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The NAD Sets Precedent for Others in Media, Marketing *Self-regulation Works When It Has Teeth to Back It up*

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By Linda Goldstein

In the midst of the current debate regarding behavioral advertising and the industry's strong desire for a self-regulatory approach, it is useful to look at the National Advertising Division of the Council of Better Business Bureaus as a model for successful self-regulation.

The NAD was created nearly 40 years ago in an effort to demonstrate to Congress that further regulation of advertising was not necessary and that the industry could adequately police itself and remove false and unsubstantiated advertising claims from the marketplace. Over the course of the last 40 years, the NAD has also become a significant forum through which advertisers can adjudicate false advertising disputes without having to resort to the expense of a protracted litigation.

Although participation in NAD proceedings is purely voluntary, the participation rate is exceptionally high, and NAD decisions have become an important source of precedent and guidance for the industry. While the growth of the NAD has been due in large part to an increasingly competitive environment and increase in the incidence and severity of brand wars, its success also lies very much in its ability to meet the changing needs of the industry. This evolution is apparent in a number of areas.

For example, in the early days of the NAD, the decisions were quite short and often fact-specific. Under the direction of Andrea Levine, the case decisions have become much more complex, detailed and sophisticated and, in effect, have established a large body of precedent on significant advertising issues well beyond those provided in the case law. Indeed, today NAD decisions are widely cited as precedent in Lanham Act cases and in NAD proceedings. The large body of precedent that has now been established provides useful guidance to advertisers in predicting how both their claims and testing are likely to be viewed by the NAD.

The NAD has also stepped in on issues where there has been a void in NAD or judicial precedent, and thus provided important guidance to the industry.

The NAD has also adapted to emerging media platforms. While early NAD decisions were focused exclusively on traditional advertising, the NAD has proactively sought to bring cases involving advertising in new and emerging media platforms and through those cases has provided further guidance to advertisers in uncharted territories. For example, the NAD has initiated cases involving social-media sites and has already provided guidance on the application of the FTC's new Testimonial and Endorsement Guidelines.

An essential ingredient of any self-regulatory program is that it must have teeth. The threat of referral to the FTC for non-participation and/or noncompliance with NAD decisions has been key to ensuring the high level of participation. While the FTC does not always pursue the cases referred to them by the NAD, the threat of referral serves as an important deterrent.

Whether through its self-monitoring program or as an arbiter of comparative advertising disputes the NAD has become an increasingly important force to be reckoned with within the advertising community and has contributed greatly to the development of a body of advertising law.

ABOUT THE AUTHOR

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