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QUANTITATIVE RESEARCH: A DISPUTE RESOLUTION PROCESS FOR FTC ADVERTISING REGULATION

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A perusal of Federal Trade Commission (FTC) activities directed at suspected deceptive advertising practices in the past few years reveals a vast preponderance of cases terminating in consent decrees.[1] Some probable contributors to this popularity of prosecutorial preemption are the time and cost of seeing litigation to its end, the track record for successful prosecution by the Commission staff, and the detrimental publicity generated by an adverse decision in an adjudicated dispute. None of these factors, however, bear directly upon the merits of an FTC complaint—whether the meaning conveyed by an ad really is deceptive—but simply act as a deterrent to pursuing the full course of litigation. Adoption of a dispute resolution mechanism based upon empirical assessment of the deceptive likelihood of advertising could be implemented early in the administrative process and long before the major costs of litigation are incurred. Such a mechanism would offer a viable alternative to the failings of adjudication and the traditional use of consent decrees by looking directly to the merits of the charges made against an advertiser. Although the meaning of an advertisement is not the only issue faced in the regulation of promotional messages, adoption of this litigatory alternative would represent substantial progress in the present system of prosecution.

This article proposes such a procedure and discusses the potential problems and benefits to be encountered in promulgating this contemporary approach to legal problem solving. The procedure is predicated on the idea that if an advertisement can be *proved* deceptive before enduring the cost and publicity of traditional FTC procedures, there will be no advantage to the advertiser in

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1. An exact percentage of actions which end in consent decrees depends upon whether one includes only cases in which advertising claims are central. A content analysis of *FTC Decisions* from 1980 to 1983 (volumes 95-102) conducted by the authors reveals that approximately 85 percent of those published cases ended in consent decrees.

challenging the allegation. Conversely, if the FTC receives convincing proof that consumers are not likely to be deceived by an advertising claim, it will probably dismiss the complaint rather than risk the embarrassment and cost of pursuing a lost cause. Additionally, a regulatory system based upon the measured fact of consumer perception of an ad's meaning represents a more equitable approach than one based upon what a few commissioners may guess that consumers believe an ad to say.[2]

Finally, such a system can lend greater consistency to regulation. Without a systematic and consistent approach to research, no advertiser can be assured of equal and fair treatment in the research process, which is essential to adoption of the procedure by the advertising community. Consistency of approach may also provide a more global benefit of giving the FTC some insight into the true nature of deception, as patterns begin to emerge in the results of these studies. If, for instance, behavioral research in several cases should discover the phrase "new and improved" to consistently create misconceptions in the minds of consumers, those tests could serve as the basis for subsequent limitations on the use of this phrase. In the same manner, claims traditionally thought to be deceptive per se may well be discovered to be nondeceptive in many or all circumstances.[3]

As proposed here, the application of the procedure demands two separate steps by the FTC: (1) the development of formal research guidelines for the

2. One review of advertising regulation notes:

> Studies of the sources of consumer information, of the influence that different kinds of information have on the purchase decision, and of the importance of factors such as brand loyalty or experience with a product, reveal that deception is a very complex process which is not always assessable merely by looking at the face of an ad. This research suggests that *the FTC's assumptions about the persuasive effects of advertising may not conform to empirical realities concerning the causes of consumer product choices.*

Comment, *Federal Trade Commission Deceptive Advertising Regulation: A Proposal for the Use of Consumer Behavior Research*, 76 NW. U.L. REV. 946, 947 (1982) (emphasis added).

3. One incident of such a mistaken belief by the FTC, where empirical research revealed the misconception, occurred when the Commission went overboard in its attempts to protect children from the undue influence of advertisers.

In 1974 the FTC proposed a rule prohibiting certain advertising directed at children, where products were promoted by flaunting the inclusion of "premiums." Federal Trade Commission, *Proposed Trade Regulation Rule Regarding Premiums in Children's Advertising*, 39 Fed. Reg. 25,505 (1974). The Commission felt that appeals of this variety, such as selling breakfast cereal with toys buried inside, encourage children to ask for products based upon the premiums associated with the product. This, in turn, discourages the children from learning proper buying habits and how to judge the relative merits of competing products. This proposal was followed by a research project which found that, to the contrary, under some conditions the attention of children to the premium would act as a catalyst to prompt the child to learn more about the product. Shimp, Dyer & Divita, *Experimental Test of the Harmful Effects of Premium-oriented Commercials on Children*, 3 J. CONS. RES. 1 (1976). The proposed rule was eventually withdrawn. Research findings in that example discovered that children were not necessarily as gullible as common wisdom would suggest, and it is certainly within reason to suspect that other regulations or Commission decisions might be found equally overcautious, or even lacking in sufficient caution, as patterns emerge in individual case studies.

conduct of quantitative research, and (2) the implementation of a model that applies behavioral research to an early determination of the facts at issue. Part I of this article reviews the values of behavioral research and argues for formalized methodological direction. Part II proposes informal prelitigation resolution of the issues related to the conveyed meaning of an advertisement.

I. *Empirical Research Standards*

The Need for Behavioral Research

The FTC standard of deception is predicated on consumer misunderstandings, rather than on any finding of fault or impropriety by the advertiser.[4] Thus, the perception of the consumer is quintessential to its proper application.[5] Explicit claims in advertising are largely measurable for accuracy at the point they are transmitted, with no need to measure how the message is received. If a product is promoted, for example, by a claim that it will increase gasoline mileage in an automobile by 20 percent and it is unable to do so, this claim is easily measured and disproved.[6] But, advertisements formulated around sex, status, or other emotional appeals convey misinformation indirectly through implication[7] and, therefore, are not so easily measured.[8] An example would be a vitamin supplement that claims to help "iron-poor blood" and seems to imply that this malady is common in persons who frequently feel tired.[9] Deciding whether this implication is made by the advertising in question is not quite so simple. It is in just such a situation that the utility of behavioral research can be realized because such research can probe what consumers actually believe the ad to mean.

A recent FTC decision, *Thompson Medical Co.*,[10] addressed the proof of both explicit and implicit claims. The former, it declares, are "ones that directly state the representation at issue. Because the message is stated unequivocally, it is reasonable to interpret the ads as intending to make the claim."[11] Implied claims, on the other hand, range from those that are very nearly explicit to those that barely suggest some claim. Thus, the Commission uses several fact-finding tools to assess the potential deceptiveness of implications:

4. Neither intent nor bad faith need be shown to sustain a charge of deception, since they are not elements of the violation. Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir.), *cert. denied*, 430 U.S. 983 (1976); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963); Feil v. FTC, 285 F.2d 879, 896 (9th Cir. 1960).

5. See the discussion of consumer perception of advertising in Richards & Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77 (1981).

6. Cliffdale, 103 F.T.C. 110 (1984).

7. For a more complete treatment of emotionally conditioning advertising techniques, see Richards & Zakia, *supra* note 5. *See also* B. GARDNER, A CONCEPTUAL FRAMEWORK FOR ADVERTISING (1982).

8. See *infra* note 20.

9. J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967).

10. 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

11. 104 F.T.C. at 788.

> One is to look at the evidence from the advertisement itself. We often conclude that an advertisement contains an implied claim by evaluating the contents of the advertisement and the circumstances surrounding it. This technique is primarily useful in evaluating advertisements whose language or depictions are clear enough, though not express, for us to conclude with confidence after examining the interaction of all the different elements in them that they contain a particular implied claim.
>
> If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable.[12]

Although evidence outside the bare advertisement is unnecessary for explicit falsities, the regulators may actually demand some additional evidentiary showing of deceptive likelihood before they will decide the fate of an advertising message. To find whether a deceptive implication is actually conveyed to consumers can best be decided by looking not to the message but to the receiver. Consequently, the external evidence favored by the FTC is empirical behavioral research:

> The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question. *Such evidence will be in the form of consumer survey research for widely distributed ads*. . . . Where we use surveys in lieu of individual testimony, the surveys are methodologically sound; they draw valid samples from the appropriate population, ask appropriate questions in ways that minimize bias, and analyze results correctly.[13]

While other forms of evidence are used and considered acceptable by the Commission,[14] it is clear from both the nature of implied claims and the position of the FTC that consumer behavior research is the best possible form of evidence when nonexplicit appeals are encountered.

The implied manner of appeal has proliferated over the past years, exacerbating the already problematic job of regulating advertising. A few years ago, FTC Commissioner Mary Gardiner Jones made the following statement:

> The present public policy in advertising is to produce truth and honesty. An interesting question is whether the existence of that policy is pushing advertising away from direct product claims

12. *Id.* at 789.

13. *Id. See generally* Preston, *Data-Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deceptiveness is Required*, 24 AM. BUS. L.J. 359 (1986).

14. *Thompson*, 104 F.T.C. at 790.

> which can be validated and subject to the F.T.C. Act, into some of the less definable, less verifiable product claims and advertising themes including this kind of psychological associating with individual status and anxieties. I don't think it is completely true, but we have to remember in formulating public policy that the so-called "cure" might push people into doing things which are more objectionable than the original problem to which the "cure" was designed to be applicable.[15]

A suitable "cure" must address the fact that product attributes can be either objective, product-centered features or subjective, consumer-centered benefits. As Holbrook describes the difference,[16] "factual" advertisements emphasize "logical, objectively verifiable descriptions of tangible product features,"[17] and "evaluative" advertisements describe the "emotional, subjective impressions of intangible aspects of the product."[18] A factual claim might say "X product contains no sugar." An evaluative claim, on the other hand, may state "X product will make you sexy."

A striking discovery of Holbrook's research is that, though factual messages may be most effective in favorably influencing some beliefs (at least for well-educated consumers buying relatively technical products), emotional appeals were barely distinguishable from the factual ones in their influence on the consumer. Indeed, a review of pertinent research by Rotfeld and Preston found virtually no difference between these two forms of sales pat-

15. Jones, *The Cultural and Social Impact of Advertising on American Society*, 8 OSGOODE HALL L.J. 65, 87 (1970). Many advertising scholars have made similar observations about the trend of modern advertising techniques. Professor Terence A. Shimp, at the University of South Carolina-Columbia, remarks:

> Regulatory agencies have generally assumed a more aggressive position in performing their statutory mandates: The FTC, for example, has expanded and intensified its efforts to regulate unfair and deceptive business practices. . . . The irony of the FTC's expanded regulatory activity is that there probably has not been any significant diminution in the extent of advertising deception. What has occurred instead is that blatant deception has been replaced with subtle forms. Regulatory pressure has likely led advertisers to resort to less discernible forms of advertising misrepresentation as a means of avoiding FTC detection.

Shimp, *Social Psychological (Mis)Representations in Television Advertising*, 13 J. CONS. AFF. 28, 28-29 (1979). *See also* Resnick & Stern, *An Analysis of the Information Content in Television Advertising*, 41 J. MKTG. 50 (1977); Shimp & Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising*, 45 J. MKTG. 22 (1981).

16. Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. MKTG. 545 (1978). *See also* Shimp & Preston, *supra* note 15. Nonfactual types of appeals have been discussed extensively by behavioral researchers and have been called, variously: "social-psychological," Shimp, *supra* note 15; "feeling," Golden & Johnson, *The Impact of Sensory Preference and Thinking Versus Feeling Appeals in Advertising Effectiveness*, 10 ADVANCED CONS. RES. 203 (1983); "arbitrary," Preston, *Theories of Behavior and the Concept of Rationality in Advertising*, 17 J. COMM. 211 (1967); and "social reality" appeals, Mizerski & Settle, *The Influence of Social Character on Preference for Social Versus Objective Information in Advertising*, 16 J. MKTG. RES. 552 (1979).

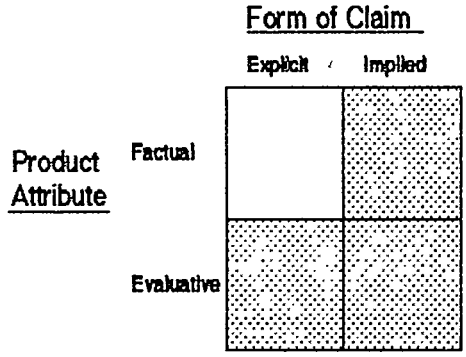
17. Holbrook, *supra* note 16, at 547.

18. *Id.*

ter.[19] In other words, emotional ploys had an impact on the public very nearly as persuasive as hard facts.[20] Additionally, it appears that advertisers use such techniques with abandon, a large majority of ads being of the emotional genre.[21]

These emotional devices present peculiar difficulties when compared to regulating factual misclaims. Because emotional claims may be interpreted differently by each consumer, the regulatory agency will find it difficult to determine the number of consumers to which each interpretation is conveyed. Objective consumer research obviously is superior to the necessarily subjective Commission expertise as a way of enabling the FTC to determine the likelihood of emotional devices to mislead.[22]

In summary, just as implied claims are harder to handle than explicit claims, so are emotional claims harder than factual claims. And either of the latter may take either explicit or implied form. For example, while the statement, "X product will make you sexy," is explicit, it is evaluative, and the same claim might be implied by picturing a man and a woman in an intimate situation. Such possibilities lead to the following classification of advertising claims:



19. Rotfeld & Preston, *The Potential Impact of Research on Advertising Law*, 21 J. ADVERTISING RES. 9, 12 (1981).

20. Emotional appeals, therefore, deserve no less attention by the FTC than do factual appeals. *See* Reed & Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733 (1977); Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171 (1975); Comment, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WIS. L. REV. 1097.

21. One empirical study determined that twice as many advertisements consist of basic persuasion as those consisting of basic information. Marquez, *Advertising Content: Persuasion, Information or Intimidation?*, 54 JOURNALISM Q. 482 (1977). Another study appears in Pollay, Zaichkowsky & Fryer, *Regulation Hasn't Changed TV Ads Much!*, 57 JOURNALISM Q. 438 (1980).

22. LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1 (1971), criticizes the concept of deference to Commission findings by the courts, arguing that the diversity of the FTC jurisdiction and the backgrounds of the individual commissioners make any significant degree of expertise an impossibility.

The Commission indicates that consumer research is useful for implied claims, but Holbrook's study suggests that such evidence would be equally useful for explicit claims that concern evaluative product attributes. The shaded area in the figure depicts the areas of potential application of behavioral studies. Any claim that is *both* explicit and factual can be assessed by the advertisement on its face, but all others demand external evidence if they are to be adequately judged.

Although there is clearly value in the application of consumer research, there are practical impediments to fully effectuating its use. The next section presents some of these hurdles that must be cleared to optimize this method of fact finding.

Regulatory Reluctance

Over the past decade, the FTC has become more receptive to behavioral data, which is clearly evidenced by a notable increase in the number of cases in which such data have been presented.[23] FTC procedures and guidance in the past did not promote the use of more systematic and scientific analysis of consumer beliefs.[24] Despite the increased prevalence of behavioral data, there has been little improvement in this area.[25] For instance, no guidelines have been promulgated to describe what scientific procedures are presumptively acceptable to the Commission as proof of innocence of the advertisers, nor is there any clear definition as to how many consumers must be misled by an ad for it to be indefensibly deceptive.[26] The Commission has been reticent in formally addressing this need.

What the regulators need to determine is consumer perceptions of the advertised product resulting from the advertisements. However, the

23. Preston, *supra* note 13, at 361.

24. Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 559 (1969).

25. Barnes, *The Significance of Quantitative Evidence in Federal Trade Commission Deceptive Advertising Cases*, 46 L. & CONTEMP. PROBS. 25 (1983).

26. Commissioners Pertschuk and Bailey, criticizing the Commissions' *Policy Statement on Deception* in Cliffdale, 103 F.T.C. 110, 174 (1984), state that:

> The Commission has never identified a minimum percentage of consumers who must be misled in order to find deception; nor has it identified any percentage as "per se" substantial. Indeed those decisions that have discussed extrinsic evidence as to the percentages of consumers who could be misled suggest that the number of consumers adequate to constitute a "substantial number" will vary depending on the nature of the claim and the consequences of the deception. Generally, twenty or twenty-five percent may be considered a substantial number. However, a smaller percentage may be sufficient if physical injury or large monetary loss could result from consumers being misled.

Analysis of the Law of Deception, enclosure in letter from Chairman Miller to Congressman John D. Dingell (Feb. 28, 1984). Though prior case law does indicate some figures considered proper by the Commission, the recent stance of the Commission being attacked in that statement adds somewhat to the uncertainty. It is likely, however, that many former cases turn on percentages of evidenced deception that would be found to be inadequate for prosecution under today's attitudes. *See* Preston & Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 J. MARSHALL L. REV. 605, 609-15 (1986).

regulators sometimes ignore direct evidence of such perceptions,[27] and they make no attempt to confirm those perceptions by obtaining them directly from consumers. Instead, the FTC applies its own expertise/opinion as to what may deceive the public,[28] and it gives little indication where it acquired this omniscient perception of public response.[29]

Although the Commission has increased its interest in behavioral research in recent years and has claimed a preference for it in some circumstances,[30] it has taken no active measures to assist or encourage the introduction of surveys or other measures of perceptions into its evaluations of deception.[31]

27. This problem extends well beyond advertising regulation. One additional example is the area of "obscenity" regulation. *See* Richards, *Obscenity and Film: An Empirical Dilemma*, 6 LOY. ENT. L.J. 7 (1986); Bates, *Pornography and the Expert Witness*, 20 CRIM. L.Q. 250 (1978); Lamont, *Public Opinion Polls and Survey Evidence in Obscenity Cases*, 15 CRIM. L.Q. 135 (1972-73); Stern, *Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation*, 20 CASE W. RES. L. REV. 527 (1969).

28. The FTC often makes no attempt to poll public perceptions, beliefs, or attitudes for the purpose of gauging such a likelihood-to-mislead. A content analysis conducted on all 3,337 cases that appeared in *FTC Decisions* during the period from the FTC's inception in 1914 through 1973 reveals that only 206 of those cases involved any showing of consumer perception, and of those, 194 were simply instances where consumers hand-picked by one or both of the parties were brought in to testify. It appears that up until 1974 only 12 cases involved surveys that *may* have had some scientific validity of "representativeness" of the buying public. Brandt & Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception*, 41 J. MKTG. 54 (1977). Internal Commission evidence was found applied in 94.7% of the cases examined. The Seventh Circuit in 1944, long before survey research methods reached their present sophistication, upheld the ability of the Commission to determine deceptive tendencies in lieu of such evidence.

> The Commission was not required to sample public opinion to determine what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisement, and then to decide for itself whether the practices engaged in by the petitioner were unfair or deceptive.

Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944). *But see* Rotfeld & Preston, *supra* note 19, which finds a recent trend toward greater use of survey evidence. *See generally* Preston, *supra* note 13. Deceptive advertising is measured against a ruler of whether the subject communication has a "capacity or tendency" (*see* FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976); Jacob Siegel Co. v. FTC, 150 F.2d 751 (3d Cir. 1944); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942); Newton Tea & Spice Co. v. United States, 288 F. 475 (6th Cir. 1923)), or "likelihood" to mislead the public. It should be recognized that there is no consensus regarding what percentage of the public represents sufficient deception, or with what probability, to justify remedial legal action. This is particularly true given the decision in Cliffdale, 103 F.T.C. 110 (1984), which misstates the former standard as "tendency *and* capacity" to deceive, thereby subtly altering history. *Id.* at 165. Through this misrepresentation the Commission justified changing its stated standard to a more strict "likelihood" probability. *See* Preston & Richards, *supra* note 26.

29. "Why questions of meaning should be submitted to the virtually unreviewable discretion of five commissioners of the FTC has never been articulated. . . . [T]here is no reason to believe that commissioners of the FTC have unusual capacity or experience in coping with questions of meaning." Pitofsky (writing as former Commissioner), *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 678 (1977).

30. See *supra* text accompanying note 13.

31. Though the Commission has done nothing to aid defendants charged with unfair or deceptive advertising practices to introduce evidence of this variety, there is some degree of "encourage-

Even if defendants desire to present evidence of this variety, the FTC offers them no formal direction as to what methodologies will be recognized as scientifically valid.

In 1916, Louis D. Brandeis, author of the famed "Brandeis Brief" that introduced quantitative methodology to the law,[32] made the following comment about the need for integration of various other disciplines with the law: "The judge came to the bench unequipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in the lawyers who presented cases to him. For a judge rarely performs his functions adequately unless the case before him is adequately presented."[33] This remark of seventy years ago still applies. The Commission seems better equipped to deal with evidence that is more familiar to legal advocacy than public perceptions, even if it is willing to consider perceptual data.

The meaning of an ad in the mind of a consumer, however, is a question of *fact*, not of *law*.[34] The primary fault, where advertising litigation circumvents a fact-finding approach to consumer beliefs, lies not upon the Commission, whose function is akin to a judge. It is, rather, the fault of the advocates presenting these cases for neglecting to offer proof of consumer beliefs beyond the scientifically invalid testimony of purposively selected consumers or the unqualified opinions of supposed "experts."[35]

Lawyers, as a rule, tend to avoid and mistrust quantitative data. This apprehension by the profession continues despite the growth of quantification techniques and approaches in legal analyses.[36] In reality, terms like "weight

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ment" to develop this evidence, stemming from respondents' opportunity to observe the FTC's increasing dependency on consumer opinion data to support its own position.

32. The "Brandeis Brief" was filed in the case of Muller v. Oregon, 208 U.S. 412 (1908). It successfully defended an Oregon statute providing a ten-hour maximum workday for women. The brief included a mere two pages of legal argument and in excess of one hundred pages of statistical matter regarding the economic and physiological issues involved. *See* M. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM (1971).

33. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

34. Continental Wax Corp. v. FTC, 330 F.2d 475, 477 (1964); Kroger Co., 98 F.T.C. 639, 726 (1981).

35. In the past these "experts" have not even needed to be experts on attitudes or perceptions. For example, in Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944), a dermatologist was qualified as an expert to testify as to what the "average woman" would believe the name "Rejuvenescence" to mean, even after he testified that a skin cream by this name might cause a woman to believe that it is "something which would actually cause her youth to be restored." *Id.* at 680. A finding by the Commission that this name had a capacity to deceive, based on such evidence, was upheld. *Id*

36. Silas, *Law Plus: Social Reseach Use is Rising*, 70 A.B.A. J. 39 (Nov. 1984), quotes Professor John Heinz, Northwestern University School of Law: "Judges are skeptical and somewhat fearful about evaluating statistical information. If it's a question of social science, they may say, 'I know this,' but if it's a chemical question, they know they don't know the answer." *Id. See generally* Rosenberg, *Quantitative Methods for Judges, Lawyers and Law Teachers*, in COMMUNICATION SCIENCES AND LAW: REFLECTIONS FROM THE JURIMETRICS CONFERENCE 171 (L. Allen & M. Caldwell eds. 1965).

of evidence" and "balancing of interests" are quantitative legal theories.[37] So too is "likely to mislead." While the number of prospective purchasers required to be potentially deceived in order to invoke legal sanction is a question of law, the likelihood-to-mislead is a question of fact; the social scientists' empirical tools, available to the lawyer, are techniques probative of these facts.[38]

This is not to say, however, that there is nothing that can be done by the Commission, procedurally, to aid and provide direction for presentation of this information.[39] These fact-finding methods are less speculative than Commission expertise and should consequently be promoted as a means of testing the charges of an FTC complaint. The following sections explore the possible steps that might be taken by the Commission to assist advocates who are pursuing empirical data to measure deception and show how these steps can play a role in the institution of a quantitative dispute resolution process.

Formal Versus Informal Methodological Guidance

While the FTC has yet to issue a policy statement or to promulgate regulations regarding presumptively acceptable research methods, many of the Commission's decisions speak to various aspects of this problem.[40] This record amounts to an informal statement of policy. However, it exists in many disparate pieces rather than being synthesized into a single statement. And, unfortunately, such a record often requires inferring what is allowed indirectly from what is forbidden.

There are two existing models that the FTC might follow in creating a formal policy toward research on the messages conveyed by advertisements. The first is its own record of evidence on substantiation of conveyed claims and the second is that of a sister agency, the Food and Drug Administration (FDA). These two examples are discussed in turn.

37. Ball, *The Trial Court: Probability Theory and Jury Issues*, in COMMUNICATION SCIENCES AND LAW: REFLECTIONS FROM THE JURIMETRICS CONFERENCE 179-90 (L. Allen & M. Caldwell eds. 1965), gives examples where many of these legal approaches to probability make inadequate or even incorrect assumptions.

38. A discussion of the relevancy of scientific evidence appears in Note, *Evolving Methods of Scientific Proof*, 13 N.Y.L.F. 679 (1967) (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)). The article recognizes that the basic principle of admissibility of a scientific technique is its "general acceptance in the particular field in which it belongs." *Id.* at 682.

39. Professor Ernest Gellhorn, evaluating the methods used for proving deception in FTC advertising cases, claimed: "Until the FTC establishes sensible ground rules for the preparation and presentation of surveys in cases where consumer understanding is a significant issue . . . the partisan survey is an unduly risky, expensive, and time-consuming method for one party to prove as single issue in the case." Gellhorn, *supra* note 24, at 567.

40. For example, the recent analgesics cases: American Home Prod., 98 F.T.C 136 (1981), *modified*, American Home Prod. v. FTC, 695 F.2d 681 (3d Cir. 1982); Bristol-Myers Co., 102 F.T.C. 21 (1983); Sterling Drug, 102 F.T.C. 395 (1983); Thompson Med., 104 F.T.C. 648 (1984), *aff'd*, Thompson Med. v. FTC, 791 F.2d 189 (D.C. Cir. 1986). *See* Preston, *"Extrinsic Evidence in FTC Deceptiveness Cases,"* COLUM. BUS. L. REV. (1987, in press).

FTC Policy on Evidence of Substantiation

Once the FTC has determined the messages conveyed by allegedly deceptive advertisements, the next step is to determine whether such claims actually are deceptive. To avoid deceptiveness, marketers are required to have a "reasonable basis" or substantiation for their claims, often based on scientific testing, before the advertisement's first dissemination.[41] This is the basis of the Commission's advertising substantiation program.[42]

While there are certain obvious differences between testing product attributes and surveying public perceptions of an advertisement, both demand some standard of scientific certainty and both are vulnerable to inadequacies in their measurement reliability and validity. Explanation of acceptable scientific procedures can minimize speculation by concerned parties when attempting in good faith to avoid deceptiveness.

It is significant, then, to observe that the FTC has shown a somewhat greater degree of formality in the substantiation area than it has in the matter of determining conveyed messages. In particular, it has issued a policy in the substantiation area, which contains statements such as:

> The Commission's determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable.[43]

This is not to say that there is no room for FTC improvement in this area.[44] Much more could be done in expanding the formal statement, parti-

41. *See* Federal Trade Comm'n Report, *Federal Trade Commission Policy Statement Regarding Advertising Substantiation Program*, 48 Fed. Reg. 10,471 (1983), 47 A.T.R.R. 234 (1984), appended to Thompson Med., 104 F.T.C. 648, 839 (1984). *See also* Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 395-96 (9th Cir. 1982); National Dynamics Corp. v. FTC, 492 F.2d 1333, 1336 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); Pfizer, Inc., 81 F.T.C. 23 (1972); FTC Staff Report, *Evolution and Evaluation of the Ad Substantiation Program since 1971* (Dec. 1, 1978); Preston, *Description and Analysis of FTC Order Provisions Resulting from References in Advertising to Tests of Surveys*, 14 PEPPERDINE L. REV. 229 (1986) (Although many of the same research principles are involved, the article examines research not on the messages conveyed by advertisements, but rather on the truth or falsity of the conveyed claims); Comment, *Ad Substantiation Program: You Can Fool All of the People Some of the Time, But Can You Fool the FTC?*, 30 AM. U. L. REV. 429 (1981).

42. *Federal Trade Commission Policy Statement, supra* note 41.

43. *Id.* at 840.

44. Even in the substantiation area there has been criticism by advertisers that FTC requirements are unduly vague and imprecise. *See, e.g.*, Bristol-Myers Co. v. FTC, 738 F.2d 554, 560 (2d Cir. 1984). The agency seems anxious to embrace the dictum from Pfizer, 81 F.T.C. 23, 64 (1972), that the amount of evidence required to substantiate a claim can only be determined on a "case-by-case basis." *See* Sperry Corp., DKG Adv., Inc., North Am. Philips Corp., and McCaffrey & McCall, Inc., 104 F.T.C. 549 (1984).

cularly in synthesizing the principles that can be derived from all of the pertinent cases. Although certain advertisers attacked by the Commission probably ought to have known of their research inadequacies on the basis of knowledge obtainable from the research community, it is at least arguable that the FTC may have contributed to certain instances of deceptiveness by failing to provide guidelines showing that it was aware of the standards of the research community and was insistent that advertisers follow them.[45]

Despite these problems, the FTC might reasonably provide specifications for research on conveyance of messages that are at least as detailed as what it has accomplished in the substantiation area. The law provides the agency with powers and procedures by which it is able to promulgate either industry guides[46] or regulations[47] that can resolve many of the ambiguities remaining in the conduct of proper research. Regulations or guides could lead scientists by the hand through research processes that will have the presumptive acceptance of the Commission and therefore may be assumed to be valid in creating evidence to defend alleged misconduct.

Policy of a Sister Agency

The FDA has been even more formal than the FTC in promulgating its requirements for a threshold of acceptable scientific methodology.[48] When submitting an application for approval of a new drug to the FDA, the applicant must prove the drug's effectiveness before gaining the agency's acceptance. Sufficiency of that proof requires a showing of "substantial evidence" of the

45. One of the first such cases was Warner-Lambert Co., 86 F.T.C. 1398 (1975), *modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), contesting the manufacturer's promotional claim that Listerine can cure or prevent colds, bringing into question an experiment's failure to provide adequate "blinding" of the control group used, even though the experimenter incorporated one form of blinding in the test design. 86 F.T.C. at 1509-12. The concept of "blinding," as used here, involves treating the control group with a placebo to minimize the bias that might occur if some participants do not feel they are receiving the benefit of a treatment that the experimental group expects to accrue from their treatment. The mere expectation by the experimental group can result in a reported benefit, even though the treatment itself offers no real value. The Commission simply declared the procedure inadequate and went on to imply that a new study would have to be a "double-blind" design. *Id.* at 1510 n.1 and 1511. This procedure not only "blinds" the control group but also the observer, where this examiner would not know which subjects were receiving the treatment and which ones received only a placebo. In this case the company offers substantiation of its claim, but it turns out not to be reasonable *enough* in the eyes of the public's guardians. Later cases reveal that there continues to be a problem with insufficient guidance, even after *Warner-Lambert. See, e.g.*, Kroger Co., 98 F.T.C. 639 (1981), *modified*, 100 F.T.C. 573 (1982); Litton Indus. 97 F.T.C. 1 (1981), *modified*, 100 F.T.C. 457 (1982); California Milk Prod. Advisory Bd. 94 F.T.C. 429 (1979).

46. 16 C.F.R. § 1.6 (1987). "Guides *may relate to a practice common to many industries* or to specific practices of a particular industry." *Id.* § 1.5 (emphasis added).

47. *Id.* § 1.7-1.20 (1987). "[T]he Commission is empowered to promulgate trade regulation rules which define *with specificity* acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Such rules may include requirements prescribed for the purpose of preventing such acts or practices." *Id.* § 1.8 (emphasis added).

48. The idea of drawing upon the approach of the Food and Drug Administration was recently espoused in Barnes, *supra* note 25.

potion's efficacy.[49] A further explication of this "substantiation" is described by the FDA as consisting of "adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug."[50] Without additional definition by the agency it would be impossible, or at the very least expensive and time-consuming, for a company to acquiesce. A firm might very likely conduct costly and unnecessary replications of its tests, possibly resulting in tremendous economic waste, or even erecting an economic barrier to new drug development. Consequently, the FDA promulgated regulations that outline acceptable scientific practices.[51]

The formal guidelines, while dealing specifically with drugs and with the "hard" sciences, are adoptable in principle by the FTC in its advertising substantiation program,[52] as well as in its behavioral research of advertising effects. Emulation by the FTC of its sister agency's standards was recently

49. 21 C.F.R. § 314.111(a)(5)(i) (1984).

50. *Id.*

51. *Id.* § 314.111(a)(5)(ii). The most relevant text of these regulations, which would apply well to FTC standards of scientific evidence, is as follows:

> (ii) The following principles have been developed over a period of years and are recognized by the scientific community as the essentials of adequate and well-controlled clinical investigations. They provide the basis for the determination where there is "substantial evidence" to support the claims of effectiveness for "new drugs" and antibiotic drugs.
>
> (a) The plan or protocol for the study and the report of the results of the effectiveness study must include the following:
>
> (1) A clear statement of the objectives of the study,
>
> (2) A method of selection of the subjects that (*i*) Provides adequate assurance that they are suitable for the purposes of the study, diagnostic criteria of the condition to be treated or diagnosed, confirmatory laboratory tests where appropriate, and, in the case of prophylactic agents, evidence of susceptibility and exposure to the condition against which prophylaxis is desired.
>
> (*ii*) Assigns the subjects to test groups in such a way as to minimize bias.
>
> (*iii*) Assures comparability in test and control groups of pertinent variables, such as age, sex, severity, or duration of disease, and use of drugs other than the test drug.
>
> (3) Explains the methods of observation and recording of results including the variables measured, quantitation, assessment of any subjects response, and steps taken to minimize bias on the part of the subject and observer.
>
> (4) Provides a comparison of the results of treatment or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data. Level and methods of "blinding," if used, are to be documented. Generally, four types of comparison are recognized:
>
> (*i*) No treatment: . . . .
>
> (*ii*) Placebo control: . . . .
>
> (*iii*) Active treatment control: . . . .
>
> (*iv*) Historical control: . . . .
>
> (5) A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.
>
> *Provided, however,* That any of the above criteria may be waived in whole or in part, either prior to the investigation or in the evaluation of a completed study.

52. See *supra* note 41.

suggested by an Associate Law Professor and Director of the Center for Interdisciplinary Legal Studies at the Syracuse University College of Law, David W. Barnes.[53] Professor Barnes draws this conclusion:

> The goals to be attained through these guidelines are simplification and prehearing settlement of evidentiary and legal issues, cooperation between parties, disclosure of relevant background materials, and clarification of substantive remedial requirements. Achievement of these goals will guarantee the integrity of fact-finding in deceptive advertising cases while intruding in the least restrictive manner on the free flow of commercial information.[54]

Aside from the practical benefits enumerated by Professor Barnes, explicit parameters of scientific methodology will serve the added function of insulating the FTC from the charge that its requirements are void for being overly vague.[55] Where quantitative data is mandated by the Commission, compliance is impossible without offering sufficient direction. Such provisions, of course, cannot be so restrictive as to prohibit research techniques that are new, progressive, or unique just because they are not applied by a majority of researchers. But, like the FDA guidelines, they can be broad while retaining some specifics and could even go a step further by offering a nonexclusive list of presumptively acceptable techniques. This would go far in assisting behavioral and other empirical researchers.[56]

Professor Barnes' point is well taken, but much of his article overstates the differences between the FDA and the FTC.[57] While the FTC has promulgated

53. *See* Barnes, *supra* note 25.

54. *Id.* at 43.

55. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). *See also* Smith v. Goguen, 415 U.S. 566 (1974); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); NAACP v. Button, 371 U.S. 415, 433 (1963). This principle is fundamental in testing the constitutional validity of a regulatory schema. This particular vulnerability has not yet proved to be a problem for the agency, but the obscurity of its standards as they presently exist leaves this as an area of potential future attack.

56. *See, e.g.*, Jacoby & Small, *The FDA Approach to Defining Misleading Advertising*, 39 J. MKTG. 65 (1975). These researchers suggest that there is a need to develop a research approach that can be used to evaluate ads that may require litigation, but that it is first necessary to define what constitutes "being misled." This would necessitate, for example, some guidance as to how many consumers need be deceived before regulatory intervention is justified. Bernacchi, *Substantive False Advertising Standards: Discretion and Misinformation By The FTC*, 5 J. ADVERTISING 24, 27 (1976), declares:

> The problem with the consumer survey method, presently, aside from its unattractive cost and time considerations, is its general lack of acceptability as a method of evidence introduction and the general failure to set standards in areas of a desired sample representativeness, instrument validity and reliability, an acceptable margin of error for the data and for data interpretation of the survey findings.

57. The analysis conducted by Professor Barnes also misses a crucial distinction in FTC cases. He does not acknowledge a difference between the scientific standards applied to substantiation and the standard for determination of the *meaning* of an advertisement. There is, necessarily, a difference between the approaches and rigidity of the physical sciences *vis a vis* the behavioral sciences. In addition, where the FTC makes a case decision regarding substantiation of a physicial

no regulations, it appears to have adopted many of the FDA standards. In the drug substantiation context, the FTC in *American Home Products* echoed many of those standards.[58] On the other hand, it may be that the parallel between the FTC and the FDA evident in *American Home Products* arises only because of, and is limited to, the fact that this case concerns products that fall under FDA scrutiny.[59] The specific references to substantiation of drugs makes interpolation of these guidelines to other products, and especially to consumer perception research, to some extent a matter of guesswork. Consequently, only a formal declaration of procedures as guides or regulations, for both physical and behavioral research, can resolve these inherent ambiguities.

Benefits Beyond Formal Guidelines

Such guidelines by themselves would benefit the search for truth. They would aid advertisers in (1) determining whether a charged claim is or is not

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product attribute, it may not be safe to assume that the threshold of scientific acceptability in that case will apply equally to the measurement of consumer understanding.

58. 101 F.T.C. 698 (1983), *modified*, 103 F.T.C. 57 (1984). The FTC required

> two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the comparative effectiveness or comparative freedom from side effects of the drugs involved. . . . The investigations shall be conducted in accordance with the procedures set forth below:
>
> At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be conducted on any disease or condition referred to, directly or by implication, or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is effective. The clinical investigations shall be conducted as follows:
>
> 1. The subjects must be selected by a method that: a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any); b. Assigns the subjects to the test groups in such a way as to minimize bias; and c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity or duration of disease or condition (if any), and use of drugs other than the test drugs.
>
> 2. The investigations must be conducted double-blind, and methods of double-blinding must be documented. In addition, the investigations shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.
>
> 3. The plan or protocol for the investigations and the report of the results shall include the following: a. A clear statement of the objective of the investigation; b. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response and steps taken to minimize bias on the part of subject and observer; c. A comparison of the results of treatments or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysis of the data. d. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

101 F.T.C. at 699-700.

59. This, however, is unlikely. Other cases have voiced many of these standards, though most of those cases also, admittedly, concern drug product substantiation. *See* Preston, *supra* note 41.

made by an advertisement, and (2) substantiating the truth of a particular product claim. Formal guidelines would provide advertisers with presumptively acceptable methods of research and would consequently diminish the probability of proffered research evidence being challenged by the FTC durings its hearings. This, in turn, would reduce costs by eliminating many studies that are inherently faulty and by removing the litigation costs associated with proving and disproving the worth of much scientific evidence. Finally, this step should be undertaken by the Commission in a sense of simple fairness to advertisers, so that they can properly (in the view of the Commission) assess their advertisements for misconveyances or misclaims before the ads are placed in the public domain where they risk challenge by the regulators. This would better serve the FTC's prophylactic purpose than its current ethereal policy.[60]

A second step supplementing the first would apply behavioral research to assess deceptiveness, with an eye toward extrajudicial resolution of the facts at issue. This approach would be based upon objective measures of public beliefs and opinions and could accurately assess whether a misrepresentation is material.[61] This can be achieved by looking, as we did with the FDA regulations, to another organization as a model.

II. *The Arbitration Model*

A dispute resolution model for a prehearing empirical assessment of deceptive tendencies of challenged advertisements can be constructed by drawing from traditional contract arbitration procedures.[62] The purpose of arbitration, like the intention here, is to provide a system of conflict reduction that is "better, more expeditious, and more economical than litigation."[63]

One of the greatest benefits to be realized from empirical studies is the economic factor of avoiding costly trials or administrative hearings, which can be substantial for the parties concerned. This can be achieved by a scien-

60. The Third Circuit, in Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963), states, "The purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer . . . and it is in the public interest to stop any deception at its incipiency." *See also* Progress Tailoring Co. v. FTC, 153 F.2d 103, 105 (7th Cir. 1946); Gimbel Bros. v. FTC, 116 F.2d 578, 579 (2d Cir. 1941).

61. One measure of materiality was expressed in Bockenstette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943), which found that a misrepresentation is material where "the natural and probable result of the challenged practice is to cause one to do that which he would not otherwise do." This is a standard which would be impossible to equitably apply without research into human behavior. Any attempt to do otherwise would necessarily involve pure speculation by the agency. Unfortunately, it is common practice for the FTC to do so.

62. Further information on arbitration can be found at F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973); F. KELLOR, AMERICAN ARBITRATION, ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948); Lippman, *Arbitration as an Alternative to Judicial Settlement: Some Selected Perspectives*, 24 ME. L. REV. 215 (1972); Goldstein, *The Power of Arbitrators in Commercial Arbitration*, 26 PRAC. LAW. 69 (1980).

63. AMERICAN ARBITRATION ASS'N, THE ARBITRATOR'S ROLE IN EXPEDITING THE LARGE AND COMPLEX COMMERCIAL CASE 2 (1982).

tific evidentiary showing before the hearing or trial regarding an advertisement's likelihood or unlikelihood to deceive.

Additionally, when surveys or experiments are used in litigation they are often conducted separately by parties on both sides of the action. This is particularly true when the methodologies of the studies are in dispute. If, however, opposing parties will agree upon the manner of testing and agree to an independent entity by which the appropriate research will be directed, further cost reduction will be realized by those involved. Such an agreement will also immunize the agreed-upon methodology from attack by the regulatory authorities.

One particular problem with the use of consumer behavior research is that it can be tainted, reflecting the desires of the sponsor that commissioned it. As Ernest Gellhorn, then an Associate Professor of Law at Duke University, charged, "[P]artisanship and accurate surveys are an unlikely mixture."[64] Agreement of the parties as to the researcher to conduct the study will effectively eliminate this threat to the validity of the findings.

Finally, a great deal has been said about the proliferation of legal actions and the backlog of cases clogging the court dockets.[65] Administrative agencies also are at a state of perpetual overload. Research that is commissioned jointly by the FTC and the marketer with the goal of out-of-court (or administrative hearing) settlement of the issue of deceptiveness might realize a net reduction in the number of cases being heard by the Commission. It might also result in a greater number of dispositions of questionable advertising practices.

These benefits are sufficient in themselves to justify this means of alternative dispute resolution. However, by avoiding lengthy court dockets and the time required for answers, replies, counterclaims, voir dire, pretrial hearings, discovery, and so forth, a noticeable amount of costly time is frequently saved through the more informal structure of arbitration. It is not unusual for FTC actions to dwell in the files of the unresolved for three or four years.[66] Some good examples are the *Listerine* case,[67] which persisted through a six-year ordeal after substantial time had already been spent investigating and preparing the case; the *Geritol* case,[68] which also took a similar amount

64. Gellhorn, *supra* note 24, at 567.

65. Admittedly, however, the concern may be somewhat overstated. *See* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and think we know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4 (1983).

66. One study determined that the average case takes four years. E. Cox, R. Fellmeth & J. Schultz, "The Nader Report" on the Federal Trade Commission 72 (1969). This incessant delay is referred to in National Dynamics Corp. v. FTC, 492 F.2d 1333, 1335 (2d Cir. 1974), as "the leisurely course typical of FTC proceedings."

67. Warner-Lambert Co., 86 F.T.C. 1398 (1975), *modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (complaint filed in June 1972).

68. J.B. Williams Co., 68 F.T.C. 481 (1965), *modified*, 381 F.2d 884 (6th Cir. 1967) (complaint filed in December 1962).

of time; and *Carter Products, Inc.*,[69] which was more than sixteen years in reaching a finale.[70]

Beyond these benefits, as consequential as they may be, there is yet one advantage that may overshadow the others. Arbitration, and the mechanism recommended herein, are nonpublic. The obvious advantage of this is the elimination, or minimization, of adverse publicity, which can condemn even the innocent marketer to an irreparable loss of sales or goodwill.[71]

The Arbitration Procedure

The premise of the model is that an advertiser, when charged with an infraction of the deception standards of the FTC, should have the option of collaborating with the agency to the extent that they can jointly hire a social scientist to explore, through scientific testing, the behavioral impact of the published claims. To effect this objective it is first necessary for the opponents to find sufficient common ground to concur on the choice of which scientist will execute the project.

Here, the arbitration model suggests a particularly effective technique. The typical system applied in arbitration is for the parties to submit a submission agreement to the American Arbitration Association (AAA).[72] Upon receipt of this instrument, the AAA assigns one of its staff members to the case as a tribunal administrator to oversee the process.

The administrator sends each of the parties a copy of a specially prepared list of proposed arbitrators who are each technically qualified to resolve the controversy. The parties are then given seven days to study the list, cross off any names to which they object, and to number the remaining names by order of preference. Abstracts of the arbitrators' backgrounds and prior decisions are available to the parties to assist them in their decision.

Once the administrator receives the lists, the numbered names are compared for mutual selections. If the parties were unable to find a mutual choice on the list, additional lists may be sent at the request of the parties. Otherwise, the AAA will make an administrative appointment of its own choosing. In no case, though, will an arbitrator whose name was crossed out by either party be appointed.[73]

69. Carter Prod. Inc., 47 F.T.C. 1137 (1951), *vacated*, 201 F.2d 446 (9th Cir.), *modified*, 346 U.S. 327 (1953); *reh. granted*, 53 F.T.C. 307 (1956), *aff'd*, 268 F.2d 461 (9th Cir. 1959) (complaint filed in May 1943).

70. Though these examples consider only litigated actions, and not consent decrees, the latter are an unsatisfactory alternative to litigation in many cases because consent may be accepted by an advertiser even where the allegations of deception are unsubstantiated. Consent decrees only serve to avoid the expense of litigation at the cost of determining the truth of the accusations.

71. A discussion of the advantages of arbitration appears in Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME LAW. 182 (1966).

72. The American Arbitration Association (AAA) is a private, nonprofit organization established to "foster the study of arbitration, to perfect its techniques and procedures under arbitration law, and to advance generally the science of arbitration." A more complete discussion of the commercial arbitration procedures and background of the AAA can be found in the organization's publication, AAA, A COMMERCIAL ARBITRATION GUIDE FOR BUSINESS PEOPLE (Apr. 1984).

An alternative technique is often applied where the amount in controversy exceeds $25,000. This is known as "tripartite" selection.[74] In this method each of the parties selects the arbitrator of their preference, and the two chosen arbitrators then select a third to act as a tie-breaker. Tripartite selection, however, has met with some resistance and controversy arising from the ethical dilemma created when normally "impartial" judges are expected to champion their nominators.[75]

Advertising Dispute Resolution Model

Adapting this approach to an Advertising Dispute Resolution Model (ADRM) is a simple matter. To best effect it, however, requires an independent administrator. This should present no substantial barrier to success. It is likely that an appeal to the American Arbitration Association, the American Sociological Association, the American Association for Public Opinion Research, or some other financially disinterested organization would quickly render a volunteer for this function.

The administrator should collect a list of social scientists who are prominent and highly qualified researchers. Members of the sponsoring organization could nominate and elect a number of their peers with experience in advertising research as the "seed" group to form the initial list of ADRM researchers. This is similar to the AAA program, which takes arbitrators from nearly all fields of specialization through nominations by leading figures in those professions.[76] The initial researchers would then participate with the administrators in reviewing the qualifications of other candidates for addition to the list. The team must ensure that researchers outside the sponsoring agency are also considered. The seed group can be particularly valuable in assisting the administrator to evaluate, under contemporary scientific standards, the acceptability of the methodologies and theoretical paradigms of the applicant scientists to guarantee a high quality of research for ADRM actions.

Before a project is commissioned, a statement of the research questions must be jointly drafted by the parties. The statement can even outline some of the research method parameters. If no agreement is forthcoming between the parties, the hearing examiner should formulate the questions. If the advertiser does not agree with the questions formulated by the hearing examiner, it will be able to forego the ADRM option and continue through the conventional regulatory process. If the advertiser opts to continue with the ADRM, the parties will submit the agreed research questions to the administrator to initiate the process.

Upon initiation of the ADRM option, the administrator will submit to

73. *Id. See also* AAA, CONSTRUCTION CONTRACT DISPUTES: HOW THEY MAY BE RESOLVED (Nov. 1980).

74. Roth, *Choosing an Arbitration Panel*, 6 LITIGATION 13, 15 (1980); Glick, *Bias, Fraud, Misconduct and Partiality of the Arbitrator*, 22 ARB. J. 161, 170 (1967).

75. Glick, *supra* note 74.

76. See AAA, *supra* note 72, at 12.

both the advertiser and the FTC a list of qualified researchers with a comprehensive *curriculum vitae* of each. The researchers must be capable of researching the questions as outlined in the submission agreement and must be available to begin the project in the very near future. The parties will then be allowed seven working days to strike their objections and to number the balance.

The administrator's next step is to compare the lists and appoint a researcher to conduct the project. It is important that the researcher be insulated from any knowledge of the preferences made by the parties so that there will be no bias introduced into the research from any feeling of obligation by the researcher to either party.

An alternative to this process that might help minimize bias of the administrator would be for the parties to alternately strike one name at a time on an odd-numbered list of names until just one name remains, rather than striking and numbering names and leaving the final decision to another entity. This would also limit the administrator's responsibility.

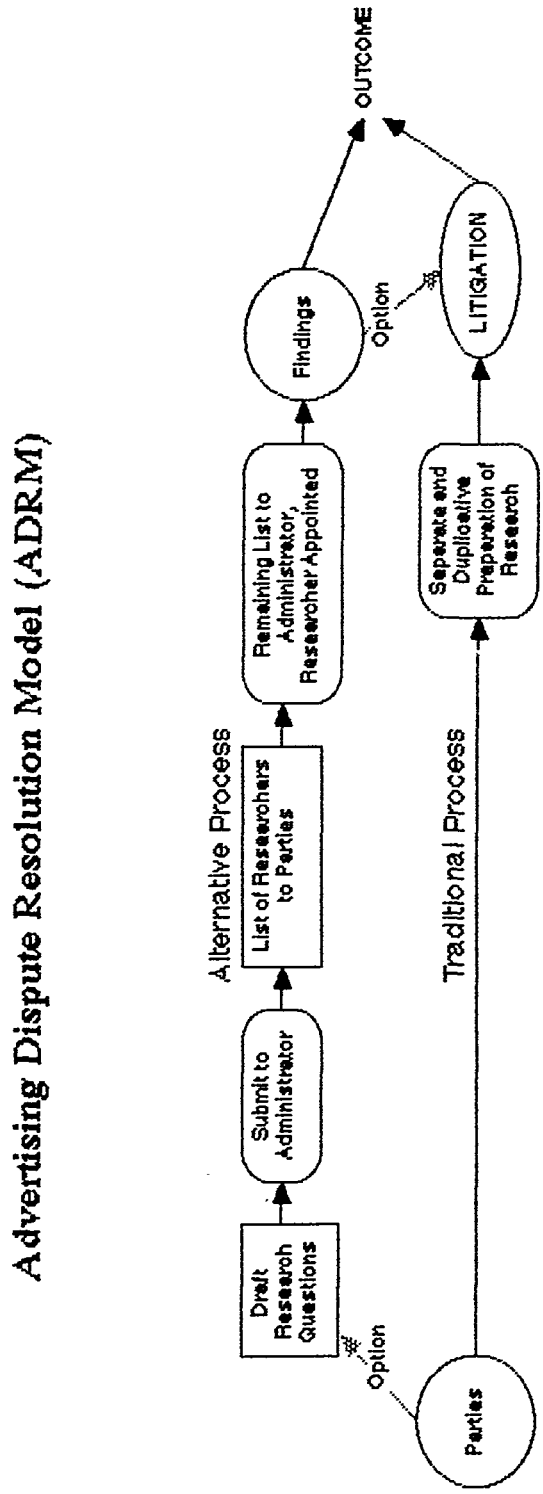
Arrangements with the researcher would then be made through the administrator. No direct contact by either party should be necessary, or permitted, unless agreed to by and in the presence of the opposing party.[77] Likewise, the best results and least bias will attain where there is no contact whatsoever between the researcher and the parties. The administrator would serve as a conduit to transmit questions, answers, and comments between the parties and the researcher, and the administrator would also be responsible for documenting all such communications.

Findings

Research results may not be binding upon the FTC without raising a question of unlawful delegation of power.[78] The Commission is permitted only to give "some consideration" to any decision on which it seeks the opinion of some entity outside the FTC. This presents no practical problem, however. Agreement between the parties as to all factual issues in advance of the study

77. This follows the precedent of the AAA and serves two purposes: It relieves the arbitrator from the burdens of administration and eliminates the danger that, in the course of conversations outside the hearing, one party may attempt to influence the arbitrator on the merits of the case without permitting the other party to rebut the allegations. The same principles apply to the ADR mechanism.

78. "Administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them." Anderson v. Grand River Dam Auth., 446 P.2d 814, 818 (Okla. 1968) (quoting 73 C.J.S. *Public Administrative Bodies and Procedure* § 57). Restated as a general legal maxim, State v. Copenhaver, 64 Wyo. 1, 184 P.2d 594, 608 (1947), declares "delegatus non potest delegare." This principle should have no impact upon the present proposal since these courts and others specifically permit the delegation of mere ministerial functions and the use of advisory panels and experts. *See, e.g.*, N.L.R.B. v. Duval Jewelry Co., 357 U.S. 1, 7 (1958). To make the findings of the researcher binding would run counter to the underlying justification for delegation: that the final word and ultimate decision on the merits of all issues before the agency must be left to the agency. *Id.* at 8.



would defuse the Commission's opposition if the results disproved its allegations.

Although this outcome would not be binding, the findings of the study would still have influence on the decision by the FTC of whether to pursue the action. Since the study can later be presented as evidence in the administrative hearing, the agency would be effectively estopped from attacking the research as defective because the research design was of its own selection. The *fact* question would be resolved, leaving only the *legal* question—what percentage of the population must be deceived for regulation to ensue—for resolution by the administrative law judge (ALJ).[79] This can be done on a somewhat spurious case-by-case basis, before submission of the research questions, allowing the ALJ the flexibility to consider factors such as the type of product and the target audience. Alternatively, this could be done by regulation.[80]

One remaining issue is at what point in the traditional course of events should this option be made available. It might be possible to offer this alternative prior to the time that the Commission staff makes its recommendation to the Commission to file a complaint, but it is unlikely that either party will be prepared to incur the expense of survey or experimental research prior to the complaint being filed. Consequently, the practicalities probably dictate that the option be made available only after the complaint is filed.

Ethics

Integrity of the research is the predicate of this model's validity as a fact-finding tool. An essential element of ensuring this integrity is a Code of Professional Responsibility. This ethical code can be compiled by combining aspects of the Code of Ethics for Arbitrators in Commercial Disputes,[81] the

79. Cases have varied greatly in the percentage of the population deemed necessary to be capable of being deceived before the finding of a "capacity or tendency to deceive" will be upheld. Percentages as low as 5 percent, A.A. Friedman, 74 F.T.C. 1056, 1071 (1968), and 15 percent, Firestone Tire & Rubber Co., 81 F.T.C. 398, 415 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), have been found sufficient, as have many other percentage figures. It is doubtful that any numbers this small would be sustained upon a hearing before the Commission, given its position announced in Cliffdale, 103 F.T.C. 110, 165 (1984), which purports to protect only consumers who act "reasonably," rather than "that vast multitude which includes the ignorant, the unthinking and the credulous" which were protected in the past. *See, e.g.*, Standard Oil Co. v. FTC, 577 F.2d 653, 657 (9th Cir. 1978); Giant Food, Inc. v. FTC, 322 F.2d 977, 982 n.13 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964). See additional discussion *supra* note 26.

80. One commentator has suggested a series of levels for different fact situations: (a) 1-5% deception level where a product directly involves the health and safety of the public, e.g., over-the-counter drugs; (b) 10% deception for advertisements aimed solely at children or elderly persons; (c) 15-20% where the harm is strictly economic in nature; and (d) 30-40% where the advertising inflicts only commercial hurt on a competitor. *See* GERLACH, THE CONSUMER'S MIND: A PRELIMINARY INQUIRY INTO THE EMERGING PROBLEMS OF CONSUMER EVIDENCE AND THE LAW, (Monograph, Marketing Science Institute Dec. 1972).

81. This Code was prepared by a joint committee composed of a special committee of the American Arbitration Association and a special committee of the American Bar Association in

Code of Ethics of the American Sociological Association,[82] and the Code of Professional Ethics and Practices of the American Association for Public Opinion Research.[83]

1977. *See* Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 BUS. LAW. 309 (1977).

82. *Toward a Code of Ethics for Sociologists*, 3 AM. SOCIOLOGIST 316, 318 (1968).

83. K. BAILEY, METHODS OF SOCIAL RESEARCH 518 (2d ed. 1982).

The following is offered as a recommended outline for such a code that might be adopted as an integral part of the ADRM model, composed from the Codes mentioned above:

I. *Integrity, Objectivity, and Fairness*

A. The scientist has a responsibility to maintain the integrity and objectivity of the research, and to take all reasonable efforts to be fair to all sides of the factual dispute which forms the basis for the research question. The scientist has a responsibility to both the process and the parties, and must observe high standards of conduct to preserve the integrity, objectivity, and fairness of the research.

B. The ethical obligations of a scientist begin upon the acceptance of the appointment and continue throughout all stages of the project.

II. *Selection and Acceptance of Appointment*

A. It is inconsistent with the integrity of the process for scientists to solicit appointment for themselves.

B. Scientists should accept appointment only if they can be available to conduct the research promptly.

C. Scientists should accept appointment only if they are qualified by education and experience to conduct the research in accordance with the parameters of the question as designated in the submission agreement, and should not misrepresent their own abilities, or the competence of their staff, to conduct a particular research project.

III. *Bias and Financial Interests*

After accepting appointment and while serving in the appointment, a scientist should avoid entering into any financial, business, professional, family, or social relationship, or acquiring any financial or personal interest which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

IV. *Research Process*

A. Where the agreement of the parties sets forth procedures to be followed in the research, it is the obligation of the scientist to comply with such procedures, or to obtain permission of the parties to make any changes that the scientist deems necessary or advisable.

B. The scientist shall not select research tools and methods of analysis because of their special capacity to yield a desired conclusion, and shall not knowingly make interpretations of research results, nor tacitly permit interpretations, which are inconsistent with the data available.

C. Scientists must present their findings honestly and without distortion, omitting no data from a research report which must significantly modify their interpretation of findings, and the scientists must indicate with specificity where and how their own theory, method, research design, or paradigm may bear upon or influence interpretation.

D. Deficiencies or weaknesses known by the scientist to be inherent in the study as conducted must be fully discussed in the findings, to permit an informed decision to be founded thereon.

The implementation of ethical standards in conjunction with the ADRM procedures will lend confidence to the research findings of the various scientists, helping to give them legal relevance and credence. This allows recourse by the Commission in the event that research was conducted improperly. Additionally, this channel of recourse might discourage the FTC from alleging impropriety if the study's results are presented in court because the FTC would then be obliged to prosecute for violation of these ethical regulations, thereby necessitating that it prove its charges.

A Trial Run

A joint study has been undertaken in at least one case. It did not involve the procedural approach described above, but it does suggest a possibility for the FTC and respondents to work together to commission studies.

Yamaha International, Inc.,[84] involved a series of "Learn-To-Ride" safety seminars sponsored by the manufacturer of motorcycles. The advertising for these seminars stated, in part, that "the motorcycle is becoming as popular as the automobile. Yamaha believes—with proper instruction—it can be just as safe. We invite everyone in America to learn to ride."[85] The FTC, to the contrary, felt that no amount of instruction can make a two-wheel unenclosed vehicle as safe as a four-wheel enclosed vehicle and charged Yamaha with deceptive advertising.[86] The issues of the case concerned the meaning that consumers would derive from this advertising—whether it *implied* exact safety equivalence between motorcycles and cars—and it was decided that research could resolve this question. A pilot study, jointly commissioned, was agreed upon to explore the issues. Following that pilot study, which was only intended to be preliminary, a more scientifically rigorous study was to be conducted. Four researchers, two from the FTC and two from Yamaha, were engaged to work out the research design.

Unfortunately, the example of *Yamaha* is incomplete because a final study was never conducted. The pilot study, despite its inadequacies, was so strongly supportive of the FTC position that Yamaha entered into a consent agree-

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V. *Communications*

A. Scientists shall not communicate with the parties to the controversy except through the administrator, unless agreed upon in writing by all parties to the controversy.

B. Unless otherwise agreed by all parties, or required by applicable rules of law, the scientist should keep confidential all matters relating to the research project and findings.

C. It is not proper at any time for the scientist, or anyone working with or for the scientist, to inform anyone of the research findings in advance of the time they are given to all parties.

84. 86 F.T.C. 973 (1974).

85. *Id.* at 976-77.

86. Hunt, *The FTC-Yamaha Joint Research Project*, in DISPUTE MANAGEMENT: A MANUAL OF INNOVATIVE CORPORATE STRATEGIES FOR THE AVOIDANCE AND RESOLUTION OF LEGAL DISPUTES (Ctr. for Pub. Res. 1980).

ment without further convincing.[87] Litigation was avoided and, unlike many other consent agreements, it was based upon the merits of the case rather than a desire to circumvent detrimental publicity or litigation expenses.

Conclusion

This article has discussed the need for innovation in advertising regulation and some steps that might easily be adopted to introduce such progress. Instruments are readily available to the regulators that can significantly reduce the amount of speculation applied in determining the salient facts at issue in these cases. The advocates presenting the cases are largely responsible for the failure to utilize these tools, but the onus should now be on the Commission to make it easier to offer empirical data into evidence or to avoid the need for litigation.

The first step in this process is for the Commission to promulgate, as either industry guides or regulations, a basic outline as to what it considers sufficient scientific methods to measure advertising effects (and to substantiate advertising claims[88]). This should include both a general, broadly defined

87. *Id.*

88. In addition to research on advertising content (and substantiation), policies regarding scientific evidence might also be tailored to instances where the Commission staff seeks the inclusion of corrective measures in a challenged campaign. Corrective advertising is a relatively recent development, legitimized by Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). *See also* Recent Cases, *The Federal Trade Commission Has the Power to Order Corrective Advertising in Cases Where the Lingering Effect of Prior Advertising Influences Future Consumer Decisions*, 47 U. CIN. L. REV. 129 (1978). In his 1976 argument for the inclusion of such powers, Professor Cornfeld proposed the use of empirical consumer data as a litmus test for determining whether a lingering impression persists in the minds of consumers sufficient to justify a remedy so potentially detrimental to the targeted advertiser. Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 639 (1976). This article advocates retention of the corrective advertising mechanism, but was written just prior to the *Warner-Lambert* decision. This followed several litigated cases, beginning with Firestone Tire & Rubber Co., 81 F.T.C. 398 (1972), in which the FTC considered demands for corrective advertising that were not well supported by evidence.

When the Commission considered corrective advertising for Firestone, the proferred evidence on retention of beliefs by consumers was based on advertisements in general; there was no evidence directly on the contested tire ads. The advertising had been discontinued for four years, and by that time there may well have been no lingering effect of the prior deceptive practices. It is possible, if not probable, that consumers who were affected by the older "deceptive" advertising will no longer remember or be under the influence of those ads. An advertiser need not be extraordinarily intuitive to recognize the advantage under these circumstances of exercising the option to assess consumer beliefs before deciding to assume the expense of arguing with the FTC in court. It would be equally advantageous for the FTC to study these impacts before facing impending embarrassment in such a case.

A further appropriate use of consumer evidence, though not addressed in the present discussion, would be in the *formulation* of an effective corrective message. The dilution of FTC-proposed corrections, like that found in *Warner-Lambert*, demonstrates a probable misunderstanding by the judiciary of the nature of human communication processes and the sufficiency of a minimized corrective message to serve the goals of the agency. While there is no evidence that the Commis-

methodology, as well as some specific examples of presumptively acceptable techniques. This would assist companies in collecting empirical data so that their efforts are not spent fruitlessly. Failure to provide these parameters is at the very least unfair to advertisers and, in certain instances, might be vulnerable to a charge of being unconstitutionally violative of due process.[89]

The next step is to take further advantage of empirical studies, by applying them to the early resolution of disputes over the deceptive likelihood of advertisements. This can be accomplished by the FTC and the advertiser commissioning joint research and bearing the costs equally.

These two steps have been presented as an integral process, but this is a slight oversimplification. The two are more precisely described as separate potential approaches to measuring the meaning of advertisements. If the FTC were to implement the first step (see part I), future assessments of the deceptiveness or nondeceptiveness of advertisements would be much more systematic and consistent. They would be less likely to be undertaken unnecessarily because their methodology would be less vulnerable to attack. Adoption of this stage, alone, would also substantially improve the current litigation process. Likewise, the second step (see part II) could be pursued in absence of the first because the two parties will have acquiesced to the employment of the researcher, thereby implicitly accepting the methods to be chosen by that researcher.

While they can be viewed as alternative solutions, they are highly interactive. Neither of these steps is alone as effective as the two acting together. The first step is useful to the effective finding of fact, but it offers no mechanism for extrajudicial dispute resolution. The second step promises to assist in the avoidance of litigation, but from it might come little consistency and the researcher's determinations would be more susceptible to challenge on methodological grounds. Clearly, the interrelation of these two stages makes adoption of both the preferred course of action.

Although *Yamaha* represents a trial run of the basic concept discussed here and in that case it worked to the benefit of the FTC, no systematic procedure

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sion has used consumer research to identify the most appropriate message to correct prior misconceptions, one cease and desist order prohibited the depiction of fruit or juice on a product label until such time as consumer surveys reveal that deceptive effects of the prior labeling do not exceed specified percentages. RJR Foods, Inc., 83 F.T.C. 7 (1973).

This application of behavioral studies is especially valuable to ensure that the parameters laid down in the name of the first amendment are not breached. "[The first amendment] triggers a special responsibility of the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved." *Warner-Lambert*, 562 F.2d at 758. This use of consumer research could, therefore, circumvent a charge that the corrective order is constitutionally overbroad.

89. Smith v. Goguen, 415 U.S. 566 (1974). Justice Powell, in the majority opinion, remarks that a regulation without narrow specificity is void for vagueness. He states further that this doctrine "incorporates notions of fair notice or warning. . . . [I]t requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Id.* at 572-73. Such behavior violates due process. *Id.* at 578.

has been established to encourage this approach. This article has outlined such a procedure, which could serve as a foundation for future regulatory policy regarding the use of behavioral research.