

Federal Trade Commission Revises Testimonial Guidelines

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Key changes to the Federal Trade Commission (FTC) Regulations regarding testimonial advertisements came into effect on December 1, 2009. According to one section of the revised guidelines, disclaimers displayed alongside a testimonial, such as, "results not typical," no longer afford protection to advertisers against legal actions for misleading advertising.

The FTC publishes guidelines that explain its position on what constitutes a deceptive advertisement according to federal law. Claims for deceptive advertising are not brought pursuant to these guidelines and, rather, are generally brought under Section 5 of the FTC Act (15 U.S.C. § 45), which allows for fines up to \$16,000 per infraction, possible injunctive relief and requirements for corrective advertising. While the FTC guidelines are not by themselves actionable, courts often refer to the guidelines in considering whether a violation of the FTC Act has occurred. Therefore, the guidelines are a critical component in determining whether a particular advertisement may or may not be deceptive.

Until recently, FTC regulations from the 1980s governed determinations as to misleading testimonial advertisements. The old 1980 guide to those regulations provided a safe harbor to users of testimonials by allowing the use of a disclaimer "clearly and conspicuously disclos[ing] the limited applicability of the endorser's experience to what consumers may generally expect to achieve," (i.e., "your results/experience may vary," or "results not typical.").

The new FTC regulations eliminate the safe harbor provision, stating:

"If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation."¹

Therefore, according to the FTC, an advertisement featuring consumer testimonials will convey to the viewer that the testimonialists' experiences are representative of experiences that the viewer would generally expect from the product or service in actual, albeit variable, circumstances. As the FTC explains, the removal of the safe harbor provision puts "advertisers who use testimonials on the same legal footing as those who convey the same claims to consumers directly."²

According to the FTC, the policy supporting these revisions is that testimonials are powerful advertising tools that will usually convey to the viewer that the results are typical, whether or not they provide a disclaimer to the contrary. The FTC tested viewer reactions to advertisements containing disclaimers such as, "results not typical" or, "these testimonials are based on the experiences of a few people and you are not likely to have similar results," and found that these disclaimers did not dissuade the viewers from believing that the testimonial was generally representative of a typical experience.³ From this observation, the Commission concluded that disclaimers in the realm of testimonial advertising are generally ineffective.⁴ The Commission does concede, however, that an advertiser possessing reliable empirical data

¹ 16 C.F.R. § 255.2(b).

² Federal Trade Commission 16 C.F.R. § 255 Notice of Adoption of Revised Guides 25.

³ 16 C.F.R. § 255 Notice of Adoption of Revised Guides 65, n.1.

⁴ *Id.*

Federal Trade Commission Revises Testimonial Guidelines

demonstrating that the net impression of its advertisement is non-deceptive will avoid the risk of the initiation of legal action in the first instance.⁵

Alternatively, an advertiser will avoid legal action if the net impression is that the testimonialist's experience is atypical. The FTC provides an example in which a formerly obese woman gives the following weight-loss testimonial, "Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of the six months, I had gone from 250 pounds to 140 pounds."⁶ Because the advertisement describes the truly exceptional circumstances under which the testimonialist achieved her weight loss, this advertisement is not likely to convey to consumers that they, too, will experience the same results without the same exceptional circumstances.⁷

In following these revised guidelines and disclosing the generally expected performance in a testimonial's depicted circumstances, prior judicial decisions and FTC orders should continue to be considered. Overall, the FTC finds that a direct company statement is not reliable unless the "representation is true, non-misleading, and, at the time it is made, [the advertiser] possess[es] and rel[ies] upon competent and reliable scientific evidence that substantiates the representation."⁸ FTC orders show that the type of evidence that will properly substantiate a claim may vary according to the statements and the product advertised.⁹ For example, the FTC permits reliance on survey evidence if the survey would provide a proper representative sample of clients/customers.¹⁰ In one instance, in *In Re Thompson Medical*,¹¹ the FTC found that a survey of only 2% of the purchasers of Aspercreme, who were self-selected by way of voluntarily returning report cards, did not provide a proper representative sample on which to base an advertising statement.

Taking all of this into account, to comply with 16 CFR § 255 an advertiser will likely have to do one of the following:

1. Be able to substantiate that a claim made by a testimonialist is representative of the typical result a consumer will experience; or
2. Clearly and conspicuously state the expected results for their consumers in general under the advertised conditions of use.

Should an advertiser choose to provide an affirmative statement clearly setting forth expected results, an advertiser may choose to rely on empirical testing of their advertisements and affirmative statements, in order to validate that their final choice of advertising statement is not misleading or deceptive. In any case, substantiation for any claims as to "typical" results is required. Such studies should be supported by "competent and reliable scientific evidence." Competent evidence likely includes tests, analyses, research, studies, or other evidence based on the expertise of industry professionals, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.¹² If scientific data, such as clinical

⁵ *Id.*

⁶ 16 C.F.R. § 255.2, Example 4.

⁷ *Id.*

⁸ *In re Daniel Chapter One*, Docket No. 9329, 2009 WL 2584873 (F.T.C. Aug. 5, 2009).

⁹ See, *In re Removatron*, Docket No. D-9200, 1985 FTC LEXIS 21, at *167 (FTC Sept. 30, 1989), *aff'd. Removatron Intern. Corp. v. F.T.C.*, 884 F.2d 1489, 1498 (1st Cir. 1989).

¹⁰ *In re IHI Clinics, Inc.*, 120 F.T.C. 264, 274-75 (1995) (discussing old regulations and application to non-testimonial advertisements).

¹¹ 104 F.T.C. 648, 251-52 (1984)

¹² See *In re Daniel Chapter One*, 2009 WL 2584873.



Federal Trade Commission Revises Testimonial Guidelines

trials, is not a possibility, then a representative survey of consumer results/experiences may be conducted. Where a representative survey is conducted, it is important to avoid systematic bias by, for example, surveying a broad sample of consumers, including, possibly, those who are reluctant to be surveyed.

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