

Why Can They Say That but I Can't?

How to Challenge Your Competitors' Advertising While Reducing the Risk of a Counterchallenge

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All About Advertising Law

Regulatory and Litigation Developments for Advertisers and Marketers

VENABLE LLP

Agenda

- Options for Challenging Competitors
- National Advertising Division Self-Regulatory Process
- Reduce the Risk of Counterclaims and Counter-Challenges
- Ethical Considerations

Options for Challenging Competitors

Options for Challenging Competitors

- ✓ Send a Cease and Desist Letter
- ✓ Report the Target to a Regulator
- ✓ File a False Advertising Lawsuit
- ✓ File a Lawsuit Requesting Preliminary Injunction or Temporary Restraining Order
- ✓ Engage in Discussion among Leadership and Business Teams
- ✓ Do Nothing

Options for Challenging Competitors

- ✓ Send a Cease and Desist Letter

Send a Cease and Desist Letter

- A letter:
 - (1) Threatening specific action and
 - (2) Challenging specific issues
- What types of issues can be challenged?
 - Advertising claims: demand substantiation for potentially false claims
 - But does the respondent need to provide it?
 - Disparaging claims: demand substantiation – but do you want it?
 - Marketing practices:
 - Fake review websites
 - Suppressing reviews
 - False social media pages

Send a Cease and Desist Letter: Possible Outcomes

- The target responds and engages with you
- The target immediately removes some or all of the offending advertising
- The target ignores you
- The target sends you a cease-and-desist
- The target sues you
- The target reports you to a regulator

Send a Cease and Desist Letter

Advantages

- Relatively low legal fees
- Conserves company resources that would be diverted pursuing target in more serious effort
- Can achieve results with relatively small investment
- Allows the company to begin discussions and learn more about the claims in advance of lawsuit or other formal challenge

Disadvantages

- If targets do not change their misconduct, you must be ready to take action
- Otherwise, the target will realize that you do not take this seriously, and could become emboldened
- Could cause competitor to counter-attack
- Slower than lawsuit, which could keep damaging claims live for longer

Options for Challenging Competitors



Report the Target to a Regulator

- Send a letter or petition to a regulator:
 - Federal regulator (Federal Trade Commission, Food and Drug Administration, Federal Communications Commission)
 - State regulator (state attorney general, California district attorney or California Task Force)
- Considerations:
 - Should you identify yourself in the letter?
 - Who should send the letter? You or an outside law firm?
 - What advertisements should you challenge?
 - Make sure your house is clean (more about this later...)

Report the Target to a Regulator

Advantages

- Regulator could take action that levels the playing field
- Regulator could find other violations that you did not identify
- Cost-effective

Disadvantages

- If not reported anonymously, the regulator could scrutinize your practices for the same or other issues
- You do not have control over the enforcement and you will not know if or when an investigation opened and how it resolved (unless public resolution or lawsuit)

Options for Challenging Competitors



File a False Advertising Lawsuit

- File a complaint in state or federal court
- The defendant can move to dismiss, counterclaim, or answer
- Fact discovery: interrogatories, requests for production of documents (and things), depositions, third-party subpoenas
- Expert discovery and expert reports
- Summary judgment
- Trial

File a False Advertising Lawsuit

You must demonstrate:

- Statements were made in a commercial advertisement or promotion
 - This is particularly noteworthy when it comes to affiliate marketers, third-party review websites, influencer marketing
- The challenged advertisements were materially false or misleading
 - i.e., they impacted customers' decision to purchase
- The advertisements deceived, or had the capacity to deceive, consumers
- The misrepresented product or service affects interstate commerce
- Injury as a result of the false advertising
 - (You'll need to show damages at trial)

File a False Advertising Lawsuit

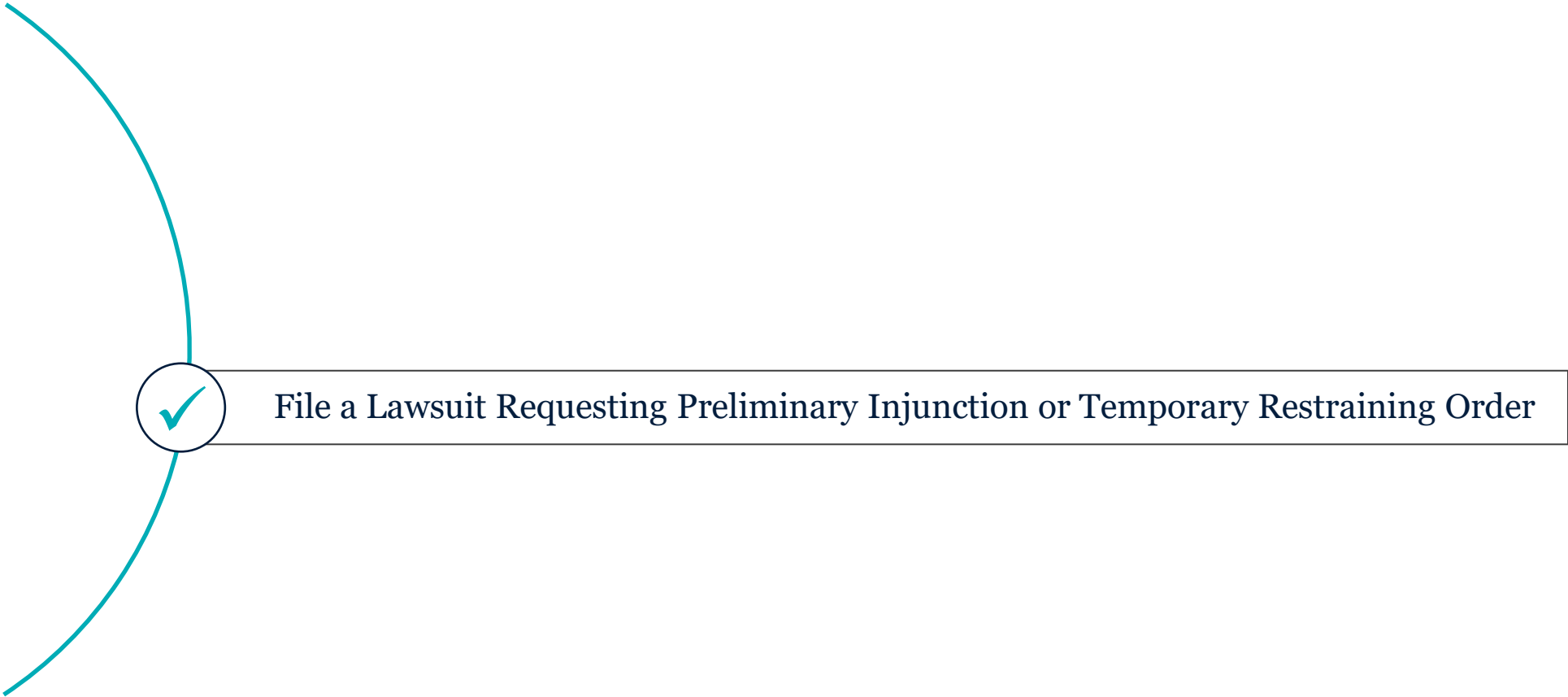
Advantages

- Shows the other side (and other competitors) that you are serious about protecting your claims
- Most likely to achieve fast results
- Pursue broad discovery (document requests, interrogatories, depositions, subpoenas) and leverage that to force resolution and that you can use to pursue your claims and use against the competitor

Disadvantages

- Potential counterclaim
- You will need to respond to broad discovery served by the other side
- You bear the burden of proving the elements
- No guarantee of success: Litigation is inherently risky
- Most expensive and time-consuming option, and will require substantial resources including time responding to and pursuing discovery
- Once you file a lawsuit, you must be prepared to see it to the end
- If you drop the claims, it might embolden the target or other competitors

Options for Challenging Competitors



File a Lawsuit Requesting Preliminary Injunction or Temporary Restraining Order

Advantages

- Asks the judge to enjoin the targets from their misconduct shortly after filing the complaint
- Expedited discovery
- Targets might immediately settle when faced with this which would expedite resolution

Disadvantages

- Costly
- Time and resources needed to provide information and declarations for the motion

To succeed, you must show:

- Likelihood to succeed on the merits
- Likely to suffer irreparable harm in the absence of preliminary relief
- The balance of equities tips in your favor
- An injunction is in the public interest

File a Lawsuit Requesting Preliminary Injunction or Temporary Restraining Order

- *MillerCoors, LLC v. Anheuser-Busch Companies, LLC*, 385 F. Supp. 3d 730 (W.D. Wis. 2019)
 - The U.S. District Court for the Western District of Wisconsin granted a preliminary injunction enjoining the defendant from making certain claims about the corn syrup content in beers, including a statement that the defendant’s Bud Light product contains “100% less corn syrup.”
- Courts will evaluate business-to-business statements even when they are not consumer-facing and when they are highly technical



Options for Challenging Competitors



Engage in Discussion among Leadership and Business Teams

- Business-to-business conversations can lead to faster and cheaper resolutions compared to when lawyers are involved.
- Confirm:
 - That the call is not being recorded, that only the other person is on the line/ listening
 - The call is for settlement purposes (such that nothing any participant says can be used in court)
- CAUTION:
 - Be careful about committing to anything or disclosing information
 - Be careful about threats!
 - Be careful about accusations to the other side—(don't accuse them of doing something you might be doing!)
- Staying claim and reserving rights
 - If the other side makes allegation, do not admit
 - If the conversation becomes counterproductive, end the meeting!
 - If a proposal is presented, take it back (unless the deal is so good that you cannot say no to it)

Engage in Discussion among Leadership and Business Teams

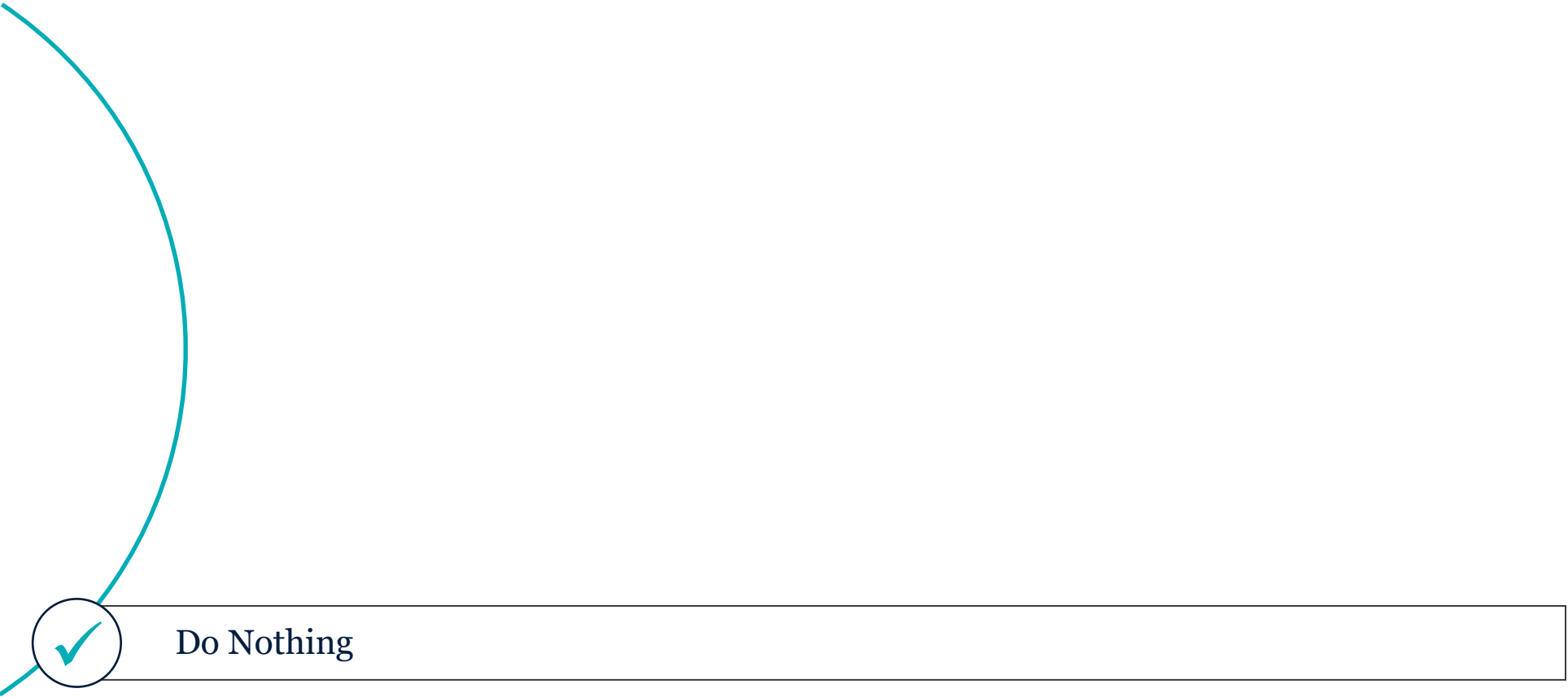
Advantages

- Cost effective
- Allows you to learn more about the target and their reasons for the damaging advertising
- Often easier to resolve issues without lawyers getting involved

Disadvantages

- Can delay ultimate resolution and keep damaging claims live for longer

Options for Challenging Competitors



Do Nothing (or Wait and See)

Advantages

- Avoid legal fees
- Conserves company resources, i.e., focusing on your own advertising

Disadvantages

- Targets will not change their misconduct
- Targets could escalate their misconduct—become emboldened if they conclude that competitors will not act
- Other targets in other matters might observe that you did not take seriously enforcing your rights
- This could be especially problematic in trademark infringement cases!

When Can (or Should) They Make the Claim but You Shouldn't?

Circumstances

- Your company is under investigation by a regulator
- You are defending a lawsuit or demand letter on the claim or other claims

The Merits

- They can substantiate the claim, so the claim is true when they make it
- You can't substantiate the claim, so they are taking a risk – do you want to take the same risk?

Business Considerations

- You want to sell your company soon and want to avoid a counterclaim and increased exposure
- The claim is not valuable and is not diverting business and unlikely to cause any material harm to you



National Advertising Division Self-Regulatory Program

National Advertising Division: Background

- The majority of NAD cases today result from competitor challenges
- Standard Track:
 - Challenge is submitted / case is opened
 - 2 rounds of written submissions: Challenge, Advertiser First Response, Challenger Reply, Advertiser Second Response
 - NAD engages in ex parte meetings with the parties
 - After reviewing the evidence, NAD issues a written decision
 - Parties may appeal the decision to the National Advertising Review Board (NARB)
 - The case report is published, along with a press release
- Compliance Proceedings: Challenge the advertiser's compliance with NAD's recommendations

NAD | NARB Procedures

Interplay: National Advertising Division and Federal Trade Commission

- Advertisers that refuse to participate in the NAD process, or who refuse to comply with NAD recommendations, are referred to the applicable government agency.
 - Federal Trade Commission (FTC)
 - Federal Food and Drug Administration (FDA)
 - Federal Communications Commission (FCC)
- FTC chooses whether to open an investigation or otherwise take action against the advertiser.

[FTC Resolution of Referrals from BBB National Programs](#)



The screenshot displays the Federal Trade Commission's website. The header includes the FTC logo, the text "FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS", and navigation links for "Contact", "Stay Connected", "Privacy Policy", and "FTC en español". A search bar is also present. The main navigation menu includes "ABOUT THE FTC", "NEWS & EVENTS", "ENFORCEMENT", "POLICY", "TIPS & ADVICE", and "I WOULD LIKE TO...". The breadcrumb trail reads: "Home » Enforcement » Cases and Proceedings » Letters and Statements » Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP". The "Letters and Statements" section is active, showing a list of items. The first item is "Resolution of Referrals from BBB National Programs, including NAD, CARU, DSSRC, and ERSP", with a sub-header "Leptitox Nutrition (Leptitox dietary supplement)" and a description "Response to NAD Referral". The date is "November 10, 2020" and the author is "Carolyn L. Hann". A document icon indicates a "Text of Letter (126.58 KB)". The second item is "MASK, LLC (Spotless Blemishes & Oily Skin Soothing CBD Sheet Mask)", with a sub-header "Response to NAD referral" and a description "Response to NAD referral". The date is "October 27, 2020" and the author is "Carolyn L. Hann". A document icon indicates a "Text of the Letter (119.63 KB)". A "FILTERS" section on the left includes a "Keyword" search box and a "Documents" search box.

NAD Single Well-Defined Issue Fast Track (SWIFT)

- The expedited process reviews advertising truth and transparency issues that **do not** require complex claim substantiation.
- Fast-Track SWIFT challenges are limited to **a single issue:**
 - The prominence or sufficiency of disclosures including disclosure issues in influencer marketing, native advertising, and incentivized reviews
 - Misleading pricing and sales claims
 - Misleading express claims that do not require review of complex evidence or substantiation such as clinical or technical testing or consumer perception evidence
- Submissions are made online and only one substantive submission is permitted per party.
- The Fast-Track SWIFT process allows parties to receive an NAD decision within 20 business days from the opening of the case.

Advantages and Disadvantages of Self-Regulatory Process

Advantages

- Lower cost than litigation
- Often faster than litigation
- No discovery / one-way discovery
- Confidential proceedings
- Levels the playing field

Disadvantages

- Limited control over the proceedings
- Limited discovery
- Confidential
- Increases the focus on your advertising
- Your competitor might have substantiation!
- Recommendations are nonbinding

NAD Case Examples: Comparative and Superiority Claims

- WaterWipes (WaterWipes)
 - NAD determined that the advertiser’s study does not provide adequate substantiation for the broad superiority claims (“#1 wipe against the causes of diaper rash” and “#1 cleansing wipes helping against the causes of diaper rash”) or the establishment claim (“clinically proven as the #1 wipe against the causes of diaper rash”) that were at issue in both that and this challenge.
 - NAD noted that broad superiority claims such as a “#1 claim” require strong support while a “clinically proven” claim requires reliable and well-controlled clinical testing on the advertised product.



Comparative and Superiority Claims

- Sanofi Consumer Healthcare (Zantac 360)
 - NAD analyzed “#1 doctor recommended” claims for its Zantac 360 heartburn medicine (“#1 doctor recommended medicine approved to both prevent and relieve heartburn” and “with the #1 doctor recommended heartburn medicine”).
 - The advertiser argued that doctor survey data for the generic group (necessarily based on the listed active ingredient), showed that in the relevant category, recommendations for famotidine-based store/generic brands far exceeded the recommendations for products with other active ingredients.
 - NAD disagreed, and concluded that a doctor’s recommendation for a product was not the same as a recommendation for the active ingredient.



Comparative and Superiority Claims

- Twilio (Customer Data Platform)
 - Twilio Inc. provided a reasonable basis for claims that its customer data platform is the “#1 CDP,” provided it makes clear that the basis for such claim is 2020 market share, as measured by the International Data Corporation (IDC).
- Merck (BRAVECTO®)
 - NAD recommended the discontinuation of Merck’s “Best in Show” commercial, which depicted a comparison of Bravecto to NexGard at protecting dogs from fleas, which is an unsupported claim.



Analyst Report

Twilio ranked #1 CDP by IDC in worldwide market share 2022

Read the report →

Market Share
Worldwide Customer Data Platform Applications Software Market Shares, 2022: Continued CDP Growth to \$2.7 Billion Proves Value of Unified Data for CX and Digital Business
David Wallace
THIS IDC MARKET SHARE EXCERPT FEATURES TWILIO

IDC MARKET SHARE FIGURE

FIGURE 1
Worldwide Customer Data Platform Applications Software 2022 Share Snapshot

Company	Market Share
Twilio	10.2%
Adobe	9.4%

Total Market: \$255.8, +153.3%

NAD Cases Addressing Disparagement Claims

- *Kleenex*, NAD Case No. 7113 (2022)
 - NAD recommended that Procter & Gamble discontinue or modify commercials in which they claim competitor’s Kleenex tissues are “harsh, insufficiently soft, and harmful to the nose.”
- *Telecommunications Disparagement Claims*:
 - NAD recommended that telecommunications company discontinue the express claim it made about competitor’s “spotty” and “glitchy” wireless home internet services.
- *NOT disparaging (as long as advertiser discontinued other “clean” claims)*:
 - The company’s founder learned that Zantac was recalled due to containing potential carcinogens. Becoming concerned, he examined the ingredients of other antacids he was taking, including TUMS, and noticed that talc was an ingredient. Talc was the subject of lawsuits against Johnson & Johnson alleging that the talc allegedly caused cancer. As a result, he did not want to put some of the ingredients in these antacids, including TUMS, into his body.



Reduce the Risk of Counterclaims/ Counter-Challenges

Reduce the Risk of Counterclaims

- Avoid comparative/superiority claims
 - When you call out a competitor's name, they are more likely to challenge you!
- Evaluate your advertising claims' substantiation
 - Conduct periodic audits
- Evaluate your marketing channels to confirm you are not engaging in high-risk activities that would be attractive for competitors to report to regulators

Reduce the Risk of Counterclaims

- Check your affiliates' actions
 - Affiliate review, ranking websites are high risk of challenge
 - Social influencers often make disparaging claims



7 Trendy Skin Care Products to Never Put on Your Face



Ethical Considerations

Secret Shopping: Ethical Considerations

***Gallagher v. Van Lott, Inc.*,
Civil Action No. 6:05-0642,
2006 U.S. Dist. LEXIS 97590
(D.S.C. 2006)**

- The U.S. District Court for the District of South Carolina excluded an audio recording of the plaintiff that was obtained by defense counsel's private investigator who misrepresented himself when communicating with the plaintiff. The private investigators told the plaintiff that he was a "special needs schoolteacher interested in buying the plaintiff's truck."

***Meyer v. Kalanick*, 212 F.
Supp. 3d 437 (S.D.N.Y. 2016)**

- The U.S. District Court for the Southern District of New York enjoined a company from using any information obtained through their investigation of the plaintiff and his counsel. Under allegedly false pretenses, the company's investigators reached out to 28 acquaintances or professional colleagues of plaintiff Meyer and his counsel. The Court believed the purpose of the investigation was to try to find derogatory personal information that could be used to try to intimidate the plaintiff or prejudice the Court against the plaintiff and his counsel.

***Impossible Foods Inc. v. Motif
Foodworks, Inc.*, Civil Action
No. 22-311-WCB, 2023
U.S. Dist. LEXIS 96227
(D. Del. 2023)**

- The U.S. District Court for the District of Delaware held that the plaintiff did not violate the Rules of Professional Conduct when they used private investigators to obtain samples of the defendant's products from trade shows and through their sales channel.

Ethical Considerations in Demand Letters

- *Barton v. State Bar of California*, 2 Cal. 2d 294 (Cal. 1935)
 - The Supreme Court upheld disbarment of an attorney for threatening to report a company to the authorities unless the company settled with the attorney's client.
- *Flatley v. Mauro*, 39 Cal. 4th 299 (Cal. 2006)
 - The Supreme Court stated that extortionate speech is not constitutionally protected, and the California anti-SLAPP statute did not apply to the defendant's threat to report the plaintiff to news outlets, and other agencies, if he did not pay the defendant's client a seven-figure sum of money.
- *Mendoza v. Hamzeh*, 215 Cal. App. 4th 799, 805 (Cal. Ct. App. 2013)
 - The Second District Court of Appeals held that a threat to report a crime coupled with a demand for money is extortion even if the victim did in fact commit the crime. The alleged crime in this instance was tax fraud.
- *Falcon Brands, Inc. v. Mousavi & Lee, LLP*, 74 Cal. App. 5th, 506 (Cal. Ct. App. 2022)
 - The Fourth District Court of Appeals held that opposing counsel's threat to inform a company interested in acquiring the plaintiff's company about the plaintiff's alleged criminal activities constituted "extortion" and did not qualify for anti-SLAPP protection.

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