

Navigating the National Advertising Division

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Many know that advertising in the United States is monitored and policed by federal and state consumer protection agencies, including the Federal Trade Commission (FTC) and state attorneys general, as well as by competitors and consumers through private lawsuits. Lesser known may be the National Advertising Division (NAD), the advertising industry's robust self-regulatory body, which offers a vigorous (yet voluntary) dispute resolution process for advertisers and is charged with independently monitoring and reviewing national advertising for truthfulness and accuracy.¹ NAD's own staff of sophisticated advertising lawyers analyzes ad claims and campaigns, with input from counsel, marketing executives, research and development departments, and outside consultants, in order to determine whether claims in national advertising are truthful and substantiated.²

This article will provide background on NAD, explain its processes and quirks, and provide practitioners with tips for successfully navigating an appearance before the body.

Background

NAD was created in 1971 in a partnership of trade associations (including the American Advertising Federation, the Association of National Advertisers, and the American Association of Advertising Agencies) and the Council of Better Business Bureaus (CBBB). The industry's decision to regulate itself was born out of increased governmental and public interest scrutiny of the advertising business.³ Together, representatives from these groups formed the National Advertising Review Council (recently rebranded as the Advertising Self-Regulatory Council (ASRC)), and the board of the ASRC, with oversight from the CBBB, created NAD, as well as the Children's Advertising Review Unit (CARU) and the National Advertising Review Board (NARB)—the appellate arm of NAD more fully described below—and each of their governing policies and procedures.⁴ Since its founding, NAD has been operating successfully, hearing in some instances 100 cases per year.⁵

How It Works

In recent years, the majority of NAD cases have been brought to NAD's attention by competitors.⁶ For example, a company may alert NAD—through submission of a detailed letter—to national advertising of a competitor that it

considers false, misleading, or otherwise problematic. If NAD decides to open a matter to investigate such advertising, the advertiser has an opportunity to respond to the inquiry in a written submission of its own. In such competitive challenges, NAD acts as a neutral arbiter on behalf of the public interest, considering the arguments of both parties, reviewing evidence, meeting separately with each party, and issuing a decision on whether or not the advertising claims at issue are appropriate as currently formulated or should be modified or discontinued.⁷ NAD also brings its own cases through its monitoring program, as well as cases that arise from consumer complaints. In both such instances, NAD initiates the review and adjudicative process itself.⁸

NAD maintains a subscription-based public online archive of all of its case decisions, providing subscribers with access to NAD's analysis of current advertising issues. NAD's case archive has become part of the nation's body of advertising and marketing law.⁹

When an advertiser or challenger disagrees with a NAD decision, it may appeal the decision to the NARB, a reviewing body comprising 70 professionals, including advertisers, agency professionals, academics, and members of the public.¹⁰ If a NAD decision is appealed to the NARB, a five-member panel—made up of three advertiser members, one agency member, and one public member—is chosen to review NAD's decision.¹¹ NARB decisions are also published in a subscription-based public online database.

Participating in a NAD proceeding is voluntary, but there are consequences for advertisers who choose not to participate or choose not to comply with a NAD decision. NAD can and does refer cases to the FTC for review and potential enforcement. The FTC has long provided full-throated support of self-regulation in the advertising arena and, specifically, of the work of NAD. Even in this new administration, the FTC has been clear that it will continue to support self-regulation. The FTC provides a page with links to the cases referred to it by NAD, CARU, and the Electronic Retailing Self-Regulation Program (ERSP) and their resolutions, which serve as a good reminder that the FTC does indeed take referrals from NAD seriously.¹²

Recent Changes

The ASRC board meets regularly to review the policies and procedures governing the NAD, CARU, and NARB challenge processes,¹³ and they periodically consider proposed changes to such rules from practitioners, policymakers, and the public.¹⁴ In 2015, the ASRC announced changes to the NAD policies and procedures, representing some of the biggest changes to the rules governing advertising self-regulation. The changes came as a result of a review of the ASRC procedures, and the self-regulatory process generally, by a working group made up of members of the American Bar Association Section of Antitrust Law's Consumer Protection Committee and Advertising Disputes & Litigation Committee (Working Group) who regularly practice before NAD, and represented consumer product companies, industry associations, and private law firms.

One of the biggest changes reflected in the 2015 policies and procedures was the ability of private parties to settle a challenge that is currently before NAD or CARU.¹⁵ In its report, the Working Group stated a belief that permitting private settlements could further NAD's mission by conserving resources and allowing NAD to focus on active challenges.¹⁶ The ASRC thus announced that NAD and CARU may now administratively close a case if,

prior to NAD's issuing a decision, the challenger and advertiser consent in writing to closure of the case.¹⁷ In such instances, NAD or CARU will still be able to file its own complaint based on the same or similar claims as part of its monitoring authority. Cases closed based on consent of the parties are now reported in the case reports database as "Administratively Closed on Consent of Parties."¹⁸ However, while there is normally a press release issued upon publication of a case decision, no press releases will be issued when cases are administratively closed on consent of the parties. In such cases, there is also no refund of the filing fee.¹⁹ However, if a case is administratively closed for any reason *other* than consent of the parties, 50 percent of the filing fee is refunded.²⁰

In a more recent, but equally significant, revision to its procedures, NAD now also permits advertisers to introduce new evidence to substantiate claims that NAD previously determined should be modified or discontinued. While NAD's procedures have always permitted the reopening of a case based on "extraordinary circumstances," the new procedures spell out the factors that NAD can and will take into account and explicitly recognize the potential for new evidence. Specifically, the new procedures provide:

A closed NAD or NARB case may be reopened if the NAD Director, in his/her sole discretion, determines that extraordinary circumstances warrant the reopening. In making this determination, the NAD Director shall take into account (1) the advertiser's compliance with any recommendations by NAD or NARB relating to the claims at issue; (2) if the reopening is requested based on new evidence, whether there is a satisfactory showing that the new evidence was not reasonably available to the party at the time the NAD record was closed; (3) if the reopening is requested based on new evidence, whether the new evidence would have likely changed the NAD or NARB decision in a material way; and (4) whether the request has sufficient merit to warrant the expenditure of NAD resources.²¹

Previously, it was very difficult for an advertiser to introduce new evidence or substantiation to support a previously discontinued claim; NAD was reluctant to allow cases to potentially continue indefinitely. Now, there are two avenues that an advertiser can pursue if it has new evidence to support a previously disallowed claim: it may resume use of the claim and request that NAD consider the new evidence in the event that the original challenger initiates a compliance proceeding, or it may seek NAD's review of the new evidence prior to resuming use of the claim.²² If an advertiser seeks to reopen a case, it must petition the NAD director and pay a nonrefundable petition fee of \$5,000; if the petition is granted, it must pay an additional nonrefundable filing fee equal to the applicable NAD challenge fee minus the \$5,000 initial petition fee.²³

Although this procedure is a potential option available to either party to the original dispute, advertisers are likely to be most interested in reopening a case, especially if they develop new substantiation for a claim that they are still invested in using. Such new substantiation could potentially address any flaws that NAD previously found precluded earlier use of the claim.

This change, which was developed in response to the recommendation offered by the Working Group, aligns the self-regulatory approach more closely with an advertiser's legal requirements: the truthfulness of a claim is paramount.

Practitioner Tips

NAD is different. A NAD proceeding is not litigation in court. There is no discovery. There are no motions, no damages, and no sanctions. There is no publicity until a press release is issued by NAD at the conclusion of the matter. Advocacy is important. But the gamesmanship litigators sometimes deploy in a court proceeding is not particularly effective or, indeed, welcome at NAD. Below is a review of some of the best practices that can help guide NAD practitioners.

NAD Is about the Merits, as NAD Sees Them

Whether you are representing the advertiser or the challenger, you should go directly to the substance of the case: Is the advertising truthful? Are the claims adequately supported? What is the consumer takeaway? Your job as advocate is to marshal the facts and present your arguments. But, ultimately, NAD's own view of the claims made in the ads is more important than what any lawyer says about them.

Read the Case Reports

Searchable NAD case reports are available by subscription on the ASRC website. If you represent advertisers, start reading the case reports now before you are involved in a case. This is where much of the body of advertising law resides. Use the case reports to counsel clients, to understand potential pitfalls of your claims, and to understand what type of substantiation you will need for those claims.

When citing NAD's cases in your papers, understand that, while helpful, precedent is rarely dispositive because each ad is different. Unlike in court proceedings, adherence to precedent is not a guiding principle in NAD proceedings. NAD can be more concerned with the impression created by the advertising at issue than adhering to its own precedent.

The More “Impactful” the Claim, the Better Substantiation NAD Will Want

If you read a lot of NAD case reports, you will notice several things about NAD's approach to substantiation. First, the more serious the claim—e.g., claims that involve health, children, or social responsibility, or claims for products or services that require a significant expenditure of money—the more substantiation NAD will require. Second, the more compelling the claim itself, no matter the product category, the more substantiation NAD will require.

Ultimately, what NAD wants to see is a “good fit” (an expression frequently used by NAD) between the support and the claim. For example, do not try to support a claim about the health benefits of a product with one small study about the individual ingredients; you will likely need at least one robust study of the product itself.

Humor Is Good, but Will Not Save You from Unduly Disparaging or False Claims

Humor does not equal puffery. The claim expressed humorously must still be truthful. You might have some license to exaggerate if it is clear that the exaggeration is over the top, but you cannot overstate benefits in a way that would lead consumers to expect to receive them. Likewise, do not trash your competitors. Use humor to highlight and entertain but not to lie or denigrate.

Claims and Their Substantiation Must Be Consumer-Relevant

It is a “black letter” principle of advertising law that a claim can be truthful but still misleading. One “famous” example of this principle is from a NAD challenge where the advertiser touted that its chocolate chip cookies contained twice the number of chips as its competitor. This was a literally true claim; however, the chips were half the size of the competitors’ chips. So, the implied claim, that there was twice the chocolate in the advertiser’s cookies, was false.

Testing, like claims, must also be consumer-relevant. Thus, testing should recreate real-world conditions. If testing a household grease remover, you need studies showing that the product removes the kind of grease a consumer would actually confront in his or her own kitchen.

Consider a Survey

You do not have to offer a consumer perception survey in a NAD proceeding. NAD can and will evaluate an ad’s takeaway without one. But there may be circumstances when a survey is helpful: for example, when the takeaway is ambiguous and you are not confident that NAD will see the claim the way you do, or when the claim is not ambiguous but you want to give NAD a ground to buttress its own decision. Commissioning a consumer perception survey will increase your costs, but in such circumstances, it may be worth it.

If you decide to use a survey, make sure it is properly designed and conducted. NAD prefers open-ended questions (e.g., “what was the main message of the commercial?”) and will want to see the verbatims (i.e., the actual responses provided to those open-ended questions). If using close-ended questions (i.e., questions that can be answered with a simple yes or no or a specific response), they should not be leading. The order of questions is very important because of the potential to focus the respondents’ attention on certain attributes. You also need to be careful of fatigue risk. So keep surveys short and to the point, and use an experienced survey expert to prepare and field it.

Note that even if you use a well-designed survey, NAD is not bound by it. As NAD has noted in several cases, “[i]t is well settled that in evaluating the reasonable messages conveyed by a commercial, NAD need not limit itself to the results of consumer perception surveys submitted by the parties but may also independently examine the contested advertising and carefully consider its net impression.”²⁴

Consider Expediting the Case

If you are the challenger and the advertiser puts in a superficial response to your challenge letter, you can speed things along by waiving your right to submit a reply. The waiver forecloses the advertiser from putting in additional papers, and NAD will issue a decision based just on the initial papers (and, of course, its own impressions of the advertising materials). Remember, then, that if you are the advertiser, you should not try to game the system by holding back arguments for your second submission because you may never get the chance to submit a second response. Therefore, whether you are the advertiser or the challenger, your initial papers should be thorough.

Remember “Routine Monitoring”

NAD has a consumer protection role in addition to its role of adjudicating disputes between competitors. You may be in an industry where companies do not often challenge each other, but NAD may be watching anyway, and NAD may call you to task. Areas where NAD often engages in “routine monitoring” include: too-good-to-be-true claims; green and other social responsibility claims (where claims are impactful and consumers are not in a good position to evaluate the claims for themselves); and aggressive and impactful claims in industries where there is little likelihood of challenges between advertisers because all the companies are making the same kind of claims.

Ignore NAD at Your Peril

Any attendee of an advertising law conference has certainly heard an FTC staff lawyer say that cases referred to the FTC from NAD “go to the top of the FTC’s pile.” Indeed, at the 2018 annual NAD conference, attendees were even presented with a data-driven analysis of what happens to those cases, which made clear that the FTC pursues each referred matter, though not necessarily in a formal enforcement action.

We see this in practice too. On October 19, 2018, NAD announced that it referred advertising claims made by LG Electronics USA Inc. to the FTC for further review, following LG’s decision not to comply with NAD recommendations regarding its “perfect black” and “infinite contrast” claims for its LG Super UHD and LG OLED televisions.²⁵ Of particular interest in that case is the fact that LG had initially appealed NAD’s decision to the NARB. The company then withdrew its appeal and petitioned NAD to reopen the case based on new evidence, relying on the changes to NAD’s procedures discussed above. However, NAD declined to reopen the case after reviewing the evidence and referred the matter to the FTC.²⁶

NAD Lawyers Like Their Jobs

NAD staff comprises experienced lawyers, who really seem to like working there. Remember that if you practice regularly before NAD, you will probably work with the same NAD lawyers on multiple matters so best practice is to behave well and establish a good reputation there.

Endnotes

1. *See About NAD*, ADVERT. SELF-REG. COUNCIL, <http://www.asrcreviews.org/how-nad-works/> (last visited Feb. 14, 2019).
2. *See ABA SECTION OF ANTITRUST LAW, SELF-REGULATION OF ADVERTISING IN THE UNITED STATES: AN ASSESSMENT OF THE NATIONAL ADVERTISING DIVISION 2* (2015) [hereinafter NAD REPORT].
3. *Id.*
4. NAD has long served as the investigative, adjudicatory, and enforcement body of the advertising industry's self-regulatory system, while the NARB acts as its appellate arm. CARU is charged with monitoring and adjudicating children's advertising.
5. John E. Villafranco & Katherine E. Riley, *So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, 27 ANTITRUST, no. 2, Spring 2013, at 79.
6. *See* NAD REPORT, *supra* note 2, at 3.
7. *Id.* at 4.
8. *Id.* at 3.
9. *Id.*
10. *See NARB Process*, ADVERT. SELF-REG. COUNCIL, <http://www.asrcreviews.org/how-the-narb-process-works/> (last visited Feb. 14, 2019).
11. *Id.*
12. *Resolution of Referrals from the NAD, ERSP, and CARU of the Council of Better Business Bureaus*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/resolution-of-referrals-from-nad> (last visited Feb. 14, 2019).
13. *See* THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION (ADVERT. SELF-REG. COUNCIL 2018) [hereinafter 2018 ASRC POLICIES AND PROCEDURES], <http://www.asrcreviews.org/asrc-procedures/>; THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION (ADVERT. SELF-REG. COUNCIL 2015) [hereinafter 2015 ASRC POLICIES AND PROCEDURES], <http://fkks.com/pdfs/NADCARUNARBSelfRegulation.pdf>.
14. *See* NAD REPORT, *supra* note 2, at 2.
15. 2015 ASRC POLICIES AND PROCEDURES, *supra* note 13, § 2.2(E).
16. *See* NAD REPORT, *supra* note 2, at 13.

17. 2015 ASRC POLICIES AND PROCEDURES, *supra* note 13, § 2.2(E).

18. *Id.*

19. *Id.* § 2.2(A)(4).

20. *Id.*

21. 2018 ASRC POLICIES AND PROCEDURES, *supra* note 13, § 3.9(A).

22. *Id.*

23. *Id.* § 3.9(B), (C).

24. *See, e.g.*, ConAgra Foods, Inc. (Hebrew Nat'l Beef Franks), NAD/CARU Case Report No. 4581 (Oct. 2006).

25. LG Elecs. USA, Inc. (Super UHD & OLED Televisions), NAD/CARU Case Report No. 6163 (Mar. 2018).

26. *See* Press Release, Advert. Self-Regulatory Council, NAD Refers Advertising Claims by LG Electronics to FTC for Further Review; NAD Declines to Reopen LG Case under New Evidence Rules (Oct. 19, 2018), <http://www.asrcreviews.org/nad-refers-advertising-claims-by-lg-electronics-to-ftc-for-further-review-nad-declines-to-reopen-lg-case-under-new-evidence-rules/>.

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