

AEJMC Teaching Competition

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Although commercial speech is an important topic in my communications or media law classes, it is sometimes abstract or too different from the traditional First Amendment issues relating to the rights and regulations of journalists, filmmakers or even advertising and public relations professionals. I teach both undergraduate and graduate classes for a range of students in professional majors.

To help examine these issues, I created an in-class group exercise using a real Federal Trade Commission case to illustrate the complexities of a commercial speech case.

In 2004, the Federal Trade Commission brought an action against the manufacturer of two weight loss products: The Slender Strip and the Hydro-Gel Slim Patch. These two products were advertised in major national publications in full-color ads, rife with textual promises, guarantees and an array of questionable photos.

The litigation offers an opportunity to examine a wide array of commercial speech questions as well as questions of government power and regulation, private litigation and First Amendment issues.

At the beginning of the class, the students are broken into anywhere from four to six groups and each group is assigned a role. Each group must dissect the advertisements and construct a legal argument either for or against the advertisements, supported by statutes, common law, precedent and equity. After constructing their arguments, the floor is opened for debate. Depending on the size of the class, occasionally, one group is designated as the United States Supreme Court. The court group acts as both judge and jury.

The roles include both real and fabricated: the Federal Trade Commission; Fulfillment Solutions (the manufacturer); the Healthy Americans Council (public interest group); Advocates for Consumer Interest (public interest group); and the Newspaper Association of America (NAA, trade group). Each is given a template and room to write the group's statements and arguments. Sometimes I collect these for grades as a quiz, sometimes I allow the group to take the template home and submit a typed "brief" or answer.

During the group work time, which is usually about 20 to 30 minutes, I move from group to group to chart their progress, discuss their developing arguments and sometimes point them to specific points. Students are encouraged to bring their casebook to class and many refer to points in the reading or their notes. Some use the internet, too, to look up some of the ingredients mentioned in the advertisements, particularly "fucus vesiculosus," a natural plant extract that often elicits laughter.

The exercise offers the students an opportunity to compete in oral arguments, which they enjoy, and also confront legal doctrines that they may not have entertained before. Debates run 40 to 60 minutes. It also requires them to cite to specific law. The exercise lends itself to a point-

by-point application of the Central Hudson Test as well as other caselaw and regulations. It also opens up questions to additional government regulation by other federal and state agencies.

Because each group occupies a different role, the discussions are often lively and entertaining. The group representing the FTC often has the easiest case to make. But the group also has to be precise and explain what legal authority it has to act and explain precisely what legal action it will take.

The arguments posited by the two public interest groups often dovetail with each other. In addition to either lobbying the FTC or piggybacking on FTC litigation, these groups also have a range of potential causes of action based on unfair trade practices, product liability and other legal theories. The NAA's role is a little more abstract, which requires students to delve deeper into First Amendment theory and even into some theories such as those posited a range of First Amendment cases, some outside the commercial speech chapter.

Upon conclusion of the exercise, I provide the groups with copies of the FTC's lawsuit and injunction and the settlement decree. While these legal documents are just that, legal papers, I also help explain some of the technicalities that may not have been developed in the arguments.

This exercise tends to be one of the more successful exercises we do throughout the semester. Students often enjoy the group projects and the opportunity to pretend to litigate, especially with such a colorful set of facts.

Attachments:

- 1) Exercise materials: FTC exhibits: two advertisements for the Slender Strip and the Hydro-Gel Slim Patch and group assignment sheets.
- 2) FTC legal papers: complaint and injunction and settlement decree