Insights: Publications

5 Key Takeaways | Navigating False Advertising Litigation Challenges, Strategies, and Risk Mitigation

January 14, 2026

Barry M. Benjamin, Managing Partner of the New York office and Chair of Kilpatrick's Advertising and Marketing group, was honored to co-present with Andrew Lustigman of Olshan law, a discussion of how to engage and strategize around false advertising challenges, for MyLawCLE. The session focused on how to think through challenges to advertising claims, whether your own company's claims or your competitor's, as well as the optimal strategies and forums to utilize depending on the circumstances and ultimate goals sought.

Takeaways from the program include:

1. Think Ahead: What is the Strategy?

Whether substantiating advertising claims before they run, considering a challenge to a competitor's advertising, or defending one's own claims, strategy is key to achieving a successful outcome. The marketing and business teams often have unrealistic expectations of how quickly legal results can be achieved, and a too-narrow understanding of the full range of legal risks involved. Those legal risks could include governmental enforcement, class actions, competitor challenges, and even simple reputational or public relations risks. Genuine reasons exist to avoid litigation, including costs, diversion of resources, disruption of the business, unexpected collateral events, disclosure of sensitive information to the public and competitors, and unwanted media attention. The lawyer's chief goal should be managing the expectations of all stakeholders to achieve the best, most realistic outcome for the company with the lowest cost and the lowest risk profile.

2. Federal-State Interplay and the Lanham Act

The modern false advertising arena requires practitioners to navigate both federal and state statutes and regulations, which can overlap or diverge in important ways. The Lanham Act remains a cornerstone for competitor-driven claims, but state consumer protection statutes can present additional exposure—often with broader standing, remedies, or class action risk. The Lanham Act imposes high burdens and standards to satisfy for a successful outcome. Not only must a plaintiff prove that a claim or statement was false, but that the false statement was material to consumers' purchasing decision (though there is a presumption of materiality in some contexts), as well as injury or likelihood of injury. These burdens can be difficult to demonstrate in a false advertising context, when false claims in the marketplace have not been fully digested or felt by the competitors. Understanding all legal frameworks and burdens of proof is crucial to evaluating litigation threats and crafting a holistic strategy.

3. Substantiation Remains the Bedrock—But Standards Are Evolving

Reliable, objective, and unbiased substantiation is the legal foundation for any advertising claim—whether express or implied, monadic or comparative. Courts and regulators continue to scrutinize the type, quality, and timing of evidence supporting claims, with particular focus on scientific testing, consumer surveys, and real-world use data. The "reasonable basis" standard is context-specific, and legal counsel must assess factors such as product type, claim specificity, consumer impact, and industry norms when advising clients or mounting a defense.

4. Comparative Advertising: Opportunity and Risk

Comparative claims ("better, faster, stronger") can powerfully differentiate products but invite heightened legal and regulatory scrutiny. Litigants must be prepared to substantiate all reasonable interpretations of superiority claims, and be wary of crossing into misrepresentation or disparagement. Pre-litigation counseling, clear disclaimers, and robust substantiation protocols are essential to mitigate risk and defend against challenges under the Lanham Act and state law.

5. FTC and NAD Enforcement Priorities—Voluntary, but with Teeth

The FTC and the National Advertising Division (NAD) continue to set industry benchmarks for truth and accuracy in advertising. NAD proceedings, while voluntary, can lead to referrals to the FTC for non-compliance, where the full arsenal of government enforcement tools comes into play. Recent enforcement trends highlight increased scrutiny of environmental, health-related, and influencer claims. Proactive compliance and prompt, good-faith participation in self-regulatory forums are best practices to avoid escalation.

Counsel to brands, agencies, and consumers must remain vigilant in monitoring the evolving legal and regulatory environment of false advertising. The tools and strategies discussed in this program are essential to advising clients, limiting liability, and achieving successful outcomes in a high-stakes and rapidly changing field.

For more information or to discuss these topics further, please contact Kilpatrick's Advertising and Marketing team.