



# Chambers Associate 2020

The Students guide  
to America's leading  
Law firms

e-Edition

## Advertising litigation – Kramer Levin

Media is one of the most desirable sectors for students entering the legal profession. We interviewed the experts at Kramer Levin to find out about their varied, exciting practice.

### The Basics

**Chambers Associate:** What is covered by advertising litigation law?

**Norman C. Simon, partner, co-chair:** Our Advertising Litigation practice covers four areas. Firstly, we advise our clients on claim substantiation and advertising copy in order to ensure both are done carefully and issue spot to mitigate the risk of litigation. Secondly, we represent our clients as plaintiffs and as defendants in litigation under the Lanham Act (the federal false advertising statute). Thirdly, we represent our clients as challengers and as advertisers in challenges before the National Advertising Division (NAD) and in appeals before the National Advertising Review Board (NARB), which are well-established business-to-business self-regulatory bodies. Finally, we defend our clients in putative class action litigation brought pursuant to state consumer protection laws. We also keep our clients current on advertising litigation developments by publishing a weekly newsletter, *The Advertising Litigation Report*, through our app (The Ad Lit Report App), and via a monthly webinar presenting Advertising Litigation Highlights.

**CA: What do the partners do?**

**NCS:** Partners are involved in every facet of advertising litigation, from protecting our clients from litigation by advising on claim substantiation and advertising copy clearance to deciding whether to bring an advertising challenge and in what manner (e.g. preliminary injunction or temporary restraining order - and federal court versus NAD). Also working hand-in-hand with clients to develop and execute on effective strategies for trials and hearings under the Lanham Act and winning arguments before NAD/NARB. We develop effective arguments to defeat putative class actions at the motion to dismiss or class certification stage. We're writing and editing briefs and other written submissions, conducting and defending depositions, handling arguments and examining witnesses in court or at NAD/NARB. Where appropriate, negotiating the most favorable settlement possible to resolve a matter. Partners are also responsible for managing our team of exceptionally talented lawyers, and

staying abreast of developments in the law and advertising space generally.

**CA: What do the senior associates do?**

**Samantha V. Ettari, special counsel:** Senior associates and counsel are involved in every facet of a false advertising representation, including early case assessment, discovery strategy, interviewing client and third-party custodians and coordinating document and data collections. We're researching and coordinating on legal defenses or asserting claims, preparing for and taking depositions, coordinating with experts and then examining and crossing witnesses at trial and drafting pleadings and motion practice.

**Patrick J. Campbell, senior associate:** Senior associates play a key role in working with the client to marshal evidence to support a claim or persuade a jury. They often take leadership roles in drafting written submissions and contribute to the strategy discussion in how best to challenge a competitor's advertising or defend a client's claims. They also play a key role in interfacing with clients and clients' experts to develop arguments and investigate the facts underlying an advertising dispute.

**CA: What do the junior associates do?**

**Dayna M. Chikamoto, junior associate:** Kramer Levin staffs cases leanly, so junior associates are given the chance to get a wide range of substantive experience early in their careers. Document review provides junior associates with the unique ability to absorb the facts of the case in a way that more senior associates do not have the luxury of doing, and this acquired knowledge becomes essential in the later stages of discovery. I have had the opportunity to shadow partners at court appearances. Often our clients call asking for claim substantiation advice, and typically the junior associates are tasked with discrete research assignments related to these inquiries.

**Ryan Gander, junior associate:** Associates conduct legal research, draft internal memoranda, prepare deposition outlines, and draft dispositive motion papers. Asso-

ciates also help edit Kramer Levin’s weekly advertising litigation publication and present a monthly webinar to keep our clients up-to-date on the latest developments in advertising law.

**Harry P. Morgenthau, junior associate:** One of the things that drew me to our advertising litigation practice is the broad range of opportunities available to junior associates. Juniors are treated as full members of the team – attending meetings, interfacing with clients, and contributing ideas for how to best serve those clients.

**CA: Describe your latest case: what was the client’s problem? What was your role? How did you spend your days?**

**SVE:** I have most recently worked on a large federal Lanham Act litigations in the Southern District of New York. The case concerned allegations of false advertising against a client concerning a pregnancy product’s attributes. The matter was bifurcated into two phases: liability and damages. Kramer Levin was retained to represent the client in the damages phase. I was the lead senior associate in the matter and handled cross-border document collection and production, assisted in pre-trial conferences, coordinated with the damages expert, took and defended pre-trial depositions, assisted on all elements of trial preparation, and sat at counsel table for the defense at trial, which included arguing evidentiary motions and putting in witness statements and corresponding evidence. Following trial, I prepared the first draft of post-trial submissions, including proposed findings of fact and conclusions of law. The damages ultimately awarded against the client were a fraction of those sought.

**PJC:** We recently represented Johnson and Johnson Surgical Vision in a successful NAD challenge to Alcon’s false and misleading comparative advertising regarding J&J’s product. Our client’s product is a revolutionary piece of intraocular technology that Alcon was falsely portraying as similar to its traditional intraocular lens. As the associate on the team, I was involved in drafting our challenge briefing, coordinating with the client’s technical experts and our own internal experts in rebutting Alcon’s technical arguments, and preparing presentation materials for the NAD. The highly technical nature of this case offered an exciting challenge in both understanding the technology at issue and articulating our arguments in a simple and effective way that conveyed to NAD how a consumer would understand the claims.

**DMC:** We recently represented TrueCar in a Lanham Act false advertising lawsuit in the Southern District of New York brought by 108 individual car dealers across the country. The plaintiffs claimed they were injured by

supposedly false advertising that TrueCar provides a car-buying experience without “haggling” or negotiation. Ultimately, through a string of progressive victories, including the court’s granting of our motion to exclude the plaintiffs’ damages expert, we were able to secure the dismissal of the case. As a junior associate, my primary role was to master the facts. I reviewed documents, identified and prepared exhibits for depositions, worked on deposition outlines, and was afforded the opportunity to take the deposition of one of the plaintiff dealerships in this case. I also conducted research and assisted in drafting briefs.

**What are the different parties you are likely to liaise with during a case?**

**NCS:** We team with in-house counsel to develop case strategy. We also regularly liaise with a client’s business leadership because a deep understanding of the business is integral to successful litigation. We frequently interface with a client’s marketing team, and equally frequently with a client’s research and development or other internal science teams involved with claim substantiation. And, of course, we regularly liaise with our colleagues in the advertising litigation bar, both across the aisle in litigation and at regular industry conferences and events.

## Your Career

**CA: What was your route into getting staffed on advertising litigation matters?**

**SVE:** When I joined the firm, I quickly found that I enjoyed the early responsibilities given to associates in civil matters. The Co-Chairs of the Advertising Litigation group were working on some of the most cutting edge and exciting civil litigation at the firm and were known to be great attorneys to work for and learn from. I expressed interest in working on matters with them and took on any small project or assignment they had so that they could get familiar with my work and work-ethic. Eventually I was staffed on a matter that came to the firm on the cusp of trial. I had a steep learning curve on many advertising law specific issues, but was also able to leverage extensive trial experience to bring value to the matter. That trial, the client interactions, and the outcome were some of the most rewarding experiences in my legal career up to that time, and I actively sought out more advertising litigation in its wake.

**DMC:** I was lucky that the first case I was assigned to at Kramer Levin was an advertising case. Since then, I received advertising litigation work organically, with partners calling me to see if I have availability to be staffed on their cases. The firm also has a litigation assignment

coordinator to assist with staffing juniors on cases, and she keeps the interests and preferences of junior associates in mind when making staffing decisions.

**RG:** While I was still in law school, I took a seminar on advertising law taught by the Co-chair of Kramer Levin's Advertising Litigation practice. After I joined the firm, I made clear to partners and associates in the department that I was interested in practicing advertising law.

**HPM:** One of the partners in the Advertising Litigation practice, Eileen Patt, interviewed me when I applied to be a summer associate with the firm. When I started at Kramer Levin, she remembered me from our interview and invited me to work on an advertising matter. I haven't looked back!

**CA: What's the most interesting case you've worked on?**

**PJC:** For me it is not really one case, it's the opportunity to work with a variety of clients on a range of topics and with a diverse set of products, from advising on crafting consumer surveys to substantiate claims coming to market, to instituting challenges before the NAD regarding competitor's claims, to representing clients in class action litigation that presents potentially significant exposure.

**RG:** One of the most interesting cases I have worked on was a recent putative consumer class action for our client, The Procter & Gamble Company, involving flushable toileting wipes. Not only did the case involve interesting and novel legal issues, but I also had the opportunity to draft multiple briefs on dispositive motions.

**CA: What are the highs and lows of working in this area?**

**SVE:** One of the highs is getting to do a deep dive on product attributes. In order to defend or prosecute claims, you often need to understand how a product works and the science behind the claims. For an inquisitive mind, that is just as much fun as mastering the legal issues. The only low I can think of is that sometimes these cases come fast and furious, with the clients wanting preliminary injunctive relief or even a temporary restraining order. This can require you to get your head around the product and related complicated science very quickly.

**DMC:** It is always fun to see advertisements of the cases you are working on and to know that the work you do can have or did have an impact on that advertisement. The lows are not necessarily unique to this practice area. Document review can be tedious and time consuming,

but is important in order to learn the facts of the case and makes you a valuable resource later in the case.

**CA: What is it like working with such well-known clients?**

**SVE:** Many of our clients are leaders in their product or industry. It is exciting to work with well-known, name-brand products and to learn about the underlying science of the products and/or claims.

**DMC:** We do work for a lot of big, well-known companies, and it is interesting to have a behind-the-scenes look at what goes into their advertising and marketing.

**HPM:** Well-known businesses attract exceptional lawyers to work as in-house counsel. Having the opportunity to work closely with highly skilled in-house lawyers makes our job both easier and more enjoyable.

## The Market

**CA: What are the current trends in affecting advertising litigation?**

**NCS:** For a good number of years, we have continued to see a proliferation of consumer class actions. Indeed, recent statistics show these are the second-most prevalent category of class actions filed in federal courts, led only by labor and employment class action complaints. We expect that trend will continue. Plaintiffs' lawyers often use Lanham Act and NAD decisions as blueprints for class action complaints, and are increasingly creative in coming up with novel allegations of falsity against companies for their marketing of products.

**SVE:** With states rapidly passing consumer privacy laws here in the United States, there are many developments for our clients to stay abreast of, particularly in how they collect, use, and sell consumer data. It is an exciting time to advise clients on privacy and cyber-security and we have dedicated an entire section of our weekly newsletter and monthly webinar to alerting our clients to developments in that area. Likewise, claims concerning the security around a product or breaches that access consumer data are increasing and the law is developing around standing, damages, and values of these litigations.

**PJC:** One current trend to watch is the increasing regulation around testimonials and the use of influencers in marketing. The Federal Trade Commission and other regulators are cracking down on the improper use of influencers without disclosing material connections between advertisers and the influencers they use. Another focus is on advertising directed towards children, with

increased regulation surrounding the Children’s Online Privacy Protection Rule and privacy regulations more generally.

**CA: What would you say the future of advertising law looks like?**

**NCS:** When I started practicing twenty-four years ago, advertising was almost exclusively television and print based. It has evolved dramatically over that time, and now those “traditional” media are less often the focus of advertising litigation. With the proliferation of digital media, influencer marketing, experiential marketing, artificial intelligence, the “internet of things,” the terrain of actionable advertising will continue to expand.

**PJC:** In some ways, the future of advertising law is the future of privacy law. We are in an increasingly digital world with an ever-changing privacy landscape. Advertising law in the future will have to account for not only who is making claims about a product, but to whom and how those claims are directed, given the rapidly expanding data subject rights laws.

**CA: What personal qualities make a good advertising litigation lawyer?**

**SVE:** It’s important to be inquisitive – you have to dig down into the science of the product and understand the claims inside and out.

**PJC:** A good advertising litigation lawyer is an effective communicator and is always willing to roll up her sleeves and get into the weeds of claim substantiation.

**RG:** Advertising law is constantly evolving, so it’s important for an advertising litigation attorney to be able to quickly adapt to new trends and changes in the law.

**HPM:** Advertising litigators need to demonstrate a flexibility and creativity in working with clients to achieve the best result for their business.

**CA: What is your top piece of advice to students to help them prepare themselves for a career in the practice area?**

**SVE:** Be well-rounded in your studies. A case is best prepared and presented when the entire team is bringing its best and you can take many classes in law school – obviously including false advertising, but also on discovery, trial practices, evidence, copyright, trademarks, damages, and civil procedure – to help contribute to a false advertising team.

**PJC:** Stay up to date on current legal issues in the field and attend relevant bar events. Not only will this come in handy at interviews, it will help you begin your career with a useful knowledge base for the issues clients in the industry face.

**DMC:** Take an advertising litigation class or one focused on the Lanham Act if your law school offers it. And take classes where you can hone your researching and legal writing skills.

**RG:** Try to take a course on advertising law specifically or on class action litigation more generally. Federal class action litigation has become increasingly common in advertising law, so having that foundation will put you one step ahead.

**CA: What makes the field of advertising litigation law unique?**

**NCS:** Advertising litigation is often driven by the need for injunctive relief – that is, to put a quick stop to a harmful advertising campaign – as opposed to monetary relief, which is often pursued as a more long term secondary objective to a preliminary injunction or TRO. As a result, with the exception of consumer class actions, advertising cases often get litigated through a full evidentiary hearing or trial, rather than settle. This is because they are not primarily about monetary recovery, which is exciting for a litigator. More often than not, advertising litigation often involves a good deal of science and expert subject matter, which makes for a stimulating and interesting learning experience that varies from case to case.

**CA: Could you describe the advertising law opportunities unique to Kramer Levin?**

**NCS:** Our firm has one of the nation’s premier advertising litigation practices. We represent many of the world’s largest advertisers in some of the most significant and high-profile cases in the space. We have had extraordinary success litigating and trying advertising suits on behalf of our clients. At Kramer Levin, we are trial lawyers known for our skills in the courtroom. Unlike some places, you can count on getting real courtroom experience before a judge or a jury, as well as regular work before the NAD and NARB, which makes ours a uniquely exciting and rewarding practice.

## Authors



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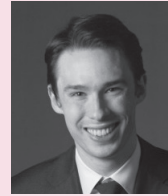
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