An Invitation from Young Lawyer Forum Chair Steven Mayer

Steven Mayer
Mayer & Glassman Law Corp.
Los Angeles

On behalf of the Business Law Section's Young Lawyer Forum, I invite you to join us for the Fifth Annual Young Business Lawyer Institute, scheduled for Thursday, April 10, 2008, at the Hilton Anatole Dallas, in Dallas, Texas, during the Section's Annual Meeting.

The Institute will feature an activity-filled day of seven timely and important "nuts and bolts" continuing education programming on such topics as: E-Discovery: What Every Business Lawyer Needs to Know Now; Contract Drafting and the Deal; A Different View on Credit Agreements - Representing the Borrower; A Practical Introduction to the Law of Electronic Payments; Understanding LLC Operating Agreements; Navigating Safe Harbors and Blue Skies - The abcs of a Private Offering of Securities; and "Fun & Games": Hot & Exciting Business Law Practices in the 21st Century.

There will also be a networking lunch, a welcome reception, a leadership opportunity meeting, and a high-energy evening event. All of these opportunities are offered to you in a one-day package for the very low cost of $149, plus the cost of the optional dinner ticket. The YLF Social Committee is busy planning our always-popular post-Institute dinner. Place, time and ticket information will be announced soon. The dinner sells out quickly. If you register for the Institute now, then you will be contacted as soon as tickets go on sale.

The Institute program brochure and registration information are now available by clicking here.

The YLF: A Wise Choice and Wonderful Opportunity

With more demands upon time, one-stop opportunities such as those offered by Young Lawyer Forum are a wise choice. The Young Lawyer Forum serves as a center of gravity for business lawyers under the age of 40 or in practice for less than 10 years. Every Business Law Section lawyer member who meets these criteria is automatically a member of the Young Lawyer Forum. The Forum provides its members with numerous opportunities for education, training, networking, socializing, leadership and business development. The Forum also strives hard to integrate its members into the Section's substantive committees and to assist them in finding a home in active Section work.

Make friends, generate business, network with lawyers from around the world, join a committee and learn something new. Your firm might even sponsor you.

We encourage your participation and activism, and look forward to seeing you on April 10, 2008! You are welcome to contact me at smayer@mglawcorp.com (310-207-0007) for more information, or just to say hello.

Steven M. Mayer
Mayer & Glassman Law Corp., Los Angeles
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Spotlight on Young Lawyers

Timothy M. Lupinacci
Baker Donelson Bearman, Caldwell & Berkowitz, PC

What is the name of your firm or corporation and office location?
Baker Donelson Bearman, Caldwell & Berkowitz, PC, Birmingham, Alabama

How would you describe the type of business law practice you have?
I am a member of the firm's Bankruptcy and Restructure Practice Group. My practice focuses primarily on the representation of special servicers, banks, financial institutions and asset-based lenders in loan workouts and insolvency, with an emphasis on creative restructuring of problem loans in long-term care and seniors' housing defaults. In addition, I serve as Office Managing Shareholder for the Birmingham Office of Baker Donelson.

What leadership positions did you hold in the Young Lawyers Division, if any?
I served as Bankruptcy Committee Chair, (1997 – 1998); Committee Director, (1998 – 1999); Liaison Coordinator (1999 – 2000); Committee Director, (2000 – 2001); and Membership Chair (2002 – 2003). I also served as YLD Liaison to the ABA Standing Committee on Membership and YLD Liaison to the Section of Business Law.

How did you become involved in the Section of Business Law (the "Section")?
I became involved in the Section as a second year associate through the Section's Business Bankruptcy Committee. The Business Bankruptcy Committee meets in conjunction with the National Conference of Bankruptcy Judges. My mentor had me attend the National Conference of Bankruptcy Judges meeting with him. I was then introduced to the Section's Business Bankruptcy Committee and therefore the Section.

I remained distantly involved in the Section for a number of years through some of the Bankruptcy Subcommittees. I became more involved in Section activities when I applied for and received a position as a Section Fellow for the years 1999 - 2001. As a Fellow I was appointed to the Business Bankruptcy Committee. In addition, following the Fellowship I served as YLD Liaison to the Section. My initial draw into the Section, however was to through the substantive work of the Business Bankruptcy Committee and its Subcommittees.

What roles have you held in the Section and what is your current position?
Following my service as a Fellow and YLD Liaison to the Section, Steve Weise appointed me as Section's Membership Chair in
2003. I served in that role through 2007, including the implementation of the Membership Point Person initiative. I served as the Inaugural Chair of the Young Lawyer Forum ("YLF") that started in 2004 during Barbara Mendel Mayden's year as Chair of the Section. I served as YLF Chair for two years. In August 2007, I became a member of the Section's Council. My term on the Council will expire in 2011. In August 2008, I will become Chair of the Section's ABA Relations Committee.

Within the Business Bankruptcy Committee, I have served as Vice Chair of the Chapter 11 Subcommittee, 2005 - present; Vice Chair, Litigation Subcommittee, 2003 - 2005; Vice Chair, Legislation Subcommittee, 2002 - 2003; and Vice Chair, Membership, Minorities and Young Lawyers Subcommittee, 2000 – 2002.

Through the Section's support and efforts, I served as a member of the ABA Standing Committee on Membership (2003-2006) and currently serve as a member of the ABA Standing Committee on Technology.

What value have you found in your Section membership?

The leading business lawyers in the country are actively involved in the Section. The opportunity to interact, learn and work together with luminaries in the profession has been invaluable to me in building my own expertise and expanding my practice on a national level. It is through relationships that I have built through the Section that I have been able to grow my own practice. The leadership skills that I have developed in the Section have been invaluable as I have taken leadership roles in my firm. Through the Section, I am able to keep on top of the latest business law developments as they evolve so that I am better able to serve my clients. I remain on the cutting edge of emerging legal trends through the Section's publications, programs and website.

Why would you encourage young lawyers to become involved in the Section?

The Section is the best value proposition for young lawyers in learning the law. The practical advice, training, tools and programs are second to none. The interaction with top-notch counsel from around the country will assist in elevating your expertise and network of referral sources. Not only will you become a better lawyer through membership in the Section by taking advantage of all these various resource, but you will also create a network of referral sources that will help with your marketing and client development. I do not think that there is any better place for a young lawyer to grow and mature in the substantive areas of law, professional development, marketing and networking than in the Section.

What advice would you give a young lawyer to help become more active in the Section?

Be persistent in your efforts to become involved in the Section. You should define your objectives for participating in the Section and pinpoint those efforts that will help you meet your goals. Be prepared to do what may be "unglamorous" work for a Committee or Subcommittee. When I had been practicing bankruptcy law for four years, I found a particular area of interest in one of the Business Bankruptcy Subcommittees. At a Spring Meeting of the
Section in Nashville, I attended a meeting of a Subcommittee focused on the area of interest. At that meeting, the leaders of the Subcommittee were looking for volunteers to summarize recent cases on the topic for an annual compendium that was distributed. I volunteered to work on the project. Working with the chair of the Subcommittee, lead to an idea for a seminar presentation at the following years’ Spring Meeting. I was asked to participate based on my work summarizing cases for the compendium.

In the audience at the presentation was the editor of a leading bankruptcy treatise. The treatise needed an attorney to fill an opening on a chapter on the specific area of business law that was the subject of the program. He asked me to serve on the editorial board of the treatise to address updates on the particular chapter. I have now spoken at several seminars hosted by the treatise and published many articles on the topic. A lot of these opportunities began with a commitment to do a job that other attorneys on the Subcommittee did not want to undertake.

**Any other words of wisdom for young lawyers?**

I encourage all young lawyers to make sure that in addition to learning the law and developing their practice, that they remember the importance of giving back to the profession. One critical way that a young lawyer can do this is involvement in the Section. The Section is involved in the cutting edge development of various areas of the law, focuses significant effort on pro bono opportunities and other ways to give back to the profession and the community. I believe that this is an inherent responsibility and obligation that we have as attorneys.

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**Volunteers Needed! Get Involved Now!**

The Section of Business Law Committee Chairs need your help planning Continuing Legal Education classes, writing articles or research, in public service activities, and other general section matters or projects. For example, the Commercial Finance Committee is looking for a young lawyer to help provide administrative support to the chair and place on a leadership path now. This is a great way to become a recognized and active member of the Section! Any Committee Chair can be contacted directly by clicking here! Get involved! Contact a committee chair for more information today!

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**YLF Programming Hits New Heights**

*Aaron D. Lovaas, YLF Vice Chair and Chair of the YLF Solo and Small Firm Subcommittee*

At the Business Law Section Spring Meeting in Dallas this April, YLF programming will expand beyond the Institute for the Young Business Lawyer to offer additional section-wide CLE programming as well. I am very pleased to be chairing the Solo
and Small Firm Subcommittee’s general CLE program entitled "Rainmaking, Retention and Referrals: The Three R's of Solo and Small Firm Client Development." The program will be presented on Saturday, April 12 at 10:30 a.m. For those of you who may not have attended the ABA Annual Meeting in San Francisco this past August, this program was first presented there and garnered very positive reviews. It was also the first YLF program presented at an Annual Meeting. Obviously, that was a great step forward for the YLF with which I was honored to be involved.

The "Three R's" program focuses on the tools for client development within the solo and small firm environment – yes, there are those of us who practice business law as solo practitioners and within small firms. I was struck, however, by the larger firm practitioners who attended this program at the Annual Meeting and commented that the same tools applied to their own practices, either on a larger scale or, more commonly, to the individual lawyer developing his or her own client relationships.

In any event, this program will provide tips and techniques in areas such as (1) initial communication with potential clients, in the nature of marketing oneself (Rainmaking); (2) techniques, including office practices, designed to retain current clients and develop those clients into sources of new and ongoing work (Retention); and (3) building a network of referral sources through third parties, such as other professionals (Referrals).

As the Program Chair for the "Three R's" program and the Moderator of that program at the Annual Meeting, I can personally attest to the fact that there is something for just about every lawyer – young and not-so-young – to take away from the program and put into practice almost immediately. The program materials from the Annual Meeting version of the "Three R's" program are available through the Business Law Section’s portion of the ABA website. Take a look and hopefully I will see you on Saturday morning in Dallas.

**Featured Articles**

**The Family Medical Leave Act**

*Tracy A. Cinocca, Tracy A. Cinocca, P.C., Tulsa, OK*

A general rule in many states is that an employment contract is terminable-at-will, which means that either the employer or the employee has the right to terminate the employment at any time for any reason or no reason at all, without liability to the other for doing so. The Family Medical Leave Act ("FMLA") modifies this rule in that covered employers may not terminate a person who provides notice of a need for leave that qualifies under the FMLA. "As a general rule, an employee is not entitled to recover for lost time where there is no agreement to that effect, or where the contract of employment allows compensation only for the days the employee works." 30 C.J.S.
Employer—Employee § 135 (2005). Likewise, as a general rule an employee is not entitled to recover for lost time when there is no agreement to that effect either. 30 C.J.S. Employer—Employee § 135. Similarly, the FMLA provides for unpaid leave and the restoration of the employee on leave to his position, if he is still able. It applies to an employer with fifty or more employees at a given location, or an employer who has granted employees such right in an employment manual.

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**Oil and Gas Private Offerings**
Anne Marie Fallon and Ronald K. Lembright, Roderick Linton LLP, Akron, OH

Most sales of securities to investors are registered with the Securities and Exchange Commission (the "SEC") and under applicable state securities laws. However, certain offerings are exempt from registration under Regulation D of the Securities Act of 1933. See 17 CFR 230.501-506. According to a statement issued by the magazine Private Equity International in May 2007, the total private equity capital raised by the top 50 private equity firms since January 1, 2002 totaled $551 billion. *Executive Summary, Private Equity International*, May 2007. The private equity market allows emerging companies in many industries, such as oil and gas, to cost effectively raise capital through a private placement memorandum.

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**Who's Afraid of the Big Bad Lease? Ten Terms to Watch for in Commercial Leases**
Kate Henry, Bailey Law Group, Washington, DC

Navigating a commercial lease can be like wading through shark-infested waters – the language may look familiar and favorable, but lurking in the next sentence could be a clause that jeopardizes your client's interests. While all leases are different in format and scope, the following ten terms generally appear in the majority, and are worth getting to know before you jump in to a negotiation on behalf of a client.

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**Online Advertising in India, Regulations: Self and Otherwise**
Sajai Singh, J Sagar Associates, Bangalore, India
Advertising is essentially a thing to induce consumption to make people buy things they do not want.

In a developing economy like India, advertising has a profound impact on how people understand life, the world and themselves, especially with regard to their values, choices and behaviour. Advertising is considered to be the cornerstone of our socio-economic system. Advertising may be viewed as the lifeline of free media, paying costs and making media widely accessible.

An Advertisement may be defined as paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Any communication which in the normal course would be recognized as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.

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The Family Medical Leave Act Overview
By Tracy A. Cinocca

A general rule in many states is that an employment contract is terminable-at-will, which means that either the employer or the employee has the right to terminate the employment at any time for any reason or no reason at all, without liability to the other for doing so. The Family Medical Leave Act (“FMLA”) modifies this rule in that covered employers may not terminate a person who provides notice of a need for leave that qualifies under the FMLA. “As a general rule, an employee is not entitled to recover for lost time where there is no agreement to that effect, or where the contract of employment allows compensation only for the days the employee works.” 30 C.J.S. Employer—Employee § 135 (2005). Likewise, as a general rule an employee is not entitled to recover for lost time when there is no agreement to that effect either. 30 C.J.S. Employer-Employee § 135. Similarly, the FMLA provides for unpaid leave and the restoration of the employee on leave to his position, if he is still able. It applies to an employer with fifty or more employees at a given location, or an employer who has granted employees such right in an employment manual.

State and federally defined exceptions to the employment-at-will doctrine and include the statutory mandates of the FMLA. “The Family and Medical Leave Act entitles employees to a total of twelve (12) workweeks of leave during any twelve (12) month period for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition. The leave granted may consist of unpaid leave, and if an employers provides paid leave for fewer than twelve (12) workweeks, the additional weeks of leave necessary to attain the twelve (12) workweeks of leave may be provided without compensation.” 30 C.J.S. Employer—Employee § 135. “An eligible employee who takes leave under the FMLA, is entitled to be restored to the same or an equivalent position upon returning from leave. But, to be entitled to be restored to his or her former position, the employee must be able to perform the essential functions of that position. Id.

Some common questions by employers about the FMLA are answered as follows:

1. **Who is an eligible employee?** One who has worked at least 1250 hours in a year at a worksite with at least fifty people in a 75-mile radius. 29 U.S.C. § 2611(2).

2. **Who is an employer subject to the act?** Any person in an industry affecting commerce who employs fifty or more others for each workday for twenty or more weeks. It includes individuals acting in the interest of an employer as well as public agencies. 29 U.S.C. § 2611(4), § 2617.

3. **What is a person? Does that mean me individually?** The FMLA within its text does not say. It references 29 U.S.C. § 203(a) that defines a person as, “an individual, partnership, association,
corporation, business trust, legal representative, or any organized group of persons.” See also 29 U.S.C. § 2611(8). The majority view is that individual liability does not exist, but there is a split on the issue. 190 A.L.R. fed 491, § 2(b). Furthermore, the Secretary of Labor regulations have upheld individual liability. 29 C.F.R. § 825.104(d).

4. **What is a spouse absent an official marriage license?** The FMLA simply states, a husband or wife. What a husband or wife is depends on the laws in your state and could include common law marriages.

5. **What is a serious health condition? Does an employee or their family member qualify?** This is an area of high litigation and significant case law interpretation. However, the statute states it is a physical or mental condition that involves in patient care or continuing treatment, in sum. 29 U.S.C. § 2611(11).

6. **What leave must an employer provide an eligible employee under the FMLA?** An employee may ask for twelve (12) work weeks of unpaid leave in any twelve (12) month period for the birth or adoption of a child or if they have or a direct family member has a serious health condition. An employee’s health condition must be serious enough that he or she is unable to perform the functions of his or her position. 29 U.S.C. § 2612(a)(1). FMLA leave requests for a new child must be continuous. However, FMLA leave requests pursuant to serious medical conditions may be taken intermittently or affected through a reduced leave schedule. When this is foreseeable, the employer may require such employee to transfer temporarily to an available alternative position at equal pay and benefits that may better accommodate the schedule. 29 U.S.C. § 2612(b)(2).

One of the most contested areas of litigation involves what constitutes a serious health condition as contemplated for leave. An employer may request certification of the conditions from a health care provider “Certification provided under subsection (a) of this section shall be sufficient if it states—

1. the date on which the serious health condition commenced;
2. the probable duration of the condition;
3. the appropriate medical facts within the knowledge of the health care provider regarding the condition;
4. a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to
care for the son, daughter, spouse, or parent; or a statement that the employee is unable to perform the functions of the position of the employee, as applicable;

(5) in the case of... leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment or in the case of certification for intermittent leave, a statement of the medical necessity for the intermittent leave, and the expected duration of the intermittent leave; and/or in the case of certification for intermittent leave, a statement that the employee's intermittent leave is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave. 29 U.S.C. § 2613(b)."

A heavily contested area in litigation concerns whether the serious health condition described by the physician or health care provider actually makes the employee unable to perform the functions of the job. A health care provider may be required to certify that it does. 29 U.S.C. § 2613(B). However, a great deal of problems can arise in this area. An employer may require at its own expense a second opinion from a health care provider not regularly employed by the employer. 29 U.S.C. § 2613(c). If the two opinions conflict, the employer may require and pay the expense for a third opinion from a mutually accepted provider whose opinion shall be final and binding. 29 U.S.C. § 2613(d). An employer may even require subsequent recertification a reasonable basis. 19 U.S.C. § 1613(e).

An employer must restore an employee on FMLA to leave to his or her position or an equivalent one with equal pay and benefits, yet need not allow benefits or seniority to accrue during the absence. 29 U.S.C. § 2614. Generally, an employer may not fire an eligible employee or have them restored to a position that is lesser than the one held before leave commenced. However, in the event a denial of restoration is necessary to "prevent substantial and grievous economic injury to the operations of the employer," the employer should advise the employee and allow the opportunity to return. 29 U.S.C. § 2614(b)(1). Employers are encouraged to adopt more generous leave policies, FMLA rights may not be abrogated, and the FMLA will not trump state and federal antidiscrimination laws. 29 U.S.C. § 2651-53. An employee with violated FMLA rights may have an interference claim or a retaliation claim.

Interference Claims. A Plaintiff must prove an FMLA violation by a preponderance of the evidence. EDC ANAFED 32:75, 4 (May 2006). To do so, Plaintiff simply proves his or her entitlement to the benefit and that the employer denied the exercise of that entitlement or interfered with it. Id. In order to establish the prima facie elements of an Interference Claim, the following elements must be shown:

1. Claimant was an eligible employee under the FMLA;
2. The Defendant is an employer as defined under the FMLA;
3. The Claimant was entitled to the FMLA leave;
4. Notice of Claimant’s intention to take leave was given the employer; and
5. The Claimant was denied a benefit to which he or she was entitled under the FMLA.

29 U.S.C.A. § 2915(a)(1). An employer’s intent in an Interference Claim is immaterial. However, if the employer can show it would have terminated the employee requesting FMLA leave anyway, the employee may be dismissed. *Bones v. Honeywell Intern, Inc.*, 366 F.3d 869 (10th Cir. 2004).

**Retaliation Claims.** A Plaintiff must prove his or her Retaliation claim. To establish an FMLA retaliation claim, a Plaintiff must show:

1. He or she engaged in statutorily protected conduct;
2. He or she suffered an adverse employment action; and
3. There is a causal connection between the two.

EDC ANAFED 32:75, 2 (May 2006). If a Plaintiff makes this prima facie showing for a Retaliation Claim, then the employer must come forward with a legitimate lawful reason for the adverse employment action. EDC ANAFED 32:75, 1 (May 2006). If it is shown through direct evidence that FMLA leave was a substantial factor in a termination decision, then the employer must show it is more likely than not it would have terminated the Plaintiff even had it not considered the FMLA leave. *Id.* at 2-3.

A request for FMLA leave does not shelter an employee from complying with a company’s absence policy. *Bones v. Honeywell Intern, Inc.*, 366 F.3d 869 (10th Cir. 2004). “Generally, a close temporal proximity between the employee’s protected conduct and the adverse employment action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection.” EDC ANAFED 32:75, 2 (May 2006). Other evidence of causal connection may be as follows: 1. Specific evidence as to the historical background of the decision; 2. The specific sequence of events leading up to the challenged decision; 3. Departure from normal procedures; and 4. Any contemporary statements made by the Defendant. 14 COA2d 85, §34.

**Damages.** 29 U.S.C. §2617 deals with the enforcement of the FMLA and what actions can be taken in order to enforce compliance or to award damages. An employee may seek damages for the following:

1. The amount of wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
2. Any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to twelve (12) weeks of wages or salary for the employee, in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee; and
3. Interest may also be awarded for the amount determined; and
4. Equitable relief such as employment, reinstatement or promotion. 29 U.S.C. § 2617(a)(1); and

5. Attorney fees and costs, including a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant. 29 U.S.C. § 2617(a)(3).

Further, liquidated damages may also be awarded equal to the actual damages as allowed plus interest. However, if an employer proves its violation was in good faith and had reasonable grounds to believe its action was not a violation a court may reduce a liquidated damage award. 29 U.S.C. § 2617(a). Otherwise, punitive damages are not recoverable under the FMLA, any more than emotional distress may be recoverable. Steck v. Bimba Mfg. Co., 1997 WL 685003 (N.D.Ill. 1997).

As to administrative actions that could precede litigation, there is no requirement a Claimant fulfill any administrative prerequisites to filing suit like in other discrimination actions. However, you could come to learn of a potential FMLA action through the commencement of an action with the Equal Employment Opportunity Commission or Oklahoma Human Rights Commission. Unlike Title VII, the ADA, the ADEA, an FMLA Claimant need not file a claim with the EEOC or exhaust other state administrative remedies prior to filing suit. 14 COA 2d 85, §32. Also, the Department of Labor is authorized to administer claims or initiate its own claims against employers. 29 U.S.C. § 2617(b) allows the Secretary of Labor to process and administer civil complaints, or request an injunction to prohibit an employer from some action or omission.

The statute of limitations requires that a suit must be brought within a two year period of the date of the last violation unless the employer acted willfully in violating the statute, and in that case, action may be brought within three years of the last violation. 29 U.S.C. § 2617(a)(4). A violation is generally held willful “when an employer knew or showed reckless disregard regarding whether its conduct was prohibited.” 14 COA 2d 85, §32. The most commonly successful defenses include:

1. Leave was not for a protected reason;
2. The employer was not put on notice that the leave was for an FMLA qualifying reason or
3. That Plaintiff was terminated for some other non-discriminatory reason.

14 COA 2d 85, §26 (2005). Though the FMLA is silent on the issue, courts have held that Plaintiff’s with FMLA claims may have jury trials. 14 COA 2d 85, §32.

Other employer responsibilities under the FMLA require the posting of notices and record maintenance. First, employers must post FMLA notices. “Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a
charge.” “Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.” 29 U.S.C. § 2619. Second, employers must maintain records. An employer is under a duty to keep and preserve records pertaining compliance to the FMLA as well as in accordance with the Secretary of Labor. 29 U.S.C. § 2616(b).

The Secretary of Labor is instructed to put into effect regulations to carry out litigation issues of FMLA claims. 29 U.S.C. § 2654. These regulations are contained at 29 C.F.R. Part 825, which may be found online at the Department of Labor website at http://www.dol.gov/dol/topic/benefits-leave/fmla.htm.
Most sales of securities to investors are registered with the Securities and Exchange Commission (the “SEC”) and under applicable state securities laws. However, certain offerings are exempt from registration under Regulation D of the Securities Act of 1933. See 17 CFR 230.501-506. According to a statement issued by the magazine Private Equity International in May 2007, the total private equity capital raised by the top 50 private equity firms since January 1, 2002 totaled $551 billion. Executive Summary, Private Equity International, May 2007. The private equity market allows emerging companies in many industries, such as oil and gas, to cost effectively raise capital through a private placement memorandum.

Regulation D sets forth the rules governing the limited offer and sale of securities without registration. Issuers commonly claim exemptions under rules 504, 505 and 506 of Regulation D. Rule 506 acts as a safe harbor for the private offering exemption. Pursuant to Rule 506, issuers are able to raise an unlimited amount of capital. Although there is no general solicitation or advertising, this exemption applies to an unlimited number of accredited investors and up to 35 sophisticated investors. The benefit to emerging companies is that under Rule 506 the issuer has the ability to determine what form of disclosure documents to give to the accredited investors. In addition, accredited investors have access to the issuer’s information at any time, so long as the request is reasonable. In contrast, the issuer must give to the non-accredited investors disclosure documents that can be as extensive as those used in registered offerings. If there are non-
accredited investors in the offering, all disclosure documents that are given to the non-accredited must also be given to the accredited investors.

The federal securities laws define the term accredited investors as: (1) a bank, insurance company, registered investment company, business development company, or small business investment company; (2) an employee benefit plan, within the meaning of the Employee Retirement Income Security Act, if a bank, insurance company, or registered investment adviser makes the investment decisions, or if the plan has total assets in excess of $5 million; (3) a charitable organization, corporation, or partnership with assets exceeding $5 million; (4) a director, executive officer, or general partner of the company selling the securities; (5) a business in which all the equity owners are accredited investors; (6) a natural person who has individual net worth, or joint net worth with the person’s spouse, that exceeds $1 million at the time of the purchase; (7) a natural person with income exceeding $200,000 in each of the two most recent years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year; or (8) a trust with assets in excess of $5 million, not formed to acquire the securities offered, whose purchases a sophisticated person makes. See 17 CFR 230.501.

Small emerging companies wishing to utilize a national NASD (now FINRA) broker-dealer network may find that getting the acceptance of these larger brokerage firms to offer the securities to their clients can almost take as much effort, time and expense as going through a public offering. Emerging issuers are essentially unknown to larger firms, so the broker-dealer must engage in a due diligence process to determine the validity of not only the offering, but the issuer’s operations. Due diligence can allow the
broker-dealers to develop a level of trust wherein the broker-dealer develops a level of comfort with the issuer and the issuer’s operations. Some broker-dealers engage an outside due diligence firm, whereas others perform their own due diligence or combine it with the outside firm’s report. This report contains an objective analysis on both the issuer and the validity of the investment opportunity offered by the issuer from an investor’s perspective.

Petroleum resources are critical to the economies of all industrialized nations. Given the rising price of oil and gas, investors are looking for opportunities to directly invest in oil and gas drilling programs. In particular, oil and gas programs which drill in the geological formation known as the Appalachian Basin, found in states such as Ohio and Pennsylvania, can offer tax benefits to high net-worth and high income investors while providing a fairly certain expectation on return without substantial risk. However, investors need to be cautious about with whom they invest. In many instances, the due diligence process can allow broker-dealers to distinguish valid offerings from potential scams.

When looking at oil and gas offerings, the first element of the offering examined through due diligence is the sophistication and validity of the issuer’s operations. This includes the history and track record of the well production of the issuer and its general reputation and experience, as described in the private placement memorandum.

In addition to examining the internal operations of the issuer, due diligence examines the specific program structure. Most oil and gas private placements offer investors a limited partnership structure in which the investor general partners convert to investor limited partners after the completion of the drilling and development of the well.
This structure allows investors to realize the IRS-permitted tax benefits for the intangible drilling and development costs and, upon conversion to a limited partner, subsequently provides a limitation on the investor’s liability after the well has been drilled.

Due diligence typically also reviews the amount of the issuer’s contribution to the offering. If the issuer is investing its own capital in the offering, that contribution evidences the issuer’s commitment to the offering. When examining oil and gas offerings, it is particularly important to note (1) the geological report as it pertains to the targeted drilling areas; (2) the location of drilling leases and production history of the wells; (3) the issuer’s lease inventory; (4) how the natural gas is going to be marketed pursuant to contracts; and (5) the pipelines available to deliver the gas to the market.

When examining any offering, investors should carefully review the issue of revenue sharing between the issuer and investor and what is a fair and reasonable allowance for the managing general partner/issuer based on its contribution. In addition, investors should review the financial strength of the issuer and any indemnification provisions disclosed in the private placement memorandum for their protection.

These items are particularly important when due diligence officers review an oil and gas program. However, strict scrutiny of the issuer’s internal operations is also crucial for any offering for compliance assurance. Any issuer wishing to raise capital through an offering exempt from registration pursuant to rule 506, must file a Form D with the SEC. In addition, issuers utilizing the broker-dealer network must have a selling agreement with the participating broker-dealers with the provisions for indemnification of the parties to each other for their participation and compliance provisions. Issuers should also expect to provide to due diligence a blue sky memorandum which focuses on the
target states where the broker-dealers are located and/or where the securities are to be offered for sale.

Counsel for an issuer may want to conduct a preliminary survey of all states where it is anticipated that securities will be offered for sale, including research to confirm each state’s filing procedures and filing fees for exempt transactions and/or exempt securities. The issuer should also implement an internal docketing system to track the distribution of each private placement memorandum to ensure compliance with Regulation D, to authenticate that each recipient of a private placement memorandum is an accredited investor, and to show that proper acknowledgments, notarizations and subscription procedures have been followed.

Although this article profiles oil and gas offerings, these basic principles and methods of constructing a private placement memorandum can easily be translated to many other forms of enterprise such as alternative fuels, real estate and technology innovations. For an emerging company looking to extend its operations dramatically, the entry into the private placement market offers a unique alternative to bank financing or even other limited forms of registered offerings for capital access. While compliance initially may seem overwhelming, once entered, the opportunity to return to satisfied investors or to attract new investors becomes more easily obtained.
Who’s Afraid of the Big Bad Lease?
Ten Terms to Watch for in Commercial Leases
By Kate Henry

Navigating a commercial lease can be like wading through shark-infested waters – the language may look familiar and favorable, but lurking in the next sentence could be a clause that jeopardizes your client’s interests. While all leases are different in format and scope, the following ten terms generally appear in the majority, and are worth getting to know before you jump in to a negotiation on behalf of a client.

1. **Damages**
The two most common types of damages are Liquidated Damages (“LDs”) and Consequential Damages (“CDs”), and as the word itself implies, they serve as a remedy for one party when the other breaches in some way. LDs are usually stated as a per diem amount, payable for each day of a default. If you are unsuccessful in striking them from a lease, a good option is to limit the timeframe by inserting a start and end date, and/or limit the overall amount your client could be liable for by capping the total damages. CDs are a little trickier; in most states they are “implied” – meaning you will not see anything to the tune of “Tenant shall be liable for Consequential Damages if….” In my practice, we call CDs the “Aphonic Assassin.” The problem with CDs is they are extremely hard to calculate – how exactly does one determine the value of reputation or good name? Accordingly, the amounts awarded can vary greatly, which may pose too big a risk for a smaller client. The only way to ensure your client will not be liable for CDs is to strike any express provision conferring liability, or to insert a waiver. Most commonly accepted are mutual CD waivers such as “Neither party shall be liable for consequential damages, including, but not limited to, loss of profits, loss of good will, loss of business opportunity, additional financing costs or loss of use of any equipment or property.”

2. **Additional Insured Parties**
Remember when you first got your driver’s license and your parents begged you to buckle up, drive slowly, keep off the highway, and avoid parallel parking at all costs? Part of the reason for that is you were likely an Additional Insured on their car insurance policy – meaning if you had an accident or claim, their insurance rates go up. Same goes for Additional Insureds on a company Commercial General Liability (“CGL”) policy: if a landlord requires to be named as an Additional Insured by a tenant, that landlord is entitled to all of the same benefits as the tenant is under their policy, and any claims paid because of the landlord chip away at the aggregate and could have a lasting impact on the tenant’s insurance rates. One way around this is to procure a separate policy in the name of the landlord, where they would be a “Named Insured” and separate from the tenant’s CGL. Another strategy, although less likely to pass muster with larger landlords, is to add the caveat that the tenant-provided insurance is secondary to the landlord’s own insurance.

3. **Force Majeure**
This fancy French phrase really just means an unexpected, disruptive event, usually in the form a gift from Mother Nature such as a hurricane. While it may seem reasonable to
excuse performance for forces of nature, it is important to take into account the location of the property, duration of the term, and effect of the Force Majeure (FM) clause on the parties. For example, if you represent a tenant who plans to rent space in a large warehouse in southern Florida, and the landlord wants to enter into a twenty-year lease, it would be important to word the FM clause in a way that protects the tenant via rent abatement or termination/suspension rights in the event of a hurricane, since a hurricane would likely hit southern Florida at least once during that twenty-year term. Often, FM clauses can be drafted to include non-weather-related occurrences specific to your client’s needs: for example, if your client is a unionized company prone to labor disputes, think about including strikes, labor disputes and lockouts as FM events so your client might avoid liability should one occur.

4. Indemnity
Everyone likes a little assurance that they will not be forced to bear a burden that is not theirs. A fair Indemnity provision will have a tenant protecting the landlord against liability from the tenant’s negligent acts and omissions and willful misconduct, and vice-versa. The two key things to look out for in an Indemnity clause are a defense obligation and liability for the actions of other parties. When the word “defend” appears in the Indemnity, you have an express defense obligation on your hands – meaning if the conditions of the provision were met (e.g. the tenant was negligent), that tenant have to retain and pay for an attorney for the landlord – in addition to paying for their own legal fees. Some crafty drafters will even require the indemnified party be the one to select the attorney – meaning they could choose a senior partner at a top firm and your client would be stuck paying the bill. Reworking the defense obligation of an indemnity clause, as well as striking or limiting any other language regarding repayment of legal fees, could save your client an enormous amount of money. The second key thing to look for is liability for the actions of other parties. Making a client liable for their own actions as a tenant is fair; having a tenant liable for the landlord’s actions, and often any affiliate, representative, invitee, licensee, etc. of the landlord, is risky. Since there is little a tenant can do to control the actions of the landlord or any other third parties, a good strategy is to negotiate a fair indemnity where each party is liable for only its own acts and omissions.

5. Termination for Convenience
Most commercial leases contain several termination clauses, with the most common being Termination for Default – meaning if one of the parties defaults on an obligation under the lease, the non-defaulting party has the right to cancel the agreement altogether. Termination for Convenience is an extremely powerful lease term because it literally allows a party to terminate the lease for any reason whatsoever, or no reason at all. Consider this: if your client, a family-owned restaurant, spent $500,000 building out the space they leased from a corporate strip mall landlord, and then the landlord decided two months later it wanted to exercise its right to terminate for convenience, your client’s financial future could be devastated. Two important remedies to include if you see a Termination for Convenience clause are Notice and Net Book Value Protection. Without an express Notice provision, your client is only afforded the statutorily required notice period of that state – which can be only a few days in certain jurisdictions. While 30
days notice is standard in commercial leasing, a common tactic is to negotiate for 60, 90, even 120 days, depending on factors such as the term of the lease, the extent of tenant improvements prior to opening for business and refurbishment requirements throughout the term. A Net Book Value Protection clause will allow a tenant to reclaim some of the capital invested in the space should the landlord terminate for convenience. Most commercial landlords will agree to some form of reimbursement based on straight-line amortization of tenant improvements, and you can also bargain for title to fixtures. While this does not compensate for the value of the business itself, these negotiated for changes can offer a tenant some protection again termination by the landlord for convenience.

6. Cross-Default
Imagine your client is the owner of a budding chain of perfume shops, and entered into a contract with a major corporate landlord to put a shop in a mall in each of the fifty states. If your client’s leases contain a Cross-Default clause, then a default at the perfume shop in Alaska would mean all forty-nine other leases were then in default. This leasing term is clearly pro-landlord! To protect your client’s interest, strike the Cross-Default language or negotiate a fair cure period to allow your client to remedy the default in the one lease before all the others are pulled in the undertow.

7. Asbestos
While not a concern in newer buildings, asbestos is still a looming problem in older construction. The issue with Asbestos clauses in commercial leasing is two fold: first, who is responsible for abatement, encapsulation or removal if Asbestos is found onsite, and second, what happens to the space during that work. Some leases will try to place responsibility on the tenant if the Asbestos is not discovered during the tenant’s building inspection prior to turnover of the space. In representing a tenant, always negotiate the lease to ensure the owner of the building, the landlord or the building management company is responsible for abating, encapsulating and removing any Asbestos, regardless of who discovered it or when it was discovered. Additionally, add a clause either granting rent abatement or use of a similar space during the Asbestos work, to ensure your client doesn’t suffer financially.

8. Alternative Dispute Resolution
More and more commercial landlords are choosing to resolve disputes out of the courtroom, generally via Arbitration or Mediation. While an Alternative Dispute Resolution (ADR) clause can wind up saving your client quite a bit of time and money compared to litigation, it is important to ensure the language meets your client’s needs. Be sure that the neutral who will serve as arbitrator or mediator is selected through a process that is fair to both parties, and include a condition that the neutral can not be in any way related, affiliated with or politically connected to either party, to ensure complete neutrality. Require the use of established ADR processes, such as adhering to the rules of the American Arbitration Association or the International Institute for Conflict Prevention and Resolution. Depending on the nature of your client’s business and their particular goals, you may want to agree to only non-binding arbitration, leaving your client free to pursue other remedies available at equity and law. Additionally, be sure to determine the location of the arbitration when negotiating the ADR clause – if the
landlord’s corporate office is in Texas, but your client is renting space in Boston, it might be in your client’s best interest to have the arbitration in Massachusetts.

9. Assignment
The “re-gifting” clauses of the commercial leasing world, Assignments are commonplace in today’s ever-changing market, much to the chagrin of landlords. Frequently, an assignment clause will be laden with conditions that must be met before an assignment can be effective, the most common being advance written permission of the landlord. While this is certainly reasonable, be sure you thoroughly understand your client’s business structure before negotiating an assignment clause. For instance, if you represent a small subsidiary of a Fortune 500 company that has a dozen other companies under its corporate umbrella, you might try to negotiate that an assignment to another subsidiary requires only notice, not advance landlord approval. Similarly, if you represent a father who is contemplating handing his business off to his son in a few years, the Assignment clause should allow for this change without the son having to go through too many hoops.

10. Holdover
What happens when a lease runs out and neither landlord nor tenant has secured an extension, amendment or entered into a new lease? If there is a Holdover clause in the lease, it likely contains astronomical penalties for the tenant once the lease expires, often requiring rental payments in excess of 200% of the originally agreed to amount. While most state laws address this issue by creating a monthly tenancy, the language in the lease will also apply, meaning your client may be paying quite the premium to remain in the space. A good strategy is to buffer the Holdover clause by tolling any penalties during renegotiation of the lease terms or negotiating an amendment. Another idea is to have the lease go month-to-month upon expiration, with a Termination for Convenience clause exercisable by either party during that monthly tenancy, and have the Holdover clause only apply if the lease is terminated, not simply because it expired.

While there are many more commercial leasing terms out there, the above ten represent a good sampling of the most important clauses that could affect your client’s financial security in his or her business. Not meant to be an exhaustive review of these issues, but rather a general overview of the problems a tenant might face, this foray into commercial leasing is a good way to get your feet wet. The more leases you negotiate, the more familiar with the subtle nuances of these terms you will become, and the more adept you will be at drafting language that is not only in your client’s best interest, but also likely to be acceptable to the other party as well. After all, in Commercial Leasing, both parties essentially want the same thing: get the tenant in the space. Keep in mind this common goal, focus on fairness, and you will be in for smooth sailing!

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Online Advertising in India

Regulations: Self and Otherwise

Advertising is essentially a thing to induce consumption to make people buy things they do not want. In a developing economy like India, advertising has a profound impact on how people understand life, the world and themselves, especially with regard to their values, choices and behaviour. Advertising is considered to be the cornerstone of our socio-economic system. Advertising may be viewed as the lifeline of free media, paying costs and making media widely accessible.

An Advertisement may be defined as paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Any communication which in the normal course would be recognized as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.

In India, advertising, both traditional and online, has grown in a major way. Ecommerce too is growing exponentially. India’s i-population stands at 38.5 million and is all set to cross the 100 million by 2007-08. Internet advertising is said to have contributed greatly to the growth of online shopping in India some statistics pertaining to the usage of online medium for shopping are produced below.

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2 Code of the Advertising Standards Council of India.
3 Internet and Mobile Association of India.
On Shopper – Cybercafé: Demographic Profile-Age, Gender & Marital Status

- 55% of Cybercafé Shoppers are Unmarried and 29% are married with kids.

What shoppers like about online shopping?

History of Advertising in India

One of the earliest methods of advertising used in India was outdoor display. Eye-catching signs were painted on the walls of buildings, including residential houses visible to pedestrians.

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4 ibid
5 ibid

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In the medieval times advertisements were conveyed by town criers appointed by the royalty or merchants. These criers read aloud notices for public information, often accompanied by the beating of drums. Those engaged by merchants used to shout business notices praising the quality or effectiveness of a product. Auctioneers also used to shout the quality and price of the products to attract customers, as they do even today.

Printed advertisements with or without graphics came only with Johann Gutenberg's invention of printing from movable metal type in the 15th Century. As printing developed in the 15th and 16th Century, advertising expanded to include handbills. Trademarks or logos came to be used in the 16th Century when many shopkeepers used to put up such symbols outside their establishments for easy identification. In the 17th Century, as disease ravaged Europe, advertisements of medicines also grew more popular. And as a result of these developments, advertisements, especially newspaper advertisements, became a rage in England. What happened in England permeated to its colonies, like India.

As the economy expanded during the 19th Century, advertising grew alongside. In the USA, classified advertisements became popular, filling pages of newspapers with small print messages promoting various goods. In the early 1800s, display advertising in printed media arrived. Whereas previous newspaper and magazine ads had been limited to short, column-sized ads, now they expanded and included illustrations.

When radio stations began broadcasting in the early 1930's in India, the stations were Government owned and the programs were aired without advertisements. Since then, radio stations have been privatized. And radio station owners earn money by selling sponsorship rights in small time-allocations to businesses. This has led to the development of one of the most popular forms of advertising. Advertising over the radio is very effective in India where the literacy level is low.

Advertising in India takes a number of forms and is not confined to just selling of products and services. One would come across various forms of advertising in direct-mail, magazines, newsletters, newspapers, slogans, online discussion groups and chat groups, posters and bulletin boards, radio announcements, telemarketing, webpages, yellow pages, outdoor, public service advertising, etc. Online advertising is the most recent form of advertising that’s gaining popularity in India. Wikipedia defines online advertising as a form of advertising using the Internet and world-wide-web to deliver marketing messages and attract customers.

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7 http://en.wikipedia.org/wiki/Online_advertising
Media being as powerful as it is, it is prone to some misuse. Lets consider one such example as it relates to advertising.

**Misleading & Surrogate Advertising**

The Consumer Protection Act\(^8\), advertising Code\(^9\), Censor Board\(^10\) and working group on Misleading Advertisements set up by the Consumer Affairs, Food and Public Distribution Department, Government of India, have all dealt with the issue of misleading advertisements. The preferred solution is to ask the advertiser to issue a corrective advertisement to neutralize the effect of misleading advertisements.

In India, due to severe restrictions on advertising certain products like alcohol, tobacco products, medicines and baby food, a whole genre of misleading / surrogate advertising has emerged. In such advertising, a brand is endorsed using a product different from the actual product being promoted. Like in the matter of United Breweries Limited vs. Mumbai Grahak Panchayat, the matter of debate included the advertisements of Bagpiper Soda. This advertisement was held to be a surrogate advertisement for Bagpiper whiskey. The National Consumer Disputes Redressal Commission, New Delhi, held that the word “soda” was used in an inconspicuous manner, while the word “Bagpiper” was boldly stated, with the baseline “India’s largest, World’s No. 3”.

**Advertising Regulation in India**

The Government of India has not set up a regulatory body in India to regulate advertisements. Depending on the nature of the grievances, the power to regulate advertisements may be exercised by a vast variety of authorities, including the courts, Central and State Governments\(^11\), tribunals\(^12\) or the police authorities\(^13\). In addition to these authorities, is the Press Council of India Act, 1978 which is also empowered to regulate press advertisements. The Council is guided by its “Norms of Journalistic Conduct”\(^14\) in the regulation of advertisements. The Press Council has the power to hold an inquiry into a complaint against a newspaper and if it finds that the newspaper has violated the standards prescribed by the council, it may warn, admonish or censure the newspaper, the editor or journalist as the case may be\(^15\).

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\(^8\) Elaborated later.
\(^9\) As elaborated in Annexure A hereto.
\(^10\) As elaborates in Annexure B hereto.
\(^11\) As for instance, under the Young Persons (Harmful Publications) Act, 1956; the Cable Television Networks (Regulation) Act, 1995.
\(^12\) For instance, the Copyright Board for a violation under the Copyright Act, 1957 or the consumer for a constituted under the Consumer Protection Act, 1986.
\(^13\) Under the Cable Television Networks (regulation) Act, 1995 or the Indian Penal Code, 1860.
\(^14\) As elaborated in Annexure C hereto.
India however, does have a self regulatory body dealing with both online and other forms of advertising. This is the Advertising Standards Council of India.

**Advertising Standards Council of India (ASCI)**

To monitor certain standards and fairness in the domain of advertising, **Advertising Standards Council of India** was established in India in 1985. Advertising Standards Council of India (ASCI) is a self regulatory voluntary organization. The role and function of the ASCI is to deal with complaints received from consumers and industry against advertisements which are considered as false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition and in contravention to the advertising code laid down by the ASCI. While safeguarding consumer interests; ASCI also monitors and guides the commercial communications of practitioners in advertising.

The impetus for establishing ASCI was the quantity of false, misleading and offensive advertising in India that resulted in consumers having an increasing disbelief in advertising, and a growing resentment of it. Misleading, false advertising, according to ASCI constitutes unfair competition. Not only does it lead to market-place disaster, but also to litigation. ASCI adopted a Code for Self-Regulation in Advertising, which is committed to honest advertising and fair competition in the market-place. It stands for the protection of the legitimate interests of consumers and all concerned with advertising - advertisers, media, advertising agencies and others who help in the creation or placement of advertisements. As the Code becomes increasingly accepted and observed proactively, ASCI believes that three things will begin to happen:

- Fewer false, misleading claims
- Fewer unfair advertisements
- Increasing respectability

Member of ASCI, are allowed to mould the course of Self-Regulation and participate in the protection of healthy, effective advertising. They have a say, through the Board of Governors, in the further development of the Code and future appointments to the Consumer Complaints Council (CCC).

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16 Registered in Oct. 1985, u/s 25, as a Not-For-Profit Co., under the Indian Companies Act 1956.
17 The ASCI Code is a self-regulatory code which is not legally binding on parties. However, in practice ASCI members include various media, publishers etc. who normally abide by decisions of the Complaint Complaints Council set up by ASCI. The ASCI Code covers all media including the online media. Please also refer to the section on General Requirements. Disobedience of ASCI's decision does not lead to any civil or criminal consequences. Its enforcement mechanism is through non-publication of the contravening advertising by its media members.
**ASCI Organization**

ASCI has 16 members as its Board of Governors. ASCI ensures equitable representation of advertisers, agencies, media and other advertising services, on its Board. ASCI has its own independent, fully staffed Secretariat of 5 members, headed by a Secretary General.

**CCC Organization**

The CCC has 21 members, constituting mainly of non-advertising professionals representing civil society, chosen from eminent and recognised opinion leaders in their respective disciplines such as medical, legal, industrial design, engineering, chemical technology, human resources and consumer interest groups.

The CCC met 14 times from April 2006 to March 2007. It considered a total of 140 complaints. 72% of the complaints were upheld by the CCC, which have resulted in the advertising being either withdrawn or modified appropriately.

**Standards of Conduct**

The advertising code has four Chapters encapsulating various parameters and criteria for advertising in India. The Code applies to advertisement read, heard, and viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant numbers of consumers in India. Chapter I deals with truthfulness and honesty of representations, claims made in advertisements and safeguards against misleading advertisements. Under Chapter I (e) of the Code, advertisements inviting the public to invest money cannot contain statements which may mislead the consumer in respect of the security offered, rates of returns or terms of amortization. Where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumptions, such conditions or assumptions must be clearly indicated in the advertisement.

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18. 9 members are from advertising practitioners.
19. Since 1986, 1335 complaints were upheld. At least 79% of these ads were withdrawn, concluded or modified appropriately so as to avoid contravention of the Code and thereby respecting the rights of consumers and competitors. Almost 50% of these advertisers were not members of the ASCI.
20. An excerpt from one of the provisions from Chapter I: Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions. Advertisements shall not contain statements or visual presentation which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised or the advertiser or about any other product or advertiser.
Chapter II deals with indecent or vulgar advertisements\(^{21}\), Chapter III deals advertisements of hazardous or harmful products\(^{22}\) and Chapter IV deals with fairness in competition\(^{23}\).

**Complaint Procedure**

The Schematic process prescribed by the ASCI for processing a complaint against an advertisement is as follows:

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\(^{21}\) An excerpt from one of the provisions from Chapter II: Advertisements should contain nothing indecent, vulgar or repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence.

\(^{22}\) An expert from Chapter III: No advertisement shall be permitted which:

- Tends to incite people to crime or to promote disorder and violence or intolerance
- Derides any race, caste, colour, creed or nationality
- Presents criminality as desirable or directly or indirectly encourages people - particularly minors - to emulate it or conveys the modus operandi of any crime
- Adversely affects friendly relations with a foreign State

\(^{23}\) An excerpt from one of the provisions of Chapter IV: To ensure that Advertisements observe fairness in competition such that the Consumer's needs to be informed on choice in the market-place and the canons of generally accepted competitive behaviour in business are both served. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided:

- It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product
- The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case
- The comparisons are factual, accurate and capable of substantiation
- There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared
- The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication
The procedure for filing a complaint to the CCC, including for online advertising is provided on its website. For online advertisements, the following information needs to be provided with the complaint:

- Name of server.
- URL / website address.
- Date the advertisement was observed.
- Location of complainant.

The complaints can be made in electronic form, online.
Statutes Impacting Advertising

While there may not be a clear decision on the point, for the purposes of this paper it is understood that all legislations which touch upon advertising would, unless to the contrary has been stated, also cover online advertising. Thus this brief overview may be read to cover online advertising too.

Constitution of India

The Constitution of India guarantees freedom of speech and expression to all its citizens subject to a few exceptions. Publication of advertisements has been recognised as “commercial speech” and has been granted protection under Article 19(1)(a) of the Constitution even by the Supreme Court of India.

An illustration of the Supreme Courts stand on this fundamental right can be summed up in the following case laws:

In Hamdard Dawakhana v. Union of India the Supreme Court addressed the issue as to whether the Drug and Magic Remedies Act, which put restrictions on the advertisements of drugs in certain cases and prohibited advertisements of drugs having magic qualities for curing diseases, was valid as it curbed the freedom of speech and expression of a person by imposing restrictions on advertisements. The Supreme Court held that, an advertisement is no doubt a form of speech and expression but every advertisement is not a matter dealing with the expression of ideas and hence advertisement of a commercial nature cannot fall within the concept of Article 19(1)(a).

However, in Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd, a three judge bench of the Supreme Court differed from the view expressed in the Dawakhana case and held that ‘commercial advertisement’ was definitely a part of Article 19(1)(a) as it aimed at the dissemination of information regarding the product. The Court, however, made it clear that the government could regulate commercial advertisements, which are deceptive, unfair, misleading and untruthful.

24 Article 19(1)(a)
25 Article 19(2)
26 Indian Express Newspapers (Bombay) Private Ltd. and Ors. V. Union of India and Ors. AIR 1986 SC 515; Tata Press Ltd. V. Mahanagar Telephone Nigam Limited and Ors. AIR 1995 SC 2438;
27 AIR 1960 SC 554.
In its celebrated decision, Bennett Coleman & Co. v. Union of India, the Supreme Court ruled that a newsprint policy like the one before the Court was violative of the freedom of the press because it imposed restrictions which severely constricted newspapers in adjusting their page number and circulation and also curtailed the area of advertisement. The Court ruled that loss of advertisements seriously affects the circulation of a newspaper and a restraint on advertisements would clearly affect the freedom of the press. This case arose in the State of Andhra Pradesh. The proprietor of a Telugu language daily, Eenadu, complained that Government had withdrawn advertisements from its paper on account of extraneous reasons, namely its criticism of the Government, and this had adversely affected the circulation of the paper and its revenue. The action of the Government was challenged. The High Court did not accept the contention that a newspaper has a constitutional right to obtain advertisements from the Government. It, however, held that the Government cannot exercise this power or privilege to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press, or as a weapon to punish newspapers which criticise its policies and actions. It has to use the funds in a reasonable manner consistently with the object of the advertisement viz. to educate and inform the public about the activities of the Government.

*Consumer Protection Act*

This statute provides for the establishment of a Central Consumer Protection Council with the object of promotion and protection of the rights of the consumer, including protection against unfair trade practices. The Act also empowers the District Forum to take measures to discontinue the unfair trade practices. The Forum also has the power to issue corrective advertisements to neutralize the effect of a misleading advertisement. India does have other legislations that regulate unfair trade practices, in addition to the Consumer Protection Act.

*Information Technology Act, 2000 (IT Act)*

The IT Act makes the publication and transmission in electronic form of material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, punishable with imprisonment and fine. The IT Act applies to any offence committed by any person outside India, if it involves a computer, computer system or computer network located in India. The offences under the IT Act are punishable with imprisonment and/or fine.

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29 Bennett Coleman & Co. v. Union of India, AIR 1973 SC 106;
30 “Unfair Trade Practice” has been defined in Section 2 of the Consumer Protection Act, 1986
The Central Government after consultation with the Cyber Regulations Advisory Committee and in exercise of the provisions of Section 67 and 88 (Constitution of the Cyber Regulations Advisory Committee) of the IT Act, has prescribed an enforcement mechanism for blocking websites that are in contravention of Section 67 of the IT Act.

The IT Act is currently under severe scrutiny in India, as its scope leaves a lot to be desired. The internet has thrown up its fair share of problems, including those relating to online advertising. Some of these include, issues pertaining to privacy wherein a user is bombed with messages and images without ever soliciting or requesting to be the recipient of these messages. Another aspect in front of regulators relates to cross border issues, where the inbound advertisement is from a jurisdiction where the legal regime is hostile or non co-operative to India.

Indian Penal Code, 1860 (IPC)

The IPC makes it a punishable offence to advertise any obscene publication or its distribution, sale, hire or circulation. It is also an offence under IPC to publish advertisements relating to any lottery which is not a state lottery or which is not authorized by the State Government. The IPC prohibits the sale, distribution, public exhibition or circulation of any obscene book, pamphlet, paper, drawing, painting, representation, figure or any other obscene object. The following advertisements would be considered an offensive and may attract punishment of imprisonment and/or fine:

- Promote by words, spoken or written, or by signs or by visible representations, disharmony or feelings or enmity, hatred or ill-will between different religious, racial, language or religious groups or castes or communities, on grounds of religion, race, place of birth, residence, language, caste or community.
- Make or publish any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the sovereignty and integrity of India.
- Assert, counsel, advise, propagate or publish that any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons.

31 Under Section 292(2)(d) of the Indian Penal Code, the keeper, printer or publisher may be held liable under this provision for the publication of an obscene advertisement. Kherode Chandra Roy Chowdhury v. Emperor, (1911) ILR 39 Cal 377. Under section 292 (2)(d), an advertisement through any means that any person is engaged or is ready to engage in the sale, distribution, public exhibition, circulation any obscene book, pamphlet, paper, drawing, painting, representation, figure or any other obscene object, is punishable with imprisonment and/or fine.

32 Section 294-A of the Indian Penal Code
33 Section 292 (d).
• Insults by words, either spoken or written, by signs or by visible representations, the religion or the religious beliefs or a place of worship of a class of citizens with deliberate and malicious intention of outraging the religious beliefs of that class.

*The Young Persons (Harmful Publications) Act, 1956*

This statute makes it a punishable offence to advertise a “harmful publication”. A “harmful publication” is a publication portraying the commission of offences, acts of violence or cruelty or incidents of a repulsive or horrible nature, in such manner as would tend to corrupt a young person.\(^{34}\)

*Indecent Representation of Women (Prohibition) Act, 1986 (IRWA)*

This statute prohibits the publication of advertisements which contains indecent representation of women in any form. Under Sections 2(c), (d), 3 and 4 of IRWA, no person may publish or cause to be published or arrange or take part in the publication of advertisements, books, pamphlet, film, slide, writing, paper, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form. An indecent representation of women is the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a manner as to have the effect of being indecent, or derogatory to or denigrating women or is likely to deprave, corrupt or injure the public morality or morals.

Any offence committed under Section 3 and 4 is punishable with imprisonment and/or fine.

*The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (CTPA)*

The CTPA prohibits advertisement of cigarettes and other tobacco products which, directly or indirectly, suggest or promote the use or consumption of cigarettes\(^{35}\) or any other tobacco products, by any person who is either engaged in the production, supply or distribution of such products or by a person having control over a medium who causes such advertisements to be advertised through that medium or by a person who takes part in such advertisement. Therefore, CTPA holds the publisher of the advertisement also responsible for publishing the advertisement.

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\(^{34}\) Section 2 (a) of the Young Persons (Harmful Publications) Act, 1956

\(^{35}\) Section 5 of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003
As an aside, it would be worthwhile to mention that the statement of objects and reasons of the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, inter alia provides that smoking of cigarettes is a harmful habit and, in course of time, can lead to grave hazards. Similarly, the objects and reasons of the CTPA provide that tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated 8,00,000 deaths annually in India.

The Drugs and Magic Remedies (Objectionable Advertisements) Act (DMRA)

This statute prohibits advertisements of drugs for certain purposes and of treatment of certain diseases and disorders. It also prohibits misleading advertisements relating to drugs and advertisements of magical remedies for the treatment of certain diseases and disorders.

Under this Act, “advertisement” includes any notice, circular, label, wrapper or other document and any announcement made orally or by means of producing or transmitting light, sound or smoke. The DMRA prohibits publication and/or the import or export of any document that contains advertisements which:

- Claim that a drug may be used for procurement of miscarriage or prevention of conception in women, improvement of capacity of human beings for sexual pleasure, correction of menstrual disorder in women and for other diseases or disorders specified under the DMRA;
- Are misleading;
- Are for magic remedies that, directly or indirectly, claim to be efficacious for treatment of specified diseases and disorders.

The Drugs and Cosmetics Act, 1940 (DCA)

Under Section 18 of the DCA no person can by himself or by any other person on his behalf manufacture for sale or for distribution, sell, stock or exhibit or offer for sale or distribute any drug that:

- is not licensed under the DCA or contravenes the terms of the license;
- is not of a standard quality, misbranded (refers to packaging and labelling requirements), adulterated or spurious;
- through any statement, design or device accompanying the drug or through any other means, claims to prevent, cure or mitigate any disease or ailment or to have any such effect as maybe prescribed.

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36 Section 3,4,5 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954
37 Section 2(a) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954
Similar restrictions apply to advertisements for traditional drugs such as Ayurvedic, Siddha and Unani. Under Section 29 of the DCA, the use of any report of a test or analysis (or its extract) made by the Central Drugs Laboratory or a Government Analyst, in an advertisement is prohibited. Contravention of the above provisions of the DCA is a criminal offence and involves punishment of imprisonment and/or a fine.

The Emblems and Names (Prevention of Improper Use) Act, 1950

This statute prohibits the use, for professional or commercial purposes, of select emblems and names of national or international significance. An advertiser who makes commercial use of such emblems and names would be liable under this statute.

Monopolies and Restrictive Trade Practices Act, 1969 (MRTP)

Section 36A of the MRTP lists out practices considered to be Unfair Trade Practices (UTP). A UTP is a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services adopts any unfair method or unfair or deceptive practice, including the practice of making any statement, whether orally or in writing or by visible representation, which inter alia:

- Falsely represent that the goods/services are of a particular standard, quality, grade, composition, style or model, and that the re-built, second-hand, renovated, reconditioned or old goods are new goods.
- Make false or misleading statements concerning the need for or the usefulness or regarding the sponsorship, approval, or affiliation of any goods and services.
- Make a materially misleading representations to the public concerning the price at which a product or like products or goods have been or are or will be originally sold.
- Gives false or misleading facts disparaging the goods, services or trade of another person.
- Offers gifts, prizes or other items with the intention of not providing them or creating an impression that something is being given free of charge when it is fully or partly covered by the price.
- Conduct any contest, lottery, game of chance or skill.

SEBI (Stock-brokers and Sub-brokers) Rules, 1992 - Code of Conduct for Stock-brokers

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38 Section 3 of The Emblems and Names (Prevention of Improper Use) Act, 1950
39 The Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP") regulates monopolistic, restrictive and unfair trade practices. India has recently legislated its antitrust law, the Competition Act, 2002. However, the new statute has not yet fully come into force (expected early next year). Once the Competition Act, 2002 coming into force in its entirety, the MRTP Act will stand repealed and the UTP provisions of the MRTP Act will be enforced under the Consumer Protection Act.
A stock-broker or sub-broker is prohibited from advertising his business publicly unless permitted by the stock exchange, including in their internet sites, by subsidiaries, group companies etc.

**SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995**

These regulations prohibit any person from making any statement, or disseminate any information which is:

- Misleading in a material particular.
- Likely to induce the sale of purchase of securities or have the effect of increasing or depressing the market price of securities, without care of whether the statement or information made is true or false or having reasonable knowledge that the statement is misleading in any material particular.

This excludes general comments made in good faith in regard to:

- the economic policy of the government;
- economic situation in the country; and
- trends in securities market.

**SEBI (Mutual Funds Regulation), 1996: SEBI Guidelines for Advertisements by Mutual Funds**

The Guidelines list out detailed requirements for advertisements by Mutual Funds. The guidelines apply to all forms of advertisements, communications, released in any form and through any media including websites. It defines an “advertisement” as any material published or designed to be published on which a mutual fund has no control over the audience and which is broadly distributed.

The guidelines list detailed requirements on the following subjects:

- Content
- Standards of communication
- Forms of advertisements (e.g. tombstone advertisement, product launch advertisement, performance advertisement)
- Use of rankings
- Required disclosures
- Time periods
Securities and Exchange Board of India (“SEBI”) (Disclosure and Investor Protection Guidelines), 2000

“Advertisement” under these Guidelines includes notices, brochures, pamphlets, circulars, show cards, catalogues, hoardings, placards, posters, insertions in newspapers, pictures, films, cover pages of offer documents or any other print medium, radio, television programmes through any electronic medium.

There are detailed requirements under these Guidelines on Pre and Post Issue of securities’ advertisements. In addition, there are general guidelines also set out for issue advertisements, briefly set out below:

- Be truthful, fair and clean and not contain any untrue or misleading statement.
- Reproduce or purport to reproduce any information contained in an offer document in full disclosing all relevant facts and not restrict to select extracts.
- Be clear, concise and understandable language and extensive use of technical, legal terminology or complex language and the inclusion of excessive details which may distract the investor, should be avoided.
- Not contain statements which promise or guarantee rapid increase in profits.
- Not contain any information what is not contained in the offer document.
- Display no model, celebrities, fictional characters, landmarks or caricatures or the likes on a form part of the offer documents or issue advertisements.
- Not appear in the form of crawlers (advertisements which run simultaneously with the programme in a narrow strip at the bottom of the television screen) on television.
- Not include any issue slogans or brand names for the issue, except the normal commercial name of the company or commercial brand names of its products already in use.
- No slogans, expletives or non-factual and unsubstantiated titles should appear in the issue advertisements or offer documents.
- If any advertisement carries any financial data, it should also contain data for the past three years and should include particulars relating to sales, gross profits, net profit, share capital, reserves, earnings per share, dividends and the book values.
- Contain names of issuer company, address of its registered office, names of the main lead merchant bankers and registrars to the issue.

There are other detailed requirements under these Guidelines regarding content, form and time frame of the issuing the advertisement.
The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

This statute prohibits advertisements relating to predetermination of sex.

The Transplantation of Human Organs Act, 1994

This statute makes it a punishable offence to issue advertisements inviting persons to supply, for payment a human organ.

The Representation of the People (Amendment) Act, 1996 (RPA)

There is a prohibition on the display to the public any election matter by means of cinematography, television or other similar apparatus in any polling area during the period of 48 hours ending with the hour fixed for the conclusion of the poll for any elections in that polling area. “Election matter” under the RPA means any matter intended or calculated to influence or affect the result of an election.

The Lotteries (Regulation) Act, 1998

Under this statute a State Government has the discretionary powers to organize, conduct or promote a lottery, including advertising thereof. Different states have enacted laws/regulations to regulate the sale, promotion, advertisement and distribution of lotteries including online lotteries, such as the States of Maharashtra, Sikkim, Punjab and Harayana etc. Some States on the other hand have prohibited the conduct of lotteries within their states.

Public Gambling Act, 1867 (PGA)

Under Section 3 of the PGA, the owning, keeping, care or management, financing or in any manner assisting in conducting the business of any Common Gaming House is prohibited.

Censorship

While this paper does not cover censorship as an issue, some guidance on forms and content for advertisements may be obtained from the censorship norms applied by the Censor Board of India while certifying films and advertisements for public exhibition. A listing thereof is provided in Annexure B hereof.
Summing it up …

The aim of advertisement is to promote sales of products or service by affecting a purchasing decision. Although the benefits of advertising are numerous it is one aspect of marketing that is subjected to a severe criticisms. And now there is a new medium for advertisers to explore, the Internet! While there may be no specific legislations governing online advertising in India, ASCI does recognize online advertising. ASCI’s Code of advertising and existing statutes provides necessary guidance and arsenal to combat errant advertisers. Finally, guidance may be sought by simplify reading the Terms and Condition’s of the website, the advertiser wants to advertise on. This exercise will avoid any negative repercussions following release of an online advertisement.

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Annexure A

The Code for Self Regulation in Advertising

Adopted by The Advertising Standards Council of India under Article 2 (ii) of its Articles of Association at the first meeting of the Board of Governors held on November 20, 1985.

The Code was amended in February 1995 and in June 1999.

The purpose of the Code is to control the content of advertisements, not to hamper the sale of products which may be found offensive, for whatever reason, by some people. Provided, therefore, that advertisements for such products are not themselves offensive, there will normally be no ground for objection to them in terms of this Code.

Declaration of Fundamental Principle

This Code for Self-Regulation has been drawn up by people in professions and industries in or connected with advertising, in consultation with representatives of people affected by advertising, and has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising, with the following as basic guidelines, with a view to achieve the acceptance of fair advertising practices in the best interest of the ultimate consumer:

1. To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.

2. To ensure that advertisements are not offensive to generally accepted standards of public decency.

3. To safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large.

4. To ensure that advertisements observe fairness in competition so that the consumer’s need to be informed on choices in the market-place and the canons of generally accepted competitive behaviour in business are both served.
The Code’s rules form the basis for judgement whenever there may be conflicting views about the acceptability of an advertisement, whether it is challenged from within or from outside the advertising business. Both the general public and an advertiser’s competitors have an equal right to expect the content of advertisements to be presented fairly, intelligibly and responsibly. The Code applies to advertisers, advertising agencies and media.

**Responsibility for the Observance of this Code**

The responsibility for the observance of this Code for Self-Regulation in Advertising lies with all who commission, create, place or publish any advertisement or assist in the creation or publishing of any advertisement. All advertisers, advertising agencies and media are expected not to commission, create, place or publish any advertisement which is in contravention of this Code. This is a self-imposed discipline required under this Code for Self-Regulation in Advertising from all involved in the commissioning, creation, placement or publishing of advertisements.

This Code applies to advertisements read, heard or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant number of consumers in India.

**The Code and the Law**

The Code’s rules are not the only ones to affect advertising.

There are many provisions, both in the common law and in the statutes, which can determine the form or the content of an advertisement.

The Code is not in competition with law. Its rules, and the machinery through which they are enforced, are designed to complement legal controls, not to usurp or replace them.

**Definitions**

For the purpose of this Code:

a. an advertisement is defined as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed. Any communication which in the normal course would be
recognised as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason.

b. a product is anything which forms the subject of an advertisement, and includes goods, services and facilities.

c. a consumer is any person or corporate body who is likely to be reached by an advertisement whether as an ultimate consumer, in the way of trade or otherwise.

d. an advertiser is anybody, including an individual or partnership or corporate body or association, on whose brief the advertisement is designed and on whose account the advertisement is released.

e. an advertising agency includes all individuals, partnerships, corporate bodies or associations, who or which work for planning, research, creation or placement of advertisements or the creation of material for advertisements for advertisers or for other advertising agencies.

f. media owners include individuals in effective control of the management of media or their agents; media are any means used for the propagation of advertisements and include press, cinema, radio, television, hoardings, hand bills, direct mail, posters, internet, etc.

g. minors are defined as persons who are below the age of 18 years.

h. any written or graphic matter on packaging, whether unitary or bulk, or contained in it, is subject to this Code in the same manner as any advertisement in any other medium.

i. to publish is to carry the advertisement in any media whether it be by printing, exhibiting, broadcasting, displaying, distributing, etc.

Standards of Conduct

Advertising is an important and legitimate means for the seller to awaken interest in his products. The success of advertising depends on public confidence. Hence no practice should be permitted which tends to impair this confidence. The standards laid down here should be taken as minimum standards of acceptability which would be liable to be reviewed from time to time in relation to the prevailing norm of consumers’ susceptibilities.
Chapter-I

To ensure the Truthfulness and Honesty of Representations and Claims made by Advertisements and to Safeguard against misleading Advertisements.

1. Advertisements must be truthful. All descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called upon to do so by The Advertising Standards Council of India.

2. Where advertising claims are expressly stated to be based on or supported by independent research or assessment, the source and date of this should be indicated in the advertisement.

3. Advertisements shall not, without permission from the person, firm or institution under reference, contain any reference to such person, firm or institution which confers an unjustified advantage on the product advertised or tends to bring the person, firm or institution into ridicule or disrepute. If and when required to do so by the Advertising Standards Council of India, the advertiser and the advertising agency shall produce explicit permission from the person, firm or institution to which reference is made in the advertisement.

4. Advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions. Advertisements shall not contain statements or visual presentation which directly or by implication or by omission or by ambiguity or by exaggeration are likely to mislead the consumer about the product advertised or the advertiser or about any other product or advertiser.

5. Advertisements shall not be so framed as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers.

For example:

a. Products shall not be described as ‘free’ where there is any direct cost to the consumer other than the actual cost of any delivery, freight, or postage. Where such costs are payable by the consumer, a clear statement that this is the case shall be made in the advertisement.
b. Where a claim is made that if one product is purchased another product will be provided 'free', the advertiser is required to show, as and when called upon by The Advertising Standards Council of India, that the price paid by the consumer for the product which is offered for purchase with the advertised incentive is no more than the prevalent price of the product without the advertised incentive.

c. Claims which use expressions such as “Upto five years'guarantee” or “Prices from as low as Rs. Y” are not acceptable if there is a likelihood of the consumer being misled either as to the extent of the availability or as to the applicability of the benefits offered.

d. Special care and restraint has to be exercised in advertisements addressed to those suffering from weakness, any real or perceived inadequacy of any physical attributes such as height or bust development, obesity, illness, impotence, infertility, baldness and the like, to ensure that claims or representations directly or by implication, do not exceed what is considered prudent by generally accepted standards of medical practice and the actual efficacy of the product.

e. Advertisements inviting the public to invest money shall not contain statements which may mislead the consumer in respect of the security offered, rates of return or terms of amortisation; where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumptions, such conditions or assumptions must be clearly indicated in the advertisement.

f. Advertisements inviting the public to take part in lotteries or prize competitions permitted under law or which hold out the prospect of gifts shall state clearly all material conditions as to enable the consumer to obtain a true and fair view of their prospects in such activities. Further, such advertisers shall make adequate provisions for the judging of such competitions, announcement of the results and the fair distribution of prizes or gifts according to the advertised terms and conditions within a reasonable period of time. With regard to the announcement of results, it is clarified that the advertiser's responsibility under this section of the Code is discharged adequately if the advertiser publicizes the main results in the media used to announce the competition as far as is practicable, and advises the individual winners by post.

6. Obvious untruths or exaggerations intended to amuse or to catch the eye of the consumer are permissible provided that they are clearly to be seen as humorous or hyperbolic and not likely to be understood as making literal or misleading claims for the advertised product.
7. In mass manufacturing and distribution of goods and services it is possible that there may be an occasional, unintentional lapse in the fulfilment of an advertised promise or claim. Such occasional, unintentional lapses may not invalidate the advertisement in terms of this Code.

In judging such issues, due regard shall be given to the following:

a. Whether the claim or promise is capable of fulfilment by a typical specimen of the product advertised.

b. Whether the proportion of product failures is within generally acceptable limits.

c. Whether the advertiser has taken prompt action to make good the deficiency to the consumer.

Chapter II

To ensure that Advertisements are not offensive to generally accepted standards of Public Decency.

Advertisements should contain nothing indecent, vulgar or repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence.

Chapter III

To safeguard against the indiscriminate use of Advertising in situations or of the Promotion of Products which are regarded as Hazardous or Harmful to society or to individuals, particularly minors, to a degree or of a type which is Unacceptable to Society at Large.

1. No advertisement shall be permitted which:

a. Tends to incite people to crime or to promote disorder and violence or intolerance.

b. Derides any race, caste, colour, creed or nationality.

c. Presents criminality as desirable or directly or indirectly encourages people - particularly minors - to emulate it or conveys the modus operandi of any crime.

d. Adversely affects friendly relations with a foreign State.
2. Advertisements addressed to minors shall not contain anything, whether in illustration or otherwise, which might result in their physical, mental or moral harm or which exploits their vulnerability. For example, Advertisements:

a. Should not encourage minors to enter strange places or to converse with strangers in an effort to collect coupons, wrappers, labels or the like.

b. Should not feature dangerous or hazardous acts which are likely to encourage minors to emulate such acts in a manner which could cause harm or injury.

c. Should not show minors using or playing with matches or any inflammable or explosive substance; or playing with or using sharp knives, guns or mechanical or electrical appliances, the careless use of which could lead to their suffering cuts, burns, shocks or other injury.

d. Should not feature minors for tobacco or alcohol-based products.

e. Should not feature personalities from the field of sports, music and cinema for products which, by law, either require a health warning in their advertising or cannot be purchased by minors.

3. Advertisements shall not, without justifiable reason, show or refer to dangerous practices or manifest a disregard for safety or encourage negligence.

4. Advertisements should contain nothing which is in breach of the law nor omit anything which the law requires.

5. Advertisements shall not propagate products, the use of which is banned under the law.

6. Advertisements for products whose advertising is prohibited or restricted by law or by this Code must not circumvent such restrictions by purporting to be advertisements for other products the advertising of which is not prohibited or restricted by law or by this Code. In judging whether or not any particular advertisement is an indirect advertisement for a product whose Advertising is restricted or prohibited, due attention shall be paid to the following:
a. Whether the unrestricted product which is purportedly sought to be promoted through the advertisement under complaint is produced and distributed in reasonable quantities having regard to the scale of the advertising in question, the media used and the markets targeted.

b. Whether there exist in the advertisement under complaint any direct or indirect clues or cues which could suggest to consumers that it is a direct or indirect advertisement for the product whose Advertising is restricted or prohibited by law or by this Code.

c. Where Advertising is necessary, the mere use of a brand name or company name that may also be applied to a product whose Advertising is restricted or prohibited, is not reason to find the advertisement objectionable provided the advertisement is not objectionable in terms of (a) and (b) above.

Chapter IV

To ensure that Advertisements observe fairness in competition such that the Consumer’s need to be informed on choice in the Market-Place and the Canons of generally accepted competitive behaviour in Business are both served.

1. Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided.

a. It is clear what aspects of the advertiser’s product are being compared with what aspects of the competitor’s product.

b. The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

c. The comparisons are factual, accurate and capable of substantiation.

d. There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.

e. The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.
2. Advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the goodwill attached to the trade mark or symbol of another firm or its product or the goodwill acquired by its advertising campaign.

3. Advertisements shall not be similar to any other advertiser’s earlier run advertisements in general layout, copy, slogans, visual presentations, music or sound effects, so as to suggest plagiarism.

4. As regards matters covered by sections 2 and 3 above, complaints of plagiarism of advertisements released earlier abroad will lie outside the scope of this Code except in the under-mentioned circumstances:

   a. The complaint is lodged within 12 months of the first general circulation of the advertisements/campaign complained against.

   b. The complainant provides substantiation regarding the claim of prior invention/usage abroad.
Annexure B

Central Board of Film Certification, India | Guidelines

(i) Anti social activities such as violence are not glorified or justified;

(ii) The modus operandi of criminals, other visuals or words likely to incite the commission of any offence are not depicted;

(iii) Scenes

a. showing involvement of children in violence as victims or perpetrators or as forced witnesses to violence, or showing children as being subjected to any form of child abuse;

b. showing abuse or ridicule of physically and mentally handicapped persons; and

c. showing cruelty to, or abuse of animals, are not presented needlessly.

(iv) Pointless or avoidable scenes of violence, cruelty and horror, scenes of violence primarily intended to provide entertainment and such scenes as may have the effect of de-sensitising or de-humanising people are not shown;

(v) Scenes which have the effect of justifying or glorifying drinking are not shown;

(vi) Scenes tending to encourage, justify or glamorise drug addiction are not shown;

(vi-a) Scenes tending to encourage, justify or glamorise consumption of tobacco or smoking are not shown;

(vii) Human sensibilities should not be offended by vulgarity, obscenity or depravity;

(viii) Such dual meaning words as obviously cater to baser instincts are not allowed;

(ix) Scenes degrading or denigrating women in any manner are not presented;
(x) Scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incidence is germane to the theme, they should be reduced to the minimum and no details are shown;

(xi) Scenes showing sexual perversions shall be avoided and if such matters are germane to the theme they should be reduced to the minimum and no details should be shown;

(xii) Visuals or words contemptuous of racial, religious or other groups are not presented;

(xiii) Visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitude are not presented;

(xiv) The sovereignty and integrity of India is not called in question;

(xv) The security of the State is not jeopardized or endangered;

(xvi) Friendly relations with foreign States are not strained;

(xvii) Public order is not endangered;

(xviii) Visuals or words involving defamation of an individual or a body of individuals, or contempt of court are not presented\(^40\); and

(xix) National symbols and emblems are not shown except in accordance with the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950).

\(^{40}\) Scenes that tend to create scorn, disgrace or disregard of rules or undermine the dignity of court come under the term ‘Contempt of Court’
Annexure C

Norms of Journalistic Conduct

i) Commercial advertisements are information as much as social, economic or political information. What is more, advertisements shape attitude and ways of life at least as much, as other kinds of information and comment. Journalistic propriety demands that advertisements must be clearly distinguishable from news content carried in the newspaper.

ii) Newspaper should not publish liquor & tobacco advertisements. No advertisement shall be published, which promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor and other intoxicants.

iii) Newspaper shall not publish advertisements, which have a tendency to malign or hurt the religious sentiments of any community or section of society.

iv) Advertisements which offend the provisions of the Drugs and Magical Remedies (Objectionable Advertisement) Act, 1954, or any other statute should be rejected.

v) Newspapers should not publish an advertisement containing anything which is unlawful or illegal, or is contrary to public decency, good taste or to journalistic ethics or propriety.

vi) Journalistic propriety demands that advertisements must be clearly distinguishable from editorial matter carried in the newspaper. Newspapers while publishing advertisements should specify the amount received by them. The rationale behind this is that advertisements should be charged at rates usually chargeable by a newspaper since payment of more than the normal rates would amount to a subsidy to the paper.

vii) Publication of dummy or lifted advertisements that have neither been paid for, nor authorised by the advertisers, constitute breach of journalistic ethics specially when the paper raises a bill in respect of such advertisements.

viii) Deliberate failure to publish an advertisement in all the copies of a newspaper offends against the standards of journalistic ethics and constitutes gross professional misconduct.
ix) There should be total co-ordination and communication between the advertisement department and the editorial department of a newspaper in the matter of considering the legality propriety or otherwise of an advertisement received for publication.

x) The editors should insist on their right to have the final say in the acceptance or rejection of advertisements, specially those which border on or cross the line between decency and obscenity.

xi) Newspapers to carry caution notice with matrimonial advertisements carrying following text *

“Readers are advised to make appropriate thorough inquiries before acting upon any advertisement. This newspaper does not vouch or subscribe to claim and representation made by the advertiser regarding the particulars of status, age, income of the bride/bridegroom”.

xii) An editor shall be responsible for all matters, including advertisements published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated beforehand.

xiii) Tele-friendship advertisements carried by newspapers across the country inviting general public to dial the given number for ‘entertaining’ talk and offering suggestive tele-talk tend to pollute adolescent minds and promote immoral cultural ethos. The Press should refuse to accept such advertisements.

xiv) Classified advertisements of health and physical fitness services using undignified languages, indicative of covert soliciting, are violative of law as well as ethics. The newspaper should adopt a mechanism for vetting such an advertisement to ensure that the soliciting advertisements are not carried.

xv) Advertisements of contraceptive and supply of brand item attaching to the advertisement is not very ethical, given the social milieu and the traditional values held dear in our country. A newspaper has a sacred duty to educate people about precautionary measures to avoid AIDS and exhibit greater far sight in accepting advertisement even though issued by social welfare organisation.