

Nicole Hyland  
(212) 826-5552  
nhyland@fkks.com

## Hypothetical - Nontraditional Claims Against Lawyers

### Part I

1. You are a partner at the law firm of Abel & Bright (A&B). You represent a long-term client – Fickle Markets, Inc. (Fickle) – a national supermarket chain that works on a non-exclusive basis with various food suppliers. Since 2005, Fickle has been offering vegan products from various suppliers, including Vegan Delights, Inc. (Vegan), in its supermarket locations throughout the United States. You represented Fickle in the contract negotiations with Vegan and had developed a close personal friendship with its President, Stan Slick.
2. In 2008, Fickle and Vegan are hit with various false advertising lawsuits concerning its claims that its products were “100% organic,” “pesticide free,” and “peanut free.” You and several partners in A&B’s Intellectual Property department had vetted the advertising materials before they had been sent out. These advertising materials include mailers and TV ads. The A&B lawyers had asked Slick for any back-up to support the claims, but Slick had never provided it, always claiming that Vegan was delaying, or was re-conducting its scientific experiments to confirm the results. Nevertheless, the A&B lawyers continued to approve the ads, making occasional wording changes. Between 2005 and 2008, there were several communications between you and Slick, in which you press Slick for confirmation (getting the answers already noted), discuss the many complaints issued against Vegan by the FCC (which Slick claimed had made Vegan change its ways), and talk about your weekly golf game with Slick and Vegan’s CEO, Tom Atoes, which Atoes hosted at his posh golf club (complete with lunch and dinner).

3. Eventually, a class of plaintiffs with peanut allergies brings suit against Fickle and Vegan, claiming that Vegan products contained peanuts, causing them serious injuries, and that their advertisements and flyers were false. The plaintiffs learn through discovery of the vetting work done by A&B.
  - a. *What claims can the plaintiffs bring?*
  - b. *What defenses are available to each of those claims?*
  - c. *Should A&B, once it is sued, reveal your communications with Slick?*

## Part II

4. A&B represents both companies jointly in the class action and false advertising actions. The firm's retainer agreements state that the firm's representation is nonexclusive and that it may represent other clients in similar or competing businesses. A&B files answers and other submissions in the lawsuits affirming that Vegan's claims are true and verifiable.
5. In May 2010, you are preparing for a summary judgment motion in one of the false advertising lawsuits. Just before you leave for the courthouse, Vegan discloses to you that several of the ingredients used in its products were sourced from a farm in South America that used pesticides and that there are some internal documents (not yet disclosed) which cast doubt on Vegan's "100% organic" and "peanut free" claims. Vegan asks you not to tell anyone – including Fickle – about this information but to negotiate quick settlements of all the cases.
6. You go ahead with arguing the motion on the record before the court, reiterating that the products are 100% organic, peanut free and pesticide free. In later discovery motions, you argue that all documents responsive to the plaintiffs' requests have been produced. The plaintiffs' lawyers accrued \$250,000 in legal fees addressing these motions. Before a decision is rendered, you settle the claims against Fickle and Vegan. A *Wall Street Journal* article about the lawsuits later reveals the existence of the undisclosed documents.
  - a. *What possible claims arise from paragraph 5 and 6?*
  - b. *What potential damages do the lawyers face?*
  - c. *What defenses exist?*

### Part III

1. In December 2009, while the false advertising and class action lawsuits are pending, you get a call from Slick. He says “I need to discuss something with you that I don’t want you to discuss with Vegan.” After a pause, he continues “We feel the quality of Vegan’s products have declined substantially and the company is riddled with incompetence. We want to phase out our relationship before they take us down.” Slick explains that he has identified a new supplier, Legendary Vegan Products (Legendary), and wants to transition the business from Vegan to Legendary.
2. Between January and June 2010, you negotiate and draft on Fickle’s behalf the necessary contracts for Legendary to supply its products to all of Fickle’s supermarket locations. Legendary’s products will replace the products previously supplied by Vegan, including its famous “Vegan Delight Burger,” which will be replaced by a new Legendary product: the “Legendary Vegan Burger.” Unbeknownst to you, one of Vegan’s top executives defected to Legendary months earlier taking Vegan’s trade secret recipe for Vegan Delight Burgers with him. Legendary hires you to obtain a patent on its recipe for the Legendary Vegan Burger and trademark protection for the product name. Once again, you bring in lawyers from the IP Department to help.
3. In February 2010, Vegan retains A&B to represent Vegan in an IPO. The firm prepares the offering documents, which – among other things – contain disclosures about the false advertising and class action lawsuits. At Vegan’s request, A&B also provides an opinion letter concerning the merits and likelihood of success on the false advertising claims, making clear, with the usual caveats, that Vegan is likely to prevail in the case. The offering documents make no mention of Fickle’s intent to replace Vegan with another supplier. The IPO closes in April 2010, before the lawsuits are settled.
4. In June 2010, the transition to from Vegan to Legendary is finalized and Legendary begins supplying all of Fickle’s stores. Vegan immediately fires A&B.
  - a. *What claims can be brought against A&B in connection with the transfer of the business from Vegan to Legendary?*
  - b. *What claims can be brought against A&B in connection with the IPO?*
  - c. *What defenses exist?*