

MAY 2005

SENDING FAXES COULD BE COSTLY

By Christopher D. Stall, Esq. & Michael S. Poncin, Esq.

Think twice before pushing the send button. That fax may be more costly than you think. The Telephone Consumer Protection Act (TCPA) prohibits sending any unsolicited advertisements via facsimile, unless an exception applies. An advertisement is broadly defined as any "material advertising the commercial availability or quality of any property, goods, or services." An advertisement is unsolicited if transmitted to any person "without that person's prior express invitation or permission." Under the current law, unsolicited advertisements can be sent to existing customers and others as long as there is an established business relationship (EBR) between the sender and the recipient.

recipient and be signed by the recipient or an authorized representative.

Attempts to Retain the Established Business Relationship Exception

The new TCPA Rule has come under fire, and the FCC has delayed the effective date of the new regulations on several occasions. Certain members of Congress have introduced legislation to reinstate the EBR rule. Pending Congressional action, however, facsimile advertisers should prepare for the elimination of the EBR exception.

Penalties for Noncompliance

TCPA violations can be expensive. Recipients can sue the senders of unsolicited facsimile advertisements. Damages for each violation can be the greater of \$500 or actual damages. If the violation is willful, damages can be tripled. Each facsimile is a separate violation. TCPA allows cases to be aggregated into class actions that can be particularly costly for systematic violations.

Practical Advice

The TCPA Rules require the disclosure of the identity of the entity sending the fax, the date and time of the transmission, and the phone number of the entity sending the fax. The sender must use their registered business name to identify itself. The business may use an assumed business name or d/b/a, but the official identification of the business, as filed with the state corporation registration office or comparable state agency, must be included. The facsimile must disclose the name of the broadcaster, if that broadcaster has a "high degree of involvement" in the sending or creation of the fax. All required disclosures must appear on the top or bottom margin of each sent page.

**THE TELEPHONE
CONSUMER PROTECTION
ACT (TCPA) PROHIBITS
SENDING ANY UNSOLICITED
ADVERTISEMENTS VIA
FACSIMILE, UNLESS AN
EXCEPTION APPLIES.**

Repeal of the Established Business Relationship Exception

The Federal Communications Commission ("FCC") now indicates that it will be tightening the regulations implementing the Telephone Consumer Protection Act (the "TCPA Rules"). The FCC will eliminate the EBR exception as of July 1, 2005. Under the new TCPA Rules, a written authorization must be obtained from each recipient prior to sending an unsolicited advertisement by facsimile.

The authorization must be evidenced by a signed written statement that clearly expresses the recipient's consent to receive facsimile advertisements from the sender. The writing must include the facsimile number of the

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After July 1, 2005, the mandatory written consent should include at least the following:

- the actual, electronic or digital signature (which is recognized as valid under applicable federal or state law) of the person;
- the fax number to which that consent applies; and
- a statement that clearly authorizes the sender to send facsimile advertisements to the recipient.

While Congressional action may breathe new life into the EBR exception, we recommend preparing for the coming changes.

INTELLECTUAL PROPERTY



Moss and Barnett is pleased to announce the formation of our new Intellectual Property Practice Area. Over just the past year, this area of our practice has seen tremendous growth due to the increasing needs of our clients for patent, trademark and copyright representation and advice. In recognition of the many years of experience they bring to this practice, **Marsha Stolt** and **David Biek** were elected as shareholders in Moss & Barnett, effective January 1, 2005, joining senior shareholder **Glen Schumann**.

Left to Right: Susan Lilyquist, Paralegal, Martha Skogquist, Legal Assistant, David Biek, Attorney, Lee Jacobson, Legal Assistant, Cindy Bjoraker, Legal Assistant, Marsha Stolt, Attorney and Glenn Schumann, Attorney

PROFESSIONAL RELATIONSHIP DEVELOPMENT SEMINAR

Moss & Barnett sponsored its first-ever seminar devoted to the development of clients and professional relationships by women in business. The event was held at the Minneapolis Club on March 31, 2005, and was attended by over 30 women from firms and businesses throughout the Twin Cities. **Nancy M. Kiskis, Esq.**,

Moss & Barnett shareholder, chaired the event, which featured panel discussion members **Deborah Johnston**, Vice President-Financial Consultant, RBC Dain Rauscher, **Linda Saggau**, President/CEO, Collaboract Consulting, LLC, and **Marla Tipping**, President, Caravel Consulting LLC.



Speakers and guests attending Moss & Barnett seminar



Panel members: Left to Right, Deborah Johnston, Linda Saggau and Marla Tipping

THE LAW OF FINDERS

By Janna R Severance, Esq.

Any entrepreneur or business owner who has sought investors has met a “finder” — a person who agrees to locate investors for a fee (usually a percentage of the money invested), but who is not licensed as a securities broker-dealer. Here are the answers to some common questions about finders:

Is it legal to engage an unlicensed person to place securities? If it is legal, should an entrepreneur engage and pay a finder?

In general, the entrepreneur will not violate law by using a finder, but certain exemptions from securities registration under state securities law may be unavailable if compensation is paid to anyone except a broker-dealer registered in that state. If the finder is not registered because he or she is precluded from registration as a result of criminal conduct or a discipline while associated with a registered broker-dealer who is a member of the National Association of Securities Dealers, Inc. (“NASD”) securities registration, exemptions from registration of securities under state and federal law are even more limited.

Is a finder a “broker-dealer” who is required to register under state and/or federal law?

Not necessarily. In Minnesota, a person who sells securities solely to persons who are “accredited” does not fall within the definition of broker-dealer or investment advisor and thus is not required to register. “Accredited” means (in broad strokes) an individual with a \$1 million net worth or \$200,000 in income for the last two years, or an institutional investor. Other states have different standards.

IN MINNESOTA, A PERSON WHO SELLS SECURITIES SOLELY TO PERSONS WHO ARE “ACCREDITED” DOES NOT FALL WITHIN THE DEFINITION OF BROKER-DEALER OR INVESTMENT ADVISOR AND THUS IS NOT REQUIRED TO REGISTER.

Federal law as to broker-dealers (the Securities Exchange Act of 1934) turns in large part on the nature of the compensation and the degree to which the “finder” is involved in the selling effort. If the compensation is a percentage of the transaction (a commission, rather than a flat fee), and if the finder is engaged in finding activity on a regular basis and actually assists in the selling effort (as opposed to simply making an introduction), the finder is likely considered to be subject to registration.

What does this mean in practical terms?

1. Do not reject a “finder” just because the person is not registered or licensed.
 - He/she may not have to be licensed/registered.
 - He/she may be willing to work on transactions too small to interest a registered broker-dealer and may have access to high net worth individuals. Many broker-dealer firms focus on institutional investors who will only consider investment in offerings of substantial size.
2. Use common sense.
 - Check out the person’s credentials. Search for disciplinary history with the NASD (online at NASDR.org) and with your state regulatory agency.
 - If you sign an agreement, it should be:
 - non-exclusive, and
 - terminable by you on short notice.
 - In addition, the agreement should not require you to pay a commission on sales after the termination of the agreement, except for sales to persons introduced to you by the finder and then only for a limited time (i.e., 6–12 months after termination).
 - Do not prepay any portion of the fee or expenses, if possible — pay based on results. Be sure that any prepayment offsets commission.
3. Do not try to engage a licensed broker-dealer and an unlicensed finder. NASD rules prohibit commission splitting between NASD and non-NASD members (i.e., unlicensed people). Note that this will also be a problem if you engage a licensed broker-dealer after terminating a finder and the finder claims commission on a sale consummated by the broker-dealer.
4. Do the “selling” yourself. Do not let the finder tell your story to the prospective investors!
5. Limit your prospective investor pool to persons who are “accredited.”
6. Engage a knowledgeable securities lawyer to assist you.

PRO BONO LEGAL SERVICES

By Susan Rhode, Esq.
Moss & Barnett Director



Providing pro bono legal services and support to individuals and charitable organizations is an important commitment at Moss & Barnett. One important recipient of Moss & Barnett attorneys' time and money is the Fund for Legal Aid. Legal Aid is one of the primary providers of legal services to individuals who cannot otherwise obtain legal assistance.

Two of our attorneys, Julia Dayton and Tim Gustin, recently led the Legal Aid "One Hour of Sharing"

fundraiser for Moss & Barnett associates. Many of the Moss & Barnett associates participated in this worthy program. On May 3, 2005, many of our attorneys attended the Legal Aid annual Law Day fundraiser, of which Moss & Barnett is a significant sponsor.

In addition to our financial support of Legal Aid, several of our attorneys have dedicated their time and energy to the Volunteer Lawyers Network. Their donated services have helped disadvantaged clients with family, housing and healthcare issues. It is a privilege to participate in these volunteer programs and we appreciate the ongoing efforts of our attorneys in so many different charitable organizations!

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney client relationship is formed by the publication or reading of this document. Moss & Barnett, P.A. assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

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