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A Careful Word From the Wise (Not Me)

By: Jim Astrachan

It's been more than six years since Marc Kasky buried the proverbial hatchet in Nike's neck, and one year since they buried the hatchet in the ground. The settlement of their public relations-related, false advertising feud cost Nike \$1.5 Million, about one-half a day's media expense from its enormous advertising budget, its own legal fees and likely a healthy contribution to Mr. Kasky's large legal fees. Small change to Nike who likely did not miss the money, but the avalanche of bad press that followed this litigation did more damage than can ever be calculated, fueled in part by Nike's losing appeal to the United States Supreme Court. How would you like to have been the PR professional whose communication caused this lawsuit?

The lesson taught Nike by Mr. Kasky is required reading for all persons who engage in corporate communications and public relations and all persons who bear some responsibility if the message goes awry. The reason for this is that for the first, but by no means the last time, public relations chatter was held to be actionable false advertising. And frankly, it should have been.

Briefly, here's what happened. Nike had been severely criticized in the media for the way its contractors in Southeast Asia treated their female workers. In effort to tell its side of the story, and publicly defend itself in the media, Nike's public relations people denied any wrongdoing on Nike's part. That part was okay, but then these PR folks went one fatal step farther and as a tag line to their message asked Nike's customers to support Nike through the purchase of its products.

And there lies the lesson. Speech generally is a protected activity under the First Amendment of the United States Constitution. Protected speech is not subject to prior restraint, although the speaker may defame or disparage his subject and be sued. But, his right to speak is generally protected, and he is free to say whatever he wants about his own product, unless, and this is key, the message is considered to be advertising.

Advertising, or commercial speech, is considered by some to be the redheaded stepchild of the First Amendment. So, if a PR person's communication can be construed

as advertising, or commercial speech, the federal Lanham Act's prohibition against false advertising comes into play as do the consumer protection statutes and mini-FTC acts on the books in a plethora of states. If the communication is construed as advertising, or commercial speech, prior restraint may be permissible as well as suits for damages caused by the false advertising. To distinguish commercial from non-commercial speech courts will examine the message to determine whether it proposes a commercial transaction. Does it say or strongly hint; "Buy my product?" If it does, it is likely to be categorized by the courts as commercial speech. And if so, the Lanham Act's prohibitions against unfair competition and false advertising are in play.

Under the Lanham Act, any competitor who is likely to be injured by a false commercial communication (Buy Me!) has a cause of action for false advertising. Injury can occur because the speaker spoke falsely about its product or a competitor's. It's a wonder that Reebok or Adidas did not go after Nike!

So, what should be the rules of the road for the communications professional whose job it is to defend his or her client in the media? First, you'll be more careful with what you say or write if you don't assume that the First Amendment will protect your speech. Second, if a third party is mentioned in the communication, or is identifiable if not mentioned directly, verify that all statements about that person are true. Even if the statements are true, be sure their publication does not invade his or her privacy by intruding on seclusion or communicate private facts. Third, stick to the facts, and don't go beyond what is necessary for rebuttal. Fourth, substantiate every assertion you make. Don't take your client's word that the assertion is true and don't let your client goad you into saying something questionable. Verify the facts before you speak or write. Then verify them again. Get substantiation in writing. Fifth, maintain a record of the substantiation. Sixth, resist the urge to add a commercial message to your defense of the client. In other words, resist the temptation for a call to action by which the audience is asked to support the advertiser through the purchase of its products. The damaging tag line in one of the full page open letters that appeared in the newspapers that Nike claimed was protected as First Amendment speech went something like, "During this holiday season, buy Nike products."

And finally, most sophisticated advertisers make it their business to clear what they understand to be commercial messages, or ads, before they run, often through both in-house counsel and their ad agency's counsel. But they almost always neglect public relations. When the subject is controversial, or mentions a competitor or any third party, clearance is a must. Straight forward but not often followed. Remember, Mr. Kasky may be in your audience.

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