YOUR SHARE OF THE RESPONSIBILITY FOR PRODUCT CLAIMS*

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BEFORE I proceed with the substance of my remarks I want to express my great appreciation to your Chairman and to your Association for inviting me to your meeting.

The subject matter of this paper would be very tiresome indeed to you and me if I adhered to the narrow scope suggested by its title. I have tried, therefore, to make it part of a broader theme concerned with advertising and the ultimate responsibility for proving product claims.

There is more and more evidence of a revulsion on the part of the consuming public to advertising which is offensive or extravagant. That is largely a matter of good or bad form in advertising and with that I am not concerned here. The subject matter of this paper deals with the proof necessary to support representations of fact in advertising. Facts are the things that chemists and scientists deal with and understand and what constitutes proof of facts is just the same whether one chemist is dealing with a colleague or whether he is dealing with the Government in the defense of questioned claims.

The advertising agency business, with its present wide range of services, is a comparatively new one. It is a science in the sense that there are certain well-recognized procedures that will produce certain well-known results. As business becomes more competitive, advertising becomes more competitive and there is greater and greater incentive to stretch a fact here and there, or to state it so artistically that deception, if in fact it were, is not apparent on first reading. As a result of that well-understood phenomenon the major networks have installed censors, at least one well-known periodical has been made responsible under a Federal Trade Commission order for its advertisers' representations, and some newspapers now refuse to accept certain kinds of advertising of drugs and cosmetics.

Advertising is an inextricable part of salesmanship. Both have the common purpose of inducing the purchase of the sellers' products,

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and even Congress recognizes that reasonable latitude must be granted salesmen and advertisers in boosting their products.

There are many successful advertising claims which need no supporting proof. You all know the slogans: "The Pause That Refreshes," "L S M F T" (Lucky Strike Means Fine Tobacco), and "A B C" (Always Buy Chesterfield).

However, when an advertiser represents that his cosmetic will remove skin blemishes, or his vitamins will return grey hair to its natural color, or his soap will put new life into fabrics, he had better be right.

Nothing but the truth is more often than not dreary and uninteresting and might often be misleading. Only last month the Supreme Court in the *Facts Magazine* Puzzle Contest case said "Advertising as a whole may be completely misleading although every sentence separately considered is literally true."

One of the most frequently cited cases brought under the Food and Drug Act was decided adversely to the manufacturer because the Court found that while the representations on a label were technically true they were nevertheless false and misleading. The difficulty arose in both of these cases when the manufacturers undertook to dress up the truth to make it look attractive.

Perhaps I can make my point with greater facility if I state it another way, to wit, how easy will it be to disprove what you say? Modern methods of testing and appraisal are the weapons of skeptics and they are just as well known and available to manufacturers as they are to the government. Whether the manufacturer will pay the cost, however, is another thing, for the crusaders among the physiologists and dermatologists and the biochemists are not on the side of national advertisers, and consequently will not give their services as freely to manufacturers as they so often do when called by the Government to testify against you.

The Ninth Circuit Court of Appeals observed in the recent Nue-Ova case that the Food and Drug Administration had almost unlimited professional resources with which to carry out its investigations. This is only partly true because the Government has a very limited scientific staff but with the help of the crusaders it can muster together almost any time a squad of so-called "medical talent" to help support its cases.

Most advertisers believe all that they say. They are converts rather than skeptics and as a result of this the Federal Trade Commission or the Food and Drug Administration, or both, constantly are charging that manufacturers are wrong, that their advertising is misleading or false, and that it must be stopped or modified or explained.

The courts are very sympathetic with the enforcement of the Federal Trade Commission Act and the Food and Drug Act. The opinions of learned judges are full of references

to the beneficent nature of these statutes and don't think the Government boys don't lay that on thick when they go out to round up a band of M.D.'s to testify against you.

In contested cases under the Food, Drug and Cosmetic and Federal Trade Commission Acts, chances of success are remote unless there is some good factual basis for advertising representations or label declarations. Even then your road will be a rough one, but at least you can stand on your feet and present your defense without apology.

After many years' experience in adjusting differences between these two Government agencies and advertisers and manufacturers, I can tell you with a great deal of confidence that before spending a lot of money on test advertising campaigns you better be sure that what you say about your product is reasonably so, the usual latitude being given for legitimate trade puffery, if you can judge accurately what that is. The responsibility for product claims rests with the advertiser and should not be delegated to or assumed by an advertising agency unless the agency wants to add a research laboratory, a staff of scientists and lawyers to their already heavy burdens and become liable not only as disseminators of advertising but as primary offenders.

Many manufacturers do not have the facilities for making their own scientific tests, at least not the kind that agencies like to talk about, such as the tests made by the well-known "independent experts." I know of no agency equipped to do such work. Yet time and again advertising campaigns are altered to meet some newly conceived competing phraseology, with no investigation into the new facts claimed. If you do not believe this is so, take any class of widely advertised products and notice the great similarity in claims. Even the style and set-up is freely borrowed because the law does not protect a non-copyrighted advertisement, however unique, unless one is nearly a complete copy of the other.

You can do your own testing like the fishing pole manufacturer who had one of his employees take one of his fishing rods out and try it and satisfy himself that it was good and thereafter advertised widely with the slogan "Best by Test." "These Testers are expert Casters, etc.," followed by an impressive set of tables which told that the fishing poles in question were over 400 per cent better in some obscure respect than the nearest competitor. The Federal Trade Commission made the Company discontinue these claims unless they added what was the truth, namely, that all of the tests had been made by an employee of the Company and not by independent testers. Such an investigation is of very little value and the advertising based upon it is just another variety of testimonial advertising which is valuable only as the witness is qualified to judge taking into account his own bias or self-interest. This does not mean that competent tests made by a manufacturer of his own products

are not good, valid tests if properly carried out. They are defective only where there is a lack of competence to do the work and the impression is given that some competent laboratory did it.

In the case of Ox-O-Gas Company the respondent was engaged in the business of selling a solution advertised for mixing with gasoline. The company claimed it increased power and mileage up to 33 per cent, eliminated carbon, cleaned the valves, and accomplished many other things all "Per Official Test by State and City of New York, Hudson County Municipalities, Automotive Engineers, and Oil Concerns." Somebody complained, probably a competitor, the Company resisted, and the Federal Trade Commission started a case. In deciding the case against the respondents the Commission said: "If acceptable the results of these tests would indicate that the product possesses substantial merit. The tests, however, appear not to have been made in a scientific manner and their accuracy is open to serious question." Last month the inadequacy of alleged scientific tests of an absorbent preparation was the subject of comment in a F.T.C. cease and desist order.

The Government rightly looks behind the bald though impressive words referring to tests because they are no better than the experience of the one doing the testing. And this illustrates a point heretofore made. The use of the words "test" or "scientific tests prove" has been so contagious that you see it everywhere and the Federal Trade Commission is determined that such will not be used unless the tests rise to the dignity of really scientific proof.

The alternative to the fishing pole type of testing is to employ a recognized expert qualified by reason of training, experience, and equipment to establish through experimental procedure by trained observations and accurate records that which you are willing to spend hundreds of thousands of dollars to proclaim to the world at large as facts. You can do such work in your own laboratories under the proper scientific auspices, or you can have it done in the outside laboratory of some expert in the field.

Once you have undertaken such a program of research don't throw your records away. In one noted case, an attorney for the Federal Trade Commission devoted thirty-five days to cross-examining one witness about the data in his voluminous exhibits, not because he believed that the work was not done, as the witness had stated on direct testimony, but because he hoped to find some flaw in his proof, some omission in his bookkeeping, or some typographical error that would enable him to make a motion to strike out respondents' evidence, which motions, I am sorry to say, are becoming standard equipment and looked upon with great glee in some quarters. If this is not so there is no reported case to the contrary.

In order to be adequate for use in a trial, records of experiments must

be accurate and complete, and I mean complete, because any single omission might make the entire work unavailable for your defense. These records should be complete in themselves; they should leave nothing either to the chemist's memory or to the reader's imagination. For example, if you are marketing a cosmetic or medicinal preparation, or lotion for use on the skin, it must be free from irritant properties and be safe for use. There are many such on the market and in one case I tried, we used a summary of the scientific evidence produced in the laboratory. Before I could get the summaries in evidence, and to avoid their being stricken out, I had to produce the laboratory notebooks from which the summaries were prepared and the original slips of papers on which the original observations were made. Some laboratories keep their laboratory notebooks in duplicating notebooks. This is highly satisfactory because it allows the introduction of one set in evidence and at the same time leaves a complete set in the laboratory. If you want to know what I think about this requirement for original scraps of paper I will tell you that it is nonsense, but I do not make the rules. This requirement goes far beyond anything the New York State courts require but the alternative is that you run the risk of having your evidence stricken out. Producing original records is dangerous too, because I have discovered that laboratory notebooks contain all sorts of preliminary test data and in the hands of an opposing lawyer such can often be used to cast doubt on the final work done after optimum conditions for doing the experiments have been established.

The Federal Trade Commission will make good use of the *Facts Magazine* puzzle decision and I predict you will hear and see quoted more and more often the words: "Advertising as a whole may be completely misleading although every sentence separately considered is literally true."

It is more important now than ever to be sure you are right in your advertising.

A lot of great businesses have become great through strong and effective advertising. The most effective combination that I can think of is a team made up of scientific representatives of the advertiser and advertising copy writer.