HOUSE COUNSEL AND CLAIM SUBSTANTIATION: INSIDE THE MIND OF INSIDE COUNSEL

Donald Lofty

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Roles in Claims Substantiation

KEY PLAYERS IN CLAIM SUBSTANTIATION

- R&D – Develops superior products and conducts lab testing to prove superiority
- Marketing – Identifies the claims that need substantiation
- Sensory/Consumer Research – Confirms lab tests with real consumers
- Legal – Determines whether claims will survive challenges from third parties
  - Can also help assess the likelihood of a challenge and the forum in which it will be brought

RELATIONS WITH INSIDE COUNSEL: A DICHOTOMY

- The obstacle: Final Approval or "Let's see if we can get it through legal."
  - Marketing, Science and Sensory will go as one to convince lawyer to approve the claim.

- The partner: Provides Input on Design or "How can we design this study so that it will pass muster with people like you, i.e. other lawyers?"
  - Lawyer does not have your expertise, but has seen many studies in many different cases.
    - Knows the kind of arguments that can be made by competitors.
  - Go to lawyer early when claim substantiation plans can be changed more easily.

INSIDE AND OUTSIDE COUNSEL

- Inside Counsel:
  - Knows your business and your people
  - Can be available for face-to-face meetings, informal discussions
  - Time may not be charged to business
- Outside Counsel:
  - Brings an outside view to evaluating the strength of testing
  - Has been involved in many lawsuits and challenges

WHERE WILL THE TRUTH OF ADVERTISING BE JUDGED?

- Competitors' lawyers and researchers
- Media where advertising will be placed
  - Standards differ for television, print, the Internet
- Governmental agency, e.g., FTC, FDA, State Attorney Generals
- Industry Self-Regulation: National Advertising Division (NAD)
- Courts

Key Issues in Claim Substantiation

CLAIM SUPPORT
THREE LEGS OF THE STOOL

- Reason to Believe
  - Superior ingredients
  - More active ingredients
- Scientific testing
  - Well controlled laboratory test
  - Testers blinded to the extent feasible
- Consumer testing
  - Typical consumers
  - Replicates real world experience

SAMPLE CONSTRUCTION

- Nationally representative sample
  - Number of subjects may depend upon forum and claim
  - Comparative or parity
  - 4 Regions - Sometimes 2 Locations per region
- Actual (or potential) purchasers of product
  - When can we accept users?
- ASTM Standard is a great place to start, but not necessarily the final word

TRAINED PANEL

- May use where differences are hard to detect, but real
- Which malodor is stronger (after application of competing air fresheners)
- Have judges ignore fragrance and focus on malodor
- Caution: Opponent may argue that trained panel is finding differences that ordinary consumers could not detect

SUBJECTIVE OR OBJECTIVE TEST?

- Subjective: Which fragrance do you prefer?
  - Need to weed out fragrance rejecters
  - Cannot use company employees
- Objective: Which glass plate is cleaner?
  - Need to screen for visual acuity
  - Company employees are acceptable as long as they are properly blinded
  - Cleaning or deodorizing can be done by machine or strict protocol

CHALLENGE TO PRODUCT

- Torture test: More likely to detect difference
  - Is the difference relevant to consumers?
  - Is the nature or amount of soil, malodor, etc, excessive?
- "Softball:" May be used by cheaper product to prove parity
  - Would the test detect a difference where there is one?
  - Soil should be tenacious; malodor strong
- May depend on claim: "As good as the market leader against the soils you see everyday"

Claim Substantiation Scenarios

TYPES OF CLAIMS

- Monadic – “Grease-Off cuts grease”
- Express comparative – “Grease-Off cuts grease better than D-Grease”
- Implied comparative- “Grease-Off has 33% more grease cleaners than D-Grease”
- Superlative – “Grease-Off is the best grease cleaner
- Preference – “Consumers prefer Grease-Off [2:1]”
- Parity – “No grease cleaner beats Grease-Off”
- Puffery – “Grease-Off: The World’s Greatest Grease Cleaner!”

COMPARATIVE CLAIMS

- Consumers say they don't like them
- BUT Marketing usually considers them to be the strongest claims
- Test method must be (a) appropriate for claim and (b) reflect real world use conditions
- Need to prove statistically significant difference at 95% confidence level
- Need to clearly identify competitive product
  - Prego Spaghetti Sauce could say it had more chunky tomatoes than Old World Ragu, even though other Ragu sauces had as many chunky tomatoes as Prego.

FRESH BRUSH V TOILET WAND COMMERCIAL

- Hand-held bowl cleaners with disposable brushes
- Fresh Brush is a “papery imitation”
- Garden hose blows Fresh Brush away
- “No brush gets toilets cleaner [than Toilet Wand]
- Later version of commercial: People prefer TW over FB 3:1



FRESH BRUSH V TOILET WAND NAD DECISION

- Advertiser argued that there was no superiority claim
  - Claim was only parity
  - BUT overall message was superiority
  - Ugly depiction of product
  - “Papery imitation”
  - Garden hose scene
- Advertiser did not present data showing superiority
  - Preference claim not supported
  - Test done in shopping mall on clean toilets

DEMONSTRATIONS

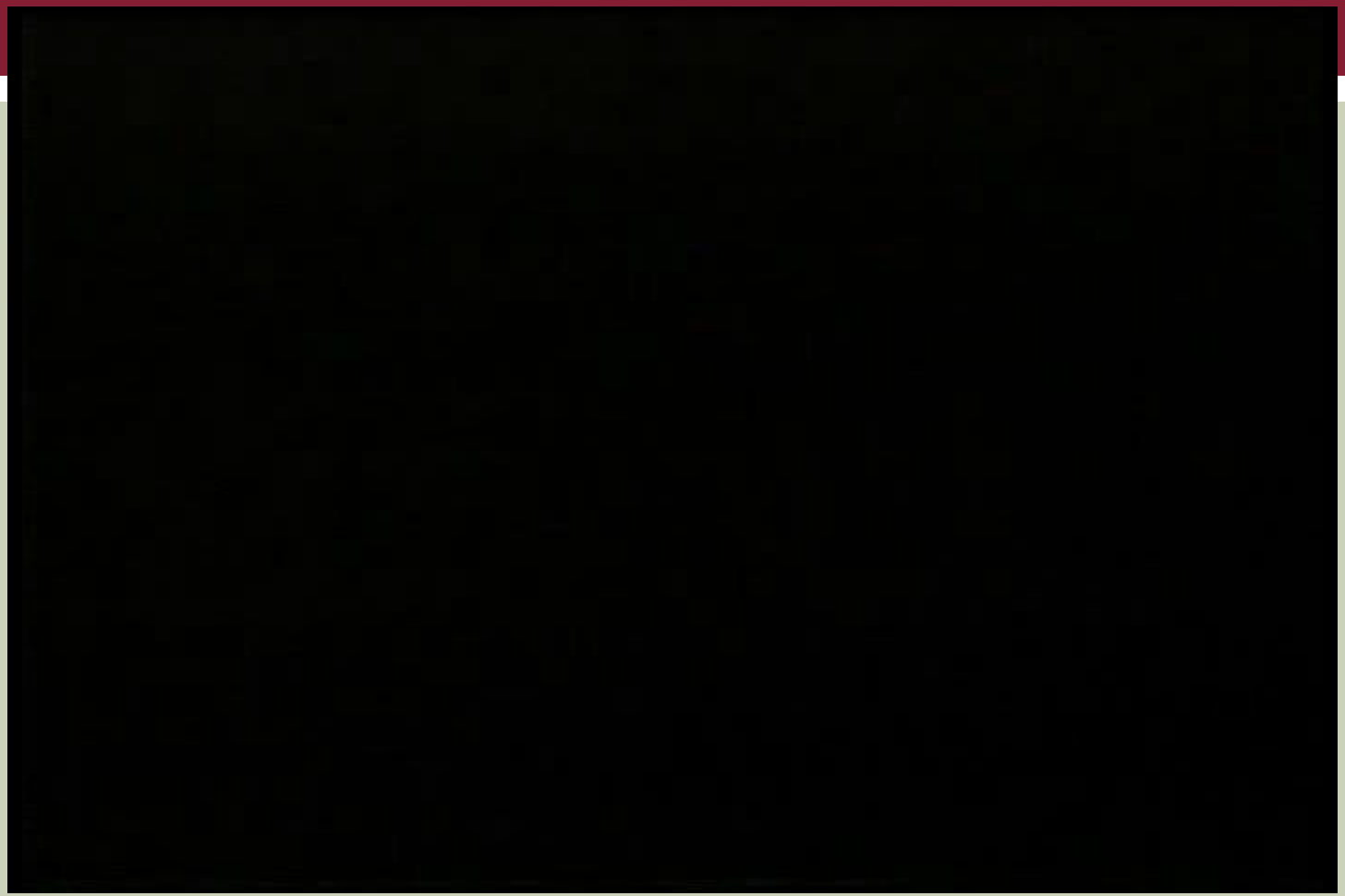
- Very powerful communication tool
- Several famous cases – Not only commercial lost, but publicity damaged advertiser's reputation
- Campbell's Soup – Marbles used to make vegetables more visible
- Volvo – Weakened competitor's cars in monster truck demo
- NAD allowed Progresso to use camera angles and lighting to enhance the appearance of Beef Pot Roast Soup

PARITY CLAIMS

- Example: "No grease cleaner beats Grease-Off"?
  - Test must have sufficient statistical power to detect a difference
  - Test must be sensitive enough to detect a difference
- Principle: Failure to find a difference does not prove parity.
- Case: Sunny Delight "fortified with nutrients equal to 2 servings of fruit"
  - NAD held claim could mean that product was equivalent to 2 servings of fruit – Not so

PUFFERY

- Obviously exaggerated - Won't mislead because consumers know not to take them literally
  - Ponderosa "The world's biggest, best salad buffet"
  - Small Hamburger Stand "World's greatest hamburger"
- BUT some product categories are inherently performance-driven
  - Not susceptible to puffery



THE UNEXPECTED

- Even if claims are well supported, advertising can be challenged
- Competitor claimed their air freshener was preferred over Glade for appearance
  - No question about validity of testing
- BUT safety issue with use of upholstered furniture in front of electrically heated product
  - Competitor voluntarily took commercial off air
- Shows another way to challenge a commercial
  - Direct contact with a responsible competitor

QUESTIONS?