

By Jonathan A. Loeb and Jeffrey A. Sklar

# The California Supreme Court's New Test for Commercial Speech

**When advising business clients, the safest option may be to suggest silence**

On May 2, 2002, the California Supreme Court sent a shock wave through corporate boardrooms and public relations firms with its decision in *Kasky v. Nike, Inc.*<sup>1</sup> The court ruled that Nike's public statements regarding its manufacturing processes—which were made in the wake of class action claims facing clothiers over alleged sweatshop conditions—could be regulated under California's Unfair Competition Law (UCL) and False Advertising Law. Nike had convinced the trial court, as well as the intermediate

appellate court, that its public statements regarding its subcontractors located in Vietnam, China, and Indonesia were non-commercial speech and, therefore, any regulation of the statements would be subject to the highest level of scrutiny. In reversing

the lower courts, the state supreme court effectively held that Nike's statements regarding its overseas labor practices were only entitled to the protection granted to advertisements. The case, which had been dismissed

on demurrer, now returns to the trial court for a determination of whether Nike's public statements were false or otherwise violated California's broad UCL and False Advertising Law.<sup>2</sup>

Noncommercial speech traditionally is considered political speech and is protected to the fullest extent by the U.S. and California Constitutions.<sup>3</sup> Thus, content-based regulations of non-commercial speech are subject to strict scrutiny, which "requires that the regulation be narrowly tailored...to promote a compelling government interest."<sup>4</sup> Content-neutral regulations of noncommercial speech, such as laws regulating the time, place, or manner of speech, are subject to intermediate scrutiny, which comprises three factors for the court to review:

- 1) Is the regulation of speech content-neutral?
- 2) Is the regulation narrowly tailored to serve a significant government interest?
- 3) Does the regulation leave open alternative channels of communication?<sup>5</sup>

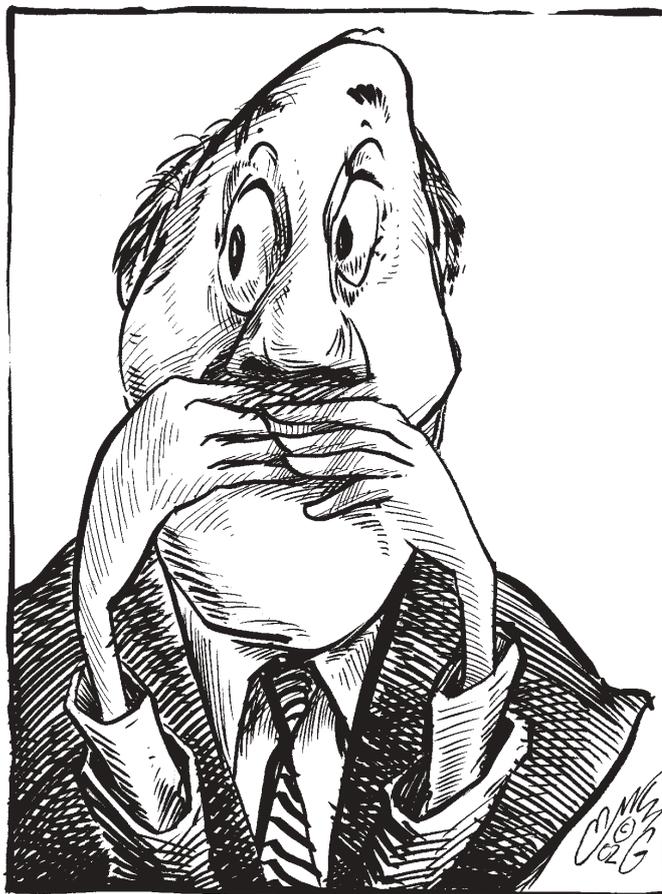
Under the U.S. and California Constitutions, commercial speech enjoys far less protection than does noncommercial speech. The U.S. Supreme

Court enunciated the test for regulating commercial speech in *Central Hudson Gas & Electric v. Public Service Commission*:

At the outset, we must determine whether the expression is protected by

the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.<sup>6</sup>

Thus, the First Amendment protects lawful and nonmisleading commercial speech from regulations that fail to provide a reasonable connection between the asserted governmental interest and the means used to achieve it. Although false or misleading non-commercial statements are often tolerated "to eliminate the risk of undue self-censorship and the suppression of truthful material' and thereby give freedom of expression the 'breathing space' it needs to survive,"<sup>7</sup> commercial speech does not receive this benefit because the truth of commercial speech is more easily ver-



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ified, and because commercial speakers are motivated by profit and thus are less susceptible to “chilling.”<sup>8</sup>

Because commercial speech receives less protection than noncommercial speech, numerous laws regulating false and misleading commercial statements pass constitutional muster. Specifically at issue in *Kasky* were California’s UCL<sup>9</sup> and False Advertising Law.<sup>10</sup>

### Unfair Competition and False Advertising

The UCL defines unfair competition as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the False Advertising Law].”<sup>11</sup> According to the *Kasky* court, “The UCL’s purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.”<sup>12</sup> In achieving this goal, the UCL casts a wide net, permitting violations of other laws to be treated as violations of the UCL (which are independently actionable).<sup>13</sup>

California’s False Advertising Law makes it unlawful for:

*[A]ny person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services...or to induce the public to enter into any obligation relating thereto, to make or disseminate... before the public in this state,...in any newspaper or other publication...or in any other manner or means whatever...any statement, concerning that real or personal property or those services...which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading...*<sup>14</sup>

The False Advertising Law has several elements in common with the UCL. First, both laws regulate not only false speech “but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”<sup>15</sup> Second, a private citizen may bring an action under the False Advertising Law on the citizen’s own behalf or on behalf of the general public.<sup>16</sup> Finally, a violation of the False Advertising Law is treated as an independent violation of the UCL.<sup>17</sup> A violation of the False Advertising Law is a misdemeanor punishable by up to six months in county jail, a fine of up to \$2,500, or both.<sup>18</sup> Therefore, under California law, a business that makes a true statement it reasonably should have known might be misleading to the public violates the False Advertising Law and the UCL.

In *Kasky*, plaintiff Marc Kasky alleged that Nike and several of its officers had committed actual fraud and deceit by making misleading and untrue statements on behalf of the company in various forms, including press releases and letters to editors of major newspapers. Kasky alleged that the defendants were liable under the UCL because their actions constituted unfair or fraudulent business practices.<sup>19</sup> Because any person acting for the interests of the “general public” may bring an action for restitution or injunctive relief under the UCL,<sup>20</sup> Kasky was not required to allege any injury to himself.<sup>21</sup>

The statements that Kasky referred to in his suit were ones made by Nike regarding its practices in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes.<sup>22</sup> In particular, press releases responded to sweatshop allegations, addressed women’s issues, stressed the company’s code of conduct, and broadly denied exploitation of underage workers.<sup>23</sup> In a lengthy press release, titled “Nike Production Primer,” Nike answered a series of allegations with detailed information and footnoted sources.<sup>24</sup> Another release drew attention to a report based upon an investigation by Andrew Young, former U.S. ambassador to the United Nations, that found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia.<sup>25</sup>

The court of appeal’s opinion details how Nike was beset in 1996 and 1997 with a series of reports on working conditions in its factories that contrasted sharply with the favorable report by Young. For instance, an Australian organization published a highly critical case study on Nike’s Indonesian factories, and the Hong Kong Christian Industrial Committee released an extensive documented study of several Chinese factories, including three used by Nike, which described 11- to 12-hour workdays, compulsory overtime, violation of minimum wage laws, exposure to dangerous levels of dust and toxic fumes, and employment of workers under the age of 16.<sup>26</sup>

### **Bolger and the Kasky Analysis**

The U.S. Supreme Court has held that commercial speech, at its core, is “speech proposing a commercial transaction.”<sup>27</sup> From this premise, the Court in *Bolger v. Youngs Drug Products Corporation*<sup>28</sup> identified three factors that provide “strong support” that a statement is commercial speech:

- 1) The speech is in advertising format.
- 2) The speech refers to products or services.
- 3) The speaker has a commercial motivation.<sup>29</sup>

At least two of these factors should be present in order to support a finding of com-

mercial speech.<sup>30</sup> Further, the Court has held that speech may not be immunized from being commercial speech simply because it includes political messages.<sup>31</sup>

Despite the well-settled *Bolger* factors, the California Supreme Court in *Kasky* has articulated a new and somewhat ambiguous “limited-purpose test” for deciding “whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception.”<sup>32</sup> This test consists of three elements:

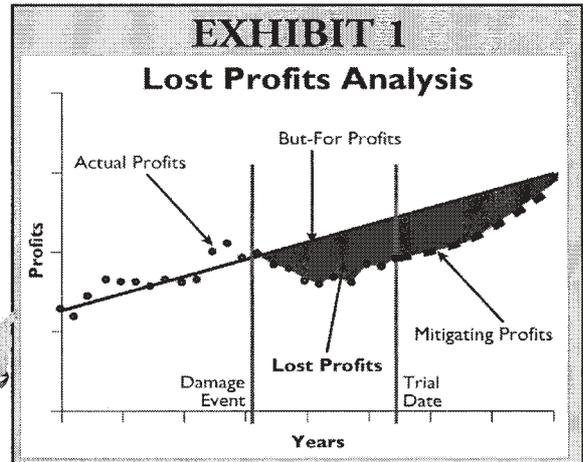
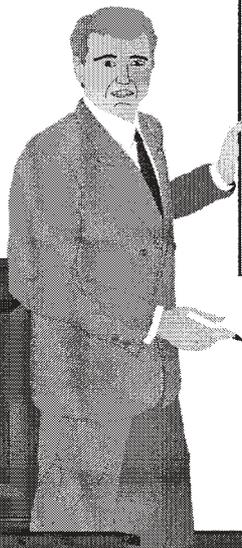
- 1) The *speaker* is someone likely to be engaged in commerce.
- 2) The *intended audience* is likely to be actual or potential buyers, customers, or persons likely to repeat the message or influence buyers or customers.
- 3) The *content* of the message is commercial in character.<sup>33</sup>

In defense of this new analytical framework, the *Kasky* court reasoned that the U.S. Supreme Court has never announced an “all-purpose test” to distinguish commercial and noncommercial speech.<sup>34</sup> The court’s scrutiny of the High Court’s commercial speech decisions revealed that the precise boundaries of commercial speech are difficult to define, and bright lines are not easily drawn.<sup>35</sup> The court also noted Justice John Paul Stevens’s admonition that efforts to describe the boundaries of commercial speech should relate to the regulatory objective of limiting commercial speech’s potential to mislead.<sup>36</sup> In light of these acknowledged challenges and principles, the *Kasky* test limits itself to the question of whether particular speech is subject to regulations of deceptive commercial practices.

The *Kasky* court described the contours of the three prongs of its test and attempted to explain how their focus on the speaker, intended audience, and content of the message is consistent with the *Bolger* factors and other U.S. Supreme Court holdings.<sup>37</sup> The commercial speaker and intended audience prongs articulated by *Kasky* were derived from the speaker-audience transactions considered implicit in *Bolger*’s focus on economically motivated speakers and advertising format.<sup>38</sup> Further, *Kasky*’s departure from a strict adherence to *Bolger*’s advertising format requirement was justified by noting *Bolger*’s broad warning that each of the factors or characteristics set forth by *Bolger* “would [not] always be necessary to the characterization of speech as commercial.”<sup>39</sup> Finally, commercial content was described as a “broad definition” of *Bolger*’s product references factor.<sup>40</sup> This expansion of the *Bolger* factor was deemed necessary in order to adequately characterize the broad spectrum of statements made and topics addressed in modern image- and sales-enhancing public rela-

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tions campaigns.<sup>41</sup> Yet despite the *Kasky* court's efforts to reconcile its holding with *Bolger*, when a practitioner attempts to apply the *Kasky* test instead of the *Bolger* factors, the result is clear: With *Kasky*, there is a new and potentially unconstitutional test in California for commercial speech.

In *Bolger*, the factors determining commercial speech are fairly discrete, particularly with reference to products and services; in *Kasky*, the factors appear to be more inclusive. One effect of *Bolger* is the possibility that some corporate speech may be non-commercial. The effect of *Kasky*, however, appears to be that practically all corporate speech may be construed as commercial.

For example, in the case of a press release issued by a company, *Bolger* requires that three factors be applied to determine whether the press release is commercial speech: advertising format, product references, and commercial motivation. While most corporations admittedly act by commercial motivation, at least one of the two remaining factors should be present in order for the company's statement to be defined as commercial speech.

The *Kasky* test stands in stark contrast. First, *Kasky* asks whether the company is likely to be engaged in commerce. The great majority of corporations are engaged in some form of commerce, so this prong is met by virtually all corporate speech. Second, *Kasky* asks whether the intended audience is likely to be actual or potential buyers of the company's products or services, or "persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers."<sup>42</sup> Essentially all businesses will satisfy this sweeping prong by making any public statement. Indeed, in this information age, it is difficult to imagine how any company could make any public statement that would not be covered and disseminated by countless media outlets and thus reach actual or potential buyers, whether a company intends so or not.

Because the first two prongs will almost always be met, the company's statement will be deemed commercial speech in California so long as the final prong is satisfied: whether the content of its speech is commercial. This factor is framed broadly by the *Kasky* court and includes not only product references as discussed in the *Bolger* test but also references to any business operations for the purpose of promoting sales or commercial transactions. According to the *Kasky* court, product references include "statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manu-

facture, distribute, sell, service, or endorse the [products]."<sup>43</sup> Similarly, references to services include statements about "the education, experience, and qualifications of the persons providing or endorsing the services."<sup>44</sup>

In response to this prong, Justice Janice Brown stated in her dissenting opinion in *Kasky* that "business operations, products, or services may be public issues. For example, a corporation's business operations may be the subject of public debate in the media. These operations may even be a political issue as organizations, such as state, local or student governments, propose and pass resolutions condemning certain business practices. Under these circumstances, the corporation's business operations undoubtedly become a matter of public concern, and speech about these operations merits the full protection of the First Amendment."<sup>45</sup>

Further, a corporation also is in the business of promoting its public image, which will likely be enhanced by public statements that it makes regardless of the issue being addressed. As a result, under the *Kasky* court's broad view of commercial content, it is hard to imagine how a company could engage in meaningful public debate on any issue, whether or not the issue directly affects its business, without the company's statement being deemed commercial.<sup>46</sup>

### Advising Business Clients

Protection of free speech under the California Constitution is at least as broad as under the U.S. Constitution.<sup>47</sup> Because *Kasky* appears to allow less protection for commercial speech than is allowed under *Bolger*, the validity of *Kasky* is questionable. However, unless and until the U.S. Supreme Court grants certiorari to hear the *Kasky* case, practitioners have a burden of uncertainty to bear.

Therefore, when advising a business client on how to publicly address certain issues that the client considers noncommercial, practitioners should alert the client that the safest choice is silence. While this is the textbook example of a chilling effect, a business client runs a substantial risk in California if it makes a statement that is mistakenly false, or true but misleading.

If silence is not an option, the business client must make statements with the utmost care and diligence to verify their truth, accuracy, and completeness. In addition, thoroughly documenting the efforts taken by the client to verify the truth and veracity of a statement may go a long way toward proving that a reasonable speaker could not have known about a false or misleading representation later found in the client's statement. Ideally, there should be no reference to the business operations, products, or services of

the client in the statement.

The lesson of *Kasky* is that practitioners must counsel their business clients to maximize the likelihood that their public statements are characterized as noncommercial rather than commercial speech. In post-*Kasky* California, only the purest political speech by a business will be deemed noncommercial. ■

<sup>1</sup> *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *rev'g and remanding* 79 Cal. App. 4th 165 (2000).

<sup>2</sup> David R. Shraga provided editorial assistance for this article.

<sup>3</sup> U.S. CONST. amend. I; CAL. CONST. art. I, §2(a).

<sup>4</sup> *Kasky*, 27 Cal. 4th at 952 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)).

<sup>5</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>6</sup> *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

<sup>7</sup> *Kasky*, 27 Cal. 4th at 953 (quoting *Herbert v. Lando*, 441 U.S. 153, 172 (1979); *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964)).

<sup>8</sup> *Id.* at 955.

<sup>9</sup> BUS. & PROF. CODE §§17200 *et seq.*

<sup>10</sup> BUS. & PROF. CODE §17500.

<sup>11</sup> BUS. & PROF. CODE §17200.

<sup>12</sup> *Kasky*, 27 Cal. 4th at 949.

<sup>13</sup> *Id.*

<sup>14</sup> BUS. & PROF. CODE §17500 (emphasis added).

<sup>15</sup> *Kasky*, 27 Cal. 4th at 951.

<sup>16</sup> BUS. & PROF. CODE §17535.

<sup>17</sup> *Kasky*, 27 Cal. 4th at 950-51.

<sup>18</sup> BUS. & PROF. CODE §17500.

<sup>19</sup> *Id.*

<sup>20</sup> BUS. & PROF. CODE §17204.

<sup>21</sup> *Kasky*, 27 Cal. 4th at 950-51.

<sup>22</sup> *Id.* at 947-48.

<sup>23</sup> *Kasky v. Nike, Inc.*, 79 Cal. App. 4th 165, 170 (2000), *rev'd and remanded*, 27 Cal. 4th 939 (2002).

<sup>24</sup> *Id.*

<sup>25</sup> *Kasky*, 27 Cal. 4th at 948.

<sup>26</sup> *Kasky*, 79 Cal. App. 4th at 169.

<sup>27</sup> *Kasky*, 27 Cal. 4th at 956 (citing *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980)).

<sup>28</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

<sup>29</sup> *Id.* at 67.

<sup>30</sup> *Id.* at 67 n.14.

<sup>31</sup> *Id.* at 68.

<sup>32</sup> *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960 (2002).

<sup>33</sup> *Id.* at 960.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 958.

<sup>36</sup> *Id.* (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring)).

<sup>37</sup> *Id.* at 960-62.

<sup>38</sup> *Id.* at 960.

<sup>39</sup> *Id.* at 962 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983)). The *Kasky* court also supported this proposition by citing their most recent decision on point: *Leoni v. State Bar*, 39 Cal. 3d 609 (1985). In *Leoni*, the supreme court characterized an attorney's mailings as commercial even though the mailings were not in the form of an advertisement.

<sup>40</sup> *Kasky*, 27 Cal. 4th at 961-62.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 960.

<sup>43</sup> *Id.* at 961.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 984.

<sup>46</sup> *See id.* at 961.

<sup>47</sup> *Id.* at 958-59.