

Insights: Alerts

# Top Takeaways: 2016 American Bar Association Forum on Franchising

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## Marc Lieberstein

Marc Lieberstein, Kilpatrick Townsend partner in the firm's New York office, was honored to participate in the **"Mine is Better Than Yours! The Risks and Rewards of Conducting Comparative Advertising"** program at the recent [2016 ABA Forum on Franchising in Miami](#). Marc points out that the topic was not only enjoyable to present—it is always nice to see your audience laughing—but also provided invaluable insight

Takeaways from Marc's presentation, include:

- Comparative advertising for those in the franchise industry is an effective legal tool to promote competition, educate consumers, and incentivize competitors to provide better services/make better products.
- But, for comparative advertising to be legal, truth in advertising is imperative; substantiation is crucial; and misrepresentations must be avoided to protect consumers and keep competitors on a level playing field.
- While the Lanham Act Section 43(a) is a powerful tool employed against false and misleading advertising, be mindful of other tools like: the FTC Act, FDA regulations, and state laws and regulations that protect consumers, including "little" FTC acts.

## John Jett

John Jett, Kilpatrick Townsend partner in the firm's Atlanta office, presented on **"Opening Moves in Franchise Litigation."** The presentation addressed tactics and strategies important to franchisors and franchisees at the outset of a franchise dispute.

Takeaways from John's presentation, include:

- Franchise agreements increasingly contain pre-dispute mediation clauses. Many courts view compliance with those clauses as conditions precedent to filing suit. A franchisor or franchisee who disregards the

pre-mediation requirement risks case dismissal. Mediation is more than a condition precedent to satisfy: it at best leads to a cost-saving early resolution of a dispute, and at worst allows each side to understand better the other's position and focuses discovery.

- It is increasingly difficult to file franchise disputes in federal court on the basis of diversity jurisdiction because many franchisors and franchisees are organizing as limited liability companies (LLC). An LLC's citizenship for diversity is determined by examining the citizenship of each member. Because many LLCs do not reveal member names, much less their citizenship, it can prove impossible to demonstrate the diversity needed for federal subjectmatter jurisdiction. Researching states' secretary of state websites, public regulatory filings, and a party's prior disclosures in litigation filings on PACER are ways to investigate citizenship. The stakes are high: federal courts police their jurisdiction carefully and will dismiss a case sua sponte if they find nojurisdiction.
- Case-law trends from the past few years reveals the value of specific, fact-based allegations. Especially after Twombly and Iqbal, courts focus on the factual content of complaints in weighing challenges to whether a party has stated a claim, whether personal jurisdiction exists, and whether the amount in controversy is satisfied for diversity jurisdiction purposes. Thorough, pre-suit investigation that ferrets out granular facts pays dividends in withstanding a motion to dismiss.

## Related People

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