
§ 5:8	<i>Edenfield v. Fane</i>	5-22

Table of Contents

§ 5:9 *United States v. Edge Broadcasting Co.* 5-23
§ 5:10 *Ibanez v. Florida Department of Business & Professional Regulation* 5-26

Chapter 6 Age of Expansion: The Commercial-Speech Doctrine from *Rubin* to *Western States*

§ 6:1 Introduction 6-2
§ 6:2 *Rubin v. Coors Brewing Co.* 6-3
§ 6:3 *Florida Bar v. Went For It, Inc.* 6-6
§ 6:4 *44 Liquormart, Inc. v. Rhode Island* 6-11
§ 6:5 *Greater New Orleans Broadcasting Association v. United States* 6-16
§ 6:6 *Lorillard Tobacco Co. v. Reilly* 6-21
§ 6:7 *Glickman v. Wileman Bros. & Elliott, Inc.* and *United States v. United Foods, Inc.* 6-23
§ 6:8 *Thompson v. Western States Medical Center* 6-28

Chapter 7 Defamation Based on Advertising

§ 7:1 Introduction 7-2
§ 7:2 Case Law 7-3
 § 7:2.1 Cases Denying Heightened Constitutional Protection for Allegedly Defamatory Commercial Statements 7-3
 § 7:2.2 Cases Applying Standard Constitutional Protections to Defamation Claims Involving Commercial Speech 7-9
§ 7:3 Analysis of Appropriate Constitutional Standard for Defamation Claims Based on Commercial Statements 7-12
 § 7:3.1 Generally 7-12
 § 7:3.2 Increased Recognition of Constitutional Protection for Truthful and Nonmisleading Commercial Speech 7-14
 § 7:3.3 Greater Chilling Effect from Common-Law Remedies Against Commercial Speech 7-17
 § 7:3.4 Diminished State Interest in Regulating Defamatory Commercial Speech 7-19

Chapter 8 Disparagement

§ 8:1 Introduction 8-1
 § 8:2 Elements of the Tort 8-3
 § 8:3 Defamation Compared 8-3
 § 8:3.1 Generally 8-3
 § 8:3.2 “Of and Concerning” 8-5
 § 8:3.3 Malice 8-8
 § 8:3.4 Falsity 8-10
 § 8:3.5 Privilege 8-11
 § 8:3.6 Damages 8-12
 § 8:4 Anonymous Speech 8-13
 § 8:5 Agricultural Disparagement Statutes 8-15

Chapter 9 Lanham Act and Misappropriation Claims

§ 9:1 Introduction 9-1
 § 9:2 Statutory “Commercial” Threshold Under the
 Lanham Act 9-2
 § 9:3 Constitutional Limitations 9-19

**Chapter 10 Publishers’ Liability for Damages Resulting
 from False Advertising**

§ 10:1 Generally 10-2
 § 10:2 Analysis 10-4
 § 10:2.1 Common Law 10-4
 § 10:2.2 The First Amendment 10-6
 § 10:2.3 Statutory Immunity for Online Publishers
 (Section 230) 10-7
 § 10:3 Liability of the Advertiser 10-10
 § 10:4 Liability Permitted or Prescribed 10-11
 § 10:4.1 Negligence, Gross Negligence, or Fraud 10-11
 § 10:4.2 Warranty 10-13
 § 10:5 Note on Contractual and Statutory Liability
 for Negligent Advertising 10-13
 § 10:5.1 Contracts 10-13
 § 10:5.2 Statutes 10-14

Chapter 11 The Right to Refuse Advertising

§ 11:1 General Right to Refuse 11-1
 § 11:2 Right to Restrict Content 11-4
 § 11:3 Exceptions to the Right to Refuse 11-5
 § 11:3.1 Exceptions Based on Content 11-5

Table of Contents

§ 11:3.2	Exceptions Based on the Governmental Nature of the Defendant.....	11-7
[A]	Public Transportation Property	11-9
[B]	Public School and University Media	11-14
§ 11:3.3	Other Exceptions	11-16

Chapter 12 Compelled Commercial Speech

§ 12:1	Convergence of Two Doctrines	12-1
§ 12:2	Agricultural Assessment	12-2
§ 12:3	Alcoholic Beverages	12-17
§ 12:4	Food, Food Additives, Drugs, and Supplements	12-19
§ 12:5	Environmental Advertising	12-35
§ 12:6	Video Game Labeling.....	12-36
§ 12:7	Audio and Video Recording Labeling.....	12-38
§ 12:8	Professional Advertising.....	12-39
§ 12:8.1	Accountants.....	12-39
§ 12:8.2	Attorneys	12-41
§ 12:8.3	Dentists	12-48
§ 12:8.4	Teachers.....	12-49
§ 12:9	Securities and Commodities.....	12-50
§ 12:10	Electronics Retailers.....	12-52
§ 12:11	Housing.....	12-56
§ 12:12	Family Planning and Reproductive Health.....	12-57

Chapter 13 Regulation of the Advertising Medium

§ 13:1	Regulation of the Broadcast Media.....	13-3
§ 13:2	Regulation of Billboards and Political Signs	13-6
§ 13:2.1	On-Site and Off-Site Signs and Billboards.....	13-7
[A]	Federal Circuit Court Decisions.....	13-7
[A][1]	First Circuit.....	13-7
[A][2]	Second Circuit.....	13-8
[A][3]	Third Circuit.....	13-9
[A][4]	Fourth Circuit	13-14
[A][5]	Fifth Circuit	13-20
[A][6]	Sixth Circuit.....	13-20
[A][7]	Seventh Circuit	13-26
[A][8]	Eighth Circuit	13-29
[A][9]	Ninth Circuit	13-29
[A][10]	Tenth Circuit.....	13-42
[A][11]	Eleventh Circuit	13-43
[B]	Federal District Court and State Decisions	13-50
[B][1]	Alabama.....	13-50
[B][2]	Alaska	13-51

ADVERTISING AND COMMERCIAL SPEECH

[B][3]	Arizona	13-51
[B][4]	Arkansas	13-51
[B][5]	California	13-51
[B][6]	Colorado	13-66
[B][7]	Connecticut	13-66
[B][8]	Delaware	13-67
[B][9]	Florida	13-68
[B][10]	Georgia	13-74
[B][11]	Idaho	13-77
[B][12]	Illinois	13-77
[B][13]	Indiana	13-80
[B][14]	Iowa	13-82
[B][15]	Kentucky	13-83
[B][16]	Maryland	13-85
[B][17]	Massachusetts	13-87
[B][18]	Michigan	13-87
[B][19]	Minnesota	13-98
[B][20]	Missouri	13-100
[B][21]	Montana	13-101
[B][22]	New Hampshire	13-102
[B][23]	New Jersey	13-103
[B][24]	New York	13-107
[B][25]	North Carolina	13-114
[B][26]	Ohio	13-115
[B][27]	Oregon	13-121
[B][28]	Pennsylvania	13-123
[B][29]	Rhode Island	13-127
[B][30]	South Carolina	13-128
[B][31]	Texas	13-130
[B][32]	Utah	13-137
[B][33]	Virginia	13-137
[B][34]	Washington	13-139
[B][35]	Wisconsin	13-143
§ 13:2.2	Political Signs	13-144
[A]	Federal Circuit Court Decisions	13-145
[A][1]	Third Circuit	13-145
[A][2]	Fourth Circuit	13-146
[A][3]	Eighth Circuit	13-147
[A][4]	Ninth Circuit	13-148
[A][5]	Eleventh Circuit	13-149
[B]	Federal District Court and State Decisions	13-149
[B][1]	Alabama	13-149
[B][2]	California	13-150
[B][3]	Colorado	13-150
[B][4]	Connecticut	13-150

Table of Contents

[B][5]	Florida	13-151
[B][6]	Georgia	13-152
[B][7]	Hawaii	13-152
[B][8]	Illinois	13-153
[B][9]	Maryland	13-153
[B][10]	Michigan	13-154
[B][11]	Minnesota	13-154
[B][12]	New Jersey	13-155
[B][13]	New York	13-155
[B][14]	North Carolina	13-156
[B][15]	Ohio	13-157
[B][16]	Pennsylvania	13-157
[B][17]	Texas	13-158
[B][18]	Washington	13-158
[B][19]	West Virginia	13-159
§ 13:3	Regulation of Electronic Media	13-159
§ 13:3.1	Regulation of Domain Names	13-159
§ 13:3.2	Regulation of Telemarketing and Telecommunications Advertising	13-160
§ 13:3.3	Regulation of Electronic Mail Advertising ("Spam")	13-178
[A]	Introduction	13-178
[B]	Early Antispam Efforts	13-179
[C]	States Move Against Spam	13-180
[D]	Federal Regulation of Spam	13-181
[E]	First Amendment and Spam Regulations	13-184
§ 13:4	Taxation of Media and Advertising	13-190
§ 13:4.1	Taxation of Media	13-191
§ 13:4.2	Taxation of Advertising	13-204
§ 13:5	Anti-SLAPP	13-207

Chapter 14 Regulation of Advertising Content

§ 14:1	Adult Entertainment	14-4
§ 14:2	Airlines	14-15
§ 14:3	Alcohol Beverages	14-20
§ 14:3.1	Significance of <i>Rubin</i> and <i>44 Liquormart</i>	14-20
§ 14:3.2	Cases Before <i>Rubin</i> and <i>44 Liquormart</i>	14-23
§ 14:3.3	Effects of <i>44 Liquormart</i>	14-27
§ 14:4	Arts and Crafts	14-51
§ 14:5	Automobiles	14-52
§ 14:6	Brothels and Escort Services	14-57
§ 14:7	Camps	14-63
§ 14:8	Clinical Laboratories	14-63
§ 14:9	Commercial Sponsorship	14-64

ADVERTISING AND COMMERCIAL SPEECH

§ 14:10	Concerts and Sporting Events	14-66
§ 14:11	Contraceptives and Family Planning	14-67
§ 14:12	Currency.....	14-69
§ 14:13	Debt Collectors.....	14-70
§ 14:14	Drug Paraphernalia.....	14-73
§ 14:15	Environmental Advertising	14-77
§ 14:16	Fair Employment	14-79
§ 14:17	Fair Housing.....	14-83
§ 14:18	Financial Institutions	14-95
§ 14:19	Fireworks.....	14-103
§ 14:20	Food, Food Additives, Drugs, and Supplements	14-103
§ 14:21	Funeral Services	14-131
§ 14:22	Gasoline	14-133
§ 14:23	Guns and Firearms	14-134
§ 14:24	Hearing Devices.....	14-141
§ 14:25	Insurance.....	14-141
§ 14:26	Jury Influence	14-148
§ 14:27	Liquidation Sales	14-151
§ 14:28	Lotteries and Gambling	14-153
§ 14:29	“Made in U.S.A.” and Similar Labeling	14-167
§ 14:30	Nonprofessional Legal Services	14-168
§ 14:31	Pesticides	14-171
§ 14:32	Photography	14-171
§ 14:33	Political Advertising.....	14-173
§ 14:34	Professional Advertising.....	14-178
§ 14:34.1	Attorneys.....	14-179
[A]	Supreme Court Cases	14-179
[B]	Alabama	14-185
[C]	Arkansas.....	14-187
[D]	California	14-187
[E]	Colorado.....	14-190
[F]	Connecticut.....	14-190
[G]	District of Columbia.....	14-190
[H]	Florida	14-191
[I]	Georgia	14-200
[J]	Illinois	14-202
[K]	Indiana	14-203
[L]	Iowa.....	14-204
[M]	Kentucky.....	14-207
[N]	Louisiana	14-208
[O]	Maryland	14-209
[P]	Michigan	14-210
[Q]	Minnesota	14-211
[R]	Mississippi.....	14-213
[S]	Nevada.....	14-214

Table of Contents

[T]	New Jersey	14-215
[U]	New Mexico.....	14-218
[V]	New York	14-220
[W]	North Carolina	14-225
[X]	Ohio	14-226
[Y]	Oklahoma.....	14-226
[Z]	Pennsylvania.....	14-227
[AA]	South Carolina	14-227
[BB]	Tennessee	14-228
[CC]	Texas.....	14-229
[DD]	Virginia.....	14-231
[EE]	Washington.....	14-232
[FF]	West Virginia	14-232
[GG]	Wisconsin	14-233
[HH]	Federal	14-234
[II]	Attorney Access to Law Enforcement Information	14-235
§ 14:34.2	Accountants.....	14-246
[A]	Supreme Court Cases	14-246
[B]	Lower Court Cases	14-248
§ 14:34.3	Chiropractors.....	14-252
§ 14:34.4	Dentists	14-260
§ 14:34.5	Engineers	14-268
§ 14:34.6	Interior Designers	14-272
§ 14:34.7	Investment Advisers	14-273
§ 14:34.8	Opticians	14-273
§ 14:34.9	Pharmacists	14-274
§ 14:34.10	Physicians.....	14-278
§ 14:34.11	Psychics	14-280
§ 14:34.12	Psychological Services	14-281
§ 14:35	Public Utilities.....	14-285
§ 14:36	Real Estate	14-293
§ 14:37	Schools	14-303
§ 14:38	Securities and Commodities	14-307
§ 14:39	Solicitation of Business or Funds	14-324
§ 14:40	Tobacco.....	14-358
§ 14:41	Trade Names	14-381
§ 14:42	Trading Cards	14-387
§ 14:43	Video Games	14-387
Table of Cases		T-1
Defendant-Plaintiff Table		DP-1
Index		I-1

