



# How to avoid legal mistakes that can destroy a **Mobile Marketing Campaign**

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## **What You'll Learn**

- The top ten legal land mines that impact mobile marketing
  - Ways to reduce your legal exposure
  - Sources for guidance



## Dear Executive,

**Mobile Marketing** is being heralded as the game-changer of the decade. It's not a question of "should," but "how," for both consumer and B2B marketers.

According to Forrester Research, by 2013 more people will access the Internet via a mobile device than through a personal computer, laptop or desktop. Engaging with on-the-go folks via the mobile channel can prompt immediate response and generate loyalty. Mobile is truly the ultimate in one-to-one communications ... *if you play by the rules.*

As excited as we—and our clients—are about mobile marketing opportunities, we want to be sure that we've adhered to Best Practices throughout the development of our campaigns.

This document provides an overview of the Top Ten legal mistakes that can ruin your mobile marketing campaign, or even land you in court. It was largely authored by Tammi Franke, attorney with Fitzgerald & Hewes LLP in Chicago, with a practice focused on technology law. Tammi is also an adjunct professor at DePaul University, making sure that graduates understand the fine points of communications law.

Please note that the content of this paper is for informational purposes only and should not be taken as legal counsel. It would be very wise to seek advice from an experienced mobile marketing lawyer licensed in your state or country to review your efforts before hitting the "send" button on your next mobile venture.

There are so many benefits in connecting with customers via their mobile devices. Mobile marketing will surely become a part of your integrated communications strategy over the next couple of years, if it isn't already. Here's to good, totally compliant mobile campaigns!

Warm regards,

A handwritten signature in black ink that reads "Lori Colman". The signature is fluid and cursive.

Lori Colman  
Co-CEO and Founder



## Just what is “Mobile Marketing”?

The Mobile Marketing Association defines “mobile marketing” as:

*“The use of wireless media as an integrated content delivery and direct response vehicle within a cross-media marketing communications program.”*

In other words—the sending of ads or marketing messages to cell phones, smartphones and tablets.

That can be accomplished in a number of different ways. The top method is via text messaging. Right now, texting is causing the most legal controversy.

Other matters, such as mobile apps and ads delivered via the mobile Internet, are also causing controversy due to privacy violations by some developers.

Proceed with caution if, as a developer or marketer, you tap into additional functionality from the mobile platform. For example, location-based mobile marketing where consumers allow their phone to automatically share their location via applications like Foursquare, Yelp, and Twitter. Or Bluetooth proximity marketing, where ads or commercial messaging are pushed onto a mobile device within a particular area. Either can trigger charges of misconduct.

### Terms you should know

Business segments are rife with acronyms, and mobile marketing is no different. Here are a few that are used within this document:

**MMA – Mobile Marketing Association** is the industry’s informational and self-regulatory body. At the MMA’s website, [mmaglobal.com](http://mmaglobal.com), you’ll find a wealth of information about best industry practices to: 1) assist with legal compliance, and 2) lessen the likelihood of federal or state government regulation of mobile marketing.



**CAN-SPAM** is federal anti-spam legislation. CAN-SPAM stands for “Controlling the Assault of Non-Solicited Pornography and Marketing.” The Federal Trade Commission is in charge of implementing CAN-SPAM. Currently, CAN-SPAM only applies to text messages which use an Internet address that includes an Internet domain name (3125551212@sprintpcs.com), aka SMTP messages. Congress is investigating the issue of Mobile Spam, and in 2009 attempted to pass legislation that would include all text messages under CAN-SPAM. So to be safe, it’s a good idea to have all of your messages comply.

Here is an easy acronym for compliance with CAN-SPAM. Just remember **IS/OR:**  
**Identification** – commercial e-mail must be clearly identified as an advertisement.

**Subject Lines** – must be accurate. No misleading or bogus subject lines to trick readers.

**Opt-out** – easily accessible ways for recipients to reject future messages from that sender.

**Return Address** – must contain legitimate return e-mail addresses (or text opt-out address).

Note that this only applies to marketing messages, and not transactional messages with your customers.

#### **TCPA – Telephone Consumer Protection Act.**

Most people are familiar with the national “Do-Not-Call-List” that allows consumers to opt out of most unsolicited telemarketing calls. For calls to mobile numbers, the TCPA requires express opt-in or prior express consent before an automated dialing system can be used. Because this is telecommunications-related legislation, the Federal Communications Commission has the primary responsibility for implementing and monitoring compliance. The FCC has issued an interpretation that a text message is the equivalent of a mobile call under the TCPA. Two recent federal court cases concur with this interpretation. Don’t think you can get around the TCPA by not using an automated dialing system. One of the federal cases ruled that a text sent by any equipment that has auto-dial capability (whether or not it is used) is subject to the TCPA.

#### **GAPP – Generally Accepted Privacy Principles**

was created by the American Institute of CPAs (AICPA) to assist businesses in complying with consumer privacy laws, and assist external auditors when asked to audit a company’s privacy practices.

**FTC – Federal Trade Commission** regulates trade practices, including monitoring of advertising and marketing practices and legal compliance in the United States. As advertisers and marketers, it’s the regulatory agency you’re used to dealing with. The FTC will draw on or defer to the expertise of other agencies in promulgating industry-specific rules. A good example of this is pharmaceutical advertising, where the Food and Drug Administration sets the requirements and restrictions. In the mobile marketing arena, the FTC works with the Federal Communications Commission; e.g., the FCC issued rules under CAN-SPAM regarding mobile e-mail spam.

**SMS, or Short Message Service.** Essentially, all text messages sent from another mobile device.

# The top ten legal land mines of Mobile Marketing.

## 1 Ignoring Generally Accepted Privacy Principles (GAPP)

Safeguarding personal information is one of the most challenging responsibilities an organization has, and is definitely a legal concern with mobile marketers. In the U.S., laws regarding the collection and use of consumer information are spread out among over twenty different pieces of legislation, making compliance difficult for businesses. Some of the legislation is very industry-specific, such as HIPPA, which addresses the privacy of health-related information. Other legislation is broader in nature, such as the Fair Credit Reporting Act.

GAPP to the rescue! GAPP, an internationally recognized privacy framework developed by the American Institute of CPAs (AICPA) and the Canadian Institute of Chartered Accountants (CICA), sets out ten straightforward principles that clarify your company's obligations when dealing with consumer data and information. By operationalizing complex privacy issues, GAPP will help your management create an effective privacy program that addresses risks and obligations.

Learn more at the AICPA website, [aicpa.org](http://aicpa.org).

## 2 Overlooking the Mobile Marketing Institute Code of Conduct

The Mobile Marketing Association was formed to support and encourage the industry to comply with privacy laws by providing Best Practices guidelines. Their Code of Conduct covers such critical aspects of a campaign as providing notice of your terms and conditions, obtaining consent, frequency of messaging, opt-in and opt-out provisions, and security of customer information. The Code should be understood and followed by your practitioners to help keep you out of the courtroom and to help keep the industry free of increased federal regulation.



One way to assure that those working on your mobile initiatives are up-to-date on Best Practices is for them to become MMA-certified.

Both the Code of Conduct and information on certification are available at the MMA website, [mmaglobal.com](http://mmaglobal.com)

## 3 Not obtaining approval of your mobile campaign from wireless carriers

Wireless companies don't want the hassle of customer service complaints, nor do they want to violate CAN-SPAM or TCPA rules and end up in court. So, they may block mobile campaigns that broadcast over their network. If you don't want to risk it, get their approval well in advance.

Using a leading aggregator or a short code (see Common Short Code Administration website) will help simplify and expedite carrier approvals. The MMA has issued a helpful Best Practices for cross-carrier mobile content programs, which contains very explicit approval guidelines for each carrier.



#### **4** Shortcutting legal reviews and clearances because “it’s only a text”

Mobile campaigns are under a microscope now due to heightened privacy concerns, and because additional charges apply for many consumers when they receive mobile ads. While it might seem tempting to shortcut your legal review/clearance process because “it’s only a text,” FTC regulations apply to ads no matter how they are delivered.

Like other forms of advertising, mobile ads can’t be false or misleading, and all claims must be substantiated.

Treat your mobile campaigns just like any other ad or marketing campaign and use the same clearance process prior to launch. Your prior review/clearance will help expedite the carrier approval/clearance process.

#### **5** Leaving out disclaimers

Think about all the broadcast and print ads you come across every day that carry a lengthy disclaimer. Pharmaceuticals, rate plans, and auto deals all come to mind. Well, the FTC does not take “I didn’t have room” as a valid defense for leaving disclaimers out of text or even AdWords marketing programs.

To stay out of hot water with the FTC, FDA or both, content must be generic: no product claims or promotional copy. So, either water down your message or use mobile as a tool for gathering opt-ins and information, not for pushing content.

#### **6** Violating GAPP by using Bluetooth proximity marketing

Even though a consumer isn’t charged for receiving a message via Bluetooth, pushing an unsolicited ad onto a mobile device via Bluetooth without consent can seem as invasive to a consumer as receiving an unwanted text message. Comply with GAPP principles and the MMA Code of Conduct and you’ll stay out of trouble.

#### **7** Disregarding contest rules

One of the great things about mobile campaigns is that they spark immediate action. So using mobile to promote contests, sweepstakes and/or lotteries is tempting. But keep in mind that state and federal laws and regulations still apply.

Treat your mobile “text-to-win” sweepstakes just like any other promotion, using the same legal review and clearance process prior to launch. Include the same disclaimers and link to your official rules. If you’re using a premium text charge to enter, you must offer an alternative means of entry (free) and provide some sort of additional value for the premium text—such as a ring tone—to avoid being classified as a lottery instead of a sweepstakes. Remember to have express opt-in by the consumer for future offers that are not related to the contest or sweepstakes.

Ultimately, the advertiser is responsible for the contest. So if you outsource your campaign, it’s best to verify for yourself that your contest is compliant with state and federal laws and not rely solely on your service provider’s statements.

## 8 Dismissing consumer complaints

While ignoring consumer complaints may not be a legal violation, consumers whose complaints are ignored will often seek resolution elsewhere, including complaining to their carrier, the FCC or the FTC. The FCC and the FTC have made it very easy to file complaints online. A high volume of consumer complaints could lead to additional industry regulation. The TCPA is a great example of a law that was passed in response to consumer complaints about telemarketing practices.

People are much less likely to file a complaint with the government if their concerns are taken seriously and their numbers are quickly removed from your list. Assign and train a specific individual or group to expedite the resolution of grievances.



## 9 Being sneaky with opt-in

Words to live by: “We will obtain express consent of the recipient before a mobile marketing message is sent.”

Don't think you can simply use mobile opt-in obtained from a different campaign. Third-party lists don't apply in mobile.

A text message is considered by the FCC and by two different federal courts to be the same as a wireless call under the TCPA which required express consent. Develop your own opt-in list with documentation for every mobile marketing message you send.

## 10 Thinking you won't be sued if you send an ad via text to a cell phone without permission

Winning class action lawsuits can be lucrative for litigation firms. And there are several that specialize in representing consumers who have claims under the TCPA. Many of these firms previously brought class action “junk fax” suits under the TCPA and are now focusing on class action lawsuits for receipt of unauthorized text messages.

*What's the worst legal mistake you can make in a mobile ad campaign? That would be sending a text message without permission.*

Look up the Simon & Schuster case, in which the law firm that represented the class of individuals who received unauthorized text messages earned \$2,750,000 in legal fees, while each class member was awarded a settlement payment of \$175 for receiving one unauthorized text.

How does this work, exactly? The TCPA provides what's called a Private Right of Action for violations. In other words, individuals can sue for damages of up to \$500 per text message received. For text campaigns where a large number of unauthorized texts are sent, a law firm gathers all of the recipients into one class and files a lawsuit on behalf of all class members. It is quite easy and “no risk” for consumers to join in a class action suit, and much easier for them to receive damages if they don't have to file a case on their own.

Repeat after me, **“We will obtain express consent of the recipient before a mobile marketing message is sent.”**



## About CBD Marketing

CBD is a B2C and B2B marketing services agency that clarifies and articulates what's most meaningful about your brand, product or service and helps you build more intimate and profitable relationships with your customers.

At the heart of everything we do is a deep understanding of the rational and emotional drivers that inspire your customers' choices. At CBD, "market what's meaningful" is our mission, guiding all disciplines from brand development to media strategy, from public relations to creative.

## Let's Talk!

To talk about how CBD can help you create moments that matter to your audience and better connect them to your brand, product or service, please contact Doug Davila, Director of Business Development at 312.661.1050 or [ddavila@cbdmarketing.com](mailto:ddavila@cbdmarketing.com).

## About the Authors

### Lori Colman, Co-CEO and Founder, CBD Marketing

As the Co-CEO and Founder of CBD Marketing, Lori's expertise in brand development is focused on keeping brands relevant in the consumer-controlled future. She is also a noted expert on preventing the commoditization of brands, and the work needed to prevent the debilitating slide down that path. Lori speaks globally on these topics, including at the premier international venues.

She has spearheaded brand-changing marketing initiatives on behalf of Lodders Croklaan, Lipid Nutrition, Janssen Pharmaceutica, CF Industries, Experian, and Heidrick & Struggles, among others. Prior to starting her own firm in 1988, Lori was an executive with agencies Cramer-Krasselt, DraftFCB, and with Colgate-Palmolive. She is a graduate of University of Michigan's School of Business.

### Tammi Franke, Partner, Fitzgerald & Hewes LLP

With a practice focused on technology law at Fitzgerald & Hewes LLP, Tammi advises marketing, communications, consulting and digital media companies on matters related to advertising law, mobile marketing, telecommunications, WiFi, technology, software, and online communications. Her expertise also includes negotiating and restructuring transactions to address acquisitions, divestitures and other corporate structural change.

Tammi serves as an adjunct professor at DePaul University in the PR and Advertising graduate program and is a regular volunteer for Lawyers in the Creative Arts. A prolific author and speaker, she is a member of the Illinois Technology Association and International Network of Boutique Law Firms. Tammi received her JD from Loyola University of Chicago, and her undergraduate degree from Indiana University.