



American Conference Institute's 4th Advanced Forum on

Resolving & Litigating ADVERTISING DISPUTES

Adapting to increased regulatory scrutiny, accounting for the rise of class actions, and mounting or withstanding challenges to competitors via the Lanham Act or NAD

March 12-13, 2015 | The Carlton Hotel | New York, NY

Pre-Conference Workshops | March 11, 2015

GOVERNMENT OFFICIALS & RENOWNED JURISTS:

Jane M. Azia (invited)
Bureau Chief, Consumer Frauds & Protection
Office of the New York Attorney General

Aiesha L. Battle (invited)
Director of Division of Consumer Protection
New York Department of State

Hon. Michael M. Baylson
Senior Judge
United States District Court for the Eastern
District of Pennsylvania

Jennifer Fried
Assistant Director
National Advertising Division of the Council
of Better Business Bureaus

Hon. Faith S. Hochberg
District Judge
U.S. District Court for the District
of New Jersey

Richard P. Lawson
Director, Consumer Protection Division
Florida Office of the Attorney General

Darren Lubetzky
Federal Trade Commission
Northeast Region

Hon. Ann D. Montgomery
District Judge
U.S. District Court for the District
of Minnesota

William H. Sorrell
Attorney General
State of Vermont

INDUSTRY INSIGHTS FROM:

Lynne Bezikos
Senior Counsel
Philips Electronics North
America Corporation

David J. Calevski
General Counsel
Suarez Corporation
Industries

Ruth Lebed
Corporate Counsel
S.C. Johnson & Son, Inc.

Jennifer Malloy
Senior Counsel
Guthy-Renker LLC

Andrew Sacks
Vice-President, Legal
T-Mobile USA

Chrysse Spathas (invited)
Director – Commercial
Standards
ABC Inc.

Ted Suzuki
Deputy General Counsel
DIRECTV

Maria W. Votsch
Counsel, Consumer
& Marketing Practices
Sprint Corporation

Svetlana Walker
Corporate Counsel
The Clorox Company

Judy Woodford, Ph. D.
Group Leader –
Global Technical Claims
KAO Corporation

With increased scrutiny on advertising claims by the government, competitors, and the plaintiffs bar, the need to prevent the appearance of deceptive claims or refute allegations of deception is higher than ever. Join our faculty of government regulators and enforcers, judges, in-house counsel, and leading outside counsel in their discussions on:

- ▶ The difficulties in obtaining an injunction or demonstrating damages in Lanham Act litigation
- ▶ Bolstering compliance and monitoring practices to safeguard against missteps on social media or digital advertising
- ▶ Advanced scientific methods for substantiating claims and conducting consumer surveys
- ▶ Best practices for responding to FTC investigations and appearing before the NAD
- ▶ Successful strategies for litigating class action lawsuits
- ▶ And more....

PLUS two interactive pre-conference workshops on March 11, 2015:

- A** Federal Trade Commission and Deceptive Advertising Primer
- B** Competitor Challenges 101—Introduction to the Lanham Act and National Advertising Division

Modern advertising disputes are more contentious than ever are you prepared?

Today, with competitors, government agencies, and the plaintiffs class action bar breathing down their necks, companies must tread very cautiously when advertising their products. The FTC has ramped up its enforcement efforts in digital and traditional media across the board, especially relating to health or green benefit claims as well as the proper use of disclaimers. Also, recent Supreme Court and Courts of Appeals decisions have greatly impacted the procedures and strategies pertaining to Lanham Act cases and class action litigation, not the least of which are obtaining injunctive relief or challenging class certification, respectively. Along with the foregoing venues, the NAD remains an effective forum for dispute resolution.

In addition to the disputes brought in the foregoing bodies, an alarming trend continues: the specter of class action litigation following an FTC investigation, Lanham Act case, or NAD resolution looms over the parties. And, of course, the common and critical thread running through the foregoing is the overarching issue of what constitutes proper scientific evidence of claims. Ultimately, understanding how to navigate the modern advertising minefield will further compliance and cost-minimization goals of your company or client.

ACI's fourth advanced forum on **Resolving and Litigating Advertising Disputes** is designed to arm you and your team with the tools you need to minimize the risk of disputes at the outset, or to maximize success in bringing or defending against challenges to advertising claims. Topics for discussion include:

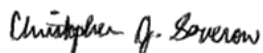
- ▶ Bolstering compliance and substantiation programs to avoid the appearance of deception
- ▶ Answering the call of FTC investigators and surviving investigations
- ▶ Best practices for bringing challenges via the Lanham Act or before the NAD
- ▶ Learning the priorities of state enforcers
- ▶ Understanding the science behind advanced consumer surveys
- ▶ Utilizing advanced techniques to combat class action lawsuits
- ▶ And more....

Prepare for the in-depth discussions at the conference by attending the pre-conference workshops. **Workshop A, the Federal Trade Commission and Deceptive Advertising Primer**, will provide an overview of the Federal Trade Commission's authority, and discuss the elements of deceptive advertising violations and the guidelines propounded to steer clear of them. **Workshop B, Competitor Challenges 101—Introduction to the Lanham Act and National Advertising Division** will detail the ins and outs of how to bring a challenge against a competitor for allegedly deceptive advertising practices either in federal court or before the National Advertising Division, respectively.

Attend this conference to prepare for the compliance and litigation challenges of the future. Don't delay—register now by calling **1-888-224-2480**, faxing your registration form to **1-877-927-1563**, or registering online at www.AmericanConference.com/AdvertisingDisputes.

I look forward to seeing you in New York this March!

Regards,



Christopher J. Soverow, Esq.
Legal Analyst & Conference Director

A

9:00 am – 12:00 pm

(Registration & Continental Breakfast begins at 8:30 am)

Federal Trade Commission and Deceptive Advertising Primer*Rodrick J. Enns*

Partner

Enns & Archer LLP

Steven Richter

Principal

Steve Richter Law

In recent years, the Federal Trade Commission (FTC) has made a decided shift from education to enforcement. New and old advertising mediums are facing increased scrutiny. This session will provide an overview of the FTC's structure and mission, summarize key regulatory guidelines, and address the available remedies and enforcement provisions available to the FTC.

- Introduction to the FTC
 - Describing its creation—when and why was it created?
 - Discussing the FTC's mission
 - Summarizing legislative revisions to the FTC's authority over the years
 - Outlining the FTC's current structure and scope of authority
 - Understanding the overlap between FTC and other governmental bodies' authority (e.g., the Food and Drug Administration, the Department of Justice, and States' Attorneys General)
- Outlining the stages of an FTC investigation and enforcement proceedings
- Summarizing key concepts relating to "deceptive advertising"
 - Content, context, and materiality
 - Unfair practices
 - Express versus implied
 - Claim substantiation
 - Disclosures and disclaimers
 - "Reasonable consumer" standard
- Identifying and summarizing key FTC guidelines governing, e.g.:
 - Disclosures and disclaimers
 - Endorsements and testimonials
 - Claim substantiation
 - Digital advertising
 - Labeling
 - "Green" products
- Discussing the remedies available to the FTC
 - Cease and desist orders
 - Corrective measures (advertisements, disclosures, etc.)
 - Civil penalties
- Addressing the FTC's post-remedial enforcement powers
 - Monitoring compliance with remedial orders
 - Examining the consequences for inaccurate financial disclosures—civil penalties and referral to the DOJ for criminal proceedings

Networking Luncheon for Attendees of Workshops A and B
(12:00 – 1:00 pm)

B

1:30 – 4:00 pm

(Registration begins at 1:00 pm)

Competitor Challenges 101—Introduction to Lanham Act, National Advertising Division, and Network Challenges*John G. Froemming*

Partner

Jones Day

Paul D. Rubin

Partner

Ropes & Gray

Chrysse Spathas

Director – Commercial Standards

ABC Inc.

Aggrieved companies can seek relief from a competitor's false or misleading advertisements in federal court via the Lanham Act, before the National Advertising Division of the Better Business Bureau (NAD), or by going to the network itself. Learn the basics of these proceedings in this exclusive session, including:

Lanham Act Litigation

- Background on the Lanham Act
- Discussing the basis of Lanham Act claims
 - Standing and the *Lexmark* case
 - Defining "false" or "misleading" advertisements
 - Delineating "sales talk" or "puffery"
 - Understanding the "commercial advertising" requirement
 - Distinguishing between "establishment" and "non-establishment" claims
- Marshalling evidentiary support for your claim or defense
 - Supporting or challenging establishment claims
 - Understanding the proper use of surveys
- Identifying available remedies

Practicing before the NAD

- Outlining the procedures for bringing and concluding an NAD challenge (e.g., pleading requirements, timeline for responses, stages of proceedings)
- Being mindful of the NAD's authority
 - NAD initiated investigations
 - Referral of matters to other agencies when the competitor refuses to participate
- Identifying key differences between NAD and court resolutions

Filing a Competitive Challenge at the Network

- Providing an overview of the challenge process at the Network
- Highlighting unique procedural requirements
- Discussing the relationship between the approval and challenge processes
- Identifying differences between procedures at the NAD and the Network

Main Conference Day One March 12, 2015

8:30 Continental Breakfast

9:00 **Co-Chairs Opening Remarks**

Edward F. Glynn, Jr.
Partner
Edwards Wildman Palmer LLP

Jennifer Malloy
Senior Counsel
Guthy-Renker LLC

9:15 **The Best Offense is a Good Defense—Bolstering Compliance Programs and Substantiation Practices**

Barry M. Benjamin
Partner
Kilpatrick Townsend & Stockton LLP

David J. Calevski
General Counsel
Suarez Corporation Industries

Maria W. Votsch
Counsel, Consumer & Marketing Practices
Sprint Corporation

Judy Woodford, Ph. D.
Group Leader – Global Technical Claims
KAO Corporation

- Discussing best practices for ensuring proper advertising in traditional media (i.e., print, radio, and television)
- Safeguarding against misuse of digital advertising mediums
 - Examining the FTC guidelines—what is clear and where is there room for confusion or possible enforcement?
 - Understanding the Digital Advertising Alliance's self-regulatory framework regarding online behavioral advertising
 - Highlighting and deriving lessons from disputes related to data security and online or mobile advertising
 - Demystifying how to make proper disclosures and disclaimers while using space constrained mediums (e.g., Twitter)
 - Discussing the proper use of endorsements and testimonials
 - Establishing checks and balances to ensure employees engage in proper online conduct
- Balancing speed to market with proper claim substantiation
 - Building an evidentiary stronghold to defend against attacks on your claims
 - Determining when to conduct market research
 - Developing consumer behavior and psychological evidence
 - Administering a clinical study
 - Tracking the benefits and detriments of internet surveys
 - Using consumer perception data

- Avoiding practice pitfalls relating to environmental, green, and health benefit claims
- Determining the best protocols for consumer testing and identifying industries with established protocols
- Distilling lessons from recent advertising challenges and any revealed weaknesses in substantiation processes
- Best practices for policing misuse of a company brand or misleading statements about a product
- Working with market researchers and experts to debunk competitor's claims

10:15 Morning Networking Refreshment Break

10:45 **Living under FTC Oversight—Minimizing the Risk of Enforcement, Responding to Investigations, and Developing Advanced Techniques for Stealing Defenses to Potential Class Actions**

Edward F. Glynn, Jr.
Partner
Edwards Wildman Palmer LLP

Darren Lubetzky
Federal Trade Commission
Northeast Region

Steven Richter
Principal
Steve Richter Law

Ted Suzuki
Deputy General Counsel
DIRECTV

- Discussing trends in FTC enforcement—what activities are being targeted as problematic?
- Identifying the problematic gray areas of pertinent FTC guidelines (digital media, disclosures, etc.)
- Supporting claims before the FTC
 - How many studies are required for there to be substantiation?
 - Comparing the FTC's standard for substantiating scientific claims with that of the FDA
 - Update on the status of *POM Wonderful* before the D.C. Circuit, and discussion on its First Amendment implications
- Analyzing recent enforcement actions by the FTC regarding disclosures
 - What lessons can be gleaned?
 - Under what circumstances is personal liability of corporate officers sought or obtained?
- Best practices for responding to FTC investigations
 - Identifying the purpose and meaning of FTC letters and requests
 - Informal letters
 - Formal CIDs and subpoenas
 - *Ex parte* TROs and subpoenas
 - Minimizing costs
 - Negotiating settlements with an eye toward potential class actions—are there clauses that can be added to deter follow-on claims?

- Discussing sample consent orders
 - What claims give rise to enforcement?
 - Which remedies are commonly ordered?
- Evaluating the effect of an FTC determination when used in subsequent litigation

12:00 Networking Luncheon

1:15 **Navigating the Lanham Act Litigation Frontier—Determining When to Bring Claims; Fighting for an Injunction; Obtaining Proper Relief**

Christopher A. Cole
Partner
Crowell & Moring

John G. Froemming
Partner
Jones Day

- Evaluating threshold considerations
 - Weighing the chances of success against potential public relations fallout
 - Evaluating the effect of any delay in bringing a claim
 - Planning out what evidence will be necessary to:
 - Prove or defend against a claim of confusion or falsity
 - Demonstrate financial harm or damages
 - Determining where to file
- Obtaining a preliminary injunction
 - What constitutes proof of irreparable harm?
 - Survey of decisions in which relief has been granted
- Streamlining discovery to lower costs and the burden on counsel
- Demonstrating actual or likely damages
- Effectively arguing for powerful relief from the court
 - Banning of the challenged and similar advertising, and countering mootness arguments
 - Requiring corrective advertising
 - Instituting product recalls
 - Disgorging profits
 - Obtaining compensation for lost profits
 - Examining circumstances in which attorneys' fees have been awarded
- Discussing the potential impact of the Supreme Court decision in *POM Wonderful v. Coca-Cola*
 - Evaluating whether the scope of potential competitor litigants has been expanded and to what extent the decision impacts other industries
 - Analyzing the intersection of FDA labeling requirements, Lanham Act litigation, and consumer class actions
- Avoiding post-Lanham litigation class actions

2:30 **Open Floor Q&A with FTC and Lanham Act Litigation Professionals**

In this unique session, attendees will have the opportunity to submit in advance or ask questions live pertaining to pressing practice issues in the FTC and Lanham Act litigation space. The speakers from the sessions above will draw on their extensive experience to provide real world solutions to the problems you encounter on the front lines of these complex legal arenas.

3:15 Afternoon Networking Refreshment Break

3:30 **View from the Bench—Insights from Judicial Venues on Claim Substantiation; Class Certification, How to Interpret Scientific and Statistical Evidence; Assessing Damages; and More**

Hon. Michael M. Baylson

Senior Judge
United States District Court for the Eastern District of Pennsylvania

Hon. Faith S. Hochberg

District Judge
U.S. District Court for the District of New Jersey

Hon. Ann D. Montgomery

District Judge
U.S. District Court for the District of Minnesota

5:00 Conference adjourns to Day 2

Day 2 Main Conference March 13, 2014

8:30 Continental Breakfast

8:45 Co-Chairs Opening Remarks

9:00 **NAD Keynote**

Jennifer Fried

Assistant Director
National Advertising Division of the Council of Better Business Bureaus

Ms. Fried will discuss standards for interpreting scientific evidence and trends in cases successfully resolved before the NAD.

9:30 **State Enforcers Spotlight**

Jane M. Azia (invited)

Bureau Chief
Consumer Frauds & Protection
Office of the New York Attorney General

Aiesha L. Battle

Director of Division of Consumer Protection
New York Department of State

Richard P. Lawson

Director, Consumer Protection Division
Florida Office of the Attorney General

William H. Sorrell

Attorney General
State of Vermont

Moderator:*Eric Kanefsky*

Partner

Calcagni & Kanefsky

(Former Dir. of NJ Division of Consumer Affairs; Former Asst. U.S. Attorney, Dept. of Justice, NJ)

Tasked with protecting consumers, state attorneys general or designated departments vigilantly review advertisements, offers, and customer outreach programs for elements of deception. The penalties for deceptive practices are steep. Hear from this distinguished panel as to what their enforcement priorities for 2015 and beyond will be.

10:45 Morning Networking Refreshment Break

11:00 **Strategies for Maximizing Success at the NAD and in Subsequent Proceedings***Kenneth A. Plevan*

Partner

Skadden, Arps, Slate, Meagher & Flom LLP

*Andrew Sacks*Vice-President, Legal
T-Mobile USA*Svetlana Walker*

Corporate Counsel

The Clorox Company

The NAD is an attractive venue for bringing advertising disputes—it can be more cost effective than litigation, its results are largely confidential, and it is an industry vested decision making body. However, it is not without its own risks: your challenge could fail, the decision could spawn class actions, or your opponent may not abide by the decision. In this session, experienced NAD practitioners will share their techniques for effective advocacy, including providing guidance on:

- Solidly establishing your claim's foundations
- Assessing what type of substantiation NAD will want
- Ensuring that your substantiation is a good fit for your claim
- Anticipating how much precedential value the NAD will give to prior decisions
- Navigating the appeals process
- Managing PR fallout should the challenge become public
- Utilizing expert witnesses and evidence effectively
- Developing strategies for deterring or preparing for follow-on class action litigation
- Leveraging an NAD decision in subsequent court proceedings should your opponent fail to abide by the decision

12:00 Networking Luncheon

1:15 **In-House Perspective—Choosing a Forum for Disputes; Managing Litigation Costs; Techniques for Training or Monitoring Employees; and Adapting to the Specter of Class Action Litigation***Lynne Bezikos*

Senior Counsel

Philips Electronics North America Corporation

David J. Calevski

Associate General Counsel

Suarez Corporation Industries

Ruth Lebed

Corporate Counsel

S.C. Johnson & Son, Inc.

Jennifer Malloy

Senior Counsel

Guthy-Renker LLC

Andrew Sacks

Vice-President, Legal

T-Mobile USA

- Determining where to bring an advertising dispute—arbitration, NAD, FTC, or federal court?
- Anticipating the effects and needs of bringing a dispute
 - Budgeting for experts
 - Preparing for counterclaims
 - Steeling your company for the possibility of PR blowback
 - Discussing what constitutes a “win”
- Safeguarding against claims of deceptive advertising
 - Tips on educating employees on regulations and guidelines
 - Establishing systems for monitoring employee's online promotional activities
- Acknowledging the elephant in the room—private class actions
 - Evaluating claims and defenses in light of what might be attractive to the plaintiffs bar
 - Discussing the need to budget at the outset of a challenge or investigation based on the possibility of subsequent class action litigation
- Controlling costs during litigation
 - Minimizing the burden of discovery
 - Working effectively with experts
 - Advising outside counsel on how better to support in-house counsel
- Top 5 issues that in-house counsel want their outside counsel to think about
- In-house pet peeves and concerns with outside counsel

2:30

Battle of the Experts—Deploying the Proper Scientific Methodology for Supporting or Challenging Claims*Sarah Butler*

Vice President

NERA Economic Consulting

Daniel M. Ennis, Ph. D.

President

The Institute of Perception

Bruce Isaacson, DBA

President

MMR Strategy Group

Robert Reitter

Senior Vice President

ORC International

This exclusive panel of expert witnesses will examine the methodology behind properly formulated surveys, as well as explore effective strategies for presenting scientific evidence to the decision-maker and for attacking an opponent's scientific evidence. The panel will describe the principles that support various types of surveys, and use real world examples to explain how these principles are executed and evaluated.

3:30 Afternoon Networking Refreshment Break

3:45 **The Ghost in the Darkness—Advanced Techniques for Defending Against Class Action Litigation**

Francis A. Citera
Shareholder; Co-Chair, Products Liability & Mass Torts Litigation Group
Greenberg Traurig, LLP

Neal H. Klausner
Partner
Davis & Gilbert, LLP

Trent H. Norris
Senior Partner
Arnold & Porter, LLP

Lawrence I. Weinstein
Partner
Proskauer Rose LLP

- Dissecting the scope of deceptive advertising claims
 - Identifying common issues ripe for litigation
 - Evaluating the efficacy of claims based on the medium of advertising (label, tv/radio/print commercial, website, video on social media, etc.)
- Are there lessons to be learned and applied from the “all natural” litigation against the food industry?
- Exploring the issue of class certification
 - Analyzing the effects of the recent Supreme Court decisions of *Dukes v. Wal-Mart* and *Comcast Corp. v. Behrend*
 - Evaluating the impact of *Carrera v. Bayer Corp.* (3d Cir.)
 - Debating the issues of standing (e.g., purchaser of single product suing on behalf of purchasers of “substantially similar” products)
- Observing performance levels of challenges to class certification—embracing effective arguments and discarding antiquated positions
- Conducting cost effective and strategic discovery
 - Negotiating e-discovery schedules—the advantages of agreeing to search terms and limiting custodians
 - Safeguarding trade secrets
 - Being vigilant of privacy issues (e.g., where survey data from Lanham Act litigation is demanded)
 - Knowing when to request court intervention
 - Analyzing the efficacy of bifurcating discovery, and identifying jurisdictions where bifurcation is preferred
- Considering settlement related issues
 - Noticing the class
 - Anticipating the number of claims
 - Identifying techniques for reducing fraudulent claims

5:00 Conference concludes

Who You Will Meet

Counsel from brand companies, and advertising agencies specializing in:

- Marketing
- Advertising
- Intellectual Property
- Entertainment
- Litigation
- Corporate Law
- Digital Media

Outside Counsel specializing in:

- Lanham Act Litigation
- FTC Investigations
- NAD Proceedings
- Advertising Substantiation and Surveys

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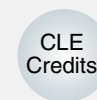
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Wendy Tyler

Head of Sales, American Conference Institute

Tel: 212-352-3220 x5242 | w.tyler@AmericanConference.com

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You are required to bring your state bar number to complete the appropriate state forms during the conference. CLE credits are processed in 4-8 weeks after a conference is held.

ACI has a dedicated team which processes requests for state approval. Please note that event accreditation varies by state and ACI will make every effort to process your request.

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American Conference Institute's 4th Advanced Forum on

Resolving & Litigating ADVERTISING DISPUTES



Adapting to increased regulatory scrutiny, accounting for the rise of class actions, and mounting or withstanding challenges to competitors via the Lanham Act or NAD

March 12-13, 2015 | The Carlton Hotel | New York, NY

Pre-Conference Workshops | March 11, 2015

Hear from in-house counsel from Philips, SC Johnson, T-Mobile, Sprint, DIRECTV, Clorox, and more on emerging litigation issues.

Government perspectives from:

- ▶ Jane M. Azia (Office of N.Y. Attorney General) (invited)
- ▶ Aiesha L. Battle (NY Dept. of State)
- ▶ Hon. Michael M. Baylson (E.D. Penn.)
- ▶ Jennifer Fried (NAD)
- ▶ Hon. Faith S. Hochberg (D.N.J.)
- ▶ Richard P. Lawson (FL Office of the Attorney General)
- ▶ Darren Lubetzky (FTC)
- ▶ Hon. Ann D. Montgomery (D. Minn.)
- ▶ William H. Sorrell (Attorney General, VT)

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Registration Fee

The fee includes the conference, all program materials, continental breakfasts, lunches and refreshments.

Payment Policy

Payment must be received in full by the conference date. All discounts will be applied to the Conference Only fee (excluding add-ons), cannot be combined with any other offer, and must be paid in full at time of order. Group discounts available to individuals employed by the same organization.

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You must notify us by email at least 48 hrs in advance if you wish to send a substitute participant. Delegates may not "share" a pass between multiple attendees without prior authorization. If you are unable to find a substitute, please notify **American Conference Institute (ACI)** in writing up to 10 days prior to the conference date and a credit voucher valid for 1 year will be issued to you for the full amount paid, redeemable against any other ACI conference. If you prefer, you may request a refund of fees paid less a 25% service charge. No credits or refunds will be given for cancellations received after 10 days prior to the conference date. **ACI** reserves the right to cancel any conference it deems necessary and will not be responsible for airfare, hotel or other costs incurred by registrants. No liability is assumed by **ACI** for changes in program date, content, speakers, or venue.

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