



**Sample Answer to Final Exercise**  
Advertising and Marketing Law  
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Professor Eric Goldman

### **Claims Analysis**

This ad makes factual claims about Bentley, even though Bentley wasn't the principal advertiser. What consequences if those facts are incorrect?

- If Bentley didn't cooperate in the ad preparation, Bentley could claim defamation.
- A Bentley rival might claim the ad promotes Bentley, and the law firm should take responsibility for that.
- Anyone who knows about the car would think less of the law firm. After all, they are presenting the detailed facts as proof that they know a lot about cars, so an error would be particularly costly reputationally.

Therefore, even though the ad claims related to Bentley don't help the law firm directly, they should be verified as if they did.

*The 1954 Bentley Special Racer is a unique car.* What does "unique" mean? More on this below. Here, it could mean that the Bentley Special Racer model is unlike any other car model. Not only is this true by definition, but I think that probably is puffery. Or it could mean that this particular item is the only one of its kind in existence, a more stringent interpretation that would likely require substantiation. Of course, every car is different *somehow*—it has different colors, accessories, mileage, maintenance history, etc., so this may be true by definition as well. The semantic ambiguity could render the entire claim into puffery, or it could require substantiation for each reasonable interpretation. Situations like this are good reasons to rewrite the ad copy.

*The photo depicts a 1954 Bentley Special Racer with a body by Robert Peel.* I had difficulty finding good information about the 1954 "Special Racer" model or who Robert Peel is. We need to find out the car's lineage and confirm that Robert Peel designed the body of this specific version.

*Other claims about the car.* The ad claims the car has large and mechanical drum brakes and a truck-like suspension. The "large" and truck-like claims are hard to measure precisely. Still, it would make sense to confirm that there is some factual basis for these claims. The mechanical drum brakes can be confirmed by the car's spec sheet (if one exists).

Some of you thought the ad claimed that the people depicted owned the car shown. I didn't see that claim.

*The photo was taken in Albert Guibara's Sculpture Garden.* Guibara is a Burlingame-based sculptor. We want to confirm that the photo was actually taken there. Ideally, there is a written agreement with the property owner giving the models and photographer access to the property and permission to take photos.

*The photo was taken by Dawdy Photography.* Dawdy is a Burlingame-based photography studio. We need to confirm the identity of the photographer so we can ensure the copyright permissions. Presumably the license agreement would sufficiently confirm this fact.

*The photo depicts members of the law firm.* Under the FTC Endorsement and Testimonial Guidelines, I don't think it would matter if third party models were used. Still, the ad implies that the models are actual firm lawyers, presumably O'Reilly and Collins. If the models aren't firm lawyers, we might consider rewording the ad to avoid any implication otherwise.

*O'Reilly Collins is a unique firm.* We already acknowledged the ambiguity of the term "unique." How does the term apply to law firms? There are many ways firms differ from each other, including size, success, expertise and experience, practice areas, billing model, location and more. When all attributes are combined, I think virtually every firm is unique compared to other firms. So perhaps this is true by definition.

Another way of interpreting the claim is that the law firm is unique in the same ways that the Bentley is unique. This is nonsensical; I doubt the law firm uses drum brakes. Implicitly, the law firm could be claiming that it occupies a similar competitive niche as Bentley: it offers a limited quantity of services only to the most discerning consumers.

I think these interpretations support a puffery conclusion. There is no meaningful way of testing them.

However, another way of interpreting this claim is that the ad itself defines what makes the firm unique, similar to how Papa John's defined what made its ingredients better. If so, the law firm may be claiming that it's unique in its car expertise and number of victories. This would be a factual claim, and the firm would need substantiation. I don't know how to substantiate it because there are countless firms and no easy way of comparing their expertise in cars or their victories, so I'm not sure any substantiation method would be credible.

Indeed, I could argue that few, if any, law firms are truly unique. Almost all law firms have competitors who offer similar, if not identical, services. So it could be that the unique claim is problematic for any law firm (see p. 219 of the text showing other examples of problematic "unique" claims). Overall, I think it's inadvisable to claim to be "unique" without specifically identifying the dimension being measured.

*The firm is one of the most successful plaintiff's trial law firms in the country.* Successful on what basis? Absolute number of trial victories? Win rate percentage? Dollar value of wins? Qualitative importance of the wins? Squeezing victories out of unwinnable cases? The incoherence of the measurements probably makes this claim puffery, although as Tim Ernst indicated, it is probably undesirable to advance a claim like this without *any* credible validation.

The ad also claims that the firm practices trial law and represents car accident victims. Both of these can be substantiated using a roster of firm clients and matters.

*The firm has been doing something over the past 40 years related to car accidents.* The ad isn't specific exactly what has been taking place for 40 years. One way of reading this claim is that the firm has been in business for 40 years, though (as far as I can tell) that wouldn't be true. Another reading is that a single firm lawyer has been working on car accidents for 40 years, presumably referencing that O'Reilly has been a lawyer since 1970. I think the combination of "40 years" and "we" doesn't work unless the firm has been around 40+ years practicing automobile accident cases. Otherwise, the claim should be rephrased, perhaps to aggregate the firm attorneys' collective years of relevant practice, i.e., "In our combined XYZ years of practice, we have learned..."

*The firm learned how (1) cars handle and (2) to investigate car accidents.* This seems like puffery, but it is partially falsifiable if in fact the firm has learned nothing. Thus, it would be advisable to substantiate the claims with some demonstrable expertise. Showing educational training in automobile engineering and car accident forensics might satisfy the substantiation requirement; but it could also be shown through experience working on cases.

*The firm uses its knowledge about car handling and investigating accidents "to good effect."* Notice that this claim doesn't promise *good* results, but that's a possible implication. As written, it's puffery.

*"We" have won scores of multi-million dollar verdicts/settlements in the specified categories.* This is a fact claim (enhanced by the introductory phrase "in fact"), and it needs substantiation through a list of resolved cases and their dollar outcome.

How many cases are required to satisfy the "score" claim? I would expect at least two score, or 40+. The "we" is also ambiguous: does it refer to the firm or to the aggregated outcomes by the individual lawyers? If it's not the firm, then the claim could be rewritten to say "our lawyers" instead of "we." Note that the following sentence uses "us" to refer to the firm. If the grammar is consistent, then "we" refers to the firm.

Finally, I think "multi-million" means \$2M or more, with at least one such verdict/settlement in each of the referenced categories. So overall, substantiation is required to show that the firm (or the individual lawyers) have generated at least 40+ verdicts/settlements of \$2M or more in the specified areas, with at least one of those verdicts/settlements in each specified area.

Note that some of you treated "score" as a synonym for "many," probably because you didn't know score had a dictionary definition. I didn't penalize you for this, but not knowing a word's dictionary definition could be a big problem in practice! If you ever have an impulse to consult the dictionary when reviewing ad copy, do it! Otherwise, consider how you will build a review system that compensates for any gaps in your vocabulary (and we all have gaps).

*“We Get Results.”* This statement is probably puffery like the “to good effect” language. As a practical matter, this is true by definition: every lawsuit has a “result,” even if the result is irresolute or a loss. The language implies that the firm gets *good* results. Even so, I think the claim probably would be puffery. (Note that claiming past outcomes is highly regulated under attorney Rules of Professional Conduct, so this claim needs extra scrutiny).

*“Premier” Trial Law Firm in Northern California.* “Premier” is probably puffery because there’s no way to prove it false. In that respect, I think “premier” is even less falsifiable than the claim that the firm is “one of the most successful”? Does the specificity about geography (in Northern California) change the analysis? Some of you thought so, but I didn’t see it.

*Terry O’Reilly, Jim Collins, Nina Shapirshiteyn and Matt O’Reilly are lawyers of the firm.* This is a fact claim substantiated by employment records.

*U.S. News & World Reports has recently named the firm one of the “Best Law Firms” in the US.* This is a fact claim and substantiated by the US News’ list of firms. The real question is what “recently” means. You recall Millennium Import Company v. Sidney Frank Importing Company, Inc., where the advertiser touted a good score in a periodic listing where more recent versions of that list had different results; NARB required the advertiser to change the claim. So how far back would you allow the claim to invoke? I don’t think there’s a problem if the firm appeared on the most recent list, so long as it was “recent.” But would five years back still qualify as “recently”? Could the firm make the claim if the firm appeared on the most recently superseded list, but not on the most recent list? Perhaps, though I wouldn’t advise it. This claim would be improved by mentioning the exact year of the list.

*Terry O’Reilly has been named to Super Lawyers for the specified years.* This is a fact claim substantiated by checking the Super Lawyers lists for the specified years.

With respect to both accolades (“best” and “super”), do you think consumers would interpret those laudatory statements to have any other meaning than simply a third party recognition? In other words, will consumers think O’Reilly really is a “super” lawyer? Even if they do, does that have any different meaning than the other laudatory statements in the ad, such as the “premier” claim? I tend to think all of these laudatory statements are non-actionable puffery.

Also, does the law firm ratify the US News/Super Lawyers’ methodologies as scientifically rigorous by advancing the claims? I don’t think so (see ZL Technologies v. Gartner) but I think it would be problematic if the methodologies were obviously defective.

*Address and Phone Number.* I don’t think the phone number is a claim, but the address is a claim about the firm’s geographic footprint and should be substantiated.

*Totality of the Ad.* The ad delivers the message that you should hire the law firm because they do a great job. But isn’t that essentially the message of every ad?

## Other Considerations

### *Trademark*

Bentley. Bentley's trademarks are depicted in at least three different ways. First, the ad copy references the Bentley name. Second, the photo depicts the car's shape and grill, which probably qualifies as trade dress (especially the severely sloping back of this particular car model, though the ad doesn't show the back very clearly). Third, the hood ornament, plus the grill's hard-to-see "RR" symbol (for Rolls-Royce, which owned the Bentley assets at the time), probably independently qualify for trademark protection.

Depicting the Bentley car in a photo normally should be protected by trademark exhaustion/first sale doctrines. However, we need to look at all of the brand references, not just the photo. Are consumers likely to take away the impression from this ad that Bentley sponsored, endorsed or authorized this ad? If so, there's a trademark problem even though there's nothing otherwise deceptive about the presentation of the third party's trademark.

The ad also makes an implied association using the trademark: that O'Reilly Collins is to other law firms as Bentleys are to other cars, i.e., like the law firm is the "Rolls Royce" of plaintiffs' trial law firms.

What do you think about consumers' perceptions of Bentley's endorsement/authorization of this ad? The ad goes into much more detail about the car than we'd normally expect, but all of that is designed to support the broader claim that the lawyers know cars—including, presumably, esoteric and rare cars. On the other hand, if the ad targets car accident victims, perhaps we would expect them not to be very sophisticated consumers of ad claims. If I were advising on this ad, I'd probably recommend saying a little less about the car and maybe not making the car the centerpiece of the photo.

There is also possible trademark dilution. The "Bentley" word mark probably is famous, and the hood ornament might be as well. I don't think there's a blurring problem because the ad doesn't try to create a new definition of either the word mark or the ornament. However, there could be a tarnishment problem. Once you've seen the car next to that blazer, it's kind of impossible to erase the image. All kidding aside, the Bentley mark is being associated with plaintiff lawyers who live off suing car manufacturers like Bentley. Indeed, one possible ad implication is that the Bentley Special Racer is defective and the law firm knows how to win an accident case involving this car. I don't think this type of harm is what tarnishment was meant to cover, but it's not a frivolous concern. If the ad copy references qualify as nominative use, that would eliminate the dilution risk. Alternatively, the ad copy might qualify as "identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner."

Dawdy Photography. In all likelihood, Dawdy Photography required the photo credit as a condition of using the ad. If so, the contract should provide express or implicit permission to reference them.

Super Lawyers and US News and World Reports. So long as the statements were accurate, this should be a protected nominative use of the recognition conferred by the magazines.

We would also want to review the personal names (discussed below) to see if any of them had achieved trademark status.

### *Copyright*

Photo. The ad implies that the photo was taken by Dawdy Photography. We'd want to verify that, and then we'd want to verify the copyright permissions to use the photo in this ad.

Ad Copy. We should check who wrote the ad copy and ensure we have the permission to use it.

Building. [OK if you didn't discuss this—we didn't really address this in class] Architectural works can be protected by copyright. There's an exclusion allowing photography of buildings from streets, but this photo may have been taken on private property, in which case the exclusion wouldn't apply. I'm not sure the photographed portion of the building would be protectable under copyright law, so I would deem this a low-risk issue even if we didn't get clearance.

Note that the car fender reflects another portion of the garden—perhaps it's an arch? If that arch constitutes a copyrightable sculpture, then depicting it in the ad copy is problematic. This is a good example of how you need to pixel-police the ad carefully!

Clothing. The clothes themselves aren't copyrightable, but pattern designs can be. The loud blazer jacket pattern probably isn't copyrightable—it's too simple—but the tie designs could be. I would probably recommend the depicted gentlemen choose less distinctive/more plain ties; or I would recommend double-checking the copyright status of the ties. I know this sounds a little silly, but it's no more silly than the *Davis v. The Gap* ruling.

Car. [OK if you didn't discuss this—we didn't really address this in class] I don't think the car is copyrightable due to the useful articles doctrine. The only possible risk relates to the hood ornament, which does have physical and conceptual separability. I'd want to research if any copyright in the hood ornament is in the public domain given its length of use.

### *Publicity Rights*

We would need to double-check if the names had developed trademark rights in addition to their publicity rights. If so, then we would need to conduct a trademark analysis as well. Most names never develop trademark rights, and I'm skeptical that happened with these.

Robert Peel. The ad copy uses Robert Peel's name. This reminded me a lot of the *Abdul-Jabbar* case (though that was trademark, not publicity rights). Even if the reference to Robert Peel is factually accurate like Lew Alcindor's accomplishments, it is gratuitous in that it has nothing to do with the ad's sales pitch; and there's no nominative use defense (or any other type of "fair use" defense) to publicity rights. Thus, the reference to Robert Peel presumably requires permission if publicity rights laws apply. They might not because (a) he may live in a

jurisdiction that doesn't recognize publicity rights. For example, I'm not sure any British protections for publicity rights extend to the US. (b) even if the jurisdiction recognizes publicity rights, Mr. Peel is probably dead and perhaps his publicity rights did not survive post-mortem.

Albert Guibara. Guibara is also referenced in the ad copy. The analysis is similar to Peel's, although it may make a difference that his name has been incorporated into a place name. For example, if ad copy references the "Norman Y. Mineta San Jose International Airport," I don't think you need Mineta's publicity rights permission to do so. However, if Guibara doesn't have publicity rights due to the incorporation of his name into the place name, then we'd have to check if the place name qualifies as a trademark and run through the trademark analysis.

Firm Lawyers. The gentlemen depicted in the photograph presumably are Terry O'Reilly and Jim Collins. The ad separately names Terry O'Reilly, Jim Collins, Nina Shapirshteyn and Matt O'Reilly. Although probably no consent is required to list or depict partners/attorneys of the firm in the ad copy, a publicity consent is the more prudent approach.

The Car. The car doesn't have publicity rights, but the car's uniqueness plus the inclusion of the license plate means that the car could be uniquely identified with its owner or most well-known driver as we saw in the Motschenbacher case. I doubt this car is as well known as Motschenbacher's, but that is worth investigating.

Some of you also raised privacy rights concerns from displaying the license plate number. I see the point, though I think it would be easy to worry too much about privacy given that ad viewers don't really learn much private information from a license plate number. Still, I would advise against including a license plate number in this ad.

### **Some Other Comments**

Some of you were confused about the differences between substantiation, revising ad claims and disclaimers. Every claim needs substantiation before being made, but the substantiation doesn't need to be in the ad copy itself. Instead, typically the advertiser keeps the substantiation in its records in case it's needed. However, sometimes the substantiation inquiry shows that the ad claim can't be supported, in which case the claim should be revised to fit the substantiation. In some cases, it's OK to leave the claim as-is and acknowledge the substantiation's limitations through disclaimers, although that's rarely the best approach from a legal standpoint.

Thanks to those of you who submitted reflection papers. They were incredibly enlightening and useful. However, I was surprised that a majority of you didn't submit the papers despite the high rewards. My personal suggestion for you: never turn down freebies!