FALSE ADVERTISING 
DISPUTES & LITIGATION 

Identifying, analyzing, and mitigating risks of bringing and defending false advertising allegations

DISTINGUISHED CO-CHAIRS

Christopher A. Cole
Partner
Manatt, Phelps & Phillips, LLC (Washington, D.C.)

Matthew Frank
Global Marketing Counsel
Hill’s Pet Nutrition, Inc. (Topeka, KS)

SPOTLIGHT SPEAKER

C. Steven Baker
Midwest Director
Federal Trade Commission

FEATURING EXCEPTIONAL FACULTY, INCLUDING INDUSTRY LEADERS FROM:

AT&T (invited)
Cricket Communications
Element 79
Federal Trade Commission
Guideline
Hill’s Pet Nutrition
The Institute for Perception
Ocean Spray
National Advertising Division (NAD)
Rand McNally
T-Mobile
and many others

Prominent attorneys in the advertising industry will provide strategies, tactics, and solutions for:

- DETERMINING the appropriate forum for your false advertising claim — the courtroom, NAD, or FTC
- EVALUATING the accuracy, admissibility, and impact of an advertising survey
- QUANTIFYING the intangible damage caused by an allegedly false advertisement
- DECIDING the appropriate type of relief to request in a false advertising dispute or litigation
- STRENGTHENING the company’s review procedure to protect against false claims in the marketplace
- CRAFTING an effective plan to confront advertising issues surrounding user-generated content
- DEFENDING effectively against a competitor’s allegation of false advertising

MASTER CLASS: WEDNESDAY JUNE 25, 2008

From the Court of Public Opinion to the Courtroom — Executing Your Game Plan for a False Advertising Case

Sponsored by: manatt
With a company’s reputation, integrity, and billions of advertising dollars at stake, false advertising claims command the instant attention of advertising counsel. And with brave new worlds like user-generated content, all companies face new challenges in bringing and defending false advertising claims. Developing a strategy for dealing with false advertising allegations is critical for any company’s business plan.

Advertising power is massive; but its power is diminished by a failed lawsuit, an adverse FTC ruling, or a lengthy cost-prohibitive legal process. The questions are complex; the answers, elusive. Which forum do you choose for your false advertising claim? What is the true impact of a survey in the courts? How do you define ‘advertising’ in a word-of-mouth scenario?

ACI’s False Advertising Disputes & Litigation conference will focus on the critical information that companies and their counsel need to successfully bring and defend false advertising allegations. Industry leaders will discuss their proven strategies, substantial experience, and potential solutions for handling false advertising claims in the courts, at the NAD, and at the FTC.

Moreover, the exclusive Master Class: From the Court of Public Opinion to the Courtroom — Executing Your Game Plan for a False Advertising Case will complement the two-day conference by drilling deeply into key issues concerning false advertising litigators. Through hypothetical scenarios, the master class panelists will share their approaches to effectively addressing media inquiries, successfully constructing a crisis management plan, and creating a compelling argument for your false advertising case.

With billions of dollars, potential liability, and the company’s reputation on the line in a false advertising claim, you cannot afford to miss this conference. 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/falseadvertising.

This conference will take place at the historic Allerton Hotel in the heart of Chicago’s Magnificent Mile.
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SPEAKERS

C. Steven Baker
Midwest Director
Federal Trade Commission (Chicago, IL)

R. Wayne Bond
Partner
Womble Carlyle Sandridge & Rice, PLLC (Atlanta, GA)

Laura Buckland
Chief Litigation Counsel
T-Mobile USA, Inc. (Bellevue, WA)

Denis Calabrese
President
Denis Calabrese Company (Houston, TX)

Daniel M. Ennis, Ph.D.
President
The Institute for Perception (Richmond, VA)

Arnold I. Friede
Counsel
McDermott, Will & Emery LLP (Washington, D.C.)

Veda Britt-Handy
Vice President & Deputy General Counsel
Rand McNally (Chicago, IL)

John E. Hall
Partner
Covington & Burling LLP (Washington, D.C.)

Darin Inglis
Senior Legal Counsel
Cricket Communications, Inc. (Denver, CO)

Robert P. Latham
Partner
Jackson Walker LLP (Dallas, TX)

Sandra A. Leib
General Counsel
Element 79 Partners LLC (Chicago, IL)

Joseph J. Lewczak
Partner
Davis & Gilbert LLP (New York, NY)

Gregg F. LoCascio
Partner
Kirkland & Ellis LLP (Washington, D.C.)

Randall Miller
Partner
Arnold & Porter LLP (McLean, VA)

Hal Poret
Vice President
Guideline, Inc. (New York, NY)

Joseph F. Schmidt
Principal
Welsh & Katz Ltd. And Adjunct Professor of Law
IP Strategies, IIT Chicago-Kent College of Law (Chicago, IL)

Alana Sharenow
Senior Corporate Counsel
Ocean Spray Cranberries, Inc. (Middleboro, MA)

John E. Villafranco
Partner
Kelley Drye & Warren LLP (Washington, D.C.)

Harold P. Weinberger
Partner
Kramer Levin Naftalis & Frankel LLP (New York, NY)

Lawrence I. Weinstein
Partner
Proskauer Rose LLP (New York, NY)

Sid White (invited)
Senior Counsel for Advertising
AT&T (Atlanta, GA)

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

Martin S. Zwerling
Assistant Director, National Advertising Division (NAD)
of the Council of Better Business Bureaus, Inc. (New York, NY)

Register now: 888-224-2480 • fax: 877-927-1563 • AmericanConference.com/falseadvertising
Survey Says: Challenging and Defending the Accuracy, Admissibility, and Weight of a Survey in a False Advertising Context

Daniel M. Ennis, Ph.D.
President
The Institute for Perception (Richmond, VA)

Hal Poret
Vice President
Guideline, Inc. (New York, NY)

Joseph F. Schmidt
Principal, Welsh & Katz Ltd. And Adjunct Professor of Law, IP Strategies
IIT Chicago-Kent College of Law (Chicago, IL)

- Evaluating the need for a survey to identify the advertisement’s implied claims
- Constructing a survey that addresses the legal issues and burdens of proof
- Designing research and consumer perception surveys to measure consumer take-away from advertising
  - Choosing a viable, useful, and unbiased sampling methodology
  - Analyzing the effectiveness, appropriateness, and credibility of online surveys
  - Determining the viability of the mall-intercept approach
- How did the advertisement impact consumers’ purchase choices?
- Best practices for developing questionnaires, coding and analyzing data, and choosing controls for the survey
  - Addressing the specific legal issues raised by the advertisement
  - Evaluating the need for control groups or internal controls
  - How are the interviewers asking the questions of the control group?
- Facilitating a neutral environment for the survey
- Uncovering the perception of the advertisement
- Choosing the right survey expert for the case
- Defining and minimizing the risks of producing a bad survey
- Ensuring the internal survey is not used by the opposition as evidence
- Translating the science of the survey into a legal basis for the false advertising case
  - Understanding the scientific methods employed by your expert
  - Interpreting the responses in the survey to reinforce the argument
  - Drawing conclusions for the case that have a scientific basis
- Optimizing the use of a survey in the company’s false advertising case
  - How do you use the survey as evidence?
  - Does a survey help or hurt the case?
  - Interpreting the survey results to determine whether the company should withdraw, move forward, or settle
Defendant – Disproving Damages

- Identifying weaknesses in the plaintiff’s use of surveys, experts and methodologies in the false advertising arena
- Defending against implied claims that are not literally false, but possibly misleading
  - Trends
  - Competition
  - Stale products

Injunctive Relief

- Defining the scope and duration of relief
- What will be the continuing jurisdiction for enforcement?
- Bonding requirements
- What are the opportunities for appeal or collateral attack on the order?
- Conduct and consequences of contempt proceedings

3:30  Afternoon Refreshment

3:45  Preparing for the Defense in Consumer Class Action Suits

Laura Buckland
Chief Litigation Counsel
T-Mobile USA, Inc. (Bellevue, WA)

Arnold I. Friede
Counsel
McDermott, Will & Emery LLP (Washington, D.C.)

Lawrence I. Weinstein
Partner
Proskauer Rose LLP (New York, NY)

- Minimizing the risk of a class action law suit
  - Early motions to dismiss before class certification
  - Opposition to class certification
  - Analyzing options once a class is certified
    - What is the company’s exposure to liability in going to trial?
    - Will a trial open the door for similar class action suits?
  - Early motions to dismiss the class action suit
  - Preparing for bad news: What happens when the product recall, product study, adverse judgment, or other negative report hits the media?
    - Key risk mitigation measures
    - Internal procedures for containing the fallout
    - Controlling and mitigating the damage to the corporation’s public image during a false advertising consumer class action suit
  - Countering disproportionate media attention where plaintiff is a poor consumer or a group victimized by false advertising
    - Anticipating the dangers that the advertisement could trigger
    - Developing a pro-active public relations strategy with the publicity department to respond to allegations of false advertising
  - Confirming that the company’s responses contain true and accurate statements
  - Adjusting the company’s legal strategy to confront the recent growth of class action suits in the false advertising arena
    - Anticipating potential class action claims of false advertising and incorporating the analysis into the legal review process
    - Evaluating the potential enhanced risk of damages in a false advertising class action case
    - Streamlining the discovery process by bringing discovery under the auspices of one court
  - Determining whether the false advertising class action suit can move forward in the state where the case is filed
    - Will the issue of reliance bar the case?
  - Facilitating a defense against a class action plaintiff’s claim of lost profits or projected revenue in a false advertising case

2:30  Obtaining Relief for the Corporate Plaintiff in a False Advertising Case

R. Wayne Bond
Partner
Womble Carlyle Sandridge & Rice, PLLC (Atlanta, GA)

Gregg F. LoCascio
Partner
Kirkland & Ellis LLP (Washington, D.C.)

Plaintiff – Proving Damages

- Determining the best option for relief based on the damages suffered
  - Monetary
  - Injunctive
- Meeting the courts’ requirements for a showing of irreparable harm
  - Making a particularized showing
  - Proving irreparable harm when the advertiser does not make explicit or implied references to its competitor
  - Breaking down the meanings of irreparable harm in markets of different geography, size, or number of competitors
- Making an effective argument that damages include the competitor’s profits obtained through its false or misleading advertisement
- In a 43(a) case, what is the range of relief that might be expected?
  - When is a plaintiff entitled to enhanced damages?
- Researching the reach and frequency of the advertisement
  - Appearances of the advertisement in media
  - Bolstering the damage claim through lost profits and diverted sales
  - Showing a connection between the competitor’s false or misleading advertisement and your company’s lost sales or profits
- Strategies for arguing enhanced damages
  - Utilizing the survey to reinforce the claim of damages in a false advertising dispute or case
  - Countering the defendant’s arguments that trends, competition, or stale products caused the lost sales or profits

- Factoring the economic injury caused by the competitor’s advertisement
- What has the company spent in tangible and intangible terms?
  - Cost of the advertising campaign
  - Research & Development of new or enhanced product
  - Personnel or Human Capital
  - Empty airwaves
- Projecting the potential revenue at risk because of a false advertising suit
  - Evaluating settlement options to mitigate the damage and avoid high litigation costs
- Quantifying irreparable harm to the company’s reputation that can only be addressed by litigation
- Examining the company’s appetite for a lengthy and costly false advertising litigation
- Allocating the company’s legal budget for potential false advertising litigation
- Probing the strengths and weaknesses of the defendant’s false advertising case based on cases, trends, and survey evidence
- Controlling the cost of discovery in false advertising litigation
  - Handling a false advertising case where the company has significantly less financial resources than the opposition
  - Developing a cohesive communications plan between in-house and outside counsel to minimize surprises during discovery
- Determining which venue is cost-effective for a false advertising claim
  - NAD
  - Courts
  - FTC
- Evaluating alternative options of resolving false advertising disputes
  - When will a demand letter suffice?
  - Determining the value of a settlement against the cost of litigation

- Conducting and consequences of contempt proceedings
- What is the range of relief that might be expected?
- Stale products
DAY TWO | TUESDAY, JUNE 24, 2008

8:30 Continental Breakfast

9:00 Co-Chairs’ Opening Remarks

9:15 Evaluating the Exposure to False Advertising Litigation Because of Word-of-Mouth or Buzz Marketing on the Internet

Robert P. Latham
Partner
Jackson Walker LLP (Dallas, TX)

Joseph J. Lewczak
Partner
Davis & Gilbert LLP (New York, NY)

- Defining the Do’s and Don’ts of word-of-mouth marketing
- What should the company know about its employees’ activities concerning word-of-mouth marketing on the Internet and when should it know this information?
- Certifying the disclosure of people’s identities who create or further word-of-mouth marketing on behalf of the company
- What information must be disclosed about the person?
- Creating a culture of compliance beginning with a disclosure policy involving word-of-mouth marketing
- Analyzing whether a company can avoid liability if an employee posts information about the company’s products or services on a blog or an Internet forum under a false name without the company’s knowledge?
- Can an employee’s friend or family member of create word-of-mouth marketing on the Internet under the employee’s guidance without exposing the company to liability?
- Where is the FTC drawing the line between permissible and non-permissible activity regarding word-of-mouth marketing?
- Analyzing the impact of recent FTC statements on word-of-mouth marketing
- What is the jurisdiction of the FTC in word-of-mouth marketing?
- Probing false advertising issues concerning user-generated content in advertising campaigns
- Evaluating the impact of the Lanham Act and the Communications Decency Act on a false advertising claim based on user-generated content
- Should a company be held liable if it inspires, requests, or encourages the creation of user-generated content regarding its products or the competition’s products?
  - Defining the company’s actions in sponsoring a contest, request, or advertisement for user-generated content
  - Examining the language used by the company to solicit user-generated content for its website
  - Is the company giving a platform for producers of content or is it using the content as advertisements?

10:30 Morning Coffee Break

10:45 Defending Against a Competitor’s Allegation of False Advertising

Randall Miller
Partner
Arnold & Porter LLP (McLean, VA)

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

- When do you bring a counterclaim?
  - Researching the competitor’s claims in its advertisements
  - Determining whether the alleged false claim is true and misleading at the same time
  - Investigating the use of disclaimers in the advertisement
  - What did the advertisement explicitly state or imply?
  - Ensuring the research support is accurate and matches the claim
  - Examining whether the advertisement conveyed a different message than the one intended
  - Analyzing the potential ‘puffery’ in the advertisement
  - Navigating the different circuit decisions on ‘puffery’
  - Evaluating the impact of ‘puffery’ cases
  - Establishing the accountability for substantiating a claim
  - When is the burden on the defendant?
  - Advising the defendant company on the viability of the ‘everybody does it’ defense

12:00 Networking Luncheon

1:15 Commanding a Viable Corporate Strategy to Prevent False Advertising Claims

Veda Britt-Handy
Vice President & Deputy General Counsel
Rand McNally (Skokie, IL)

Darin Inglis
Senior Legal Counsel
Cricket Communications, Inc. (Denver, CO)

Sandra A. Leib
General Counsel
Element 79 Partners LLC (Chicago, IL)

Alana Sharenow
Senior Corporate Counsel
Ocean Spray Cranberries, Inc. (Middleboro, MA)

- Developing an effective review procedure with in-house and outside counsel to review advertisements and substantiate claims before they appear in media
DAY THREE | WEDNESDAY JUNE 25, 2008  
9:00 a.m. – 12:30 p.m. (Registration Open at 8:30 a.m.)

MASTER CLASS

FROM THE COURT OF PUBLIC OPINION TO THE COURTROOM – EXECUTING YOUR GAME PLAN FOR A FALSE ADVERTISING CASE

Laura Buckland  
Chief Litigation Counsel  
T-Mobile USA, Inc. (Bellevue, WA)

Hal Poret  
Vice President  
Guideline, Inc. (New York, NY)

Denis Calabrese  
President  
Denis Calabrese Company (Houston, TX)

Harold P. Weinberger  
Partner  
Kramer Levin Naftalis & Frankel LLP (New York, NY)

Lawrence I. Weinstein  
(Moderator)  
Partner  
Proskauer Rose LLP (New York, NY)

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

With your company’s reputation on the line, false advertising litigation includes the terrific demands of protecting the company’s image, developing a persuasive case, and executing your strategy.

In this invaluable master class, you will learn proven techniques that can refine your already highly significant skills. The master class panelists will share their approaches to effectively addressing media inquiries, successfully constructing a crisis management plan, and creating a compelling argument for your false advertising case.

Through hypothetical scenarios, the master class will complement the two-day conference by drilling deeply into key issues concerning false advertising litigators. The scenarios realistically pinpoint the challenges that you frequently encounter in false advertising litigation. Join industry leaders as they provide insight on:

- Ensuring that the company is speaking with ‘one voice’ to the media
- Creating an atmosphere of effective communication within the company
- Tackling the issue of the opposition litigating its case in the media
- Structuring a false advertising survey that will be advantageous to your case
- Tackling the challenges created from enforcement by the FTC and State Attorneys General
- Verifying that the information you receive from the expert is accurate
- Changing tactics based on new rulings, information, or depositions learned during discovery
- Extracting key information from your marketing team about the advertisement

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# Registration Form

On behalf of Manatt, Phelps & Phillips LLP, you will receive $200 off registration for this event. Please use the following discount code upon registering: 629L08-SPN1

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**YES! Please register the following delegate for FALSE ADVERTISING DISPUTES AND LITIGATION**

**NAME** ___________________________  **POSITION** ________________

**APPROVING MANAGER** _________________  **POSITION** ________________

**ORGANIZATION** ____________________________________________________________

**ADDRESS** ________________________________________________________________

**CITY** ___________________________  **STATE** _______________  **ZIP CODE** _______________

**TELEPHONE** _________________________  **FAX** ___________________________

**EMAIL** ______________________________  **TYPE OF BUSINESS** _______________________

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