



THE FUTURE OF ADVERTISING SELF-REGULATION

by Ronald R. Urbach

The National Advertising Division (NAD) of the Council of Better Business Bureaus is the front line of the advertising industry's efforts to police itself and fend off government regulation. For consumers, NAD ensures that the advertising claims they see and rely on to make informed decisions when buying products and services are truthful, accurate, and in no way deceptive or misleading.

NAD—which is part of the Advertising Self-Regulatory Council (ASRC)—adheres to a self-regulatory dispute resolution process run by experienced advertising lawyers in accordance with specified rules and reliance on applicable law and NAD precedent. Think of it as “litigation light”—no discovery, no counter claims, no motion practice, limited briefings, and expedited process.

For the first time, a committee of the American Bar Association (ABA) recently reviewed NAD and, in a 40-page report released last week, has made recommendations for improvements and changes. But herein lies the rub: With self-regulation, NAD relies on the voluntary cooperation of many stakeholders. So the critical questions will be: If NAD implements some or all of the recommendations, what will the industry's reaction be? Will it create more or less demand and voluntary cooperation?

The stakes are high. NAD is too important an institution to make a mistake. So NAD and the stakeholders need to proceed cautiously or the repercussions could be severe.

What Did The ABA Subcommittee Do?

The working group divided its review into six categories: History and Mission of NAD, Bringing a Complaint, Presenting the Case, Decision and Press Release, Appeals Process, and Post Review.

The report contains recommendations on all of these subjects, expressing “strong support for NAD” and recognizing “the value” and “success” of the advertising industry self-regulatory system at the direction of NAD. It concludes that the system “works well” but finds “opportunities for increased efficiencies or improvement.”

Let's take a look at what advertisers need to know about each category.

- >> **History and Mission:** The report recommends that funding for NAD should be more transparent and strengthened with additional funding sources. A NAD attorney who investigates a prospective case and determines that a case should be opened should not be the same attorney who reviews the evidence, decides the case, and writes the decision.
- >> **Bringing a Complaint:** The report recommends that NAD's jurisdiction, including who is an advertiser and whether NAD has jurisdiction over charitable solicitation campaigns, needs to be clarified. It also recommends revisiting page-limit restrictions for complaints, briefs, and joint case management processes; that NAD should not recharacterize claims challenged; an administrative closing should not suggest claims were unsubstantiated if NAD

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did not reach the merits; and parties should have the option to enter into a private agreement terminating the case without NAD's approval and press release.

- >> **Presenting the Case:** Here the report suggests that NAD adopt different approaches to cases based on complexity and number of claims; assign a related challenge to the same attorney handling the initial challenge; revisit its expedited review procedures and consider alternatives; and explore options to improve scheduling.
- >> **Decision and Press Release:** The report recommends that NAD not include separate statements of each party's case, but include a single and shorter synthesis of facts; to not use material information outside of the record, unless parties can review it and respond; and to modernize the online archive of decisions. It also suggests that NAD issue decisions more quickly; that the advertiser's statement should be limited; and to discontinue the issuance of press releases, except in limited cases.
- >> **Appeals Process:** Here, the report recommends that NAD should not have a right to appeal to the National Advertising Review Board (NARB) except for NAD-initiated cases. It also recommends that challengers have an automatic right to appeal to NARB; the briefing schedule should be tightened; new arguments, but not new evidence, should be accepted in NARB appeals; NARB should review decisions *de novo*; and the NARB Chair should enforce compliance with decisions should be enforced.
- >> **Post-Review:** In the final category, the report calls for more time to respond to a compliance inquiry; less time to respond to NAD's initial recommendation and final decision; and new evidence be allowed when "new factors" have called the underlying decision into question. In exceptional circumstances, the report suggests, a compliance ruling may be appealed; the FTC referral process should allow access to referrals and closing letters; and NAD not comment on claims that are withdrawn after a challenge is filed.

THE BOTTOM LINE

Many of the ABA committee's recommendations are rational refinements of current practice and procedures and should be adopted. Others, however, are a wish list disconnected from the reality of the ASRC's resource limitations. In addition, given how much of advertising is now via digital channels, NAD's social policy role appears to have been given little focus.

It will be interesting to see which communications are adopted. Stay tuned.

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