

June 19 – 20, 2012

Affinia Manhattan, New York, NY

**Pre-Conference Advertising Case Law Review:**

A Hands-On Examination of the Key Cases of the Past 12 Months, What They Mean for Advertising Practitioners, and the Impact on Litigation

**Post-Conference In-Depth Focus Session:**

Designing Consumer Perception Surveys That Can Withstand Competitor and Court Attack

*The Litigation Companion to ACI's Industry-Leading Forum on Advertising Law*

3<sup>rd</sup> Expert Forum on

# Litigating & Resolving Advertising Disputes

*Mitigating the risks of bringing and defending advertising challenges in an increasingly litigious environment*

## Judicial Insights



**Hon. Timothy C. Batten, Sr.**  
District Judge  
U.S. District Court  
N.D. Georgia (Atlanta, GA)



**Hon. Ruben Castillo**  
District Judge  
U.S. District Court  
N.D. Illinois (Chicago, IL)



**Hon. Jeremy Fogel**  
District Judge  
U.S. District Court  
N.D. California, Director  
Federal Judicial Center  
(Washington, DC)



**Hon. Lee Yeakel**  
District Judge  
U.S. District Court  
W.D. Texas (Austin, TX)

## Co-Chairs



**Ted Suzuki**  
Vice President and  
Deputy General Counsel  
DIRECTV, Inc.



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

Top members of the advertising bar will **share their expert strategies for bringing and defending advertising suits** and help you:

- **READY** your litigation arsenal for the increasing trend of consumer class actions
- **SUCCEED** in NAD proceedings by effectively advocating your claim
- **MITIGATE** the risks of discovery abuse
- **SCRUTINIZE** your internal review process and support of the advertising in question
- **UTILIZE** recent consent orders to ascertain the government's position on the marketing of food
- **SAFEGUARD** your logos and trade dress from patent, trademark and copyright infringement
- **COORDINATE** a global advertising litigation strategy
- **DEVELOP** surveys that capture the impact of false or deceptive ads on consumer perceptions and behavior

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## Class certification raises the stakes tremendously – Are you prepared?

A disturbing trend has emerged in false advertising litigation – plaintiffs are filing class action lawsuits that rely heavily on FTC complaints and NAD decisions. These “piggyback” suits threaten a brand’s credibility and can cost millions of dollars in settlement. As pressure on advertisers continues to mount, now is the time to revisit your litigation tactics. American Conference Institute’s **3<sup>rd</sup> Expert Forum on Litigating and Resolving Advertising Disputes** has been specifically designed to help advertising litigators resolve their biggest challenges.

## Find out the most effective strategies for protecting the company’s brand

In this competitive economy, more and more companies are developing an aggressive approach by attacking their competitors in the hopes that they can either protect their market position or capture additional market share. And as litigation costs continue to skyrocket, the NAD has become a preferred venue to resolve these disputes. **Hear directly from the NAD** as the agency shares its expectations for dispute resolution, as well as tips for staying out of the litigation crosshairs.

**New this year, practitioners and outside counsel will use a hypothetical fact pattern to take you through the stages of an advertising litigation case – from pre-discovery, to trial and on to settlement. This new conference component will provide practical tools that you can bring directly to your office.**

## Workshops Increase Conference Learning

In the past year, there has been a large volume of advertising suits, making it cumbersome for the attorneys to keep track of each latest development. Join our expert for the **Pre-Conference Advertising Case Law Review: A Hands-On Examination of the Key Cases of the Past 12 Months, What They Mean for Advertising Practitioners, and the Impact on Litigation**, where you will hear up to the minute developments, as well as analyze what recent decisions mean for the overall industry.

Consumer perception surveys have become a key tool in the advertising challenger’s toolkit. As each claim made in a commercial or print advertisement must be substantiated, these surveys enable the advertiser to glean exactly what a consumer thought or felt when seeing a specific ad. The post-conference **In-Depth Focus Session: Survey Says: Designing Consumer Perception Surveys That Can Withstand Competitor and Court Attack** will help you to gain a deeper understanding of how research and consumer perception surveys are utilized to provide support for a claim, and how to ensure surveys can withstand scrutiny in federal court.

With billions of dollars, potential liability and company reputation on the line in advertising disputes, you cannot afford to miss this conference. Ensure your place by calling **1-888-224-2480**, emailing [CustomerService@AmericanConference.com](mailto:CustomerService@AmericanConference.com); or visiting us online at [www.americanconference.com/advertisingdisputes](http://www.americanconference.com/advertisingdisputes).

Join the **ACI: Advertising Law** group on LinkedIn for latest updates!

### 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:

- False Advertising Litigation
- FTC Investigations
- NAD Proceedings
- Advertising Substantiation and Surveys

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Head of Sales, American Conference Institute

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Accreditation will be sought in those jurisdictions requested by the registrants which have continuing education requirements.

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## Pre-Conference Advertising Case Law Review

7:15 – 9:15 a.m. (Registration begins at 6:30 a.m.)

### A Hands-On Examination of the Key Cases of the Past 12 Months, What They Mean for Advertising Practitioners, and the Impact on Litigation



**Andrew B. Lustigman**

Partner, Olshan Grundman Frome Rosenzweig & Wolosky LLP (New York, NY)

This pre-conference session is designed to provide you with a comprehensive review of the year's most important advertising cases. Counsel well-versed in these cases will engage you in an in-depth examination of the real-life impact of each case on advertising practice. Participants will learn what these cases reveal about trends in advertising litigation, the priorities for the FTC and NAD, as well as recommendations for how in-house counsel and practitioners can update their litigation strategies in response to recent developments.

8:30 Registration for the Main Conference Begins

9:30 Co-Chairs' Opening Remarks



**Ted Suzuki**

Vice President and Deputy General Counsel  
DIRECTV, Inc. (El Segundo, CA)



**Andrew Sacks**

Vice President, Legal  
T-Mobile USA (Bellevue, WA)

### *Cheery v. Happy*: Dissecting the Phases of an Advertising Litigation Suit From Discovery to Settlement

Hypothetical Advertising Litigation Scenario

*Using this hypothetical, practitioners will go through the ins and outs of a False Advertising case, delving into the key issues at stake during all phases of a trial.*

In 2011, Cheery Apple Juice, eager to hop on the healthy product bandwagon, launched a new line of "100% natural" juices. Cheery spent a lot of money to advertise the benefits of its juices, including improved energy levels and increased metabolism. Cheery also touted its flavor as better than its competitors (superiority). The ads did not clearly state that the juice was made from concentrate, or that other ingredients were added in order to enhance the juice's color. The juice proved to be very popular, but competitors began to raise questions about the health claims made in Cheery's advertisements. A competitor, Happy Juice launched a lawsuit citing unsubstantial health claims and irreparable harm stemming from comparative claims.

Happy wants to carry the suit to trial, and does not want to take its challenge to the NAD. It wants to offer into evidence an internet survey conducted to test whether consumers understood from the ads that Cheery is made from concentrate. The surveys concluded that the ads were misleading, and that consumers believe that apple juice not made from concentrate is better in terms of freshness, healthfulness, taste and purity, and that each of these categories is important to consumers considering whether to purchase a particular juice. You have just been hired as Cheery's litigation counsel. Despite the best efforts of both sides, a settlement could not be reached.

9:45 Pre-Litigation and Discovery Tactics



**Michael Eidel**

Partner  
Fox Rothschild LLP (Warrington, PA)



**Norman C. Simon**

Partner  
Kramer Levin Naftalis & Frankel LLP (New York, NY)



**Randi W. Singer**

Partner  
Weil, Gotshal & Manges LLP (New York, NY)

- Deciding whether to send a cease and desist letter
- Determining the best venue for your advertising dispute
  - NAD
  - federal court
    - temporary restraining orders
    - preliminary injunctions
    - jury cases
  - regulatory agency

- Considering whether and when to retain experts
- Working with your adversary to plan for the discovery process
- Obtaining evidence from the opposing party through traditional discovery devices and court assistance
- Mitigating the risks of discovery abuse
- Analyzing information gathered during e-discovery
- Determining whether to proceed if injunctive relief is denied

## 11:00 Morning Coffee Break

## 11:15 Buckle Up: We're Headed to Trial



**Maria W. Votsch**  
Counsel, Consumer & Marketing Practices  
Sprint Nextel (Reston, VA)



**Jessie F. Beeber**  
Partner  
Frankfurt Kurnit Klein & Selz PC (New York, NY)



**Christopher A. Cole**  
Partner  
Manatt, Phelps & Phillips LLP (Washington, DC)



**Kenneth A. Plevan**  
Partner  
Skadden, Arps, Slate, Meagher & Flom LLP (New York, NY)

- Establishing a false advertising claim under the Lanham Act
  - literally false vs. misleading claims
- Assessing what scientific and/or statistical issues are relevant
- Conducting legally admissible consumer perception surveys
- Proving that the superiority claims are literally false because the tests used are not sufficiently reliable to permit a conclusion that the juice is superior
- Developing alternative advertising in case your current ads are successfully challenged
- Scrutinizing your internal review process and support of the advertising in question
- Anticipating how the plaintiff will proceed and weighing potential defense tactics
  - identifying potential weaknesses in the plaintiff's case
- Making effective use of counterclaims
- Protecting privileged information
  - interactions with advertising agencies and other third parties
- Developing a consistent approach to internal & external communications about the lawsuit or the claims involved

## 12:30 Networking Lunch

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## 1:30 Evaluating When Settlement is Your Best Option

**W. David Hubbard**  
VP & Deputy General Counsel — Marketing  
Verizon (Basking Ridge, NJ)



**Stellman Keehnel**  
Partner, Chair, Seattle Litigation Practice  
DLA Piper (Seattle, WA)



**Gayle Rosenstein Klein**  
Principal  
McKool Smith (New York, NY)

- Deciding when to pull the plug following lack of success in the initial pleadings
- Ensuring effective coordination of settlement efforts between in-house and outside counsel
- Utilizing emergency defense procedural tactics to facilitate settlement of the case
- Negotiating the most beneficial provisions in potential settlement agreements
- Factoring concurrent proceedings into settlement strategies
- Identifying and negotiating key provisions in settlement agreements

## 2:45 Afternoon Refreshment Break

## 3:00 View from the Bench: Judicial Perspectives on Advertising Litigation



**The Honorable Timothy C. Batten, Sr.**  
District Judge  
United States District Court, N.D. Georgia (Atlanta, GA)



**The Honorable Ruben Castillo**  
District Judge  
United States District Court, N.D. Illinois (Chicago, IL)



**The Honorable Jeremy Fogel**  
District Judge, United States District Court, N.D. California  
Director, Federal Judicial Center (Washington, DC)



**The Honorable Lee Yeakel**  
District Judge  
United States District Court, W.D. Texas (Austin, TX)

### Moderated by:



**Amy Ralph Mudge**  
Partner  
Venable LLP (Washington, DC)

As Lanham Act litigation slowly increases to pre-economic crash levels, distinguished members of the bench will give you rare insights on how judges weigh key matters when presiding over advertising cases such as requests for injunctive relief and the validity of advertising claims. These jurists will also share what they look at when determining how to use FTC actions and NAD determinations.

## 4:30 Defining Advertising Injury: Protecting Coverage Rights When the Company is Sued for False or Misleading Advertising



**Stephen T. Raptis**  
Partner  
Manatt, Phelps & Phillips LLP (Washington, DC)



**David M. Simon**

Partner

Edwards Wildman Palmer LLP (Chicago, IL)

- Finding an appropriate policy for mitigating risks inherent to advertising your product
- Knowing what your policy covers
  - antitrust
  - copyright infringement
  - trade secrets
  - false advertising
- Ensuring the policy is worded to maximize what is covered
  - settlement of liability vs. fine
- Putting carriers on notice in a timely fashion
- Understanding the pitfalls of inadequate or no coverage for a very significant claim
- Uncovering what triggers coverage in lawsuits involving intellectual property
- How can an advertiser get the defense costs paid?
- Preparing for potential secondary litigation with your insurance carrier
- Understanding the policy's exclusions

5:30 Cocktail Reception Hosted By: **manatt**

## Day 2 – Wednesday, June 20, 2012

8:15 Registration and Continental Breakfast

8:45 **Co-Chairs' Opening Remarks**

9:00 **Sidestepping the Litigious Consumer: Preparing for the Explosion of Class Action Lawsuits**



**Michelangelo Troisi**

Senior Counsel & Director of Litigation and Risk Management  
Samsung Electronics America, Inc. (Ridgefield Park, NJ)



**Thomas E. Gilbertsen**

Partner

Venable LLP (Washington, DC)



**Simon J. Frankel**

Partner

Covington & Burling LLP (New York, NY)



**Courtland L. Reichman**

Partner

King & Spalding LLP (Atlanta, GA)

- Defeating class certification
- Working with the government to mitigate the risk of class actions
- Bracing for the use of FTC and NAD decisions as a launching pad for plaintiff's lawyers
- Determining when settling the suit is your best option to avoid "piggyback" classes
- Readyng your litigation arsenal for the increasing trend of class actions filed in State court

- responding to a flood of suits filed under State Consumer Protection and Consumer Fraud statutes
- Developing a proactive public relations strategy to counter the massive media attention on your product
  - internally containing the fallout
- Streamlining the discovery process by bringing discovery under the auspices of one court
- Applying court rulings to all of the company's advertising
- Utilizing the *Concepcion* case as a powerful defense against class actions
- Establishing which laws may be applied in a multi-state class action

10:30 Morning Coffee Break

10:45 **A 360 Degree View of an NAD False Advertising Challenge: Inside Strategies for Effectively Resolving Advertising Disputes**



**Andrew Sacks**

Vice President, Legal

T-Mobile USA (Bellevue, WA)



**Martin S. Zwerling**

Associate Director of Operations & Case Management  
National Advertising Division (New York, NY)



**Nancy J. Felsten**

Partner

Davis Wright Tremaine LLP (New York, NY)



**Ronald R. Urbach**

Chairman of the Firm, Co-Chair of the Advertising Marketing & Promotions Practice Group  
Davis & Gilbert LLP (New York, NY)

- Preparing for all potential legal pitfalls when rolling out a new advertising campaign
- Deciding the appropriate course of action when the results achieved through a cease and desist letter are unsatisfactory to the resolution of your claim
- Initiating a proceeding before the NAD
  - what can you reasonably expect to achieve?
  - what are the limitations of an NAD challenge?
  - estimating the resolution timeline
- Assessing the NAD's requirements for substantiation
  - establishing support for every reasonable interpretation of its statements
  - consumer perception
- Differentiating between the NAD and federal court requirements for a false advertising claim
- Complying with the NAD's decision in order to prevent future litigation or government enforcement
- Determining what components (if any) of the NAD record can be used in litigation
  - weight of evidence
  - demonstrating a perpetual course of conduct
- Exploring the interplay between NAD resolution and parallel litigation

12:15 Networking Lunch

1:15 **Protecting Your Mark: Defending Against the Unauthorized Use of Your Brand's Intellectual Property**

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**Jennifer DeMarco**  
General Counsel  
Allstar Products Group (Hawthorne, NY)



**Ted Suzuki**  
Vice President and Deputy General Counsel  
DIRECTV, Inc. (El Segundo, CA)



**Neal H. Klausner**  
Partner  
Davis & Gilbert LLP (New York, NY)

- Safeguarding your logos and trade dress from patent, trademark and copyright infringement
- Establishing an online monitoring process to mitigate trademark abuse on the Internet
- Shielding yourself from liability with tailored disclaimers
- Ensuring that marketing tactics do not violate the publicity rights of celebrities and other individuals
  - person's name or likeness, look-alikes, nicknames associated with a celebrity
  - examining recent cases to know what courts have said constitutes protected expression
- Understanding how courts will treat an infringement claim based on key words
  - *Rescuecom v. Google*
- Applying the trademark use test to internet advertising and social media platforms
- Determining the liabilities of social media platforms when a company's intellectual property is infringed upon online
- Compelling the infringer to remove content without litigation

2:30 **Food Fight: Developing a Strategy to Combat the Uptick in Litigation Challenging the Marketing and Labeling of Food Products**

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**Barry Benjamin**  
Partner  
Kilpatrick Townsend & Stockton LLP (New York, NY)



**Linda A. Goldstein**  
Partner, Chair, Advertising, Marketing & Media Division  
Manatt, Phelps & Phillips LLP (New York, NY)



**Steven A. Zalesin**  
Partner  
Patterson Belknap Webb & Tyler LLP (New York, NY)

- Drafting, evaluating and deciding on a proposed health benefit claim
  - factoring the increased expectations of the FTC and FDA into future marketing efforts
  - dissecting the standards for substantiating different types of health claims
    - ensuring adequacy of substantiation

- clearly identifying what information is required to adequately show substantiation that will withstand regulatory scrutiny
- study requirements
- Utilizing recent consent orders to ascertain the government's position on the marketing of food
  - proving health claims with at least two well-designed human clinical studies
  - adopting set standards for food advertising
- Preparing litigation strategies when the plaintiff is the FTC
  - what kind of relief does the FTC seek?
  - how high is the FTC-set bar?
- Substantiating comparative taste claims
  - double blind studies
  - serving food served in a way that is consistent with normal consumer use
- Taking extra precautions in how your food products are positioned toward children
  - proving that a child actually relied on the advertising

3:45 **Afternoon Refreshment Break**

4:00 **Coordinating a Global Advertising Litigation Strategy**

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**Michel Béjot**  
Partner  
Bernard-Hertz-Béjot (Paris, France)



**Subrata Bhattacharjee**  
Partner  
Heenan Blaikie LLP (Toronto, Canada)

- Taking into consideration the advertising laws of the countries in which you are launching campaigns
- Reconciling country specific claim substantiation protocols
- Retaining local counsel and ad agencies to draft country-specific compliant advertising copy
  - protecting your brand from widespread problems
- How to respond when a dispute with one country threatens your entire advertising campaign
- Utilizing recent NAD and UK decisions to plan post-production techniques, such as photo shopping
- Managing counsel from different jurisdictions to synchronize the global litigation strategy

5:00 **Conference Concludes**

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Because ACI provides many niche conferences annually, our events are a great way to discover a rich pool of highly qualified talent.

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The newly posted jobs will appear on the relevant sections of [www.americanconference.com](http://www.americanconference.com) and our partner sites, ensuring that your free job listing is visible to a large number of targeted individuals.

## Post-Conference In-Depth Focus Session

9:00 a.m. – 12:00 p.m. (Registration begins at 8:15 a.m.)

### Survey Says: Designing Consumer Perception Surveys That Can Withstand Competitor and Court Attack



**Sarah Butler**

Senior Consultant, NERA Economic Consulting (San Francisco, CA)



**Daniel M. Ennis, Ph.D.**

President, The Institute for Perception (Richmond, VA)



**Rodrick J. Enns**

Partner, Enns & Archer LLP (Winston Salem, NC)



**Christopher K. Larus**

Partner, Chair, Minneapolis IP Litigation Group, Robins, Kaplan, Miller & Ciresi L.L.P. (Minneapolis, MN)

In this era of aggressive advertising, you must show extrinsic evidence, usually in the form of a consumer survey, demonstrating that a material number of consumers took away a misleading message from the advertisement. This interactive workshop will enable attendees to hear directly from experts in survey creation and execution, who can help you develop a survey that withstands intense scrutiny in court.

- Assessing the need for a survey to identify the advertisement's implied claims
- Developing surveys that capture the impact of false or deceptive ads on consumer perceptions and behavior
- Evaluating the relationship between consumer purchasing decisions and particular product claims
- Choosing a viable, useful, and unbiased sampling methodology
  - Survey populations
  - use of control groups
  - question formats
  - statistical analysis
  - analyzing the effectiveness and credibility of online surveys
- Employing best practices for developing questionnaires and coding and analyzing data
  - the need for control groups
- Choosing the right survey expert(s) for the case who will withstand aggressive defense tactics
- Facilitating a neutral survey environment
- Understanding the scientific methodologies used by a third-party expert
- Introducing differing potential interpretations to the responses in the survey to cast doubt on the argument
- Protecting internal survey data from being used by the opposition as evidence
- Interpreting survey results to determine whether the company should withdraw, move forward or settle



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June 19 – 20, 2012 | Affinia Manhattan, New York, NY

The Litigation Companion to ACI's Industry-Leading Forum on Advertising Law

3<sup>rd</sup> Expert Forum on

# Litigating & Resolving Advertising Disputes

Mitigating the risks of bringing and defending advertising challenges in an increasingly litigious environment

PRE-CONFERENCE  
ADVERTISING CASE LAW REVIEW

A Hands-On Examination of the Key Cases of the Past 12 Months, What They Mean for Advertising Practitioners, and the Impact on Litigation

June 19, 2012 | 7:15 a.m. – 9:15 a.m.

POST-CONFERENCE  
IN-DEPTH FOCUS SESSION:

Survey Says: Designing Consumer Perception Surveys That Can Withstand Competitor and Court Attack

June 21, 2012 | 9:00 a.m. – 12:00 p.m.

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ATTENTION MAILROOM: If undeliverable to addressee, please forward to:  
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YES! Please register the following delegate for **Litigating & Resolving Advertising Disputes**

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Reservations: (212) 563-1800 or 1 (866) 233-4642

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