

# 5 Key Takeaways from the 2023 ANA Masters of Advertising Law Conference

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**PRACTICES** Trademark and Advertising, Advertising, Marketing and Promotional Law

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The Association of National Advertisers (“ANA”) recently held their annual Masters in Advertising Law Conference in Orlando, FL. Over the course of three days of engaging panels, roundtables, and presentations, several key themes and takeaways emerged. Artificial intelligence, dark patterns, privacy, effective collaboration, and green claims dominated the conversation. Below is our round-up of key takeaways on these five topics for savvy advertisers who want to successfully market their brands and mitigate risk in emerging areas.

## 1. Get ahead of the AI revolution.

Artificial Intelligence has taken a large step forward in the past year with new language models such as ChatGPT and GPT-3. This new technology brings risks and challenges that advertisers should be aware of, including new regulations, as well as ethics, privacy, brand damage, and intellectual property concerns. For brands looking to leverage AI tools, internal guidelines should be created and implemented. These policies should specify which AI tools can be used within the organization. A strong AI policy likely includes a process to vet all data that is input into an AI tool with a particular focus on whether the tool uses personal identifying information. Advertisers using AI should also be cognizant of biases that may be inherent in certain AI tools, which can discriminate based on race, gender, or other protected classes—several examples of these biases were shown across many panels at the conference. Advertisers must also ensure that they do not unwittingly violate other rightsholder’s intellectual property rights, including copyright, when utilizing AI tools. Finally, given the nascent stage of their development, marketers working with AI tools should regularly review their AI policies to ensure compliance with the developing law.

## 2. Avoid slipping into dark patterns.

Enforcement is on the rise for “dark patterns,” which are deceptive and harmful trade practices used by marketers to convince consumers to act in ways they would not have otherwise. State and federal regulators and private plaintiffs are increasingly on the lookout for different types of dark patterns such as the “roach motel” (a tactic that makes it very hard to exit or unsubscribe), “confirmshaming” (a tactic in which the user is manipulated through emotional shaming into making a decision that they would not have otherwise made), and “interface interference” (a tactic that privileges or highlights certain actions over others and may lead to user confusion). For example, the FTC recently obtained a \$18.5 million settlement with Publishers Clearing House (PCH) for using dark patterns—including confusing wording and entry forms—to mislead consumers into believing a purchase was necessary to enter PCH sweepstakes. Critics of these recent enforcement actions argue that these “dark patterns” are actually just traditional marketing tactics being adapted online and thus, shutting them down implicates First Amendment issues, but they will remain a focus of the FTC.

## 3. Prioritize privacy.

After AI, privacy was the most talked about hot topic at ANA this year, largely due to the quickly evolving status of privacy laws. Twelve states have passed consumer and data privacy acts, making nationwide compliance a difficult patchwork. It is predicted that state Attorneys General will capitalize on these new laws and dole out fines and commence prosecutions. Any advertiser navigating this space should first assess *where* it is operating and *what* information it is amassing, to determine which state laws pose the largest strategic risk. One of the clearest risks is in collecting sensitive data. The definition of “sensitive personal information” differs by state, but generally it includes data relating to race, religion, medical or health information, genetic data, and biometric data. In some states, sensitive data also includes inferences that could be made based on data. An audit of the data types your brand collects from consumers, along with what inferences may be drawn from that data is key in determining where to focus your compliance efforts.

#### **4. Invest in collaborative relationships.**

In-house counsel are often tasked with addressing competitor claims that may be unsubstantiated or misleading. Strong collaborative relationships—between in-house counsel and their business counterparts, as well as between in-house counsel and their outside counsel—are crucial in effectively addressing these competitor claims. A panel led by Haynes Boone partners, Tiffany Ferris and Joseph Lawlor, provided tips on how to establish trust between in-house counsel and their business clients. In-house counsel can build relationships with their clients by attending business and marketing meetings (even when their presence is not required), by learning and understanding the business and industry, by acting as a sounding board so that marketing teams are comfortable approaching the legal team from the conception of a marketing campaign, and by understanding the practical risk tolerance of their brand. Once these relationships are established, the collective team is better able to analyze a competitor’s claims, determine whether it poses a true risk, and work collaboratively with the business to determine whether the claim should be addressed formally via demand letters, a National Advertising Division (NAD) challenge, or litigation in court.

#### **5. Pay close attention to your green claims.**

The green claim-focused panels, including Haynes Boone associate Emily Ketterer’s roundtable on the FTC’s Green Guides, highlighted the increasing attention that green claims are receiving from multiple sources, including state and federal regulators, private plaintiffs, the NAD, and NGOs. Carbon offset/net zero claims and aspirational claims were highlighted in many ANA sessions. California continues to lead the way in this area with AB1305, which regulates the marketing, purchase, and sale of voluntary carbon offsets, set to go into effect on January 1, 2024. Among other things, marketers making these carbon claims will need to publicly disclose the basis for these claims and update those disclosures annually. Guidance on aspirational claims (e.g., “Net Zero by 2035”) has been mixed, but generally it is a best practice to have evidence on hand of an operational plan adequate to meet the stated goal and undertake some concrete steps toward the goal.