



ANA Advertising Law & Public Policy Conference

Ten Minute Solutions to Six of Your Biggest Problems

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TAB 1

ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

FTC ANNOUNCES NEW MOBILE PRIVACY GUIDELINES ON SAME DAY SOCIAL NETWORKING APP SETTLES PRIVACY CHARGES

The Federal Trade Commission (FTC) issued a report containing specific recommendations on improving mobile privacy disclosures for mobile platforms, app developers, advertising networks, and other third parties.

If it is possible to have any doubts about the FTC's strong and continuing focus on mobile privacy issues, it is worth noting that the new report was issued on the same day that the Path social networking app agreed to pay \$800,000 to settle FTC charges that it deceived users by collecting personal information from their mobile device address books without their knowledge and consent, and that it illegally collected personal information from children without their parents' consent in violation of the Children's Online Privacy Protection Act (COPPA).

REPORT'S RECOMMENDATIONS

The FTC report notes that because mobile platforms offer app developers and others access to user data from mobile devices (e.g., geolocation information, contact lists, calendar information, and photos) through their application programming interfaces (APIs), platforms have an important role in conveying privacy information to consumers. Accordingly, the report recommends that mobile platforms:

THE BOTTOM LINE

The report's recommendations are best practices – not rules or regulations. However, they offer a glimpse into the FTC's likely enforcement stance under Section 5 of the FTC Act, so these are guidelines that the industry certainly should follow. The guidelines should be considered together with prior FTC pronouncements regarding privacy by design and online data collection. The industry's stakeholders should pay close attention to future announcements regarding guidance, recommendations, initiatives, and significant enforcement proceedings in this area.

- >> Provide so-called "just-in-time" disclosures to consumers and obtain their affirmative express consent before allowing apps to access sensitive content such as geolocation;
- >> Consider providing just-in-time disclosures and obtaining affirmative express consent for other content that consumers would find sensitive in many contexts, such as contacts, photos, calendar entries, or the recording of audio or video content;
- >> Consider developing a one-stop "dashboard" approach to allow consumers to review the types of content accessed by the apps they have downloaded;
- >> Consider developing icons to depict the transmission of user data;
- >> Promote app developer best practices by, for example, (i) adding provisions to contracts with app developers to require them to provide just-in-time privacy disclosures and to obtain affirmative express consent before collecting or sharing sensitive information; (ii) reasonably enforcing these requirements; and (iii) educating

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app developers on privacy and making important information about consumer privacy considerations available to them as they craft their apps;

- >> Consider providing consumers with clear disclosures about the extent to which platforms review apps prior to making them available for download in the app stores and conducting compliance checks after the apps have been placed in the app stores; and
- >> Consider offering a Do Not Track (DNT) mechanism for smartphone users.

It is important to keep in mind that a mobile DNT mechanism already has been endorsed by a majority of the Commission, which believes that it would “allow consumers to choose to prevent tracking by ad networks or other third parties as they navigate among apps on their phones.”

Specifically with respect to app developers, the report recommends that they should:

- >> Have a privacy policy and make sure that it is easily accessible through the app stores;
- >> Provide just-in-time disclosures and obtain affirmative express consent before collecting and sharing sensitive information (to the extent that platforms have not already provided these disclosures and obtained such consent);
- >> Improve coordination and communication with ad networks

and other third parties (such as analytics companies) that provide services for apps so the app developers can better understand the software they are using and, in turn, provide accurate disclosures to consumers; and

- >> Consider participating in self-regulatory programs, trade associations, and industry organizations, which the report said can provide guidance on how to make uniform, short-form privacy disclosures.

In addition, the report recommends that advertising networks and other third parties should:

- >> Communicate with app developers so that the developers can provide truthful disclosures to consumers; and
- >> Work with platforms to ensure effective implementation of DNT for mobile.

Finally, the report suggests that app developer trade associations, academics, usability experts, and privacy researchers could:

- >> Develop short-form disclosures for app developers;
- >> Promote standardized app developer privacy policies that will enable consumers to compare data practices across apps; and
- >> Educate app developers on privacy issues.

The FTC’s recommendations – including its continuing emphasis on DNT – complement California’s recently issued mobile privacy guidance, and likely will be considered by the Department of Commerce’s National Telecommunications and Information Agency in connection with its efforts to develop a code of conduct on mobile application transparency. For more information on mobile marketing and privacy and the latest update, please click [here](#) for our previous Alert.

PATH SETTLEMENT

In its complaint against Path, the operator of a social networking app that allows users to share personal journals with up to 150 friends, the FTC alleged that the user interface in Path’s iOS app was misleading and did not provide consumers with meaningful choice regarding the collection of their personal information. The FTC also alleged that Path’s privacy policy deceived consumers by claiming that it automatically collected only certain user information such as IP address, operating system, browser type, address of referring site, and site activity information but that version 2.0 of the Path app for iOS automatically collected and stored personal information, including first and last names, addresses, phone numbers, and email addresses, from the user’s mobile device address book.

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The FTC also charged that Path, which collects birth date information during user registration, violated the COPPA by collecting personal information from approximately 3,000 children under the age of 13 without first obtaining their parents' consent.

In addition to agreeing to pay an \$800,000 civil penalty to settle the COPPA charges, Path agreed to

establish a comprehensive privacy program and to obtain independent privacy assessments every other year for the next 20 years. The settlement also prohibits Path from making any misrepresentations about the extent to which it maintains the privacy and confidentiality of consumers' personal information.

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FTC AMENDS COPPA TO STRENGTHEN CHILDREN'S PRIVACY PROTECTIONS

The Federal Trade Commission (FTC) adopted final amendments to the Children's Online Privacy Protection Act (COPPA) to strengthen children's privacy protections and to give parents greater control over the personal information that websites and online services collect from children under thirteen.

The final amendments go into effect on July 1, 2013 and were announced only weeks after the FTC issued a report, which found that mobile applications have demonstrated "little progress" in addressing privacy concerns for children's data (click [here](#) for our Alert on this topic).

BACKGROUND

Enacted in 1998, COPPA requires that operators of website and online services that are either directed to children under thirteen or have actual knowledge that they are collecting personal information from children under thirteen give notice to parents and obtain their verifiable consent before collecting, using, or disclosing personal information. In 2010, the FTC initiated its review of COPPA to ensure that it keeps up with evolving technology, including mobile devices and social networking.

KEY CHANGES TO DEFINITIONS

The final amendments include a number of modified definitions:

>> **An operator** has been updated to clarify that it covers a child-directed

THE BOTTOM LINE

The FTC continues to focus on children's privacy issues, striving to give parents greater control over their children's personal information collected through websites and online services. The COPPA amendments expand the types of companies required to obtain parental consent before collecting personal information from children under thirteen, as well as the types of information that would require parental consent. As a consequence, advertising networks, app and plug-in developers, mixed-audience sites, and child-directed sites should carefully study the COPPA amendments and take all steps necessary to ensure that they are in compliance with COPPA.

site or service that integrates outside services, such as plug-ins (downloadable software kits) and advertising networks, which collect personal information from visitors. Notably, the definition does not extend liability to platforms such as Google Play or the App Store when they simply offer access to a third party child-directed site or service.

>> **Personal information** has been updated to include geolocation information, as well as photos, videos, and audio files that contain a child's image or voice. The definition also includes persistent identifiers that can be used to recognize users over time and

across different websites or online services. However, parental notice and consent are not required when an operator collects a persistent identifier for the sole purpose of supporting the web site or online service's internal operations.

>> **A website or online service directed to children** has been amended to include plug-ins and ad networks that have actual knowledge that they are collecting personal information through a child-directed website or online service. Under the new definition, a subset of child-directed sites and services can differentiate among users, requiring them to provide

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notice and obtain consent only for those who identify themselves as under thirteen.

>> Collection of personal information has been revised so that operators may allow children to participate in interactive communities without parental consent so long as the operators take reasonable measures to delete all or virtually all children's personal information before it is made public.

NOTICE AND PARENTAL CONSENT

The amendments revise the parental notice provisions to help ensure a more effective "just in time" message to parents about an operator's information practices in the operator's privacy policy and in the notices it must give before collecting children's personal information.

The amendments add several new methods that operators can use to obtain verifiable parental consent, including electronic scans of signed parental consent forms, videoconferencing, use of government-issued identification, and alternative payment systems, such as debit cards and electronic payment systems, provided they meet certain criteria.

Notably, after considering public comments, the FTC retained *email plus* as an acceptable consent method, finding that it remained a valued and cost-effective consent mechanism for certain operators. Under *email plus*, an operator that collects children's personal information for internal use only may obtain verifiable parental consent via an e-mail from the parent provided the operator confirms consent by sending a delayed e-mail confirmation to the parent, calling or sending a letter to the parent.

To encourage the development of new consent methods, the FTC established a voluntary 120-day notice and comment process so that parties may seek approval of a particular consent method.

CONFIDENTIALITY AND SECURITY REQUIREMENTS

The COPPA amendments require operators to take reasonable steps to ensure children's personal information is released only to service providers and third parties that are capable of maintaining the confidentiality, security, and integrity of this information, and who assure that they will do so. They also require operators to retain

children's personal information for only as long as is reasonably necessary, and to protect against unauthorized access or use while disposing of the information.

SAFE HARBORS

The FTC will increase its oversight of the approved self-regulatory "safe harbor programs" by requiring them to audit their members and report annually to the FTC the aggregated results of those audits.

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FTC FINALIZES NEW GREEN GUIDES

Two decades after the Federal Trade Commission (FTC) first issued Guides for the Use of Environmental Marketing Claims (Green Guides), and nearly five years after it began its latest review of them, the FTC has released new and updated Green Guides that offer today's marketers important guidance on how to properly make environmental claims in advertising and marketing materials as well as on product labels and packaging.

The Green Guides are not enforceable law, but do indicate how the FTC will apply Section 5 of the FTC Act, which prohibits unfair and deceptive acts or practices, to express or implied environmental marketing claims. The Guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of this item or service to individuals, as well as to business-to-business transactions.

KEY PRINCIPLES

The Green Guides set forth several general principles that apply to all environmental marketing claims:

- >> Qualifications and disclosures should be clear, prominent, and understandable and must be made at the point of sale (i.e., cannot be relegated to a website).
- >> Unless it is clear from the context, an environmental marketing claim should specify whether it refers to the product, the product's packaging, a service, or just to a portion of the product, package, or service.

THE BOTTOM LINE

The new Green Guides contain a wealth of important information and numerous examples that should be considered. They also cover a number of new areas that were not covered in the prior guides. Now that they have been finalized, one can expect that the FTC will turn its attention to enforcement. Marketers and advertisers that intend to make or rely on environmental claims for their products or in their advertising must be aware of the specific provisions of the Green Guides to avoid making misleading environmental claims.

- >> The claim should not state or imply environmental benefits, even specific ones, if the benefits are negligible. Furthermore, it should not overstate an environmental benefit (e.g., if a manufacturer increases the recycled content of an area rug from 2% recycled fiber to 3%, it should not label the rug as "50% more recycled content than before.")
- >> Comparative environmental claims should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception.

SPECIFIC GUIDANCE

In addition, the new Green Guides contain guidance for a variety of specific categories of environmental marketing claims, including for claims that were not discussed in the prior Guides, such as "carbon offset" and "renewable energy," and updates to guidance from the previous Guides such as for "general environmental benefit claims," and "recycled content" claims.

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GENERAL ENVIRONMENTAL BENEFIT CLAIMS

The new Guides adopt a much stricter tone than before and now expressly state that marketers should not make *unqualified* general environmental benefit claims such as “green” or “eco-friendly” because consumers interpret these terms to suggest that the product or packaging has no negative environmental impact whatsoever. Instead, the FTC suggests qualifying general environmental claims as to specific attributes (e.g., “Eco-friendly: made with recycled materials”). However, if a product has an overall environmental benefit because of a specific attribute, the overall environmental impact and the trade-offs resulting from the attribute to prove the claim must be considered. For instance, the example claim above may still be deceptive if the environmental costs of using recycled content outweigh the environmental benefits of using it.

CERTIFICATIONS AND SEALS OF APPROVAL

The new Guides now have a section on environmental certifications or seals of approval. The Guides emphasize that certifications and seals of approval may be considered endorsements that are covered by the FTC’s Endorsement Guides, and it includes examples that illustrate how marketers could disclose a “material connection” that might affect the weight or credibility of an endorsement.

The new section also indicates that certifications or seals of approval should not be used if they do not clearly convey the basis for the certification. Moreover, marketers should use clear and prominent qualifying language where environmental certifications convey general environmental benefit claims. A marketer with a third party certification still must substantiate all express and implied claims.

Where certifications are based on attributes that are too numerous to disclose, marketers can qualify them by stating: “Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product].” The marketer should make sure that the website provides the referenced information, and that the information is truthful and accurate. Importantly, this seems to be the only instance in which the FTC would consider it acceptable for the specific environmental disclosures to be made on a website rather than in close proximity to the claim. In general, websites cannot be used to qualify otherwise misleading claims appearing on labels or in other advertisements because many consumers would not see that information before their purchase.

COMPOSTABLE/DEGRADABLE

The new Guides contain guidance about claims that a product is compostable or degradable. A company that claims a product is

compostable must have “competent and reliable scientific evidence” that all materials in the product or package will safely break down into – or become part of – usable compost, and in about the same time as the materials with which it is composted. A company should qualify a compostable claim if the product cannot be composted safely at home, cannot be composted in a timely manner, or can only be composted in a municipal or institutional facility that is not readily available to a substantial majority of consumers.

An unqualified degradable claim is permitted only if the entire product or package will completely break down and return to nature within a reasonably short period of time – which is considered to be no more than one year – after customary disposal. The new Guides specify that products destined for landfills, incinerators, or recycling facilities will not degrade within a year, so unqualified biodegradable claims for them are not permitted.

RECYCLABLE/RECYCLABLE CONTENT

A product or package should not be marketed as recyclable (such as with the Resin Identification Code (RIC)) unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.

If recycling facilities for a product are not available to at least 60% of consumers or communities, a marketer should state: "This product may not be recyclable in your area." If recycling facilities for a product are available to only a few consumers, a marketer should use stronger qualifying language: "This product is recyclable only in the few communities that have appropriate recycling programs."

The new Guides also contain guidance on "recyclable content" claims. The FTC says that these claims should be made only for materials that have been recovered or diverted from the waste stream during the manufacturing process or after consumer use. The new Guides provide that claims for products or packages made partly from recycled material should be qualified, such as by stating: "Made from 30% recycled material." Companies also should qualify recycled content claims where products contain used, reconditioned, or re-manufactured components.

CARBON OFFSETS

The new Guides require that marketers have "competent and reliable scientific evidence" to support carbon offset claims, based on "appropriate accounting methods." Emission reductions that will not occur for at least two years must be disclosed, and offsets based on activity already required by the law should not be advertised.

OTHER CLAIMS

There are a number of other claims that are highlighted in the new Guides, including claims that products are made with renewable energy or renewable materials, are lower in weight, volume, or toxicity than before, or are free of a specific substance or substances. By contrast, either because the FTC believes that it lacks a sufficient basis to provide meaningful guidance or wants to avoid proposing guidance that duplicates or contradicts rules or guidance of other agencies, the new Guides do not address use of the terms "sustainable,"

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"natural," and "organic." Organic claims made for textiles and other products derived from agricultural products are covered by the U.S. Department of Agriculture's National Organic Program.



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a blog by Ron Urbach about everything the industry is ...

October 22, 2012

Data: A Creative Director's Perspective

Data, data, data. Advertising Week was buzzing with chatter about data – its importance for the advertising industry, future implications, how to improve and maximize data, privacy and security issues... The list goes on. So it was only appropriate for Ogilvy & Mather North America Chief Creative Officer Steve Simpson's keynote address at the National Advertising Division's annual conference on Monday of Advertising Week to be focused on big data. *Adweek* reporter Katy Bachman put it well in summing up the key takeaway from Steve's address: "In the age of big data, advertisers need to get their act together when it comes to online privacy."

The Way I See It

- I see a boom in online behavioral advertising and interest-based advertising, which has given rise to the need for stricter consumer data protection standards for the industry.
- I see a number of challenges and potential pitfalls that advertising agencies and brands need to be cautious of in order to be able to reap the benefits of all of the data that is becoming available.
- I see the need for increased transparency across the industry in order to educate consumers about privacy policies and the data that is being collected from them.

The Way the Industry Sees It

I had the pleasure of speaking with **Steve Simpson**, Ogilvy & Mather North America Chief Creative Officer, after Advertising Week to further discuss his NAD keynote address and his thoughts on data, privacy, creative, and more.

Q. During your keynote, you said that this is a "massive creative issue." Can you elaborate on this point? What steps should the advertising industry take to address this creative issue?

A. For marketers, privacy is an ethical issue, it's a legal and regulatory issue, but it's also a *respect* issue. This is to say, the new issues are the old issues. It could be argued that the old days of one-way communication didn't respect the consumer in the broadness of the messaging or bluntness of the media. It intruded on your time with messages for products or services in which you often had no interest and for which you had no use. But the difference was the consumer knew *what was what*: the rules of the game were well known, transparent, and pretty much invariable. The message was honest about its intent and succeeded by the power of its proposition or the force of its charm. And when you turned the TV off, the TV didn't rise from its stand, follow you about, and note all your doings. It stayed shut off, because the "off" switch was a simple unambiguous technological act: "off" meant "off," it didn't mean "not apparently on, but watching *you* all day to see how *you* like it." While many

in the industry declare with dewy eyes and a catch in the voice that the “consumer is now in control,” they are telling only half of the truth. Because while the consumer can with high dudgeon tell a company exactly how to make a product better according to his own exacting personal standards—“Who’s in control now, you corporate hacks!!!!”—ending his tweet or review with a flurry of exclamation points, and moves on—he doesn’t move on, because the company he’s engaged isn’t ready to move on from him, but is only beginning to track him relentlessly in return for his “valuable inputs and collaboration.”

- Q.** You said that if an advertiser is not respectful of its consumers’ privacy concerns that the job to be done by advertising, and the role of the creative director for that account, is very difficult. Can you explain what you mean?
- A.** If consumers feel that marketers have relied solely on technology to track and target them, without openness and transparency, or without their knowledge or consent, then we have put the consumer into a state of alarm, resentment and even active resistance to our message. Hence, the “massive creative issue.” What kind of ad can we create that is so wonderful it can overcome this? Dear consumer, you feel violated—ready for a funny ad?
- Q.** You work with some of the most important and valuable global brands in business today. Without giving away any trade secrets, how does data and information about the potential type of customers for these companies help you in your role as the creative director on these accounts?
- A.** I won’t go into specific projects, because in my experience everybody in the industry enjoys free-wheeling general discussion until it comes too near his own case. But we are at work on several projects where, with personalization granted by consumer permission, we are designing marketing that has the potential to be more *useful* than, possibly, ever before. Don’t be thrown by the word *useful*. This does not mean dull, or uninventive, or merely utilitarian; it simply means that the communication has a much better chance of serving the right need for the right person at the right time. And it will be brilliantly effective or creative, or not, depending upon our own talents. To quote the Talking Heads: “Same as it ever was, same as it ever was...”
- Q.** There are some who believe that with the greater focus on data and analytics, the role of creativity and the making of creative advertising are less important. Do you agree with that statement and if not, why?
- A.** Who believes that? Send them to me; we’ll have coffee. Once we have chased the consumer over acres of “Big Data,” once we have picked over their habits and quirks and predilections with our sharp delicate analytical tools, once we have run them to ground right in their very bedrooms, once we have stopped them and asked them for their attention and they pause and prepare to listen, we say—what? The “what” is the creative and it had better be good.

Q. There are some who read or hear the words “data” and “advertising” and they are fearful. What would you say to them to make them less concerned?

A. “Data” is knowing. If the terms of knowing are agreed by all parties (this is no small thing, but it is vital), then marketing and advertising can become more intelligent, more useful and ultimately more creative.

Q. What is the coolest thing in your office right now?

A. The coolest thing in our office is on our office: the roof of our 11-story building on 11th Avenue in Manhattan. Up top, we have a bar, patio and shaded veranda. During the summer, we have the Battle of the Rooftop Bars with the Ink Hotel across the way. I like our crowd better; smart, creative, perfectionist. I believe this is not a requirement to get into the Ink Hotel bar, but it is for ours.

Ronald Urbach is the Chairman of the leading advertising law firm Davis & Gilbert LLP. With over 30 years of experience, he represents numerous advertising agencies – including those considered the world’s top creative agencies – and some of the largest advertisers and marketers on all aspects of advertising law. Ron can be reached at rurbach@dglaw.com or 212.468.4824.



MADISON AVE INSIGHTSSM

a blog by Ron Urbach about everything the industry is ...

October 9, 2012

Privacy and the FTC: Inside Perspective from FTC Commissioner Julie Brill

On Thursday during Advertising Week in New York City, I hosted an event called “Mission Impossible: Truth & Privacy – The Future is Now,” featuring Commissioner Julie Brill of the Federal Trade Commission, along with Frank Abagnale, one of the world’s foremost authorities on fraud and identity theft (you may know him best from the film Catch Me If You Can – he was portrayed by none other than Leonardo DiCaprio), and Jonathan Salem Baskin, Co-Author of Tell The Truth. Privacy is an issue everyone is talking about these days, and I wanted to share with you some of the thoughts and issues discussed during the session at Advertising Week. Advertising is a fascinating and complex industry, reflecting the latest innovations, the newest technologies, and, of course, the height of creativity. Advertising is a reflection of the fundamental changes sweeping our society – the transformative effect of digital, the changes in all forms of media, the importance of data and the rise of wireless. Amidst this rapid change, privacy is one of the most important issues in the advertising and media business, and one which demands our attention now, not tomorrow.

The Way I See It

- I see that digital technology and media has created an unprecedented “Holy Grail” opportunity for marketers to have conversations with consumers as individuals wherever they are on a broad array of devices. The question we must answer is, how do we manage the legitimate privacy concerns?
- I see the FTC’s role and influence in steering the privacy and data security debate and action rising in importance.
- I see global marketers and agencies working in good faith either alone or in groups to navigate safely through leading edge issues and the concerns of interested parties – the government, agencies, marketers, technology providers, media and consumers.
- I see “do not track” continue to be a central issue that focuses many of the important advertising industry and societal issues about both what can be and what should be.
- I see “privacy by design” being a simple concept, but a difficult concept to execute in real time.

The Way the Industry Sees It

Commissioner Julie Brill of the FTC shared some extremely valuable insights with me and the attendees of our Advertising Week session. I then asked Commissioner Brill some follow up questions that touched upon some of the conversation that we had in our Advertising Week session.

- Q.** Can you highlight what you see as the role of the FTC in regards to its relationship with the advertising industry's need to focus on consumer privacy and data security?
- A.** The Commission has developed a set of best practices, as outlined in the agency's March 2012 final privacy framework, for companies that collect and use consumer data. ("Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers," An FTC Report (Mar. 26, 2012) available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.) Because the advertising industry is among the heaviest users of such information, these best practices can be useful to the advertising industry—including ad networks, individual advertisers, and all other players in the advertising eco-system—as they develop and maintain processes and systems to operationalize privacy and data security practices within their businesses. In addition to our policymaking role, the Commission takes action against companies—including those in the advertising industry—that do not treat consumer data in accordance with the laws enforced by the agency. For example, we took action against several advertising networks that misrepresented their practices involving consumers' ability to opt-out from online behavioral advertising. (See press releases, "FTC Puts an End to Tactics of Online Advertising Company That Deceived Consumers Who Wanted to "Opt Out" from Targeted Ads" (Mar. 14, 2011), available at <http://www.ftc.gov/opa/2011/03/chitika.shtml>; "Online Advertiser Settles FTC Charges ScanScout Deceptively Used Flash Cookies to Track Consumers Online" (Nov. 8, 2011), available at <http://www.ftc.gov/opa/2011/11/scanscout.shtml>).
- Q.** In the fast paced world of marketers and agencies where they must implement "privacy by design", what is the biggest issue confronting the industry?
- A.** Well, there are a lot of big issues. One of the biggest issues is the rapid pace of today's technological advances. Companies are bringing products and services to market as quickly as they can—and the advertising and marketing have to keep up with that pace. As a result, companies may not be employing a methodical process to consider all the privacy and data security issues that could arise with the product or service, or with an advertising or marketing campaign. I think one of the most important elements of Privacy by Design is for companies to take the time to thoroughly examine the consumer information they are collecting, what is being done with that information, and how it is being safeguarded. In our privacy report, we stress the importance of operationalizing these processes, which will help companies conduct these analyses in an efficient and timely fashion.
- Q.** With the digital transformation of our society, the gathering of data – information that can be used to help determine what a specific consumer might be interested in – can be very helpful to advertisers and agencies in achieving more effective and more efficient advertising. What are the competing interests from the FTC's perspective?
- A.** From my perspective, more effective and efficient advertising is not what chiefly concerns me—in fact, many consumers prefer to receive advertising that matches their interests. Rather, it is the other uses of data that cause me concern. For example, lists of elderly patients who suffer from Alzheimer's disease and similar maladies that data brokers market as "perfect prospects" for holistic remedies, financial services, subscriptions and insurance. (See Karen Blumenthal's article in The Wall Street Journal, "How Banks, Marketers Aid Scams," July 15, 2009.) And social network chats and online search histories that some firms "scratch and

sniff” to provide information to a future potential employer, unbeknownst to consumers. I am concerned about how a consumer’s browsing history may be used in a way that can unfairly cause her harm — perhaps she has viewed articles on reducing credit card debt and this browsing history is then provided to a bank where she is seeking a loan. Information about online purchases can also be a concern when a consumer’s purchase of a deep fat fryer is transmitted to the health insurance company and it uses that information to set higher rates.

Q. For global marketers and agencies, finding a balance between the laws in the U.S. and those around the world in their business practices is a challenge. Can you speak to what the current challenges are for us as marketers, and for the FTC, in terms of global versus domestic privacy?

A. On a global level, the challenge that regulators around the world now face—and the challenge they are working to address—concerns the contrasting privacy requirements among jurisdictions. The FTC and many regulators around the world, particularly in the EU and the APEC region, have been considering how these different privacy frameworks can become more inter-operable. By “inter-operable,” I am referring to systems that, while they may not be the same, allow for mutual recognition and—importantly—transfers of data across borders. To foster inter-operability, we need a certain degree of commonality and shared privacy values. I think that there is sufficient common ground between the US and regulators around the world to move towards inter-operability. And the mechanisms are in place, or are being developed. The U.S./EU Safe Harbor is a mechanism that allows for inter-operability between the United States and the EU. The APEC Cross Border Privacy Rules system is designed to allow multilateral inter-operability through a set of detailed privacy requirements negotiated by the relevant stakeholders and authorities in the Asia Pacific Economic Cooperation Forum region, based on the APEC Privacy Principles.

Q. Do you see privacy or data security as a bipartisan issue?

A. Absolutely. Members of both parties are very concerned with these issues. Both sides of the aisle want consumers’ data to be protected, while at the same time they want businesses to be able to continue to grow and innovate. We’ve seen bills introduced by both Democrats and Republicans that address both privacy and data security issues. U.S. Representatives Markey and Barton, a Democrat of Massachusetts, and a Republican from Texas, co-chair the Bipartisan Congressional Privacy Caucus. And at the Federal Trade Commission, our concerns about privacy, particularly in the enforcement arena, are also largely bipartisan.

Q. What lessons can companies take from the recent release by the FTC on mobile apps? What does this say about the FTC’s approach on how it interacts with industry?

A. The lesson is that all developers, large and small, need to pay attention to both truth-in-advertising and privacy principles when marketing mobile apps. Our guidance encourages app developers to bake privacy into their apps from the start. Developers should limit their information collection to the information they need for the proper functioning of their app. And they should ensure the security of the information they do collect. They should collect sensitive information—financial, medical, precise geolocation—only with affirmative consent. They must comply with the provisions of the Children’s Online Privacy Protection Act in connection with children’s information. And app developers should be transparent about their

practices. They should provide choices that are easy to use and understand, and the choices should, of course, be honored.

- Q.** There have been a number of significant FTC enforcement actions in the areas of privacy and data security. Without going in to any specifics of any of the decisions, what are the lessons that the FTC is trying to teach the industry?
- A.** Our enforcement efforts demonstrate that companies need to address privacy and data security up front, as products are being developed, and consistently, through company processes and procedures. Privacy and data security cannot be dealt with as an afterthought. In many of our privacy and data security consent orders, the companies agreed to develop comprehensive privacy or data security programs. The goal of these requirements is to assist the companies in addressing privacy and data security in a systemic fashion, with accountable employees, proper training, and appropriate procedures for making sure that privacy and data security concerns are dealt with every step of the way.
- Q.** You spent a number of years at different state Attorney Generals' offices focusing on consumer protection. How do you find your role as Commissioner of the FTC to be different? Do you find your prior state Attorney General experience to be helpful?
- A.** As Commissioner I am working with my fellow Commissioners and agency staff to set the agency's priorities on consumer protection, privacy, and competition enforcement matters; on developing legislative recommendations and agency-wide policy. Each of the Commissioners draws on his or her experience in our enormously expansive role. I brought an unusual depth of experience in consumer protection and competition law generally, because of my years as a state enforcer in the Vermont Attorney General's office and then the North Carolina Attorney General's office. I also had deep experience in privacy and data security before I became a Commissioner, because I served for many years as the chair of the Privacy Working Group for the State Attorneys General. In general, as a state Assistant Attorney General and Chief of Consumer Protection and Competition, I brought many individual state cases involving a wide variety of consumer protection matters, and led some important multi-state investigations involving privacy, data security, pharmaceutical marketing, and advertising issues. My role as a Commissioner is very different from my role in state attorneys general offices. I'm no longer a front line attorney, supervising attorney, or in charge of a single division. I'm now in a role where I set policy for the entire agency. And yet much of what I learned regarding consumer protection and competition at the state level is directly applicable to my work as a Commissioner, because the laws under which the states bring consumer protection and competition actions share many similarities with the FTC Act.

Q. What is the coolest thing in your office right now?

A. Well, I'm not sure they are the coolest things in my office, but I am most fond of the black and white photos of 20th century heroes that cover my walls. They include photos of Louis Brandeis, Winston Churchill, FDR and Eleanor, JFK, and Martin Luther King, Jr.—leaders who had to make some pretty tough decisions in their day and can serve as inspiration as we grapple with the tough issues of our time.

Ronald Urbach is the Chairman of the leading advertising law firm Davis & Gilbert LLP. With over 30 years of experience, he represents numerous advertising agencies – including those considered the world's top creative agencies – and some of the largest advertisers and marketers on all aspects of advertising law. Ron can be reached at rurbach@dglaw.com or 212.468.4824.

TAB 2



RONALD R. URBACH

Chairman

Co-Chair, Advertising, Marketing & Promotions; Entertainment, Media & Publishing;
Intellectual Property; Technology, Digital Media & Privacy

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212.468.4824

Ronald R. Urbach is Chairman of the firm and the Management Committee. He is also co-chair of the Advertising, Marketing & Promotions Practice Group and head of the Intellectual Property; Entertainment, Media & Publishing and Technology, Digital Media & Privacy Practice Groups.

His clients include numerous multinational, national and regional advertising agencies, including those agencies that are viewed as being the top creative agencies in the world. Agency clients include the full range of below the line agencies which include promotion, direct marketing, telemarketing, public relations, health care, interactive, event and other businesses. Some of the largest advertisers and marketers in many different product categories are his clients, including those in the automotive, telecommunications, wireless communication, retailing, video games, consumer electronics, publishing, membership services, computer, entertainment, internet, alcoholic beverages, magazines and travel sectors.

Mr. Urbach has been recognized as a leading advertising lawyer for seven consecutive years by *Chambers USA: America's Leading Lawyers for Business* (2006-2012) and has received a "Star Individual" ranking since the inception of this tier. He is described by clients as having "an outstanding reputation for his broad-based advertising practice which covers IP, media, commercial and contractual matters, and data security." Clients also "applaud him as one of the most excellent lawyers in the advertising bar," and state that he is "savvy, creative, smart and clear." In addition, Mr. Urbach has been recognized by *The Legal 500 U.S.* as a "leading lawyer" in the area of advertising and marketing. Clients describe him as being "the best attorney in the field" and commend him for providing "invaluable" advice and for "dealing with complex issues." Mr. Urbach has also been recognized as one of *The Best Lawyers in America* in advertising law (2010- 2013) and as a Super Lawyer by *New York Metro Super Lawyers* (2007-2012).

Mr. Urbach regularly counsels his clients on all aspects of the law in the creation, production and distribution of advertising, marketing and promotional materials. Not only are the federal, state and local laws that generally apply to advertising, marketing and promotion considered, but also the laws and regulations unique to a specific product category or industry.

From broadcast clearance of advertising materials, review of advertising copy, analysis of marketing programs, and the application of intellectual property laws and rights of privacy and publicity, Mr. Urbach's practice covers every applicable issue and area. A substantial portion of his practice involves the negotiation and drafting of all types of contracts and agreements, including agency client, promotion, joint marketing, sponsorship, talent, music and licenses.

Mr. Urbach's practice and proficiency involves appearing before federal and local regulatory agencies - the Federal Trade Commission, state attorneys general, and other federal, state and local agencies that have jurisdiction over advertising, marketing and promotions. He has handled many of the most critical advertising and marketing practice cases in recent years, a number of which were joint FTC and/or multistate actions. Mr. Urbach also regularly handles cases before the National Advertising Division (NAD), the leading self-regulatory body of the advertising industry.

In addition, Mr. Urbach has a leading reputation in the new media and interactive industries. He works with publishers, interactive agencies, technology companies, internet companies and content developers. His practice touches on every aspect of the internet eco-system.

REPRESENTATIVE ENGAGEMENTS

- Davis & Gilbert was retained by the two leading advertising industry trade associations, the American Association of Advertising Agencies and the American Advertising Federation, to file comments on behalf of the advertising industry with the Federal Trade Commission regarding possible revisions to its "Guides Concerning the Use of Endorsements and Testimonials in Advertising."
- Worked with Amazon in the formulation of interactive advertising policies and guidelines in connection with its implementation of interactive advertising. The goal was to balance diverse legal, regulatory and policy issues with the company's business and marketing objectives.
- Working with the American Association of Advertising Agencies, Davis & Gilbert drafted standard forms, advised on value compensation metrics, participated in nationwide industry educational efforts on value compensation, advised on industry developments, and represented the interests of the industry on both regulatory and litigation matters.
- Represented the American Association of Advertising Agencies, the American Advertising Federation and the Association of National Advertisers in the filing of an amicus brief before the U.S. Supreme Court in *Nike v. Kasky*, a First Amendment commercial speech case concerning a corporation's right to speak freely on matters of public concern and one of the most watched and anticipated free speech cases in the last 20 years.
- Davis & Gilbert was retained by the three key advertising industry trade associations, American Association of Advertising Agencies, the American Advertising Federation and Association of National Advertisers, to file comments on behalf of the entire advertising industry with the Federal Trade Commission regarding revisions to its "Guides for the Use of Environmental Marketing Claims."
- Developed all of the terms and conditions, and reviewed the applicable collateral and marketing materials, for a sophisticated loyalty redemption program for a major retailer.



- Negotiated numerous agency client agreements on behalf of agency and advertisers, many of which are global agreements involving a range of individuals covering all areas - procurement, finance, marketing, advertising and legal.
- Represented Verizon Wireless in the settlement reached among 32 state attorneys general and three of the nation's largest wireless telephone carriers involving pricing and signal coverage disclosures, among other issues.
- Represented Affinion Corporation in a settlement resolved with 16 state attorneys general that involved a major national bank and their marketing practices for membership clubs using trial offer marketing and key solicitation devices.
- Successfully defended American Isuzu Motors in the Federal Trade Commission and multi-state action against automobile industry lease and finance advertising practices.
- Advised clients on all of the applicable "Green" and environmental advertising and marketing practices and issues relating to product development, packaging and marketing. And further handled seminal Green marketing and advertising regulatory and self-regulatory matters.
- Negotiated successful settlements with numerous individual state and local government agencies on advertising and marketing practices for national, regional and local advertisers across product and service categories.
- Successfully defended "negative option" marketing practices for clients, both at the federal and state regulatory levels, and in state enforcement actions from New York to California.

SPEAKING ENGAGEMENTS

"Advertising Law: Regulation at Hyper-Speed," New York State Bar Association IP Section Annual Meeting, January 21, 2013

"Today's Consumer & Consumer Marketplace," 34th Annual Promotion Marketing Association Conference, November 12-14, 2012

"Privacy & Data: The Future is Now," 2012 Advertising Week, October 4, 2012

"Third Screen: Digital Disclosures and Challenges," NAD Annual Conference 2012, October 1-2, 2012

"360 Degree View of an NAD False Advertising Challenge: Inside Strategies for Effectively Resolving Advertising Disputes," American Conference Institute's 3rd Annual Forum on Litigating and Resolving Advertising Disputes, June 19-20, 2012

"Crime and Punishment Up Close and Personal," 2012 ANA Advertising Law & Public Policy Conference, March 28-29, 2012

"Spotlight on Advertising Privacy," American Conference Institute's 25th National Advanced Forum on Advertising Law, January 23-24, 2012

“Brave New World: Exploring the Rapidly Changing Commercial and Legal Landscape,” 33rd Annual Promotion Marketing Association Conference, November 15-16, 2011

“Uncovering the Legal Risk as Organizations Leverage Social Media for Marketing and Advertising Purposes,” Marcus Evans’ 2nd Social Media Legal Risk and Strategy Conference, July 19-21, 2011

“NAD? Federal Court? Determining Whether and Where to Challenge Your Competitors’ Ads,” American Conference Institute’s 2nd Annual Forum on Litigating and Resolving Advertising Disputes, June 21-22, 2011

“Annual Integrated Marketing Conference: Government and Legal Affairs Symposium,” Promotion Marketing Association, May 26, 2011

“Collateral Consequences,” Association of National Advertisers Advertising Law & Public Policy Conference, March 15-16, 2011

“Establishing Parameters for Utilizing Information in Behavioral Advertising: Balancing Consumer Privacy Concerns with a Company’s Desire to Collect and Use Data,” American Conference Institute’s 24th National Advanced Forum on Advertising Law, January 24-25, 2011

“What You’re Watching – Chaos and Opportunity: The Internet Ecosystem; The Rise of Integrated Marketing,” 32nd Annual Promotion Marketing Association Conference, November 18-19, 2010

“Staying Clean When Going Green - An Update on the FTC’s Green Guides and Policy Considerations and Strategies for Companies and their Counsel.” New York City Bar Association, November 9, 2010

“For Adults Only,” International Trademark Association’s 132nd Annual Meeting, May 22-26, 2010

“Intellectual Property In The 21st Century,” ANA Advertising Law & Public Affairs Conference, March 17-18, 2010

“Negotiating Talent and Endorsement Deals under the New Guides,” ACI: 23rd National Advanced Forum on Advertising Law, January 26-27, 2010

PUBLICATIONS

Author, “The Pace Of Privacy: A Look Back At 2012,” *Law 360*, December 19, 2012

Co-Author, “FTC Finalizes New Green Guides,” *D&G Advertising, Marketing & Promotions Alert*, October 2012

Author, “Advertising Week: A Time of Introspection and Inspection,” *The Huffington Post*, October 3, 2012



Author, "What the Advertising Industry Learned From the Olympics," *AdRants*, August 16, 2012

Author, "How the Olympics Has Fueled Mobile Growth," *AdRants*, August 10, 2012

Author, "Five Tips For Marketers Eyeing Olympic Athlete Endorsements," *AdRants*, August 8, 2012

Author, "Shuttlecocks + Controversy = Happy Advertisers," *AdRants*, August 6, 2012

Author, "The Importance (And Relevance) of Official Olympic Sponsorship," *AdRants*, August 2, 2012

Author, "Advertising Lessons Learned From the Olympics Opening Ceremony," *AdRants*, July 31, 2012

Co-Author, "Study of 'Up To' Claims Suggests Possible Change in FTC Standard," *D&G Advertising, Marketing & Promotions Alert*, July 2012

Co-Author, "FTC Hosts Workshop on Advertising and Privacy Disclosures in Online and Mobile Media," *D&G Advertising, Marketing & Promotions Alert*, June 2012

Co-Author, "The Future of 'Do Not Track' and its Impact on Online Media," *D&G Advertising, Marketing & Promotions Alert*, June 2012

Co-Author, "California Suit Highlights Risks of Environmental Marketing," *D&G Advertising, Marketing & Promotions Alert*, November 2011

Co-Author, "Stop Online Piracy Act: The Details," *D&G Advertising, Marketing & Promotions Alert*, November 2011

Co-Author, "Michaels Stores Settles 'Continuous Sale' Charges With New York," *D&G Advertising, Marketing & Promotions Alert*, September 2011

Author, "The Path to Regulation and Compliance," *E-Commerce Law & Policy*, May 2011

Co-Author, "Dot Com Disclosures: FTC Seeking Comments," *D&G Advertising, Marketing & Promotions Alert*, June 2011

Author, "Seven Legal Issues That Agencies Should Be Thinking About In 2011 – Where Does Your Shop Stand on These Topics?" *Advertising Age*, April 27, 2011

Co-Author, "Congress Passes Restore Online Shoppers' Confidence Act" *D&G Advertising, Marketing & Promotions Alert*, December 2010

Co-Author, "FTC Proposed Privacy Framework Sparks Action and Debate," *D&G Advertising, Marketing & Promotions Alert*, December 2010



Co-Author, "FTC Releases Proposed Revisions to Green Guides and Seeks Comments," *D&G Advertising, Marketing & Promotions Alert*, October 2010

Co-Author, "Industry Shift In The Clearance Of Comparative Claims Made In Print Advertisements," *D&G Advertising, Marketing & Promotions Alert*, October 2010

Co-Author, "FTC Brings Action Against PR Agency for Misleading Online Endorsements," *D&G Advertising, Marketing & Promotions Alert*, September 2010

Co-Author, "FTC Answers Frequently Asked Questions About Endorsement Guides," *D&G Advertising, Marketing & Promotions Alert*, July 2010

PRESS

Quoted, *Law360.com*, "FTC Set To Update Dot-Com Disclosure Guide By Year's End," by Allison Grande, October 1, 2012

Quoted, *AdWeek.com*, "In Unorthodox Arrangement, Marketer Has Dual Roles – Can Red Peak Chairman Really Also Be Client Acer's CMO?" by Noreen O'Leary, September 17, 2012

Quoted, *Law360.com*, "Dot Com Ad Guidance Must Be Flexible To Endure: Attys," by Allison Grande, September 27, 2011

Quoted, *Advertising Age*, "Agencies Beware: Culpability Potholes Ahead - FTC's Updated Guidelines, New Court Precedents Indicate Firms Must Step up Due Diligence in Their Work," March 6, 2011

Quoted, *St. Louis Post-Dispatch*, "FTC Could Rewrite Marketing Guidelines," by Matthew Hathaway, May 16, 2010

Quoted, *Brandweek*, "NAD: The Plug Stops Here," by Robert Klara, November 1, 2009

Quoted, *The National Law Journal*, "Everybody's Getting On Case Against Bad Ads," by Tresa Baldas, August 17, 2009

Quoted, *The National Law Journal*, "FTC Targets Retailers as well as Manufacturers for Deceptive Advertising," by Tresa Baldas, July 22, 2009

Quoted, *Brandweek*, "New FTC Asserts Itself," by Todd Wasserman, April 27, 2009



PROFESSIONAL MEMBERSHIPS/AFFILIATIONS

New York State Bar Association

Promotion Marketing Association, Board of Directors and Legal Affairs Committee

American Association of Advertising Agencies, Legal Affairs Committee

BAR ADMISSIONS

New York

EDUCATION

Washington University School of Law, St. Louis, J.D., 1976

Clark University, B.A., *magna cum laude*, 1973

Attorney Advertising :: Prior results do not guarantee a similar outcome.

TAB 4



ADVERTISING, MARKETING & PROMOTIONS

Since 1934, when we structured the deal for the original radio – “soap opera” – the first advertiser-created broadcast program, Davis & Gilbert has been the preeminent law firm for all issues relating to the advertising, marketing and communication industry. We represent more clients in these areas than any other law firm, and no firm has more attorneys dedicated to this work than Davis & Gilbert.

Our attorneys regularly advise on all issues relating to the creation, production, and dissemination of all kinds of advertising, marketing, and promotion material across all media. We have unmatched expertise in addressing issues generated by the influx of interactive technology and consumer-generated content. In this way, we are uniquely able to help clients adapt and succeed in this world of rapid change.

Davis & Gilbert’s Advertising, Marketing & Promotions Practice Group has been recognized by numerous directories and publications that cover the legal industry. The firm was recently featured in *The National Law Journal’s* Midsize Hot List, which cited the firm’s “venerable” position in the field of advertising and marketing communications. Our practice has achieved a first-tier ranking in “Best Law Firms” by *U.S. News & World Report – Best Lawyers* in the categories “National – Advertising Law” and “New York – Advertising Law” for the past three years. We have been top-tier ranked by *Chambers USA: America’s Leading Lawyers for Business*, the leading research publication in the legal industry, in the nationwide category Advertising: Transactional & Regulatory for seven consecutive years. The 2012 edition applauds the firm’s “top-drawer counsel on the gamut of advertising law” and highlights the high caliber of the group’s attorneys, describing them as “extremely responsive, thoughtful and timely.” The group also earned a ranking in the *Chambers* categories “client service” and “commercial awareness” for Advertising. In addition, *The Legal 500: United States*, has ranked Davis & Gilbert in the top tier for Media, Technology and Telecoms: Marketing and Advertising for six consecutive years. The 2012 edition of the guide distinguished Davis & Gilbert as “the best firm in the advertising agency world” and highlighted its leading reputation as a “trusted advisor” to global brands, leading advertising agencies and industry trade associations and self-regulatory bodies.

THE DAVIS & GILBERT ADVANTAGE

Davis & Gilbert is at the forefront of changes sweeping the advertising industry, and no law firm offers more expertise in meeting all needs of advertisers and agencies. We represent clients in all matters involving advertising, marketing, entertainment, intellectual property, interactive, integrated and traditional media, sales promotion, direct marketing, public relations and licensing. Our attorneys have a thorough knowledge of the various businesses within these industries and are uniquely able to develop innovative solutions to any issues our clients encounter. We frequently are called upon to

advise in situations where there is no precedent and, consequently, Davis & Gilbert attorneys often establish the industry standards in these areas.

OUR CLIENTS

Davis & Gilbert's clients are among the most visible in all media; our advertising and marketing communication agency clients range in size from small start-ups and mid-size creative shops to regional and national firms, as well as diversified global holding companies and their operating companies. Our advertiser and marketer clients reflect some of the most well-known brand names in the United States and around the world.

While our clients sell diverse products and services, their common element is that they all need to market, promote, advertise and sell. Our attorneys have unique knowledge and perspective that distinctly benefits in-house counsel seeking to keep their businesses at the leading edge of competition.

UNEQUALED INDUSTRY EXPERTISE

We know everything there is to know about the business of advertising and marketing communications because we are involved in every phase of our clients' work. From concept to distribution, we work with clients on all contractual, regulatory, intellectual property, media and business law issues that relate to advertising, media, promotion and marketing.

Whether advising on traditional or digital media or marketing strategies, our advertising and marketing attorneys have particular expertise in the business needs and regulatory concerns of companies in all key industry segments, including wireless communications, consumer electronics, food, health, cosmetic, fitness, automotive, retail and alcoholic beverages. We are involved in every aspect – from intellectual property protection to regulatory issues, including governmental, legislative and self-regulatory concerns – for all critical and sensitive areas of law, such as marketing to children, health claims, negative-option marketing, branded content, viral marketing, and consumer-created content. In advising numerous trade associations, speaking before government groups and advocating for our clients, we have established countless essential regulatory principles that apply to these areas. We continually define the critical issues of tomorrow and advise clients how to best prepare for these eventualities.

A core area of our practice focuses on all kinds of promotional activities, including sweepstakes, sponsorships, tie-ins and cutting-edge marketing techniques such as word-of-mouth, viral, and guerilla. The use of wireless devices, particularly cell phones, to engage consumers is one of the most exciting growth areas in our marketing practice. Through our longstanding representation of a leading wireless communications carrier, we are especially well-suited to analyze and structure the most innovative promotional programs distributed by way of wireless devices.

Content generation has moved from the traditional creators of films, television programs, songs, books and plays, to the advertisers, marketers and agencies that create, fund, or support these works. We work with clients in all these areas to structure and facilitate the related arrangements. With the rise of digital media and the adoption of technology that allows for the dissemination of consumer generated content, we counsel clients on how to best use and control such content while avoiding unnecessary risk.

As the leader in advertising, marketing and promotions law, our practice continues to expand with each technological innovation. Davis & Gilbert has been with the industry since inception and we are uniquely positioned to lead the way for future developments as they evolve.

INDUSTRY ASSOCIATION AFFILIATIONS AND/OR REPRESENTATIONS

Davis & Gilbert attorneys frequently are called upon by the following professional groups for guidance on issues, forms and procedures:

- American Association of Advertising Agencies
- American Advertising Federation
- American Marketing Association
- Association of National Advertisers
- Council of Public Relations Firms
- Counselors Academy of the Public Relations Society of America
- Direct Marketing Association
- Mobile Marketing Association
- Promotion Marketing Association

REPRESENTATION OF CLIENTS BEFORE THESE SELF-REGULATORY/INDUSTRY GOVERNING BODIES:

We have successfully brought or defended advertising challenges before all of the following organizations, establishing key principles for substantiation, defining national vs. local advertisers, and establishing critical demonstration principles for toy advertisers:

- National Advertising Division of the Council of Better Business Bureaus (NAD)
- Children's Advertising Review Unit (CARU)
- National Advertising Review Board (NARB)
- All major broadcast and cable networks and stations standards and practices groups, including ABC, NBC, CBS, MTV, Nickelodeon, ESPN, WB

REPRESENTATIVE ISSUES ADDRESSED FOR OUR CLIENTS INCLUDE:

Advertising

- Agreements and forms including:
 - Agency/client agreements
 - Sponsorship agreements
 - Event marketing agreements
 - Commercial production agreements
 - License agreements for music and other rights
 - Talent (over scale and other) agreements with performers, writers and musicians
 - Media purchase and insertion orders
 - Web development, digital media, interactive and technology agreements
 - Art buying and licensing with artists, photographers, illustrators, designers and animators
 - Privacy policies



- Advice and guidance from concept through production and distribution
- Copy review and clearance
- Demonstrations, simulations, testimonials and endorsements
- Disclosure requirements in any and all media, including online, print, broadcast and outdoor
- Privacy/publicity challenges and analyses
- Intellectual property – copyright, trademark and patent
- Product claim support and substantiation
- Comparative claims review
- Comparative advertising challenges, including Lanham Act and unfair competition claims
- Compliance with federal, state and local laws and regulations
- Advertising and marketing compliance audits
- Formulation of internal compliance policies and procedures
- Internal client training seminars and workshops on legal clearance procedures

Marketing

- Do-not-call/do-not-mail
- Recorded telephone conversations
- Internet marketing and unsolicited commercial e-mail
- Refer-a-friend strategies
- Viral and word-of-mouth marketing strategies
- Guerilla marketing
- Price range advertising
- Prize promotion fulfillment
- Mail/Telephone Order Rule compliance
- Discount buying club compliance
- Gift certificates and stored-value cards, including escheat laws
- Coupons and continuity programs
- Direct marketing and membership club marketing practices
- Loyalty programs
- Co-branding project agreements
- Joint marketing campaigns and the licensing of third-party rights
- Joint promotional programs among businesses
- Sampling programs
- Discount offers, refunds, rebates, and installment sales
- Compliance with service contract and extended warranty laws, including necessary compliance with the Telemarketing Sales Rule, the Telephone Consumer Protection Act and similar state laws, including drafting and reviewing telemarketing scripts
- Participation in drafting federal, state and local legislation
- Electronic billing, credit and billing practices, including compliance with the Truth in Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity Act and related state laws and regulations

Promotions

- Web-based sweepstakes
- Mobile phone promotions
- Multi-player tournaments
- Online auctions
- Retail and business promotions
- Special hazard promotions
- Special events
- Gambling and state lottery analysis
- Game play and skill contests
- Sponsorship and third-party tie-in arrangements, including commercial co-ventures
- Registration and bonding in appropriate jurisdictions
- Structure and content of official rules and/or terms and conditions of promotions

Sponsorships

- Artist and concert tours and promotions
- Sports team and sports league marketing
- Sports personality and major marketer arrangements in all sports and industry categories
- Stadium and building naming rights
- Motorsports sponsorships
- Event marketing at all venues

Multiplatform Media

- Establish policies and guidelines for the online publishing industry, including standard terms and conditions, advertising expenditure analysis, measurement and metrics, best practices and online advertising guidelines
- Negotiate hundreds of on-line advertising deals, from sophisticated co-branding and sponsorship agreements, to insertion orders for virtually all types of on-line inventory, including banner impressions, click-through arrangements, keyword purchases, and the creation and acquisition of "rich-media" inventory
- Special expertise in the areas of web and podcasts, satellite radio, handheld game systems, digital downloads, broadband, cell phone ring tones and other wireless devices
- Mobile distribution of music, video content, television, movies and films
- Draft and negotiate contracts and provide advice regarding legal issues from every perspective in the affiliate marketing space

Regulatory

- Regulatory disputes with all federal, state and local agencies
- Represent clients and negotiate resolutions in key disputes before the FTC and the state Attorneys General
- Participation in FTC industry programs, workshops and proceedings across the country
- Monitor and advise on statutes and regulations governing the marketing, advertising, and labeling of foods, drugs, cosmetics and medical devices

- Client representation before the FDA, including defense of clients whose products have been seized for alleged misbranding
- FDA inspections of clients' manufacturing facilities
- Assisting foreign clients with bringing products and services to the U.S. market

Talent Agreements

We have handled countless complex celebrity talent and music agreements for the advertising and marketing industries. These include celebrities from every area of sports, film, television, theater, and music. Our representation includes more than simply drafting agreements. We are able to advise on the applicability and details of any union guild agreement, and coordinate with the unions thereafter if issues arise. We oftentimes are asked to find the talent, and negotiate and finalize an array of significant talent transactions, including global deals, multimillion dollar arrangements, and detailed service and relationship contracts. A very small sampling includes the following:

- Goodby, Silverstein & Partners/Hewlett Packard/Vera Wang
- Big & Rich/MS&L/Prilosec OTC
- Mariah Carey/Elizabeth Arden
- Baz Luhrmann/Nicole Kidman/Chanel No. 5
- Beyonce Knowles/Spike DDB/Pepsi
- Samuel L. Jackson/Bartle Bogle Hegarty/Barclays Bank PLC
- Lenny Kravitz/TBWA Chiat/Day/Nissan
- Bootsy Collins/Wieden & Kennedy/Nike
- R. Kelly/DDB/Exxon/Mobil
- Jeff Bridges/DDB Worldwide/Ameritrade
- Lucy Liu/ Wieden & Kennedy/Vodafone
- Kelly Ripa/DDB/Electrolux
- Claire Danes/Ogilvy/Time Warner Cable
- Ricky Gervais/Ogilvy/Time Warner Cable



ADVERTISING, MARKETING & PROMOTIONS

REPRESENTATIVE ENGAGEMENTS

- Davis & Gilbert was retained by the two leading advertising industry trade associations, the American Association of Advertising Agencies and the American Advertising Federation, to file comments on behalf of the advertising industry with the Federal Trade Commission regarding possible revisions to its “Guides Concerning the Use of Endorsements and Testimonials in Advertising.”
- Davis & Gilbert was retained by the three key advertising industry trade associations, American Association of Advertising Agencies, the American Advertising Federation and Association of National Advertisers, to file comments on behalf of the entire advertising industry with the Federal Trade Commission regarding revisions to its “Guides for the Use of Environmental Marketing Claims.”
- We represented Verizon Wireless in the development and launch of its groundbreaking V CAST service which provides broadband access to news, entertainment and other video content on its 3G wireless network. We also negotiated the company’s groundbreaking deal with You Tube.
- We represented Verizon Wireless in a joint venture between Verizon Wireless and MTV/ RealNetworks’ Rhapsody service, to create a cutting-edge integrated digital music service that consumers can access via their PC, portable music device or mobile phone.
- We advised Verizon Wireless on a transaction with ESPN to provide for an ESPN-branded experience on Verizon Wireless phones focused around ESPN content.
- We represent Goodby Silverstein & Partners and handled a promotional campaign for the California Fluid Milk Processors Board, a trade organization designed to promote the sale and consumption of milk, involving the placement of chocolate chip cookie scent strip strips in outdoor bus shelters. Our work included drafting and negotiating the production and licensing agreements relating to the scent strips; the distribution agreements relating to distribution and placement of the scent strips; the advertising and marketing laws pertaining to “guerilla” tactics; insurance and liability issues; and regulatory and consumer protection issues.
- On behalf of MediaVest, a major media agency, and BBDO, a global advertising agency, we worked on the legal matters relating to the creation, production and broadcast of the television program “Gillette Young Guns Fast Cars and Superstars”. The firm handled production, integration and network license agreements for the celebrity reality-based racing driver television program.
- We represent the WPP network of companies and, among countless other creative projects, worked on the production and distribution of a series of “webisodes” featuring Jerry Seinfeld and Superman for WPP’s client, American Express. In addition to traditional television commercials and significant online content, a six-minute short film, The Adventures of Seinfeld and Superman, aired in primetime on NBC.



- Davis & Gilbert worked with Amazon in the formulation of interactive advertising policies and guidelines in connection with its implementation of interactive advertising. The goal was to balance diverse legal, regulatory, policy issues with the company's business and marketing objectives.
- Working with the American Association of Advertising Agencies (AAAA), we have drafted standard forms, advised on value compensation metrics, advised on industry developments, and represented the interests of the industry on both regulatory and litigation matters.
- We represent Wieden + Kennedy and prepared all of the production services agreements and releases relating to the distribution of a full-length film entitled "Sneaker Heads," on behalf of Nike.
- We represent BBH and negotiated the production services agreements with @radical.media and negotiated the distribution agreement with MTV networks relating to the television series "Gamekillers."
- We negotiated a settlement with the Screen Actors Guild over athletes/endorsers appearing in Nike advertising, which led to the creation of an industry allocation model for pension and health contributions arising from athlete/endorser's services.
- We have handled numerous leading "lookalike" and "soundalike" cases for the advertising industry involving plaintiffs such as Carlos Santana, Herb Alpert, Jacques Cousteau, Julia "Butterfly" Hill, the Fat Boys, and many others.
- We have presented at the FTC's Green Lights and Red Flags National Workshops on the use of advertising disclosures.
- We were instrumental in expanding the broadcast networks' acceptance of personal products, including feminine hygiene products and undergarments.
- We played a key role in developing the form insertion order for Internet advertising used by the IAB/AAAA.
- We negotiated a cutting-edge, multinational media buying agreement between a large media buying agency and an international entertainment conglomerate.
- We defended the advertising industry against efforts by the Screen Actors Guild to classify stunt drivers as principals in television commercials.
- We have represented major infomercial companies in FTC investigations, including those involving compliance with the Mail and Telephone Order Merchandise Rule.
- We have defended numerous false advertising and deceptive practice cases before state and local agencies involving inadequate substantiation, test data and claim interpretation for products and services in the hi-tech, cosmetic, food, drug and automotive industries.
- We advised and drafted the rules in connection with the development of the first billion-dollar sweepstakes promotion.
- We represented our client in the development of the first auction website for real estate, which included drafting auction terms and conditions, and advising on applicable auction laws.
- We represented Frito Lay in connection with the first Internet auction directed to children, including drafting auction terms and conditions, and advising on applicable auction laws.

Representative Litigation Successes:

- Davis & Gilbert represented Verizon Wireless in the settlement reached among 32 state attorneys general and three of the nation's largest wireless telephone carriers involving pricing and signal coverage disclosures, among other issues.
- We represented Affinion Corporation in a settlement resolved with 16 state Attorneys General that involved a major national bank and their marketing practices for membership clubs using trial offer marketing and key solicitation devices
- We represented a major pharmaceutical company in a settlement with 12 states relating to advertising and marketing practices for smoking cessation products.
- We successfully defended American Isuzu Motors in the Federal Trade Commission and multi-state action against automobile industry lease and finance advertising practices.
- We defended a major interactive marketer in litigation over its marketing practices and affiliate marketing program
- On First Amendment grounds, we successfully defended advertising agency DeVito/Verdi and the ACLU in a libel and privacy case involving the advertisement "They Finally Found an Answer to Overcrowded Prisons. Smaller Prisoners."
- In the U.S. Supreme Court's landmark case of *Nike v. Kasky*, raising First Amendment and commercial speech issues, we prepared the amicus brief for the 4As, ANA and AAF.
- We successfully have defended "negative option" marketing practices for clients, both at the federal and state regulatory levels, and in state enforcement actions from New York to California.
- We defended a trademark infringement action brought against American Express in connection with its MY LIFE MY CARD advertising campaign that was created by our client Ogilvy & Mather, American Express's long standing advertising agency.
- We obtained summary judgment for the advertising agency TBWA Worldwide, dismissing a \$42 million indemnification action brought by its former client Taco Bell.
- We successfully defended McDonald's and its advertising agency, DDB Needham Worldwide, in an action by the Estate of James Dean over the use of a James Dean lookalike in an Australian television commercial for McDonald's.
- We obtained a favorable settlement for Miller, its advertising agency and Joe Piscopo, in an action by the rap group "The Fat Boys" alleging that a television commercial for Miller Lite Beer copied, among other things, visual elements of the group's persona. The plaintiffs also brought claims for sound recording and musical composition copyright and libel.
- We filed an amicus brief in federal court on behalf of an advertising agency in a class action against DeBeers diamonds. In response to our amicus brief, plaintiffs voluntarily dismissed their federal law false advertising claims and the court dismissed the plaintiffs' state law false advertising claims.
- We have successfully defended an online media company in consumer class actions alleging deceptive practices in connection with the distribution of the company's software that delivers pop-up advertisements.
- We defended a company that markets consumer products through infomercials in a class action alleging that it sends and charges consumers for products that they have not ordered.



- We successfully defended a copyright infringement claim brought against the advertising agency that created the “Bud-Weis-Er” frogs’ campaign by an individual who claimed to have created the characters while he was a bartender.
- We prosecuted a copyright infringement matter for Covington Industries to enforce a copyright on one of their best selling and profitable plaid fabric designs. In a novel approach, we proved that our client’s plaid design contained original coloring, spacing and weaving, and thus merited full copyright protection.
- We successfully negotiated the settlement of a copyright infringement action brought against RJR Tobacco Company and its former marketing agency, Kevin Berg & Associates, for the use of a graphic image in advertising and promotional materials.
- We successfully defended PepsiCo. Inc. and its advertising agency in lawsuits alleging copyright infringement and misappropriation of ideas relating to advertising and marketing campaigns.
- We successfully obtained at trial a complete dismissal of a copyright infringement case brought by composers of musical compositions claiming infringement arising from foreign and cable distribution of daytime dramas produced by our client, Procter & Gamble, and others.
- We represented McKinney & Silver and its client, Audi, in a copyright and trademark suit in one of the few cases in the country addressing a plaintiff’s claim for “indirect profits” under the Copyright Act.
- We successfully defended AT&T and Young and Rubicam in a suit alleging copyright and trademark infringement when a mural by the plaintiff was filmed in the background of a commercial. We proved that the mural did not function as a trademark and the lawsuit was dismissed.

THE NATIONAL LAW JOURNAL

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An **ALM** Publication

MIDSIZE

A SPECIAL REPORT

HOT LIST

Davis & Gilbert

Editor's note: The world tends to judge law firms by results. Do they win big cases? Orchestrate world-changing deals? Keep big fish out of jail?

Fair enough: We certainly considered the candidates' professional skills when compiling this year's Midsize Hot List. Still, we felt that mere outcomes wouldn't tell the whole story in a world where keeping the client out of the headlines sometimes matters as much as anything else.

And so the 20 firms listed here are good at what they do, but they're also good at how they do it—in spotting legal trends while they're still emerging and positioning themselves to take advantage; in pioneering billing arrangements that deliver results at prices clients can actually afford; and in building groups of attorneys who work well together and stick around to serve their clients for the long haul.

—MICHAEL MOLINE

MIDSIZE HOT LIST

When it comes to marketing, they go way back

This 106-year-old firm was practically there at the birth of the industry. It remains at the leading edge.

Davis & Gilbert

BY ROB STIGILE

Midsize and mighty. Oh, and venerable. All of the above apply to Davis & Gilbert, which opened in 1906. The firm's 114 lawyers specialize in the law attending marketing and advertising for clients including Apple Inc., Discover Financial Services and Nissan North America.

Davis & Gilbert operates from a single office in New York and seeks attorneys willing to commit for the long term and evolve alongside the world of marketing. "There's rarely a case where, if I'm not well versed in an issue, I can't just go across the hall or downstairs and find someone who is," said Marc Rachman, a partner in the intellectual property litigation group. "There's probably not something we haven't worked on related to advertising and marketing."

The firm really did get into the business on the ground floor. It oversaw the incorporation of major advertising agencies, including the late Benton & Bowles, and helped put the first soap operas on the air during the 1930s. It helped Crest obtain the American Dental Association's endorsement.



RONALD URBACH: "We change alongside the industry. The specialty knowledge market is the real sweet spot."

MIDSIZE HOT LIST

Davis & Gilbert keeps up with the trends by creating its own experts, who learn and refine new skills to stay abreast of emerging issues. “We dominate a sector that has ultimately changed dramatically,” said chairman Ronald Urbach. “When you do oil and gas exploration, that’s all it is. But for us, we change alongside the industry. The specialty knowledge market is the real sweet spot.”

Growth is orderly. Davis & Gilbert tends to hire laterals with a year or two under their belts at Wall Street firms, generally three to five of them each year, according to Urbach. “For us, growth is profit growth, revenue growth. It’s not growth for growth’s sake,” he said. “It’s really a different business model.”

Unlike, say, Dewey & LeBoeuf, which has lost dozens of partners since the beginning of 2012, Davis & Gilbert considers growth for its own sake “a flawed business strategy,” Urbach said. “If they stop [growing], they collapse.”

That doesn’t mean abandoning the cutting edge. Urbach led the team that prepped the Chevrolet Volt for its market rollout in 2011. That entailed drafting and substantiating product claims for the innovative car, developing the advertising and helping to prepare dealership brochures and Web pages.

Emerging as a focus of interest is the application of business-method patents to marketing techniques “that in the past no one would have expected or thought would have been patentable,” Rachman said. That the law is unsettled is reflected in his representation of Vevo LLC, a video Web site featuring short videos and still-picture advertisements to help support the site’s content. A company called Soundview Industries LLC claimed a patent on that process and filed suit against Vevo and a number of competitors, including AMC Entertainment Inc. Rachman settled pre-emptively on Vevo’s behalf to avoid heavy trial costs.

Technology-sector business patents are “something I think the industry is very concerned about and trying to figure out how to deal with, because it’s coming up across the board,” he said.

Neal Klausner, also a partner in the intellectual property litigation group, recently fought what he called a “classic David versus Goliath matter” involving beverage packaging. The client, Arizona-based Ecosentials LLC, was sued for trademark infringement over its packaging scheme for a new product, Vitamin Squeeze. Energy Brands Inc., a Coca-Cola Co. subsidiary, cited the use of black-on-white labels and a particular font.

Figuring that discretion was the better part of valor, Klausner said he immediately sought to settle the case. As an emerging company, Ecosentials was still working with distributors to find shelf space for Vitamin Squeeze, and any delay might have been crippling. “If they were not able to market the product then, they would have had to wait at least a year until they could,” Klausner said. “We immediately shifted into a gear of, ‘How can we resolve this speedily so our client can get this on the shelves?’ ”

Competition for clients is of little worry to Urbach. “A number of firms profess to have a level of advertising expertise, but that typically involves a couple of things,” he said. Most important among those is a tendency for firms to specialize in either the regulatory or litigation side of the business. For Urbach, this leaves little alternative for marketers seeking serious legal advice.

Hence his firm’s all-inclusive approach. “The way we think, any way you slice it, it’s kind of us,” he said.

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USA

2012

The Client's Guide

DAVIS & GILBERT LLP

Ranked in Chambers USA 2012:

NATIONWIDE

ADVERTISING

Advertising: Transactional & Regulatory
Leading Firms
Band 1
Davis & Gilbert LLP
Leading Individuals
Star individuals
Urbach Ronald R
Band 2
Eisert Richard
Lewczak Joseph J
Band 3
Weingrad Howard
Recommended for Client Service
Nationwide
Davis & Gilbert LLP
Recommended for Commercial Awareness
Nationwide
Davis & Gilbert LLP

Davis & Gilbert LLP

THE FIRM This full-service firm places a strong emphasis on its work in the advertising space. It provides top-drawer counsel on the gamut of advertising law matters to a range of clients including major marketing companies, entertainment businesses and household brands. The group has been particularly active in dealing with privacy and disclosure issues of late, and clients are particularly quick to commend its depth of knowledge in the digital space. Its impressive roster of clients includes Verizon Communications, Nissan, Gap and Harpo Productions.

Client Service *"The lawyers are extremely responsive, thoughtful and timely with their work, and there is always someone who is available for assistance even if the primary contact is not."*

Commercial Awareness *"They understand what is valuable to us, they don't just give the blanket answer."*

KEY INDIVIDUALS Practice cochair **Ronald Urbach** enjoys an outstanding reputation for his broad-based advertising practice which covers IP, media, commercial and contractual matters, and data security. He has in the last year been increasingly active in dealing with digital

and mobile media issues. Sources applaud him as one of the most excellent lawyers in the advertising Bar, noting that he is *"savvy, creative, smart and clear."* **Joseph Lewczak** *"has a broad knowledge base and is very practical in his approach to dealing with issues,"* sources say. His practice covers the full range of advertising, direct marketing, promotions and telemarketing issues, and sources are particularly quick to highlight his work on behalf of advertising agencies. **Richard Eisert** is *"extremely intelligent and efficient,"* and draws further praise for his strong grasp of technology and ability to navigate the digital landscape. Highlight work from the last year includes advising Specific Media in connection with its acquisition of MySpace. **Howard Weingrad** is sought for his expertise on talent, privacy and union matters, one client noting: *"He is the go-to guy on Screen Actors Guild issues."*

NEW YORK

LABOR & EMPLOYMENT

Labor & Employment
Leading Individuals
Band 4
Rubin Howard
Up-and-coming individuals
Brochin Gregg
Cortes Jessica

Other Notable Practitioners

Howard Rubin is cochair of the litigation and employment practice at Davis & Gilbert LLP and has substantial experience of defending employers in alleged discrimination cases. He is currently advising a client on employee misclassification matters. Sources describe him as an “*excellent, strategic litigator who is dedicated to finding solutions.*” **Gregg Brochin** is at the same firm and counsels management on various aspects of employment law, as well as assisting with the

drafting of policies and contracts. He represents a number of clients from the advertising and social media spheres and comes recommended for his “*extensive technical knowledge of the laws and regulations.*” Rubin and Brochin are ably assisted at the firm by new partner **Jessica Cortes**. Cortes continues to work on high-profile cases and draws praise from clients for her ability in tricky negotiations. She recently contributed to the successful defense of an employer in a retaliation suit.

MEDIA & ENTERTAINMENT: FILM, MUSIC, TELEVISION & THEATER

Media & Entertainment: Film, Music, Television & Theater
Leading Individuals
Band 3
Johnston James L

Other Notable Practitioner

Davis & Gilbert LLP’s **James Johnston** is commended for being a “*fantastic communicator who works tirelessly to conclude deals in a timely manner.*” Sources also praise his understanding of the complexities of new media in relation to old media.

REAL ESTATE

Real Estate: Mainly Dirt
Leading Firms
Band 3
Davis & Gilbert LLP
Real Estate
Leading Individuals
Band 2
Uram Gerald R

Davis & Gilbert LLP

THE FIRM This seven-partner department is particularly noted for handling leasing matters, and has advised on the leases for some of Manhattan’s most well-known buildings. It acts for major banks and other financial institutions, as well as other blue-chip companies, on the leasing for their headquarters. For example, it recently advised Commerzbank on its lease at Two World Financial Center.

Sources say: “*They have good judgment and a reputation for being easy to deal with. They’re deal-makers not deal-breakers.*”

KEY INDIVIDUALS **Gerald Uram** is described as a dean of the real estate Bar, and is widely recommended for his leasing expertise. He has “*a tremendous amount of experience and excellent problem-solving skills,*” say sources, who add: “*He is very precise and a good negotiator yet very practical.*” Uram handled the lease of 805 Third Avenue for Meredith, as well as the lease of 1251 Avenue of the Americas for Natixis.