

American Conference Institute's 2nd Annual Forum on

Litigating and Resolving Advertising Disputes



Withstanding competitive and regulatory scrutiny and mounting successful challenges to competitors' claims

June 21-22, 2011

Millennium UN Plaza Hotel, New York

Hear Industry Insights From:

ABC	Johnson & Johnson
American Express	National Advertising Division
Clorox	NBC Universal
Dannon	Nissan North America
DIRECTV	Priceline
Duracell	The Princeton Review
Dyson	T-Mobile
Eli Lilly	Verizon
FedEx	Welch's
FTC	

A Who's Who of the nation's advertising bar will share their expert strategies for bringing and defending false advertising allegations and help you:

- UPDATE claim substantiation strategies to reflect the FTC's new position on health-related advertising
- DETER and respond to the increased threat of consumer class actions and State Attorney General investigations
- SELECT the most effective method for challenging a claim by a competitor
- SUCCEED in NAD proceedings with more effective claim advocacy tactics
- DEVELOP persuasive arguments for federal Lanham Act cases
- STRENGTHEN internal review processes and claim substantiation standards
- BRING your challenge directly to the major television networks

Featuring Enforcement Insights From:

Leonard Gordon
Director, Northeast Regional Office
Federal Trade Commission

Joy Feigenbaum
Deputy Superintendent for Frauds
& Consumer Services
New York State Insurance Department
(former Special Deputy Attorney General
for Consumer Frauds & Protection, N.Y.S.
Attorney General's Office)

David Monahan
Deputy Chief, Consumer Protection Division
Office of the Massachusetts Attorney General

Keynote Address:

Jennifer Ansbro Hale
Vice President, General Counsel & Secretary
Dyson, Inc.

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No. 2 tax preparer in the U.S. files a federal lawsuit alleging its larger rival maligned it with false advertising that incorporates several literally false, misleading and highly disparaging advertising claims
(*Wall Street Journal*, 1/31/11)

Class action lawsuit asks restaurant chain to stop misrepresenting its products and engage in a corrective advertising campaign (*Reuters*, 1/25/11)

Federal regulators sue the maker of a popular fruit drink, in a widening effort by the government to clamp down on food ads that tout specific health benefits. (*Wall Street Journal*, 9/27/10)

Never before have advertisers been so pressured by issues arising simultaneously with competitors, with state and federal regulators, and with consumers. At this uniquely trying time, marketing claims are the focus of inquiries by the FTC, investigations by state prosecutors, or a trigger for consumer class action claims. In addition, companies must keep track of initiatives seeking greater substantiation for certain types of advertising, and comply with new regulatory guidance. Meanwhile, wars between competitors continue to erupt that threaten market share and lead to bitter false advertising disputes and costly litigation.

LEARN THE MOST EFFECTIVE STRATEGIES FOR DEFENDING YOUR CLAIMS AND CHALLENGING MISLEADING STATEMENTS BY COMPETITORS

Counsel for brand companies must now focus on revising internal practices to meet the new standards that have been set by regulators, and be prepared to both bring and defend challenges to competitive claims. American Conference Institute has specifically designed its 2nd Litigating and Resolving Advertising Disputes conference to be an intensive and comprehensive guide for staying one step ahead of the latest legal exposures and risks, as well as providing effective tactics for success in the different forums where advertising claims are examined and resolved. In the current more litigious environment, it is vital to be prepared to advocate your case before the National Advertising Division (NAD), in the federal courts under the Lanham Act, and to respond effectively to regulatory scrutiny by the FTC. In addition, increasingly industry counsel must be prepared to resolve investigations by state enforcers, and to defend against consumer class action actions relating to the making of allegedly misleading claims.

PANEL FOCUSING ON INCREASED STATE ENFORCEMENT

This year's program will zero in on the increased amount of activity (including large recent settlements) taking place at the state enforcement level. A special panel including senior officials from the states of New York and Massachusetts and Ted Suzuki, Associate General Counsel of DIRECTV, will offer rare inside insights on how state laws are being applied in multi-state consumer protection actions and settlement negotiations.

ACI's conference will bring together industry leaders who will share with you their proven strategies and solutions for handling advertising disputes in the courts, at the NAD, at the FTC and directly with the major television networks. The program will feature an unprecedented in-house faculty including experts from companies on the front line of the current advertising debate including Verizon, Welch Foods, Dyson, Dannon, Priceline, FedEx, Clorox and other major brands. In a unique session, potential strategies will be examined for responding to recent conduct and pronouncements by the FTC, including consideration of whether to take an aggressive stance against the Commission.

You can add value to your attendance by taking advantage of our high-level interactive workshops. Master Class A, **Supporting Comparative, Health Benefit, and other Hot Button Claims: Interactive Workshop on Substantiating Ads that Attract Extra Scrutiny** is designed to offer very timely guidance on navigating the FTC's new take on health-related claims and other areas of heightened risk for advertisers. At the Advertising Counsel **Advanced Luncheon Workshop on Defending & Challenging Consumer Surveys**, you will gain a deep understanding of how research and consumer perception surveys will be scrutinized when a conflict arises, in a hands-on session conducive to networking with peers from other brand companies.

This industry-leading event will provide you with the strategies, tactics, and insights that are critical to protecting your client's brand. 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

Who You Will Meet

- ✓ Counsel from brand companies, including:
 - Marketing Counsel
 - Advertising Counsel
 - General Counsel
 - Litigation Counsel
 - Regulatory Counsel
 - Corporate Counsel
- ✓ Outside counsel specializing in:
 - False advertising litigation
 - FTC investigations
 - NAD hearings
 - Advertising substantiation and surveys
 - Consumer class actions
 - State attorney general investigations

Global Sponsorship Opportunities

With more than 500 conferences in the United States, Europe, Asia Pacific, and Latin America, American Conference Institute (ACI) provides a diverse portfolio devoted to providing business intelligence to senior decision makers who need to respond to challenges spanning various industries in the US and around the world.

As a member of our sponsorship faculty, your organization will be deemed as a partner. We will work closely with your organization to create the perfect business development solution catered exclusively to the needs of your practice group, business line or corporation.

For more information about this program or our global portfolio of events, please contact:

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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. This course is identified as nontransitional for the purposes of CLE accreditation.

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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.

Questions about CLE credits for your state? Visit our online CLE Help Center at www.americanconference.com/CLE

Tuesday, June 21, 2011

8:15 **Registration and Continental Breakfast**

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

Nancy Dowling
Associate General Counsel
The Dannon Company

Po Yi
Vice President & Chief Advertising Counsel
American Express

9:15 **In-House Counsel Think Tank: Sharing Perspectives on Dispute Assessment and Advertising Challenges**

Nancy Dowling
Associate General Counsel
The Dannon Company

Steven Tugentman
SVP & Deputy General Counsel
Verizon Communications

Svetlana Walker
Corporate Counsel
The Clorox Co.

Phyllis Wallitt
Vice President and Associate General Counsel
Priceline.com Inc.

- Identifying the proper concerns for brand counsel relating to the waging of more aggressive advertising strategies
 - assessing what may trigger a dispute and push a competitor to take legal action
 - projecting potential costs and revenue at risk if an advertising campaign must be withdrawn or defended
 - evaluating what types of marketing may attract greater regulatory attention
- Navigating the relevant science behind your products and related product benefits claims
- Determining the proper response to claims by competitors
 - estimating damage to your market share from a competitive claim
 - making an early assessment of the strength of your position
 - assessing potential gains and risks in initiating a claim substantiation battle
- Anticipating what can prompt consumer class action litigation
- Assessing whether it is possible to make the weak below the radar cases go away at minimal cost
 - examining whether your insurance coverage will cover claims for false advertising
- Public relations concerns especially in light of rapid information-sharing on the web

10:30 **Morning Coffee Break**

10:45 **Takeaways and Strategies for Factoring a More Activist FTC into Your Advertising Practices**

Leonard Gordon
Northeast Regional Director
Federal Trade Commission

Edward Shin
Senior Corporate Counsel
Welch Foods Inc.

John Villafranco
Partner
Kelley Drye & Warren LLP

- Scrutinizing the increased level of interest by the Commission in advertising practices
 - looking at the FTC's priorities under Director David Vladeck
 - have recent FTC positions raised the bar for advertisers?
 - are more specific evidentiary requirements for claims being imposed?
 - does the FTC's recent interaction with companies indicate that it is requiring advertisers to obtain FDA approval before making certain types of health related claims?
- Drilling down to identify what the FTC is now seeking by examining the terms contained in recent consent judgments
- Considering whether the FTC has gone beyond its authority, and changed the substantiation doctrine
- Predicting whether the courts will go along with recent FTC positions
- Anticipating forthcoming focus areas for the FTC and what types of claims will be on its radar
- Examining FTC interaction with other agencies and state AGs
 - recent collaboration with the FDA

11:45 **Controlling Litigation Risks by Revisiting and Updating Standards for Your Claims**

Craig Bloom
Vice President, Legal Affairs
NBC Universal Media, LLC

Andy Eckstein
Global Counsel
Duracell

Kristen Marchesiello
Broadcast Standards Review Specialist
ABC

Gina Shockley
Associate Consultant
Eli Lilly & Co.

Moderator:

Barry M. Benjamin
Partner
Kilpatrick Stockton LLP

- Examining whether recent advertising challenges revealed weaknesses in substantiation processes
- Identifying what type and quantity of evidence may now be deemed sufficient to support different types of claims
 - anticipating areas where companies need to meet higher expectations
- Enhancing your position by strengthening claim substantiation policies
 - determining when to conduct market research
 - fitting a survey for a particular purpose
 - designing a clinical study
 - developing consumer behavior and psychology evidence
 - using consumer perception data
- Assessing the reliability of your data
 - concerns relating to internet surveys
- Trouble-shooting for "hot button" claims and ensuring that compliant statements are made

- improving internal processes for ensuring accuracy of claims
- knowing what not to say when making specific product benefit claims
- Working with market researchers and experts to debunk competitor's claims

12:45 **Networking Luncheon**

2:00 **NAD? Federal Court? Determining Whether and Where to Challenge Your Competitors' Ads**

Bradley Peacock
Senior Counsel
FedEx Corporation

William J. Whalen
Senior VP
Nissan North America, Inc.

Ronald Urbach
Partner
Davis & Gilbert LLP

- Exploring options for resolving disputes short of legal action
 - techniques for utilizing relationships with competitors
 - drafting effective cease and desist letters
 - employing public relations initiatives
 - weighing when it makes sense to ignore the competitor
- Determining whether to complain to regulators
 - pros and cons of bringing a matter to the FTC, or other federal or state regulators
 - constructing a compelling case against your competitor
 - assessing the likelihood that federal or state regulators will take action
- Working with the television networks to have a campaign removed
- Understanding the pros and cons of initiating a proceeding before the NAD
 - estimating the timelines
 - determining what you can expect to achieve
 - knowing what you need to support your case
 - considering how the courts view the NAD
- Evaluating whether to bring a Lanham Act false advertising case in federal court
 - comparing substantive and procedural differences in federal court vs. NAD
 - availability of types of potential relief
 - likelihood of securing a preliminary injunction or other remedies
 - costs and risks
 - demands upon resources if litigation is pursued
 - concerns relating to potential counter-claims
- Factoring in strategies for initiating a settlement
 - settling before a judicial ruling has been rendered
 - navigating procedural tactics that seek to facilitate settlement of the case on your competitor's terms
 - impact of concurrent proceedings on potential settlement

3:00 **Afternoon Refreshment Break**

3:15 **Winning Your Lanham Act Case in Federal Court: Plaintiff and Defense Success Strategies**

Kathryn A. Meisel
Assistant General Counsel
Johnson & Johnson

Roger A. Colaizzi
Partner
Venable LLP

Christopher Cole
Partner
Manatt, Phelps & Phillips LLP

Norman C. Simon
Partner
Kramer Levin Naftalis & Frankel LLP

For Plaintiff:

- Determining the key elements for putting together a winning advertising case under Section 43(a)
 - assessing what scientific and/or statistical issues are relevant
 - assembling the proper team for effective litigation
- Selecting the most appropriate or receptive venue
- Anticipating potential issues relating to your standing to bring the claim
- Factoring remedies under analogous state statutes and potential preemption arguments into your strategy
- Tailoring your position to what arguments are likely to be most effective
 - knowing what complex marketing and scientific principles will be most understandable to the court
- Assessing the likelihood of proving that a competitor's claim is literally false
- Pursuing effective and rapid discovery
- Seeking a preliminary injunction
- Determining whether to proceed if injunctive relief is denied
- Meeting the burden of proving that a challenged claim has false or misleading implications
 - understanding the applicable standards of proof
 - identifying and presenting necessary data or proof for attacking the claim
 - constructing surveys that properly address the relevant issues
 - optimizing use of surveys and experts
- Challenging claims in the disputed advertisement that refer to studies or proof
- Effectively arguing for powerful relief from the court
 - banning of the challenged advertisement
 - requiring corrective advertising
 - mandating product recalls
 - securing lost profits, enhanced damages and attorney's fees

For Defense:

- Scrutinizing your internal review process and support of the advertising in question
- Assessing the potential scope and impact of the claim
- Anticipating how the plaintiff will proceed and weighing potential defense tactics
- Identifying weaknesses in the plaintiff's case and defending the false advertising claim
 - arguing against standing
 - scrutinizing use of surveys
 - challenging experts
 - countering arguments relating to lost sales or profits
- Making effective use of counterclaims
- Protecting privileged information
 - interactions with advertising agencies and other third parties
- Seeking appellate review of trial court determinations
- Negotiating the most beneficial provisions in potential settlement agreements

4:30 **View from the State Trenches: Being Prepared for Stepped-Up State Consumer Inquiries into Advertising Practices**

Joy Feigenbaum

Deputy Superintendent for Frauds & Consumer Services
New York State Insurance Department
(former Special Deputy Attorney General for Consumer Frauds & Protection, New York State Attorney General's Office)

David Monahan

Deputy Chief
Consumer Protection Division
Office of the Massachusetts Attorney General

Ted Suzuki

Associate General Counsel
DIRECTV

Michael Mallow

Partner
Loeb & Loeb LLP

More consumer protection actions relating to advertising claims are being brought by state enforcement officials, creating yet another arena where companies face potential vulnerabilities and risks. In this session leading regulators and industry counsel will examine this area of increasing concern for advertisers and provide insights on:

- Recent trends in the types of challenges brought by State Attorney Generals
- How different types of state laws relating to trade practices and consumer protection are being applied to advertising campaigns
- Collaborations between the state AGs and the FTC and other states
- The potential role played by plaintiff law firms in inquiries by state authorities
- Resolution and settlement negotiations

5:30 **Cocktail Reception**

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Wednesday, June 22, 2011

8:15 **Continental Breakfast**

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

9:15 **Deterring and Defending Against the Growing Nightmare of Consumer Class Action Litigation**

Angel A. Garganta

Partner
Arnold & Porter LLP

Ronald Rothstein

Partner
Winston & Strawn LLP

Recently, plaintiffs have increasingly tried to use NAD decisions, FTC consent orders and FDA warning letters as evidence in follow-on consumer fraud class actions. In this session we will address how companies can meet this challenge, by deterring and defending against such private actions.

- Takeaways for brand counsel from recent false advertising class action lawsuits
 - identifying whether/how the consumer fraud class action followed an earlier dispute
 - examining if some companies may have inadvertently facilitated follow-on actions
 - assessing the low entry barrier for filing plaintiff suits
- Analyzing the impact of Dannon and other settlements in stimulating new plaintiff claims
- Understanding recent judicial views on class certification
 - where courts have found that misleading advertising practices create "common questions"
 - potential defense arguments for requiring that plaintiff demonstrate individual reliance by each member of the class on the advertisement in question
 - individual factors that may require separate hearings for each class member
- Assessing what law may be applied in a multi-state class action
- Anticipating which side will bear the burden of proof
 - when defendants may be required to provide adequate substantiation for the challenged claim
- Incorporating deterrence of follow-on class actions in your strategies for resolving disputes between competitors and regulatory inquiries
 - specific language for use in negotiating settlement terms
- Settling a consumer class action :
 - timing the settlement offer
 - negotiating favorable terms
 - payment of attorneys fees
 - understanding whether the settlement will send a message that may stimulate further litigation

10:15 **Morning Coffee Break**

10:30 **Keynote Remarks**

Jennifer Ansbro Hale

Vice-President, General Counsel & Secretary
Dyson Inc.

11:00 **Inside Strategies for Effectively Utilizing the NAD to Resolve Advertising Disputes**

Kathleen Dunnigan

Staff Attorney
National Advertising Division

Linda Goldstein

Partner
Manatt, Phelps & Phillips LLP

Bringing a dispute to the National Advertising Division (NAD) can be a less costly way to achieve your desired results. To succeed in this venue, however, practitioners must have an expert understanding of the distinct nuances of NAD proceedings. In this session, experienced NAD practitioners will share their insider techniques for effective advocacy. They will provide 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
- Turning the tables: emerging with a strengthened position after being taken to the NAD by a competitor
- Navigating the NAD appeals process

12:00 **From Suing the Government to Negotiating a Consent Order: What You Need to Know When Facing an Attack by Regulators on Your Advertising**

Jeffrey D. Knowles
Partner
Venable LLP

Steven Steinborn
Partner
HoganLovells LLP

Some companies have been seeking relief in the federal courts when believing that their rights have been violated by regulators, and the industry has seen interesting questions raised as to whether a company can directly challenge conduct by the FTC that stems from inquiries involving marketing by other companies. This unique session will provide strategic guidance and negotiating strategies that will enable you to select the most effective option for your company, when your advertising comes under regulatory scrutiny.

- Identifying the purpose and meaning of regulatory letters and requests
 - informal letters from FTC staff
 - cease and desist letters from state attorney generals
 - formal CIDs and subpoenas
 - ex parte TROs
- Tactics for effectively defending your product claims
 - responding to requests for evidence on substantiation
 - responding to public allegations
- Bargaining for the best terms in proposed FTC or state AG consent orders
- Minimizing downstream risk exposure and follow-on litigation
 - looking at how courts weigh charges brought by the FTC
 - limiting the scope of admissions to deter consumer class actions
- Meeting challenges raised by parallel proceedings
 - concurrent state and federal actions
 - private suits and class actions
 - NAD proceedings
- Assessing your chances for success in a suit against the government
 - examining issues relating to standing to sue
 - dissecting concerns relating to the FTC's handling of the Nestlé Healthcare Nutrition and Iovate Health Sciences USA settlements and whether they constitute standing for third-parties
 - comparing the different requirements for standing in the Circuit Courts
 - analyzing instances where the courts have examined the chain linking alleged damages to the advertising in question or regulatory restrictions to be too tenuous
- Making and supporting a claim that an agency overstepped its authority
 - factoring in concerns over potential fall-out from the litigation in future interactions with the agency

1:00 **Networking Luncheon**

2:15 **Clearing Ads for Television and Making an Effective Case Directly to the TV Networks**

Jennifer Santos
Vice President, Ad Standards
NBC

Chryse Spathas
Director – Commercial Standards
ABC

Lynn K. Neuner
Partner
Simpson Thacher & Bartlett LLP

- Understanding the substantiation requirements for advertising on television
 - express and implied claims that must be substantiated
 - internal network provisions and examples of the networks' advertising standards
- Determining when to file challenges with the major networks
- Navigating their internal processes
- Meeting initial requirements for pursuing a challenge
 - necessity of attempts to resolve the matter first directly with a competitor
- Understanding how the respective networks apply their standards in practice
 - confidentiality of the proceedings
 - identifying practical considerations and potential time frames
 - anticipating the challenges for counsel
- Drafting your response when a competitor goes to the networks about your ad

3:15 **Afternoon Refreshment Break**

3:30 **War Stories and Survival Lessons: Learning from Advertising that has been the Focus of Recent Adversarial Proceedings**

Gabriel T. Martinez
Advertising Counsel
The Clorox Company

Andy Sacks
VP, Legal Affairs
T-Mobile USA

Andrea Lewis Allan
Vice President & Assistant General Counsel
The Princeton Review, Inc.

Terri Seligman
Partner
Frankfurt Kurnit Klein & Selz PC

This session will examine several advertisements (television, internet, and print) that were the subject of adversarial proceedings during the past year to identify the elements that caused the challenger to file the action and extract the potential legal lessons for brand attorneys and litigators.

- What was the challenger's problem?
- What was it about this particular ad that caused the dispute to escalate?
- What type of evidence was presented during the proceedings?
- Who won and why?
- Identifying hot button issues and takeaways
 - use of testimonials and endorsements
 - concerns relating to "green" claims in advertisements
 - potential strategies for better controlling risks when mounting aggressive campaigns

4:30 **Conference Adjourns**

POST-CONFERENCE MASTER CLASSES

Thursday, June 23, 2011

A. Supporting Comparative, Health Benefit, and other Hot Button Claims: Interactive Workshop on Substantiating Ads that Attract Extra Scrutiny

9:00 a.m. – 12:00 p.m. (Registration at 8:30)

Nancy Dowling
Associate General Counsel
The Dannon Company

Gabriel T. Martinez
Advertising Counsel
The Clorox Company

Steven Steinborn
Partner
HoganLovells LLP

This master class will provide an unparalleled opportunity for you to respond to the high level of scrutiny being directed at certain types of ads. Using a hands-on, problem solving approach to meeting this challenge, the faculty will share proactive techniques for integrating lessons from recent decisions and settlements that reflect newly emerging substantiation standards for supporting these hot button claims. Special attention will be paid to the FTC's new take on health-related advertising and how future health claims should be substantiated.

- Delineating the current FTC position and other regulatory requirements for different types of claims
 - comparing current statements and policy set by FTC officials in recent enforcement matters to the prior standard for claim substantiation
 - understanding when a claim now must be cleared through FDA's pre-market clearance procedures
 - stances taken by State Attorney Generals
- 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
 - clearly identifying what information is required to adequately show substantiation that will withstand regulatory scrutiny
 - study requirements
- Updating the types of support you need for comparative claims to reflect recent NAD positions and court cases
- Identifying how implied claims and consumer interpretations can affect substantiation

B. Advertising Counsel Advanced Luncheon Workshop on Defending and Challenging Consumer Surveys

12:15 p.m. – 3:15 p.m. (Registration at 12:00)

Lawrence Weinstein
Partner
Proskauer Rose LLP

Norman C. Simon
Partner
Kramer Levin Naftalis & Frankel LLP

Attendees at this working luncheon will gain a unique perspective on when research and consumer surveys will hold up to support a claim, and when they will be undermined by counsel and exposed to be deficient. The interactive setting will be conducive to sharing of effective techniques and networking with peers.

For Plaintiff:

- Designing research and consumer perception surveys that can withstand attack
 - choosing a viable, useful, and unbiased sampling methodology
 - employing best practices for developing questionnaires and coding and analyzing data
 - choosing the best control
 - learning from mistakes made where surveys have not stood up to close scrutiny
- Interpreting the responses in the survey in a bullet-proof manner to support your case
- Choosing the right survey expert(s) for the case who will withstand aggressive defense tactics
- Ensuring the internal survey is not used by the opposition as evidence

For Defense:

- Questioning the methods and protocol of the survey
 - digging deep: attacking the survey as flawed based on biased, leading or ambiguous questions
 - critiquing the reliability of an internet survey
- Undermining the expert's approach, including his or her choice of control
- Introducing differing potential interpretations to the responses in the survey to cast doubt on the argument



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ACI understands that gaining perspectives from – and building relationships with – your fellow delegates during the breaks can be just as valuable as the structured conference sessions. ACI strives to make both the formal and informal aspects of your conference as productive as possible.

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Post-Conference Master Classes June 23, 2011:

- A. Supporting Comparative, Health Benefit, and other Hot Button Claims: Interactive Workshop on Substantiating Ads that Attract Extra Scrutiny
- B. Advertising Counsel Advanced Luncheon Workshop on Defending & Challenging Consumer Surveys

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