A&B TELEMARKETING: A CASE STUDY IN CONSUMER DISSATISFACTION AND COMPLAINING BEHAVIOR

James Kent Pinney, University of Nevada, Las Vegas
Larry Strate, University of Nevada, Las Vegas

ABSTRACT

Ample evidence exists demonstrating that marketing institutions that fail to satisfy all of their customers all of the time are still permitted to function in society. This paper is a case study of one marketing institution that did not satisfy all of its customers all of the time. However, it failed to satisfy a few who chose to file formal complaints against the institution. As a result, the institution was fined and ordered by the courts to cease and desist. Should the legal system expect or demand such requirements of marketing institutions within the business community?

INTRODUCTION

The Marketing Concept

Paraphrasing an old adage, the marketing concept would suggest that any institution engaged in marketing its products/services to the market place cannot hope to please all the consumers all the time. The most the institution might hope for is to please some of its consumers some of the time, maybe even most of the time, but rarely if ever all of the time.

If the institution has conducted sound market research, has segmented the marketplace of consumers such that it has identified those consumers it has some hope of pleasing most of the time, and has marketed its products/services to that end, very little more should be expected of it.

Which leads us to the intended purpose of this paper which is to analyze a recent telemarketing case involving consumer dissatisfaction and complaining behavior. (The case hereinafter is referred to as A&B Telemarketing in order to protect the anonymity of the institution.) The court records show that the institution in question engaged in telemarketing for a period of about fifteen months, promoting a variety of products to a rather lengthy list of consumers -- many to their apparent satisfaction. Further, however, the records also show that twenty-three consumers filed formal complaints against the institution in question. Finally, those same records show that while, on the one hand, many of those who were satisfied were repeat consumers -- confirming at least some degree of satisfaction, on the other hand, various public institutional representatives contended that for every formal complaint received, an additional eighty to ninety consumers were undoubtedly not satisfied but were disinclined or reluctant to get involved.

The purpose of this paper, further, is to demonstrate that, from time to time, the legal system will contend that even if a small number of consumers submit formal complaints and, if the institution is found guilty of those complaints, the courts can administer fines and penalties, impose prison terms, and/or shut the institution down, regardless of the apparent fact that a large number of its consumers were satisfied.

Can Any Product, Service, or Institution Satisfy All Its Consumers?

Historical records show that many institutions -- some of them within the private sector within the United States as well as others from selected other countries -- have done exceptionally well in pleasing the vast majority of their respective consumers while having to address periodic grievances. Examples include some extremely successful institutions such as Proctor and Gamble, Ford Motor Company, General Motors, and Johnson & Johnson in the United States, as well as many other successful institutions such as Nestle SA (Swiss), Unilever (Dutch/British), Mercedes Benz (German), Olivetti (Italian), and Mitsubishi (Japanese) which have stood the test of time both in their respective national as well as multinational markets.

Despite their very long standing records of success, i.e., millions of satisfied consumers,

many of them have had to deal with periodic complaints from a limited number of dissatisfied, complaining consumers, but continue to operate successfully both in the United States as well as all over the world.

In the instance of Proctor & Gamble, it had conducted significant research before entering the sanitary products market. Market research showed that ". . . Rely (tampons) were significantly preferred by women over other tampons and sales seemed to validate that finding." (Engle, et al. 1990) In May of 1980, the Federal Center for Disease Control made public a report that at least 55 cases of toxic shock syndrome had been confirmed linking these cases to tampon use. Although Proctor & Gamble's Rely was identified as being involved at a "statistically significant" level, at least 65% of the alleged victims were using other than Rely tampons.

Despite these somewhat comforting findings, between September and October of 1980, Procter & Gamble voluntarily not only removed all Rely products from the marketplace, it also agreed to provide a full refund on all boxes of Rely returned to the institution, spending millions of dollars to notify its consumers to this effect. The results of this response to an enormously small number of possible complaints (not understating the value of human life), Procter & Gamble experienced a $75 million after-tax writeoff on Rely. In summarizing the institution's commitment to its consumers and their long run satisfaction, the then chairman of the board stated, ". . . we believe we have done what is right and that our action is consistent with the long-held Procter & Gamble view that the company and the company alone is responsible for the safety of our products. To sacrifice this principle could over the years ahead be a far greater cost than the monetary losses we face on the Rely brand." (Engle, et. al. 1990)

In the instance of Johnson & Johnson's Tylenol -- the leading brand of nonaspirin pain reliever in the U.S. market in mid-1982 -- Tylenol accounted for 17 percent of the net profits of the institution. However, beginning in mid-1982, seven people died after taking Tylenol capsules that apparently had been laced with a poison some time after the product had been shipped from the factory. A similar event followed in 1986 with one person dying and additional supplies of Tylenol, discovered to have been tampered with, were located on nearby retail shelves.

In both instances, "Johnson & Johnson's response was speedy and thorough, even though the company itself appeared blameless." (Stanton and Futrell 1987) Even as in the case of Procter & Gamble's Rely tampon, Johnson & Johnson expended tens of millions of dollars withdrawing millions of bottles of the product from the shelves. Further, "The company was quite open in its contacts with the media and the public," setting up telephone banks to receive toll-free calls, having top executives appear on national television, etc. In 1982, the cost to the company exceeded $100 million and, in 1986, the cost was even greater. Despite these two tragedies, Johnson & Johnson ultimately recovered much of its former market share after the former incident and exceeded its former market share following the latter incident. The company had demonstrated a tremendous commitment to satisfying its consumers under the worst possible circumstances, despite the fact that so very few of its consumers had been "terminally" dissatisfied with the product consumption experience, but never with the product itself. Many consumers remain fully satisfied, obtaining an even higher sense of satisfaction in the consumption of the product, knowing of the commitment of the company to stand behind its product through major commitments to tamper-proof containers and quality control within the production and marketing stages. (Stanton and Futrell 1987)

In the instance of General Motors, "No single event so sharply focused public attention on the issue of corporate responsibility (to the satisfaction of the consumer) as did the mid-1960s confrontation between that Goliath of American industry . . . and a young man named Ralph Nader." (Smith 1990) Unfortunately, the charges of Ralph Nader against this company's Chevrolet Division in general and the Corvair automobile in particular were well documented: the Corvair had major mechanical problems that contributed to its being "Unsafe At Any Speed." (Smith 1990)

Unfortunately, in the short run, General Motors investigators attempted to discredit Ralph Nader rather than admit to his charges. Fortunately, in the long run, as seen in the minds of many, General Motors was compelled to

discontinue the Corvair altogether despite attempts in later model years to address the problems identified by Ralph Nader. This decision cost General Motors millions of dollars just in unrecovered costs from the design, development, and production of the automobile. However, to this day, General Motors continues to be the largest automotive producer in the United States, satisfying millions of consumers annually with its wide range of products, including not only automobiles but many other products as well.

And, finally, in the instance of the Ford Motor Company, the commitment to consumer satisfaction -- albeit after some rather prolonged litigation -- manifest itself. In 1968, then vice president for Ford Motor Company Lee Iacocca encouraged the rapid development of the Ford Pinto -- a product weighing considerably less than most if not all U.S. automobiles then in production.

Unfortunately, the compelling force in this decision was styling and design rather than the results of sound marketing research or engineering studies. As a result, the company became heavily involved in a law suit which focused on a particular 1972 Ford Pinto hatchback that had been struck from the rear, erupting into flames, killing the driver and permanently injuring a 13-year old passenger. (Grimshaw vs. Ford)

Specifically, the charges contended that Ford Motor Company, more concerned with styling and design and less with sound engineering and testing, had produced an automobile with a gas tank located to the rear of the rear axle rather than either in front of or above it. The net design results were that the gas tank was only 9-10 inches forward of the rear bumper, a space referred to as the "crush space." Further, the bumper itself was nothing more than a chrome strip. Still further, the design did not allow for reinforcing members, either longitudinal or horizontal, to provide a secure "box" within which the gas tank should have been located. Also, the bolts used to attach certain body panels on the undercarriage were left exposed which punctured the gas tank when the latter was pushed forward and upward when impacted from the rear. When the panel bolts were sheered, the panels separated permitting gas to access the passenger compartment, thereby threatening the occupants most surely with injuries if not death from the ensuing fumes and likely fire. Finally, records showed that the Pinto could not withstand impact from the rear at a modest 20 miles per hour (when firmly affixed to a stationary object) without major damage including significant fuel spillage, the minimum federal safety requirement at that time.

Needless to say, the Pinto was also discontinued, based upon its bad image in the minds of both actual and potential consumers of the product, and costing the institution millions of dollars in damages and legal fees. Despite this extremely negative publicity, Ford Motor Company continues to satisfy millions of consumers each year with its line of automobiles. (Stern and Govaldi 1984)

In summary to this review, ample evidence exists that despite these setbacks (again, not meaning to understate the value of life or limb in the instances of deceased or injured consumers), these companies have prevailed, continuing to satisfy the vast majority of their respective consumers most of the time. Although they failed to please all of their respective consumers all of the time, each of them made a major decision -- often at the cost of hundreds of millions of dollars and other resources -- to recommit itself to the satisfaction of most if not all of its consumers the vast majority of the time. And, finally, of specific relative importance to this paper, the courts have permitted these institutions to continue to operate in the market place, quite to the contrary of the specific case which is the ultimate focus of this paper. It might be noted that even as the first draft of this paper was being written, Burroughs Wellcome Co., the manufacturer of Sudafed 12-Hour decongestant capsules, was in the process of withdrawing this particular product from all shelves after at least two persons died from consuming the product which had been laced with cyanide. (Associated Press 1991) And Union Carbide continues to recover from the Bhopal, India tragedy of the past decade, involving the loss of over 2,500 lives and injury to more than 10,000 persons.

If a Few Consumers Complain, Should the Institution Cease and Desist, Pay a Fine, and/or Go to Prison?

As has already been demonstrated earlier in this paper, the answer to this particular question has been a relative "no." Neither Procter & Gamble, Johnson & Johnson, General Motors, nor Ford Motor Company were required to cease and desist, even though significant social and regulatory forces might have compelled them to do so. Admittedly, several did pay major court settlements, incurred monumental costs in the recall of specific products, and three of the four specific products were totally discontinued. It should also be noted that not one person was required to go to prison and not one stockholder was required to pay a fine as a result of any related litigation.

THE CASE HISTORY

A Brief History of A&B Telemarketing

The Institution Itself. A&B Telemarketing began operations in May of 1986 and continued through mid-year 1987. The institution -- as the name implied -- was a telemarketing company, offering for sale a variety of specialty advertising materials by means of telephone solicitations. Shortly after the business was licensed, the city's Business License Department began receiving inquiries and complaints about the company. In relatively short order, the Business License Department contacted the Detective Bureau of the local police department. A&B Telemarketing discontinued operations in mid-1987 due to a cease and desist court order based on the alleged violation of at least five different points of law which will be described more fully below. In summary, however, the owners were charged with ". . . aiding and abetting the sales persons in their capacities as owners of A&B Telemarketing, of counseling, encouraging, hiring, commanding, and/or inducing the sales persons to make the false representations alleged herein, and by providing a physical location and telephone service (adequate environment and facilities) from which to make said sales representations." (Petition)

The Product. A&B Telemarketing focused its efforts on the sale of specialty advertising materials, namely, pens and desk sets. Although other materials might have been used, the formal complaints were confined to these particular products.

The Price. Consumers were required to purchase the promoted products by the gross. A sample of "prices" suggested boxes of the products were available from as low as $119 to as high as $359, with an average of $239, and a median and mode of $249. Some consumers apparently were offered "quantity discounts" but no specific pricing schedule used by the telemarketing staff in the promotion of its product was available.

The Place. A&B Telemarketing was located in Clark County, Nevada although neither in the City of Las Vegas nor in that part of Clark County considered to be the metropolitan area of Las Vegas (extending into unincorporated areas adjacent to the City of Las Vegas). (The paper will remain somewhat vague on this matter in order to observe confidentiality and to avoid any negative connotations some readers might associate with this gaming community.)

The Promotion. The primary emphasis was on personal selling by means of the telephone with supporting printed advertising materials that accompanied shipments of the product to the ordering customer.

The Problem. The primary problem in the case was not the products, the prices, or the place of operation. Testimony indicated that, for most of the complainants, the products, although lacking somewhat in quality, nevertheless resembled the products described over the telephone and, in many cases, were sufficiently satisfactory as to warrant reorders. Further, the prices of the products were never misrepresented over the telephone although promises of other inducements to buy might have impacted on the "net prices" as perceived by the consumers. Also, the quality of the products might have warranted slightly lower prices according to the testimonies provided by some of the complainants. Finally, the location of the business was not of any major consequence

although some complainants did infer that Las Vegas and Nevada were locations of questionable repute.

The main area of concern for both the complaining consumers (re:complainants) and the subsequently involved public agencies, i.e., Consumer Affairs Division, the District Attorney, etc., was never the marketing mix variables of the product, the price, or the place of business. It focused almost exclusively on the promotion efforts of A&B Telemarketing, in particular in the wording of the sales presentation, the use or misuse of specific words and/or phrases, voice inflections, and, to a lesser extent, some of the written materials that were a part of the "promotional inducement" used by the institution to induce the consumer to purchase the products. The remainder of this paper will confine itself to this particular aspect of the marketing plan of the institution.

The Basic Problem: "The Pitch": Intent to Defraud?

Almost without exception, the primary complaint was that the "pitch" portion of the promotion effort, i.e., that portion presented by sales force representatives over the telephone, was deceptive and misleading, with the intent to obtain monies under false pretenses.

According to the defense counsel, the "pitch" applied the following guidelines: "The salesperson would contact the . . . prospective customer by means of a long distance (telephone) call. The salesperson would inform the (prospective) customer that he (or she) was 'qualified' for a cash award if he (or she) purchased included advertising specialty merchandise. The salesperson would indicate that there would be a drawing for the cash award. After the order of merchandise was given, the customer would be contacted by a verifier from A&B Telemarketing to check the advertising copy on the merchandise. A letter from a customer relations person at A&B Telemarketing would be sent to the customer. . . . The letter indicated that A&B Telemarketing stands behind its merchandise and wished the customer 'good luck for the biggest cash price you have ever received.' . . . The goods were shipped to the customer by either U.S. Mail or UPS and were sent COD which meant a customer need not accept the goods. Accompanying the goods was a Bonus Cash Promotion Certificate which set forth the Rules and Regulations for the Bonus Cash Promotion. The customer had to sign the Official Entry Form . . . and return the form to A&B Telemarketing. The entry form clearly stated that the customer had 'met and understood all the conditions and provisions of the Bonus Cash Promotion.'" (Petition)

To the satisfaction of the defense counsel, this was a legitimate promotion and, therefore, was neither a crime nor a public offense. Because this was the official format for the "pitch", the owners further contended that even if the "pitch" were modified by the specific salespersons of A&B Telemarketing, thereby qualifying the latter to be found deceptive or misleading as charged, there was no evidence that the owners were guilty of "aiding and abetting" these salespersons.

Some fine points of law entered in at this juncture. Defense counsel argued that ". . . to be a principal (in a criminal offense), (it must be proved) that an accused actually committed the act or that he counselled, encouraged, hired, commanded, induced or procured another to commit the act, . . . must consciously share in a criminal act and participate in its accomplishment, . . . and in some sort associate himself with the venture, that he participate in something he wishes to bring about, and that he seek by his action to make it succeed." (Petition)

The Case for the Prosecution

According to filed records, A&B Telemarketing had 32 formal complaints registered against it, to include violations of statutes regarding (l) obtaining money under false pretenses, (2) attempting to obtain money under false pretenses, (3) racketeering, (4) illegal wire tapping, and (5) aiding and abetting.

According to the statutes in the State of Nevada, elements of the crime of "Obtaining Money Under False Pretenses" are (l) the intent to defraud, (2) a false representation by the defendant, (3) reliance on the representation by the victim, and (4) that the victim in fact is defrauded. The purpose of the law is to punish for dishonesty, and to protect persons from fraudulent

representations which might induce them to part with their property. (Nev. Rev. Stat. 205.380)

It was interesting to study the trialogue among the prosecutor, the defendants and their legal representatives, and the judge. In the original draft of this paper, lengthy extracts from court records -- including an audiotape -- were reproduced, the purpose being to demonstrate how dependent upon the law and its interpretation each participant was. On the one hand, prosecution was anxious to demonstrate from the audiotape and other evidence, that not only were the words, expressions, and phrases intentionally selected so as to misrepresent the intentions of the institution, representatives of the institution also used voice inflection, tone, and volume to further misrepresent the intentions of the institution.

On the other hand, both defendants and their various representatives attempted to rely exclusively on the exact wording that was used. For example, numerous complainants contended that they were told the least they would "win" was a given sum of money ranging from as low as $700 to as high as $2,000. However, defense contended that what the complainants said was basically correct, i.e., that *were they to "win" the drawing*, they would receive a sum of no less than $700 and no more than $2,000. Subtle though this distinction was, it was established by the defense as the wording used by nearly every institutional representative. (Transcript of Defendant's Writ) The defense was quite adamant: "An offer to get someone to participate in a drawing *to be eligible* for a cash prize in that drawing is not a false representation." (Transcript of Defendant's Writ)

Obviously, what defense was attempting to demonstrate was that wishful thinking and a certain predisposition to win prevailed over the facts contained in the representation. When the complaining consumer chose to expect more than was delivered, the institution or its representative could not be held accountable for that behavior.

Another area of concern originated with the judge who asked that the prosecutor demonstrate just how the alleged victims were "defrauded." Prosecution replied that the victims used the cash prize in the calculation of the net cash flow that would accrue to the victims. That if the victims had not relied on or believed that he or she was guaranteed to win the cash prize, the price of the products would not have been acceptable and would not have been paid. The judge found for the prosecution that the alleged victim "relied on" the forthcoming cash prize and, hence, the institution was guilty of violating the "reliance portion of the law." However, the judge found for the defense that there was no "damage" since the alleged victim had expected to receive both the "net cash flow" and the pens, i.e., a "free lunch," and there is no such thing. The victim did receive the product and, hence, no damage was done but the victim had relied on a strong inclination to believe the cash prize was forthcoming.

A vital piece of evidence introduced by the prosecution was the audiotape produced by one of the complainants in which he transcribed the entire series of sales presentations which occurred over a series of four distinct telephone conversations with representatives of the institution, including one of the owners. Although the transcription document ran for twelve pages, only highlights will be critiqued at this time. It should also be noted that although twenty-three complainants were involved in the case, the proceedings of any one was fairly comparable to those of the other twenty-two. Several of the records were referred to as excellent examples, both for the prosecution and for the defense.

Without lengthy reference to the documents, it was evident throughout -- when the material was used by the prosecutor -- that wording, phrasing, innuendo, voice inflection, etc., were all instrumental in drawing the prospective consumer to believe that a cash prize was forthcoming and, hence, could be used by him or her in the calculation of the net cash flow. However, it was also evident throughout -- when the material was used by the defense -- that the letter of the law must be the determining factor in the decision of the jury. And, to the satisfaction of the two authors of this paper, the letter of the law prevailed -- but not necessarily the spirit of the law. Sometimes, however, this distinction was very subtle; and, at other times, not so subtle. The institutional representatives provided an abundance of objective information that could not be contended with: the product per se, the price, the dates and locations of delivery, etc. This factual, objective information was readily available and referred to throughout the presentation, with

more subjective, conditional kinds of statements inserted periodically. Perhaps this was by intent, but the net effect seemed to place the prospective consumer in a positive frame of mind, i.e., that everything that was said was factual . . . when, according to the prosecution, it was not.

Subsequent conversation was more troublesome to the authors. Whenever the consumer complained about not having received the prize (a check) as promised, the representative would skirt the issue and begin discussing the problems of modern day society, e.g., dependence on computer technology that does not always work, the difficulty in finding honest people who do what they say they are going to do, and appeals to patriotism within the context of the free enterprise system. (Perhaps tinsel in the radar?)

Additional conversation found the institutional representative skirting the issue by focusing on the positive attributes of the consumer, e.g., "good customer," "consumer loyalty," etc. or playing the consumer and the institution off against the role of government in their respective lives, e.g., "if I don't give this money to my good customers, I just have to give it to 'big government' and what they do not need is more of our money."

Another technique of the representative was to play one representative of the institution off against another since the consumer had, in fact, spoken to at least three or possibly even four different persons. The representative would contend that information provided either by the consumer or one of the prior representatives was never made available to the present representative, thereby, in effect, starting the process of delay all over again. The consumer was reaching a high level of dissatisfaction at this point, regardless of the communication breakdown in the system.

At this stage in the court records, it was noted, in particular from the audiotape, that the institutional representative stated that the complainant had participated in "seven or eight previous drawings and never won a #%& thing." This point was never emphasized by the defendants or their lawyers that this particular complainant had participated many times in these particular promotions, and *continued to participate*. Had not the consumer obtained a degree of satisfaction at least six or seven prior times sufficient to motivate the consumer to participate a seventh or eighth time? It has been said before, "You get me once, shame on you; but you get me twice, shame on me."

The next technique used by the institutional representative is what is called the "good guy, bad guy" technique. Here, the representative played the roll of the good guy, saying that he was anxious to see that the consumer got what he or she had coming to him or her, namely, a prize. Further, the representative expressed dismay that other representatives in the institution would act so irresponsibly, so insensitively, so uncaringly for as solid, a time-tested consumer as the one currently on the telephone. This representative was going to put this matter to rest by ensuring that the consumer be included in the next drawing and in such a way as to ensure receiving one of the prizes. The good guy then went on to promise that he would be in touch with the other representatives, re: bad guys, to ensure that they ceased and desisted from leading the consumer to incorrect conclusions, to using misleading expressions, etc.

Further, when this also failed to satisfy the consumer, the representative resorted to still another ploy, i.e., the hard-luck story about his having come from an extremely poor family where honesty, patriotism, and hard work often times received no recognition. Having come from such a background, he could fully empathize with the consumer and the latter's concern for cash flow, for promises made and possibly broken, for expectations unfulfilled, and for dreams unrealized. Indeed, the representative was on the cutting edge of patheticism.

When this last ploy failed to work, the representative became hostile, resorting to name-calling, suggesting that he knew the kind of consumer he was talking to: one who was greedy, expecting something for nothing, driving the representative's company into hard times by compelling it to come forth with unwarranted prizes. Needless to say, it failed to touch the consumer who attempted to conclude the conversation with the threat of being in touch with the postal authorities, the state attorney general, the Better Business Bureau, and the appropriate licensing authority.

Seeing this particular battle was lost, the representative attempted to make the best of a bad

situation by asking the irate consumer: "Didn't you enjoy the pen and pencil sets we sent you?" "Didn't we do what we said we were going to do?" "What if we send you back your #%& money and we'll forget the whole deal?" That concluded the conversation with the consumer abruptly hanging up the telephone.

This compelling evidence concluded the case for the prosecution. The various representatives of the institution had been charged with using numerous misleading techniques in obtaining as well as attempting to obtain money under false pretenses. The audiotape proved to be extremely condemning since it demonstrated the violation of both the letter of the law, i.e., the exact wording used by the representatives, and the spirit of the law, i.e., the use of voice inflection, volume, timing (pauses or rapid response), innuendo, and other non-verbal forms of communication to mislead the consumer to purchase the products. The prosecution rested its case.

The Case for the Defense

Many Satisfied Consumers: The Winners. The company records demonstrated that there were many satisfied consumers, including both the promotional award winners and repeat buyers. Inasmuch as the prosecution failed to bring any of these persons forward to bear testimonies, the defense contended: "The failure of the prosecutor to call forward any of the promotion winners who were identified to the grand jury during the testimony . . ." constituted failure on the part of the prosecutor to provide exculpatory evidence. It was the contention of defense counsel that ". . . these winners could have been easily identified and would have offered exculpatory evidence as mandated by NRS 172.165 . . ." (Nev. Rev. Stat. 172.165)

The defense further argued that "It is (the grand jury's) duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they shall order that evidence to be produced . . ." as required by law. (Nev. Rev. Stat. 172.145) And, finally, "If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury." (Petition) Further, although there was evidence presented that over $14,000 had been paid in prize money, no witnesses were brought before the grand jury to testify as to their winning a cash bonus promotion. (Petition)

Many Satisfied Consumers: The Repeat Buyers. Records demonstrate that A&B Telemarketing grossed considerable revenue over the period of its operation and that a major portion of this revenue was obtained from satisfied customers. The defense counsel argued that ". . . the lack of testimony from satisfied customers who did not win any cash bonus promotion but who appreciated and accepted the advertising specialty merchandise. . ." (some were even established repeat buyers) also constituted negligence on the part of the prosecutor who failed to bring forth this exculpatory evidence. Further, ". . . many customers other than those listed as alleged victims could have brought forth exculpatory evidence that could have possibly exonerated all the defendants (in the case). . ." (Petition)

Many Satisfied Consumers: At Least They Did Not Formally Complain. Records demonstrate that the institution had generated gross sales of $1,827,000 during the fiscal year ending March 31, 1987. It was mentioned earlier that the average "sale" for the institution was $239. Dividing this figure into the gross sales figures, one could safely conclude that A&B Telemarketing had sold its products to about 7,645 consumers (including repeat buyers). Using the prosecutor's own statement that for every formally complaining consumer there were 80 to 90 who chose not to complain despite being dissatisfied, there must have been at the most 2,093 dissatisfied consumers (23 formal complainants plus 23 X 90 = 2070 non-formal complainants). This would have left a balance of 5,552 consumers who must have been satisfied despite the vast majority of them not winning anything at all. Surely the court would have to give these satisfied consumers some credence had they only been called to appear before the jury. After all, they constituted 72.6 percent of the customers.

Defense counsel had contended that from the company's own records, 42% of all sales were canceled, returned to sender, stopped payment on checks, or checks were written with insufficient

funds. However, this would suggest that 58% of all sales were successful, i.e., accepted, paid for, and the checks cleared, resulting in the gross sales figure of $1,827,000.

The Verdict: Guilty as Charged Obtaining Money Under False Pretenses and Attempting to Obtain Money Under False Pretenses

A&B Telemarketing was created to engage in interstate commerce, using WATS lines to contact prospective customers outside the State of Nevada, in the selling of specialty advertising materials. Almost immediately, the Las Vegas District Attorney's Office, Major Fraud Division, and the Consumer Affairs Division of the Nevada State Department of Commerce began receiving complaints that awards promised both in telephone conversations and in writing had not been received. Ultimately, 23 complainants filed 32 formal complaints against the institution. This occurred over a period of about fifteen months during the years 1986 and 1987. The institution subsequently was charged with 34 counts, 24 of which were for "Obtaining Money Under False Pretenses," 8 for "Attempting to Obtain Money Under False Pretenses," 1 for "Racketeering," and 1 for "Illegal Intercept of Wire Communication." Eventually the institution was found guilty of 32 charges.

SUMMARY AND CONCLUSIONS: A HUNG JURY

A considerable amount of effort was expended in the early portion of this paper to establish the fact that numerous prominent companies have engaged in the production and marketing of products the results of which were consumer dissatisfaction and complaining behavior. The purpose of this effort was to establish deeply within the mind of the reader that isolated cases of consumer dissatisfaction and complaining behavior have not been the basis for major fines, penalties, imprisonment, or cease and desist orders. Rather, the various companies acted responsibly -- admittedly by degrees -- and went on about their businesses. In the instance of A&B Telemarketing, evidence was provided that many consumers were pleased -- to the extent of receiving cash awards -- and still many other consumers were pleased, despite not winning cash awards, to the extent that they placed repeat orders. It was alleged that many other consumers undoubtedly were not satisfied but were not sufficiently motivated to file complaints or step forward to testify. Undoubtedly thousands of customers were either satisfied or only modestly dissatisfied (7,645 total transactions less the 23 complainants and some number who chose not be involved). Only twenty-three customers actually filed formal complaints -- less than 0.3% of the total number of transactions (23/7,645) -- and came forward to testify in behalf of the prosecution. And yet the owners were fined tens of thousands of dollars and were ordered to cease and desist in their operations. Was justice rendered swiftly? Was justice tempered by mercy -- perhaps as in the cases of the major companies referred to earlier on in this paper? Or, was the legal system itself punitive in its own processes? Concerns still linger that despite evidence of an abundance of consumer satisfaction and for various reasons, the current legal system might need but a modicum of dissatisfaction and complaining behavior to intervene and shut a portion of the system down. Once again, can it not be agreed that no institution can be expected to please all the people all of the time, and might only be successful if it can please some or most of the people most of the time? As for the two authors -- the one a lawyer with a knowledge of the letter of the law, and the other a marketing professional with some sense of the spirit of the law and the total impossibility of pleasing all the consumers all the time -- they ended up a "hung jury."

REFERENCES

Associated Press, miscellaneous releases to the media, February and March, 1991.

Engle, James F., Roger D. Blackwell, and Paul W. Miniard (1990), "Consumer in Focus - The Decision was Easy: The Rely Withdrawal," in *Consumer Behavior*, 6th Edition, Hinsdale, IL: Dryden Press, 1990, Page 767.

Grimshaw vs. Ford Motor Company 174 Cal. Rptr. 348 (Cal. App. 1981).

Nevada Revised Statutes 172.145.

Nevada Revised Statutes 172.165.

Nevada Revised Statutes 205.380.

Petition for Writ of Habeas Corpus. (References are made

to court documents without specific detail in order to ensure the anonymity of the actual court case.)

Smith, Jonathan E. (1990), "Do the Right Thing: Ethical Principles and Management Decision Making," in *Advanced Management Journal*, Vol. 55, 4, Autumn, Pages 4-7.

Stanton, William J. and Chas. Futrell (1987), "Some Companies Have Acted in a Socially Responsible Manner; Some Have Not," in *Fundamentals of Marketing*, 8th Edition, New York: McGraw-Hill, Page 606.

Stern, Louis W. and Thomas L. Govaldi (1984), *Legal Aspects of Marketing Strategies: Anti-Trust and Consumer Protection Issues*, Englewood Cliffs, NJ: Prentice-Hall, pp 129-149.

Transcript of Defendant's Writ, Court Reporter's Transcript of Defendant's Writ.

Send correspondence regarding this article to:
J. Kent Pinney
College of Business and Economics
University of Nevada, Las Vegas
4505 Maryland Parkway
Las Vegas, NV 89154-6010