

Challenging a Comparative Advertisement Checklist

A Checklist from our website setting out five key methods for challenging a comparative advertisement and identifying issues to consider in determining which method (or methods) to pursue.

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METHODS FOR CHALLENGING A COMPARATIVE ADVERTISEMENT

Five methods to challenge a comparative advertisement are to:

- Send a demand letter to the competitor.
- Submit a takedown request to the broadcaster or publisher displaying the disputed advertisement.
- Alert the appropriate state and federal regulators.
- Initiate a proceeding before the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB).
- Litigate under the Lanham Trademark Act (Lanham Act).

These options are not exclusive, and in some cases it may be effective to pursue more than one simultaneously or consecutively.

>> For an overview of comparative advertising law in the US, search [Comparative Advertising Law in the US](#) on our website.

SEND A DEMAND LETTER TO THE COMPETITOR

PROCEDURE

- Send a demand letter (also known as a cease and desist letter) to both:
 - directly notify the competitor of your objection to certain comparative claims made in an advertisement; and
 - demand that the competitor modify or discontinue the comparative advertisement.

TIMING AND COST

- Sending a demand letter is inexpensive and does not require a large commitment of time or resources to produce.

RECOVERY OR RESULT

- In the best case, the letter will open a dialogue between the parties to negotiate a discontinuation or modification of the disputed advertisement.
- You should not expect to recover monetary damages or receive any other compensation for business losses incurred.

OTHER CONSIDERATIONS

- You should anticipate that the competitor is unlikely to initially admit any wrongdoing and may reply that your own advertising is false and deceptive.

SUBMIT A TAKEDOWN REQUEST TO THE MEDIA OUTLET

PROCEDURE

- The challenge process typically consists of two rounds of submissions to give each party an opportunity to present evidence and rebut the other party's claims.
- If a complaint is also pending in court or with the NAD, many media outlets will suspend review of a challenge until the pending complaint is resolved. Therefore, you should consider approaching the applicable media outlet before pursuing those options.
- Requests for confidential treatment will be granted if the media outlet considers the request to be reasonable.
- The media outlet will only review the specific advertisement that it or its affiliates are running.

TIMING AND COST

- Media outlet challenges are commonly reviewed and resolved much more quickly than litigation or NAD reviews.

- Submitting a takedown request can have the same effect as a temporary restraining order, but at a fraction of the cost.

BURDEN OF PROOF

- A media outlet typically pulls an advertisement when a challenger provides a well-constructed argument, supported by evidence, that a competitor's advertisement contains false or misleading comparative claims.
- During its review, the media outlet generally considers the truth and accuracy of the alleged claims, as well as other factors, such as:
 - tastefulness;
 - obscenity;
 - indecency; and
 - profanity.

ENFORCEABILITY AND APPEAL

- The decision by a media outlet is final and cannot be appealed.

OTHER CONSIDERATIONS

- Media outlets' review standards can be subjective and arbitrary.
- The media outlet has an inherent conflict of interest because it is collecting revenue from airing or publishing the challenged advertisement.
- A challenge can lead to a retaliatory counter-complaint from the competitor if the media outlet is also running your comparative advertisements.

ALERT STATE AND FEDERAL REGULATORS

PROCEDURE

- Consider who to approach within the applicable regulatory agency. For example, a challenger may have more success bringing its concerns to a regional Federal Trade Commission (FTC) office, rather than the Washington, DC office, which has other responsibilities such as rulemaking.
- Request an investigation. Prepare and present a white paper outlining your position and be prepared to meet with the appropriate regulators.
- Consider whether to keep your identity as a challenger confidential, as a competitor may be able to obtain a copy of your complaint through a Freedom of Information Act request or under

applicable state law. If it is important to keep your identity as a challenger confidential, you should:

- provide oral statements instead of a white paper; and
- ensure any documents given to the regulators do not identify you.
- Whether a regulator will proceed on a claim depends on many factors including:
 - the degree of consumer harm suffered (this factor is critical and directly linked to the likelihood that regulators will investigate your claim);
 - the number of consumer complaints submitted regarding a company or advertisement;
 - the type of practice in which the advertiser is engaged, for example, if the advertisement presents a consumer health or safety issue; and
 - whether the alleged unlawful practice falls under the regulator's current enforcement priorities, for example, green marketing claims, consumer privacy-related issues and health benefit claims.
- If the dispute is a matter between competitors only (as opposed to raising significant consumer harm issues, for example), regulators are more likely to expect the parties to resolve their dispute through other means (such as negotiation or litigation).

TIMING AND COST

- Once you make a complaint, you have no control over how (or if) the investigation proceeds. An investigation can carry on for years without your having knowledge of its progress or potential outcome.
- Alerting regulators is relatively inexpensive compared to litigation.

BURDEN OF PROOF

- The FTC evaluates comparative advertising in the same way it evaluates all other advertising and does not require a higher standard of proof for challenging comparative claims.

➤➤ For more information on the FTC's regulation of advertising, search [Advertising: Overview](#) on our website.

RECOVERY OR RESULT

- The FTC can seek penalties such as injunctive relief and restitution or disgorgement for an advertiser's unlawful comparative advertising

practices. In addition, FTC action against an advertiser can trigger:

- increased scrutiny at the state level;
- consumer class action lawsuits; and
- Lanham Act litigation brought by other competitors.

OTHER CONSIDERATIONS

- **Expertise.** Many government attorneys, particularly those at the FTC, have the background and skills to understand the implications of a challenger's complaint and evaluate the potential for consumer harm.
- **FTC connections.** A report by the FTC finding that a competitor is engaged in false or misleading advertising carries significant weight with other regulators and enforcement agencies.
- **Publicity.** The opportunity to leverage an investigation for publicity purposes is limited. FTC policy states that generally it is required to conduct its investigations on a non-public basis. The FTC is only permitted to disclose information about an investigation under limited circumstances, such as when the:
 - target has publicly disclosed the relevant information in a press release or regulatory filing;
 - investigation has already received substantial publicity; or
 - disclosure does not identify a target that has not already disclosed its own identity.
- **Industry-wide scrutiny.** Flagging an industry-specific concern may lead to increased scrutiny of the entire industry. Therefore, you should ensure your own advertising practices are defensible before you alert a regulator to a competitor's advertising practices.

INITIATE AN NAD PROCEEDING

PROCEDURE

- **Scope of review.** The NAD reviews factual claims made in any national advertisement directed towards consumers that are at least 12 years old.
- **Briefs.** The two sides must submit briefs to the NAD outlining their respective positions.
- **Meetings.** After the parties submit their briefs, optional meetings may follow to further discuss the disputed claims.
- **Precedence over litigation.** Under NAD rules, cases that are the subject of litigation are

outside the NAD's jurisdiction. Some advertisers may attempt to force the NAD to suspend its proceedings by filing an action in court for declaratory judgment against the challenger. However, courts have shown a willingness to stay these actions to allow the NAD to investigate the dispute and issue a decision.

- **Confidentiality.** The NAD has rules for the treatment of confidential materials to protect proprietary information submitted during the process. Trade secrets and proprietary information may be withheld from a challenger if the advertiser:
 - clearly identifies the confidential and/or proprietary information;
 - affirms that the material is not publicly available; and
 - provides a comprehensive summary of the material to the challenger that includes as much non-confidential information as possible.

TIMING AND COST

- Experienced attorneys at the NAD evaluate the claims and apply legal precedent in their review. As a result, the NAD process offers the opportunity to obtain a thorough review of a comparative advertising claim in less time than it would take to litigate.
- Generally, a decision is issued within 90 days of a challenge. However, if you waive the right to respond after filing your complaint, a decision is often issued around 60 days from the date of a challenge.
- Because the NAD's timeframe for issuing a decision may be affected by the schedule for any follow-up meetings, you should schedule any follow-up meetings as soon as possible after each side files its brief.
- The NAD process does not involve discovery, making it less costly than litigation.
- A filing fee is required, which is determined based on your organization's annual revenue and whether you are a member of the CBBB.

>> For more information on NAD filing fees, search [Comparative Advertising Law in the US](#) on our website.

BURDEN OF PROOF

- The NAD applies a higher standard to advertisements that criticize a competitor's products than to advertisements that solely focus

on the product being promoted, to ensure these claims are truthful, accurate and narrowly drawn.

- The NAD evaluates the message communicated in the advertisement (both express and implied) and determines whether the advertiser has provided a reasonable basis to support the message. Unlike the FTC, it does not examine whether:
 - deception has occurred;
 - any laws have been violated; or
 - an entity has engaged in false or unfair advertising.
- Extrinsic evidence, like a consumer survey, is not required but is highly recommended when challenging implied comparative claims. Online surveys have increasingly been accepted.

ENFORCEABILITY AND APPEAL

- Complying with an NAD decision is optional. However, given the NAD's strong reputation, advertisers generally comply with NAD decisions even if they do not agree with them.
- If an advertiser refuses to cooperate with NAD proceedings or comply with the NAD's decision, the NAD may forward the case to the FTC or a state regulator for action.
- Parties may appeal NAD decisions to the National Advertising Review Board (NARB). The appealing party must pay an additional filing fee to the CBBB (currently \$1,500 for CBBB members and \$2,500 for non-members).
- While advertisers have the automatic right to appeal NAD decisions to the NARB, challengers must first request NARB approval to file an appeal. A challenger's appeal request will be denied if the NARB Chair determines that there is no substantial likelihood that an NARB panel decision would differ from the NAD's decision.
- The NARB rarely reverses NAD decisions. For example, of the eight appeals reviewed by the NARB in 2009, one NAD decision was modified in favor of the advertiser.

COUNTER-CHALLENGES

- Though NAD rules do not permit counterclaims, in practice, you may be the target of a retaliatory counter-challenge.
- If the NAD accepts the counter-challenge, it will assign a different case review specialist so the proceedings are kept separate.

PUBLICITY

- A press release is issued with each NAD decision. The parties are asked to provide a statement indicating whether they intend to comply with the NAD decision.
- The parties must sign a statement confirming that the proceedings will not be used for publicity during or after the case. Therefore, except for the press release, NAD decisions are generally not appropriate for publicity purposes.
- The NAD permits the prevailing party to provide a list of media contacts (but absolutely no business contacts) to receive the press release.

LITIGATE UNDER THE LANHAM ACT

PROCEDURE

- Before pursuing litigation, you should determine whether your claim would be barred because:
 - it is subject to prudential standing limitations (for more information, search [Comparative Advertising Law in the US](#) on our website); or
 - the dispute involves representations about certain intellectual property rights (for more information, search [Comparative Advertising Law in the US](#) on our website).
- Consider whether to seek monetary damages in addition to injunctive relief.
- Consider moving for a preliminary injunction at the outset of litigation to force the advertiser to either end or modify the campaign immediately.
- To win a motion for preliminary injunction, you must show likelihood of success on the merits. This means the entire case must be argued, supported by relevant evidence, in a tight timeframe (usually about 30 days).

TIMING AND COST

- Litigating can take ten to 12 months or longer.
- Litigation is expensive. In addition to factoring in the cost of litigating the initial dispute, you should also weigh the potential costs of litigating any counterclaims or appeals.
- The pre-trial evidentiary process could expose potentially damaging information about your own practices. You should identify in advance potential vulnerabilities that may be exposed when raising certain issues.
- Litigation is likely to disrupt the company's business. Resources may be diverted to:

- depositions;
- interviews;
- development of expert testimony; and
- discovery.

BURDEN OF PROOF

- **Injunctive relief.** To request injunctive relief, you must show that a competitor's false advertising threatens to cause you irreparable harm. Irreparable harm:
 - can be shown by determining the likelihood of consumer confusion, however, if the competitor only makes claims about its own product, your claim must be supported by some evidence of actual injury; and
 - is often presumed when the challenged comparative advertisement specifically mentions you or your products.
- **Monetary damages.** Monetary damages require a higher level of proof than injunctive relief. To recover monetary damages, you must prove:
 - the elements of a false advertising claim;
 - that actual consumer deception or confusion occurred; and
 - that the false advertising claim was material to customers, causing you actual injury.

>> For more information on proving a false advertising claim under the Lanham Act, search [Advertising: Overview](#) on our website.

- When the challenged advertisement makes a misleading comparison or references your product, courts often take the position that causation and injury may be presumed.

- Where an advertisement relates to a competing product and makes direct comparative claims, demonstrating a reasonable belief of injury is generally sufficient to establish a reasonable likelihood of injury.
- Where your products are not obviously in competition with the advertiser's products or otherwise not mentioned in the advertisement, you must make a more substantial showing of injury and causation, which may require producing market surveys or other similar evidence.



AUTHOR

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