

## 3 DAY COURSE

held at The Greenbrier in White Sulphur Springs, WV

**TUESDAY - WEDNESDAY - THURSDAY**

**APRIL 17-19, 2018**

# ADVERTISING CLAIMS SUPPORT Case Histories and Principles

**"In this age of science we must build  
legal foundations that are sound in science  
as well as in law."**

**– Stephen G. Breyer,  
Associate Justice of the U.S. Supreme Court**

### WHO SHOULD ATTEND

Attorneys specializing in advertising law,  
market research managers, product developers,  
in-house counsel, sensory and consumer  
scientists, and packaging/product  
testing specialists.

Register online at [www.ifpress.com](http://www.ifpress.com) for this course.

# ADVERTISING CLAIMS SUPPORT

## Case Histories and Principles

Comparative advertising can improve sales, but how do you address false claims or challenges made by your competitors? Claims support is a critical business focus for many companies in categories with aggressive competitors. There is a scientific and legal foundation necessary to support advertising claims.

The purpose of this course is to raise awareness of issues in testing product performance and evaluating advertising to provide solid evidentiary support needed in the event of a claims dispute.

The course speakers have decades of experience as instructors, scientific experts, jurors, and litigators in addressing claims with significant survey and product testing components. National Advertising Division® (NAD®) and litigated cases will be used to examine and reinforce the information discussed.

### Scientific Team:

Dr. Daniel M. Ennis, Dr. Benoît Rousseau, Dr. John M. Ennis

### Legal Team:

NAD: Kat Dunnigan, Anu Gokhale, Hal Hodes

Litigators: Lauren Aronson, Chris Cole, Alex Kaplan, David Mallen

In-House Counsel: Kathryn Farrara

## Course Registration

**April 17 – 19, 2018 (3 days)..... \$1,975\***

\*A 20% discount will be applied to each additional registration when registered at the same time, from the same company.

\*The Institute for Perception offers reduced or waived course fees to non-profit entities, students, judges, government employees, and others. Please contact us for more information.

**Note:** Approximately 12 credits will be sought for registrants in jurisdictions with CLE requirements. This program also qualifies for Certified Food Scientist contact hours (CH). CFS Certificants may claim 15 CH for their attendance.

Register online at [www.ifpress.com/short-courses](http://www.ifpress.com/short-courses) where payment can be made by credit card. If you qualify for a fee discount, or would like information about payment by invoice, please contact **Susan Longest** at [mail@ifpress.com](mailto:mail@ifpress.com) or call 804-675-2980 before registering.

**Fee includes food/beverage  
break refreshments, lunches, group dinners,  
course manual, and a copy of our latest books:**

- ♦ Readings in Advertising Claims Substantiation
- ♦ Tools and Applications of Sensory and Consumer Science
- ♦ Thurstonian Models: Categorical Decision Making in the Presence of Noise



**TUESDAY (APRIL 17, 8am - 4pm)**

**8:00 – 9:00 | Advertising Claims Support**

- ♦ Introduction and scope of the course
- ♦ Claims support in product/brand development
- ♦ Admissibility of expert testimony
- ♦ Surveys in false advertising and trademark cases
- ♦ Efficacy, perception, and materiality

**9:10 – 10:00 | Claims and False Advertising: Internal Counsel Perspective**

- ♦ Three ways an ad can be false
- ♦ A typical false advertising lawsuit
- ♦ Puffery, falsity, and injury: *The Procter & Gamble Co. vs. Kimberly-Clark* (2008), *Schick vs. The Gillette Co.* (2005), *The Procter & Gamble Co. vs. Ultreo, S.D.N.Y.* (2008)
- ♦ To sue, challenge, or negotiate - an internal counsel's perspective

**10:10 – 11:00 | ASTM Sensory Claims Guide**

- ♦ Review of the ASTM Claims Guide: Choosing a target population, product selection, sampling and handling, selection of markets
- ♦ Claims: Superiority, unsurpassed, equivalence, non-comparative

**11:10 – Noon | Sensory and Hedonic Methods**

- ♦ Methods: Discrimination, descriptive, hedonic
- ♦ Data: Counts, ranking, rating scales
- 1) **NAD Case #5609** (2013) Starbucks Corp. (Verismo Single-Serve Coffee System)
- 2) **NAD Case #5715** (2014) General Mills Inc. (Yoplait Blended Greek Yogurt)
- 3) **NAD Case #5782** (2014) MOM Brands Company (Malt-O-Meal Brand Cereals)
- 4) **NAD Case #5984** (2016) French's Food Company (French's Tomato Ketchup)

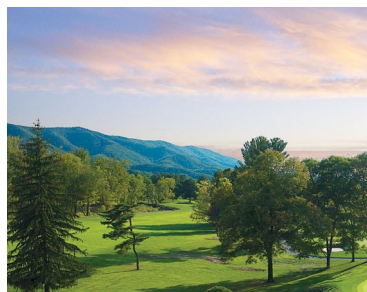
**■ Noon – 1:00 LUNCH ■**

**1:00 – 3:00 | NAD Mock Hearing; Overview of the NAD**

- ♦ NAD mock hearing
- ♦ Motivating Case: 3D TV
- 5) **NAD Case #5416** (2012) LG Electronics USA, Inc. (Cinema 3D TV & 3D Glasses)
- ♦ Advertising self-regulation and the NAD process
- ♦ Preparing for an NAD hearing

**3:10 – 4:00 | "Better" and "Greater"; Attribute Interdependence**

- ♦ "Better" and "Greater" hedonic, sensory and technical claims
- ♦ Attribute interdependencies
- 6) **NAD Case #5866** (2015) Kimberly-Clark Corp. (Huggies Natural Care Wipes)
- 7) **NAD Case #5874** (2015) and **NARB Panel #207** (2016) Chattam, Inc. (Nasacort)



**LODGING:** Lodging is not included in the course fee and participants must make their own hotel reservations. A block of rooms is being held at The Greenbrier at a special rate of **\$205 (plus resort fees & taxes)**. To make a reservation, please call **1-877-661-0839** and mention you are attending the **Institute for Perception** course (**note:** the special rate is not available through online reservations.) To learn more about The Greenbrier, visit their website at [www.greenbrier.com](http://www.greenbrier.com).

**TRANSPORTATION:** The Greenbrier Valley Airport (**LWB**) in Lewisburg is only a 15 min. shuttle ride from the hotel. Direct flights to LWB are available on United Airlines from Chicago O'Hare (**ORD**) and Washington Dulles (**IAD**). Other airports include Roanoke, VA (**ROA**, 1hr. 15 min.), Charleston, WV (**CRW**, 2 hrs.), and Charlottesville, VA (**CHO**, 2 hrs. 15 min.).

**CANCELLATION POLICY:** Registrants who have not cancelled two working days prior to the course will be charged the entire fee. Substitutions are allowed for any reason.

## WEDNESDAY (APRIL 18, 8am – 4pm)

### 8:00 – 9:00 | Requirements for a Sound Methodology

- ◆ Probability and non-probability sampling
- ◆ The AAPOR report (*American Association for Public Opinion Research*)
- ◆ Psychometric properties of the survey items
- ◆ Reliability and validity:
  - Ecological, external, internal, face, construct
- ◆ Bias: Code, position
- ◆ Task instructions – importance and impact

### 9:10 – 10:00 | Consumer Relevance

- ◆ Setting action standards for consumer-perceived differences
- ◆ Linking expert and consumer data
- ◆ Clinical vs. statistical significance

► **Litigated Case:** *SC Johnson vs. Clorox*  
– *Goldfish in Bags*, 241 F.3d 232 (2nd Cir. 2001)

8) **NAD Case #5819** (2015) *Unilever US*  
(*Degree MotionSense and Degree Clinical Protection Antiperspirants*)

9) **NAD Case #5974** (2010) *Comcast Communications, Inc.*  
(*Xfinity Internet, Television & Telephone Services*)

10) **NAD Case #6025** (2010) *Bausch & Lomb, Inc.*  
(*PeroxiClear Contact Lens Peroxide Solution*)

### 10:10 – 11:00 | Test Method, Design, Location, and Participants

- ◆ Test options: Monadic, sequential, direct comparisons
- ◆ Test design issues: Within-subject, matched samples, position and sequential effects, replication
- ◆ Choosing a testing location and defining test subjects

11) **NAD Case #3506 and NARB Panel #101** (1999) *Visa USA, Inc.*  
(*Visa Credit Card-Preferred Card Advertising*)

12) **NAD Case #5425** (2012) *Church & Dwight Co., Inc.*  
(*Arm & Hammer® Sensitive Skin Plus Scent*)

13) **NAD Case #6041** (2016) *Unilever United States, Inc.*  
(*Suave Essentials Body Wash*)

### 11:10 – Noon | Survey Science

- ◆ Answering questions
- ◆ Purpose of conducting surveys: Events and behaviors, attitudes and beliefs, subjective experiences
- ◆ How respondents answer questions: Optimizing and satisficing
- ◆ Filters to avoid acquiescence and no opinion responses
- ◆ Survey questions: Biased, open-ended vs. closed-ended
- ◆ Predicting primacy and recency effects
- ◆ Motivations to optimize
- ◆ Steps to improve survey questions

### ■ Noon – 1:00 LUNCH ■

### 1:00 – 2:00 | Consumer Takeaway Surveys

- ◆ Consumer takeaway surveys: NAD perspective
- 14) **NAD Case #5849** (2015) *T-Mobile USA* (*More Data Capacity*)
- 15) **NAD Case #5926** (2016) *Comcast Cable Communications* (*Xfinity Cable TV*)
- 16) **NAD Case #6009** (2016) *Epson America, Inc.* (*Epson EcoTank Supertank Printers*)
- ◆ Critique of cases

### 2:10 – 3:00 | Analysis - Interpretation and Communication

- ◆ Hypothesis testing
- ◆ Common statistical analyses
- ◆ Determining statistical significance and confidence bounds
- ◆ Statistical inference in claims support
- ◆ Communicating claim requirements to the business side
- 17) **NAD Case #5569** (2013) *InterHealth Nutraceuticals* (*Zychrome Dietary Supplement*)
- 18) **NAD Case #5695** (2014) *Sergeant's Pet Care Products* (*Sentry® Fiproguard*)
- 19) **NAD Case #5755** (2014) *The Procter & Gamble Co.* (*Olay Sensitive Body Wash*)
- **Litigated Case:** *Avon Products vs. S.C. Johnson & Son, Inc.* (S.D.N.Y. 1994)

### 3:10 – 4:00 | Test Power

- ◆ The meaning of power
- ◆ Planning experiments and reducing cost
- ◆ Sample sizes for claims support tests
- ◆ Managing Risks: Advertiser claim, competitor challenge
- 20) **NAD Case #3605** (1999) *Church & Dwight, Co.* (*Brillo Steel Wool Soap Pads*)
- 21) **NAD Case #4248** (2004) *McNeil, PPC, Inc.* (*Tylenol Arthritis Pain*)

## THURSDAY (APRIL 19, 8am – 3pm)

### 8:00 – 9:00 | What to Do with No Difference/ No Preference Responses

- ◆ No preference option analysis
- ◆ Power comparisons: Dropping, equal and proportional distribution
- ◆ Statistical models and psychological models
- ◆ ASTM recommendation
- 22) **NAD Case #4270** (2004) *Frito-Lay, Inc.* (*Lay's Stax® Original Potato Crisps*)
- 23) **NAD Case #5453** (2012) *Ocean Spray Cranberries, Inc.* (*Ocean Spray Cranberry Juice*)
- 24) **NAD Case #6037** (2016) *Mizkan America, Inc.* (*RAGU Homestyle Traditional Sauce*)

### 9:10 – 10:00 | Testing for Equivalence and Unsurpassed Claims

- ◆ How the equivalence hypothesis differs from difference testing
- ◆ ASTM requirements for an unsurpassed claim
- ◆ The paradox of finding support for superiority, unsurpassed, and equivalence; the need for a minimum standard for superiority
- ◆ FDA method for qualifying generic drugs: The TOST
- ◆ Improved methods over TOST for testing equivalence
- 25) **NAD Case #5822** (2015) *Kimberly-Clark Global Sales, LLC*  
(*Huggies® Little Snugglers Diapers*)
- 26) **NAD Case #5829 and NARB Panel #202** (2015) *Bayer HealthCare, LLC*  
(*Claritin and Claritin-D*)

### 10:10 – 11:00 | Ratio, Multiplicative, and Count-Based Claims

- ◆ The difference between ratio and multiplicative claims; Examples
- ◆ Why ratio claims are often exaggerated
- ◆ Count-based claims (e.g., “9 out of 10 women found our product reduces wrinkles”)
- 27) **NAD Case #5107** (2009) *Ciba Vision Corp.* (*Dailies Aqua Comfort Plus*)
- 28) **NAD Case #5416** (2012) *LG Electronics USA, Inc.* (*Cinema 3D TV & 3D Glasses*)
- 29) **NAD Case #5484** (2012) *Reynolds Consumer Products* (*Hefty® Slider Bags*)
- 30) **NAD Case #5934** (2016) *Rust-Oleum Corp.*  
(*Painter's Touch Ultra Cover 2X Spray Paint*)

### 11:10 – Noon | “Up To” Claims

- ◆ Definition and support for an “up to” claim
- ◆ FTC opinion on windows marketers
- ◆ Analysis of an “up to” claim scenario
- ◆ Issues in applying the FTC rule
- 31) **NAD Case #5707** (2014) *Mars Petcare US* (*Pedigree® Dentastix® Chews*)
- 32) **NAD Case #5876** (2015) *The Procter & Gamble Co.*  
(*Duracell Coppertop & Duracell Quantum Alkaline Batteries*)

### ■ Noon – 1:00 LUNCH ■

### 1:00 – 3:00 | Applying Course Principles and Concepts

- ◆ **Group Exercise 1:** Develop support strategy for an advertising claim to include: engagement of all stakeholders, wording of the claim, design and execution of a national product test, product procurement, analysis, and report
- ◆ **Group Exercise 2:** Design a consumer takeaway survey of a fertilizer package statement
- 33) **NAD Case #6033** (2016) *Bayer CropScience US*  
(*Bayer Advanced 3-in-1 Weed and Feed for Southern Lawns*)
- ◆ Course summary and conclusion

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## Scientific Team

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**Dr. Daniel M. Ennis** - *President*, The Institute for Perception. Danny has more than 35 years of experience working on product testing theory and applications for consumer products. He has doctorates in food science and mathematical & statistical psychology and is a Professional Statistician accredited by the American Statistical Association. He has published extensively on mathematical models for human decision-making and was the first to show that humans possess a transducer in the chemical senses. In 2001, he solved the degeneracy problem in multidimensional unfolding. Danny is a recipient of the *Sensory and Consumer Sciences Achievement Award* from IFT and also the *ASTM David R. Peryam Award* in recognition of “outstanding contributions to the field of basic and applied sensory science.” Danny consults globally and has served as an expert witness in a wide variety of advertising cases.



**Dr. Benoît Rousseau** - *Senior Vice President*, The Institute for Perception. Benoît received his food engineering degree from AgroParisTech in Paris, France and holds a PhD in sensory science and psychophysics from the University of California, Davis. He has more than 20 years of experience in managing projects in the field of sensory and consumer science, actively working with clients in the US, Asia, Latin America, and Europe. His theoretical and experimental research has led to numerous journal articles as well as several book chapters. Benoît is well known for his advanced presentation skills, where his use of sophisticated visual tools greatly contribute to the success of The Institute for Perception communications, short courses, and webinars. Dr. Rousseau has recently been appointed as a visiting professor at Chuo University in Japan.



**Dr. John M. Ennis** - *Vice President of Research Operations*, The Institute for Perception. John received his PhD in mathematics and also conducted post-doctoral research in cognitive neuroscience at the University of California, Santa Barbara. He is the winner of the *Food Quality and Preference Award* for “Contributions by a Young Researcher.” John has published in statistics, mathematics, psychology, and sensory science. He has a strong interest in the widespread adoption of best practices throughout sensory science, serves on the editorial boards of the *Journal of Sensory Studies* and *Food Quality and Preference*, and is sub-chair of the ASTM subcommittee E18.04 - “Fundamentals of Sensory.”

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## Legal Team

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### National Advertising Division (NAD)



**Kathleen (Kat) Dunnigan** - *Senior Staff Attorney*, the NAD. Kat has worked for the Legal Aid Society’s Juvenile Rights Division, the Center for Appellate Litigation, and Center for HIV Law and Policy. She has also litigated employment discrimination, civil rights claims, and many employment cases before the New Jersey Supreme Court.



**Hal Hodes** - *Senior Staff Attorney*, the NAD. Prior to joining the NAD, Hal worked in private practice where he represented hospitals and other health care practitioners in malpractice litigation. Hal has also served as an attorney at the New York City Human Resources Administration representing social services programs.



**Anuradha (Anu) Gokhale** - *Staff Attorney*, the NAD. Prior to joining the NAD, Anu was a litigator of intellectual property and complex commercial matters at King & Spalding LLP in NYC. She has also served as a visiting lawyer with South Africa’s largest public interest organization, Legal Resources Centre, where she handled refugee and environmental advocacy matters.

### In-House Counsel



**Kathryn Farrara** - *Senior Marketing Counsel*, Unilever USA. Kathryn has handled a variety of brands in the personal care, food, and beverage categories. In addition to counseling brands, she handles overarching issues related to Digital & Social Media and Privacy at Unilever. Prior to joining Unilever, she was a Senior Attorney at the NAD.

### Litigators (in alphabetical order)



**Lauren Aronson** - *Counsel*, Crowell & Moring in Washington, DC. Lauren advises clients regarding the development, substantiation, approval, and defense of advertising claims. She was formerly a counsel in the Advertising, Marketing & Media division at Manatt, Phelps & Phillips.



**Christopher A. Cole** - *Partner*, Crowell & Moring in Washington, DC. Chris practices complex commercial litigation and advises the development, substantiation, and approval of advertising and labeling claims. He has represented leading consumer products and services companies and appeared many times before the NAD.



**Alexander Kaplan** - *Partner*, Proskauer Rose in NYC. Alex represents and advises a range of consumer product, food and beverage, pharmaceutical, and medical device companies before the NAD and federal courts. He also frequently counsels clients concerning advertising and marketing claim substantiation and review.



**David G. Mallen** - *Partner*, Loeb & Loeb in NYC. David’s focus is in the areas of advertising and consumer protection law. He co-chairs the firm’s Advertising Disputes practice and represents clients in disputes and investigations before the FTC and state agencies. As former NAD Deputy Director, he has worked with advertisers to both defend and challenge claims.