

# First Amendment/Commercial Speech

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Wiley's Appellate & Litigation Team has extensive experience vindicating the speech rights of our clients both in defensive litigation and in proactive constitutional challenges.

Wiley's expertise spans the spectrum of First Amendment litigation, from strict scrutiny to commercial speech to rational basis review. The firm has argued these issues in procedural settings ranging from preliminary relief and fee disputes to emergency appeals and Supreme Court practice.

We expect this area of litigation to be of growing importance. In an era of mounting pressure to reduce public expenditures, state and local governments have increasingly turned to speech regulation as a low-cost means of achieving their regulatory objectives, and we see no signs of this trend reversing.

## **First Amendment Rights of Businesses and Industry**

Wiley has successfully litigated core First Amendment cases, ranging from restrictions on broadcasters and limitations on the use of business data to compelled disclosures and warnings in retail settings. Government action in a variety of settings can impact First Amendment rights, and Wiley understands how to deploy the First Amendment to ensure that burdens on speech are both properly justified and narrowly tailored.

Recently, Wiley's Team led the wireless industry's successful challenge to San Francisco's so-called "Cell Phone Right to Know" Ordinance. This Ordinance attempted to mandate the posting and dissemination of alarmist and misleading government messages about cell phone safety. The wireless industry challenged this law—the first of its kind in the nation—to prevent the unlawful compulsion of inaccurate and misleading speech. The case, *CTIA-The Wireless Association v. City and County of San Francisco* (9th Cir.), involved questions about the scope of government power to enlist private parties in the spread of government messages.

Wiley has also vindicated television broadcaster rights in mandatory cable television carriage disputes in New York, raising important First and Fifth Amendment concerns. After Wiley attorneys secured cable carriage for the local broadcaster before the Federal Communications Commission (FCC), the Communications Litigation Group was called upon to handle the appeal in the Second Circuit, which unanimously affirmed the FCC's decision. *Cablevision v. FCC* (2d Cir.).

Wiley has protected wireless carriers' First Amendment rights from improper encroachment by regulators, serving as counsel to the wireless industry in cases challenging regulation of line item billing as unlawfully restricting carriers' rights to communicate information about charges and their relation to government policies.

*Peck v. Cingular Wireless LLC* (9th Cir.) and *BellSouth Telecommunications Inc. v. Farris* (6th Cir.).

Wiley's First Amendment expertise includes challenging FCC decisions restricting retention marketing activities of telecommunications carriers competing in the market for bundled telecommunications services, as well as a First Amendment challenge to the FCC's rules regarding the sharing of customer proprietary network information (CPNI) for use in targeted marketing. *Verizon Northwest, Inc. v. Showalter* (W.D.Wash.).

Wiley also litigates business free speech issues outside the communications context. For example, relying in part on the First Amendment, Wiley's litigators successfully obtained the dismissal of multiple class actions brought against Molson Coors and other major American beer and spirits manufacturers by parents and guardians alleging that the alcoholic beverage industry advertising is to blame for underage drinking. *Alston v. Advanced Brands & Importing Co.* (6th Cir.).

### **Commercial Data and CPNI**

Restrictions on use of commercial data and customer information can have important First Amendment implications, and Wiley has been at the fore of litigation aimed at vindicating free speech principles in this area.

The Supreme Court recently concluded that "[s]peech in aid of" commercial marketing "is a form of expression protected by the Free Speech Clause of the First Amendment" and restrictions on the use of information needed for such marketing are properly "subjected to heightened judicial scrutiny." *Sorell v. IMS Health*, 131 S.Ct. 2653 (2011). Wiley attorneys participated in the *Sorell* case, which unequivocally reaffirmed the notion that the First Amendment is, at its core, a restraint on government. As the Court explained, "[t]he capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate."

Wiley has litigated this concept for years, including in cases involving CPNI. For example, Wiley secured a preliminary and a permanent injunction against state regulations restricting the use of customer proprietary network information for use in targeted marketing. *Verizon Northwest, Inc. v. Showalter* (W.D.Wash.). In addition, Wiley represented intervenors challenging the FCC's regulations implementing Section 222, presenting First Amendment and Administrative Procedure Act arguments against the Commission's adoption of an opt-in requirement for the sharing of customer information with joint venture partners and independent contractors. *National Cable & Telecommunications Ass'n v. FCC* (D.C. Cir.).

Wiley attorneys also provide counseling and compliance advice related to carriers' duties and rights with respect to CPNI, as set forth in Section 222 of the Communications Act and the FCC's implementing regulations.

## Media Ownership

Wiley has extensive experience litigating critical disputes over media ownership restrictions. The firm is currently representing major national radio and television broadcasters, the association of newspaper publishers, and owners of newspapers and broadcast stations in multidistrict federal appellate challenges to the FCC's rules limiting local radio ownership and local television ownership and cross-ownership of newspapers and broadcast stations. *Prometheus Radio Project v. FCC* (3d Cir.). Wiley handled the earlier litigation over media ownership restrictions in the Third Circuit and before the Supreme Court of the United States.

In addition, Wiley successfully represented a major cable company in its federal appellate challenge to the FCC's 30% horizontal cable ownership cap. In *Comcast Corporation v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit reversed and vacated the FCC's ownership cap for cable operators, which limited cable operators to serving only 30% of the nation's multi-channel video subscribers. In doing so, the court agreed with the Comcast position that the subscriber limit was arbitrary and capricious and restricted Comcast's ability to make economically efficient acquisitions.