

#MarketingLaw – Update from the 2018 ANA/BAA Marketing Law Conference

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by Sarah Robertson



The TMCA is back from the 2018 ANA/BAA Marketing Law Conference, Upping Your Game: Pragmatic Business and Compliance Strategies. While in Chicago, we had the privilege of obtaining a comprehensive review of this year in marketing law and gained some insight into the areas of focus for enforcement of

marketing laws. We also were witness to the season's first snowflakes. While we cannot recreate the snowflakes here, we give you a run-down of some of the key take-aways from the conference.

Privacy: The buzz word for the entire conference and top of mind for all attendees. Privacy topics included the EU General Data Protection Regulation (GDPR), California Consumer Privacy Act (CCPA), Illinois Biometric Information Privacy Act, anticipated developments at the state law level, and the potential for federal law preempting state regulation. Recommendations to implement “privacy by design” abound. Given the inconsistencies between statutes and the compliance headaches that come from a “checkbox” approach to compliance, in-house counsel from countless organizations touted a change in thinking about privacy. They recommended viewing privacy as a competitive advantage and building privacy into the planning process to enable a proactive approach. To do this, a few suggestions by panelists included:

- An Integrated Legal Department: Legal’s involvement should occur early on. Rather than thinking of Legal as a stopping point for final sign off, Legal should be involved from the beginning. This facilitates the integration of privacy considerations and processes into the new program, campaign, or product, and helps ensure that any data gathered up-front is usable.
- Data Mapping: When developing and implementing a privacy program, determine

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where data is kept, what data is being collected, what is being done with that data, and why the data is valuable. Also consider whether the data is necessary or just nice to have.

- **Compliance “Tweaks”:** Determine what needs to be done differently with respect to compliance. The general consensus by in-house counsel at the conference was that applying the strictest standard across the board is not necessarily the best approach for business. Recommendations included setting a floor and treating outliers separately, as needed.
- **Knowledge Management:** Identify and define a group of individuals within the company who have an understanding of the data collected, stored, and used, and who can be consulted about these topics when determining compliance needs or implementation.
- **Well-Documented Consent:** Design appropriate privacy and notice/consent into the process and maintain documentation of that consent. Not having documentation of consent is as good as not having consent.
- **Technological Hurdles:** Cautionary tales were exchanged over the fact that compliance solutions can involve technical aspects that are potentially difficult to implement and/or involve many moving parts both internally and externally. Such factors should be accounted for when determining and implementing compliance mechanisms.

“Truth” in Advertising: In an era of “fake news” and alternative facts, the question posed is: What content can be trusted? Influencers and consumer reviews are playing an ever-increasing role in consumer decision-making—a bi-product of the social media age. The presence of undisclosed sponsored posts and paid reviews, as well as bots and fake accounts, undermines truth in advertising and erodes consumer trust. Consequently, consumer reviews, insider rating, and substantiation are big targets for the NAD, FTC, and state AGs. Other targeted areas of enforcement include affiliate marketing and lead generation.

The OmniChannel: Retailers gathered to discuss expansion of the customer experience and the switch from a retail-centric focus to a consumer-centric one. The OmniChannel is about creating a seamless shopping experience. This approach focuses on building customer loyalty and providing the same service and experience regardless of channel. Panelists generally agreed that this seamless experience for the consumer is much more difficult to implement from the legal perspective, and their companies have made a conscious effort to integrate legal into the business side. Panelists shared approaches taken by their various legal departments; suggestions included using legal questionnaires to gather information from the business side, building relationships with partners and affiliates based upon solid grounds, using data mapping as a key tool, and implementing privacy by design.

The Shared Economy: The community-based business model brings with it issues of trust and social values. Pioneers in this area discussed what it means for consumers to be users and providers, and how the corporate entity can successfully enable peer-to-peer interactions. The integration of policy and marketing was a focus. Topics included: implementation of community guidelines that empower hosts and providers rather than taking the role of management; thoughtfully regulating third-party content to prevent hate speech, privacy violations, and IP violations; using “relevance” and the Communications

Decency Act § 230 as a tool; and understanding the role of consumer reviews in building and sustaining trust in the platform.

Telephone Consumer Protection Act (TCPA): For those of you who follow our Consumer Financial Services Blog, you already know that the TCPA is having a banner year. Developments spanned from the ACA International ruling issued by the D.C. Circuit in March, to legislative activity on Capitol Hill (discussed here and here), the FCC's numerous requests for comment and an Omnibus II on the horizon, and now the Supreme Court's grant of *certiorari* in *Pdr Network v. Carlton & Harris Chiropractic*, No. 17-1705, 2018 U.S. LEXIS 6754, at *1 (Nov. 13, 2018) (considering whether the Hobbs Act requires a district court to accept the FCC's legal interpretation of the TCPA). This area of relative uncertainty and constant change was a recurrent reference across presentations and a complete topic for a breakout session. Everything from the shifting definition of ATDS to recycled cell phone numbers and abusive plaintiffs and plaintiffs' counsel was fair game.

Cannabis Marketing: Our own Sarah Robertson participated in a panel on cannabis marketing in the U.S. and Canada. The panel covered the regulatory framework for and, in some cases, the significant constraints placed on, the sale and advertising of cannabis in the U.S. and Canada, from the lawyers' perspectives, and also from those of a cannabis producer and agencies operating in the packaging design and digital marketing worlds.

Overall, the schedule was packed, the topics were robust, and the participation was plentiful. We look forward to next year's ANA/BAA Marketing Law Conference in sunny San Diego (November 4-6, 2019), and hope you can join us there.