

## Westfax background

The FCC should be aware that Westfax has been sued numerous times for violating the TCPA. On September 10, 2010 Westfax was found jointly liable along with its advertiser client, and judgment was later entered against Westfax in *AGV Sports Group, Inc., v. Westfax, Inc., et al.*, Case #03-C-09-929 OT (Circuit Court for Baltimore County, MD).

In May 2011 in another case, the same Westfax attorney who submitted the very Petition that the FCC is now considering, Colorado attorney William B. Hayes, was disqualified from representing Westfax in the case *Baltimore Podiatry Group, Drs. Scheffler & Sheitel, P.A., v. Westfax, Inc., et al.*, Case #03-C-09-929 OT (Circuit Court for Baltimore County, MD). In that case it was noted that Mr. Hayes created a Colorado entity called the National Number Removal Assistance Association, which itself sent faxes through Westfax, and an Affidavit was submitted of a former Westfax employee, which can be provided to the FCC. The former employee alleged under oath that Westfax used the NNRAA to generate leads for new fax advertising customers.

Westfax is currently being sued in federal court in *Silverstein, et al. v. Westfax, Inc., et al.*, Case #12-cv-2430-MJG for alleged TCPA violations for fax ads sent AFTER the above referenced judgment against Westfax and disqualification of its counsel.

Viewed with this background, the FCC's first response to Westfax should be to investigate its fax broadcasting practices. The public record demonstrates that in at least one case so far Westfax did not comply with the TCPA. Any attempt to weaken the TCPA or allow a certain subset of transmissions of fax advertisements by way of "clarification" should be viewed skeptically at best, and ultimately denied. It appears that in light of mounting litigation, Westfax wants to branch out into sending fax ads via email, and seeks a very broad interpretation (aka clarification) to allow this.

The FCC should interpret the TCPA liberally to effect its purpose as a consumer protection statute, and not in a way that the recent stream of petitioners have requested so as to permit more fax or voice transmissions that the public clearly does not want to receive, including junk efaxes.

## Defining "recipient" of a fax

Defining the "recipient" of an efax should be irrelevant to a fax sender like Westfax. The plain and unambiguous language of the TCPA applies to the sending of a fax ad, and is not limited to any class or type of persons or entities. 47 U.S.C. § 227(b)(1). If a question actually arises as to whether a fax service provider, or subscriber to that fax service, is the "recipient," that should be left to the contracting parties (such as but not limited to efax, which is just one company providing such email-to-fax or fax-to-email services) and to the courts.

## ?Safe Harbor? language

Westfax requests that the FCC provide ?safe harbor? language to meet the JFPA?s requirement for an opt out notice be included on all fax ads. This is an odd request because fax broadcasters, including Westfax, generally take the position that they have nothing to do with the opt out notice included on the fax ads that the fax broadcaster transmits. The statutory language of the TCPA is adequate as to what needs to be included in an opt out notice. Westfax and fax broadcasters can simply incorporate the language in the statutory subsection cited by Westfax to ensure compliance. The FCC has already determined ?safe harbor? language is not needed.

## Fax broadcaster provision of opt out services

Westfax asks the FCC to ?clarify? that certain conduct and services, such as accepting opt out requests or providing toll free numbers, are not deemed by the FCC to be giving legal advice on how to comply, and that ?such services are not an example of any ?involvement? and such services do not create any TCPA and JFPA liability.?

Westfax is asking the FCC to make broad factual determinations and legal conclusions, for situations that are factually or legally not always the same or uniform. Westfax?s request is also based on Westfax?s assertion that fax broadcasters offer their contact information and/or cost-free numbers to accept opt-out requests in most cases as ?merely an ancillary service of the fax broadcaster and there is no charge for the service.?

First, fax broadcasters do not generally (if ever) provide their opt out services and toll-free to anyone unless the person is already buying some service from the fax broadcaster. The opt out and number removal services are not simply ancillary, but come as a necessary part of the purchase of fax broadcasting services. They are a necessary part of the fax broadcasting to comply with the TCPA and FCC rules.

Second, in practice, the fax broadcaster must have varying degrees of involvement in opt out services and fax number management. It is not a matter of the fax broadcaster simply providing a toll free number for placement on a fax ad for opt out compliance purposes, and then sitting back and relaxing. Litigation has revealed, specifically for Westfax, that advertisers will receive opt out requests directly from persons who do not want to receive unsolicited fax ads, and forward them to a fax broadcaster to handle and manage for the advertiser. In other words, not all recipients of unwanted fax ads use solely the toll free numbers typically printed on a fax ad, thus requiring more involvement by both the advertiser and the fax broadcaster.

Third, the FCC is limited to concluding what complies with its rules, not the TCPA, and should not be making blanket legal conclusions about what is or is not compliance with the TCPA statute for specific classes of persons or entities. Past FCC statements about what constitutes liability for an advertiser are not statements about what constitutes liability for a fax broadcaster, and the FCC should not make such determinations on a global basis. The plain language of the TCPA makes it unlawful to "send" an unsolicited fax ad, and fax broadcasters are certainly and obviously the physical senders of faxes. 47 U.S.C. § 227(b)(1)(C).