

SELF-REGULATION OF ADVERTISING
IN THE UNITED STATES:
AN ASSESSMENT OF THE NATIONAL
ADVERTISING DIVISION

Prepared by

The Advertising Disputes & Litigation Committee and
The Consumer Protection Committee of the
American Bar Association's Section of Antitrust Law*

*This is a report of the ABA Section of Antitrust Law's Advertising Disputes & Litigation Committee and Consumer Protection Committee. It does not necessarily represent the views of the ABA or the Section of Antitrust Law.

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FOREWORD

Make it even better. That has been our guiding principle from the outset of the Working Group project, which started in response to a request for input made by the President of the Advertising Self-Regulatory Council, Lee Peeler. The success of advertising industry self-regulation at the direction of the National Advertising Division was already clear to all involved. What was surprising was how many were committed to participate in an in-depth discussion of how it could be made even better.

The call to participate was made in June 2014 and, almost immediately, 59 interested parties signed up. Not only did these individuals agree to commit substantial time over a seven-month period, many joined the Section of Antitrust Law just so they could participate on the Working Group project. Working Group members included representatives from consumer product companies (big and small), industry associations, and advertising lawyers with extensive experience representing challengers and advertisers at the National Advertising Division.

While every Group member contributed substantially to this Report, the nature and quality of participation from this last category was especially welcome. There are some real heavyweights on that list who have argued NAD cases for decades. Having those individuals at the same table, working constructively to make a great process even better, lent an unexpected energy to the entire undertaking. Clearly, these advertising attorneys, who agree about so little as frequent adversaries, understood there was important work to complete here.

On behalf of the Advertising Disputes & Litigation Committee and the Consumer Protection Committee, we sincerely thank the Working Group for its outstanding effort. Special thanks to our Editorial Teams, each of which spent countless hours leading discussion and drafting observations and recommendations for consideration and refinement; our peer reviewers, both within and outside the Section of Antitrust Law; and our Editorial Team Assistant, Donnelly McDowell, and Administrative Assistant, Simone Roach, for their work in coordinating the overall effort.

Finally, we thank all of the companies, associations, and law firms who committed thousands of hours to this project.

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EXECUTIVE SUMMARY

The American Bar Association (“ABA”) Section of Antitrust Law’s Advertising Disputes & Litigation Committee (“ADL”) and Consumer Protection Committee (“CP”) (collectively, the “Committees”) convened a Working Group (the “Group”) to discuss the state of advertising self-regulation in the United States and offer recommendations intended to assist the National Advertising Division (“NAD”) in fulfilling its mission of promoting truthfulness and accuracy in advertising. The Group convened a series of meetings to identify, consider, and make recommendations on the following topics: (1) History and Mission of NAD; (2) Bringing a Complaint; (3) Presenting the Case; (4) Decision and Press Release; (5) Appeals Process; and (6) Post Review.

The Group comprised 59 individual stakeholders, supporters, and users of the NAD process, representing major advertisers, leading law firms, and industry trade associations. The Group expressed its strong support for NAD and recognized the value of a robust self-regulatory system in promoting public confidence in advertising and providing a user-friendly process for resolving advertising disputes. It also noted the importance of having experienced and impartial NAD attorneys with expertise in advertising law providing careful review, legal analysis, and recommendations in published decisions.

In evaluating the different topics, the Group concluded that the system works well, and considered areas where there might be opportunities for increased efficiencies or improvement. The Group recognized the important role and considerable accomplishments of NAD, notwithstanding the relatively small professional staff (a Director and six to seven attorneys). The Group believes that the quality and timeliness of NAD decisions are key attributes of the system and was mindful that several of the recommendations would impose additional requirements on the staff. To ensure that the implementation of these recommendations does not detract from the timeliness of decisions, additional funding and staff may be required.

The Group’s report (“Report”) consists of findings and recommendations on the topics considered. In some cases, the Group recommends changes or modifications to NAD procedures or practices; in other cases, the Group calls for a reassessment of various aspects of the current model.

The Group hopes this Report will be an initial step in a dialogue that will continue in future months and is prepared to assist in implementing or further exploring the Report recommendations.¹ The Group’s findings and recommendations on the foregoing topics are summarized as follows:

¹ The Group did not vote whether to accept specific recommendations. The Editors’ identification of “majority” and “minority” positions throughout the Report is based on their collective assessment of the discussion following multiple meetings and conference calls during the period August 2014 to March 2015.

HISTORY AND MISSION

- The funding mechanism for NAD should be strengthened and made more transparent and the Advertising Self-Regulation Council (“ASRC”) should explore additional funding sources. Possibilities include direct contributions to NAD and *cy pres* awards arising out of false advertising litigation. A minority of members also proposed having higher filing fees for expedited cases as a potential source of additional funding.
- NAD should consider implementing a system whereby the NAD attorney who investigates a prospective case for an NAD-initiated proceeding, and determines that a case should be opened, is not the same attorney who reviews the evidence, decides the case, and writes the decision. This recommendation would extend to monitoring cases brought in conjunction with industry association partnerships. NAD should continue to ensure that criteria for NAD-initiated cases are applied consistently across industry, notwithstanding whether a company is a member of the association funding an NAD initiative.

BRINGING A COMPLAINT

- ASRC should clarify the rules governing NAD’s jurisdiction, including which entities are properly considered “advertisers,” and whether NAD has jurisdiction over claims made in connection with charitable solicitation campaigns.
- NAD should continue to restrict the right to designate portions of the record confidential to the advertiser alone. A minority of members recommended that NAD permit the challenger to designate material confidential in certain cases.
- ASRC should revisit Rule 2.2(A) regarding page-limit restrictions for complaints and briefs, which currently states “challengers should strive to limit the length of their submissions to eight double-spaced typewritten pages (excluding evidentiary exhibits),” although the Group did not reach consensus on how this should be accomplished.
- ASRC should revise its procedures to permit, at NAD’s discretion, a joint case management conference between the parties and NAD to discuss issues related to length and format restrictions for briefing and scheduling issues. A minority of members believed that NAD should have separate case management calls with the parties to discuss any necessary modifications to the briefing schedule and tentative dates for meetings with NAD.
- NAD should limit the scope of its opening letter and its decision to the claims identified and avoid re-characterizing the claims set forth in the challenger’s complaint. NAD should refrain from characterizing an administrative closing in a manner that suggests the claims were unsubstantiated (*e.g.*, “discontinuation was necessary and proper”), if NAD did not reach the merits of the case.

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- Parties should be able to enter into a private mutual settlement agreement that terminates the case by NAD without having to seek NAD's approval of a written settlement agreement and without issuance of a press release.

PRESENTING THE CASE

- The Group did not reach consensus on any proposed change regarding the burden of proof, but acknowledged the problem presented by late-submitted evidence, particularly as it relates to timing to decision. NAD should retain flexibility regarding the timing of evidentiary submissions and the current practice requiring the advertiser to provide substantiation for its claims should remain in place.
- NAD should retain its current case-by-case approach to survey evidence and refrain from either requiring or prohibiting surveys. Some Group members indicated that NAD could assist industry by providing additional guidance concerning the type of survey evidence that it finds persuasive.
- NAD should consider adopting different tracks, or a tiered approach, to case management with unique page limits and briefing timelines depending on the complexity and number of claims.
- NAD should continue its current practice prohibiting counter-challenges within a specific challenge, but NAD should attempt to assign a related challenge (*i.e.*, a challenge that touches on similar substantive issues to the initial challenge) to the same attorney handling the initial challenge (as it already appears to do in many such cases).
- NAD should revisit its current expedited review procedures and consider alternatives. The Group discussed, but did not reach consensus on the possibility of an approach that would permit an expedited proceeding in cases with only one or two claims at issue. This approach could include strict limits on the number of pages in submissions and the number of witness statements, and/or a higher filing fee.
- NAD should maintain its current practice of holding separate meetings with each party, and continue its flexible approach to scheduling meeting dates. NAD should explore options for speeding up the scheduling of meetings (*e.g.*, videoconferencing technology, scheduling meetings at the outset of a case, etc.).

DECISION AND PRESS RELEASE

- NAD should revise its current practice of including separate statements of each party's characterization of the facts and instead include a single and shorter synthesis of relevant facts that reflects the positions of both parties, similar to factual recitations presented in judicial opinions.
- To the extent that NAD relies on material information outside of the record (*e.g.*, information derived from NAD's independent research or from outside experts) the

parties should be given an opportunity to review and respond. This opportunity to review material information is particularly important in monitoring cases, where the advertiser does not have the opportunity to respond to a challenger's submission.

- ASRC should make modernizing the Online Archive a priority for funding allocation, including allowing for reliable and efficient searching across all NAD decisions, providing proximity search functionality, and highlighting search terms within decisions.
- NAD should make it a priority to issue decisions in a more timely manner after the final briefs have been submitted. Rule 2.9 should be revised accordingly, given that 15 days from last brief is unrealistic without dramatic changes to the system, most importantly, the hiring of additional professional staff. To facilitate maintaining and keeping to an accelerated schedule, the Group recommends that NAD consider (1) setting meeting schedules at the outset of a case; (2) investing in videoconferencing technology for the parties' meetings; and (3) creating tracked or tiered briefing schedules based on complexity and number of claims.
- A majority of members believed that the Advertiser's Statement should be limited to a statement indicating whether the advertiser intends to comply with NAD's recommendation to modify or discontinue challenged advertising, not comply, or appeal the decision to the National Advertising Review Board ("NARB"), and that any statement detailing the reason for disagreeing should be excluded.
- ASRC should discontinue its current method of issuing press releases and instead publicly release case abstracts or summaries taken from the NAD decision. The Group believes that this will conserve resources and ensure consistency between the information publicly disseminated and the case decision itself. Press releases should continue to be used in cases where an advertiser has refused to participate or to accept NAD's recommendations and where NAD has therefore referred the matter to regulatory agencies or law enforcement for further investigation.

APPEALS PROCESS

- NAD should not be a party to an appeal to NARB, but NAD should be present and available to participate in NARB meetings so that it can answer panel questions. The majority of the members believed that this rule should not apply to NAD-initiated cases that are appealed, although consensus was not reached on this point.
- A slight majority of members recommended that current procedures be revised to provide the challenger an automatic right to appeal to NARB, although a number of members opposed the change on the grounds that it would be unfair to the advertiser.
- The cross-appeal process should remain as is, but the briefing schedule should be altered to permit the cross-appellee a chance to read and respond to cross-appeal arguments (without extending the appeal timeline). This could be accomplished by requiring all appellant and cross-appellant briefs to be filed simultaneously.

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- New arguments, but not new evidence, should be accepted in NARB appeals, including reliance on additional cases.
- NARB should review decisions *de novo*, but the panel should not consider issues that were not affirmatively appealed.
- Compliance with NARB's decisions should be enforced by the Chair of NARB.

POST-REVIEW

- A majority of members believed that NAD should continue a case-by-case approach to compliance proceedings and should not adopt a more concrete timeframe for compliance. Some members thought that guidelines explaining NAD's expectations for compliance based on various criteria (*e.g.*, type of media, ubiquity of claim, etc.) would be helpful for both NAD and the industry.
- A majority of members believed that Rule 4.1(A) should be revised to increase the time for the advertiser's response to a compliance inquiry. A minority of members believed that the current response deadline is appropriate. A minority believed that the challenger should be permitted to participate in compliance inquiries and provided an opportunity to reply to the advertiser's compliance report.
- Rule 4.1(C) should be revised to shorten the timeframes for the advertiser's response to NAD's initial recommendation and final decision.
- Advertisers should be allowed to offer new evidence in support of a claim that has previously been found to be unsubstantiated, in circumstances when new factors (*e.g.*, technology, supplemental testing, product revisions, extrinsic evidence, etc.) have called the underlying decision into question. This could be accomplished by revising Rule 3.8 to permit an advertiser to petition NAD to reopen a closed matter and requiring the advertiser to pay an appropriate filing fee. At minimum, NAD should clarify the circumstances in which it will re-open a case under existing rules.
- NAD should consider allowing the advertiser to petition the Chair of NARB for permission to appeal a compliance ruling in exceptional circumstances.
- The Federal Trade Commission ("FTC") referral process should generally remain the same, but efforts should be made to improve access to information concerning NAD referrals and closing letters.
- NAD should be sensitive to the proliferation of class actions and demand letters, and, in the spirit of self-regulation, should not comment on claims that an advertiser decides to withdraw after a challenge is filed.

WORKING GROUP REPORT

I. INTRODUCTION

The American Bar Association's Section of Antitrust Law's Advertising Disputes & Litigation Committee and Consumer Protection Committee identified the state of advertising self-regulation as a significant topic meriting attention. The Committees thereafter formed a Working Group to assess the strengths and weaknesses of advertising industry self-regulation in the United States and offer recommendations intended to assist NAD in its mission. The Group comprises 59 members from the Committees with a professed interest or expertise in advertising self-regulation.

This Report presents the analysis and recommendations of the Group. In certain instances, where consensus could not be reached, considerations and proposals are discussed to provide a starting point for possible future discussion and evaluation.

In June 2014, Group Leaders John Villafranco, David Mallen, and Amy Mudge reached out to members of ADL, CP, and other individuals with a background in advertising self-regulation to gauge interest in the project. The Group includes representatives from leading law firms in the field, diverse representatives from the industry (including both large and small companies), and representatives from trade associations representing industry.

In August 2014, the Group held an initial meeting with an open discussion of ideas and possible approaches to evaluate the state of advertising self-regulation. The Group determined that it would be most effective to identify categories of issues and delegate each set of issues to one of six Editorial Teams. Each Editorial Team then led an open conference call, in which Group members participated, and identified majority and minority positions on various issues, leading in many instances to specific recommendations. The Editorial Teams then drafted and circulated summaries of these conference calls for review. The Editorial Teams were as follows:

- *History and Mission of NAD*, Barry Cutler (Baker & Hostetler LLP), David Mallen (Loeb & Loeb LLP), and Jeremy Schachter (Kilpatrick Townsend & Stockton LLP)
- *Bringing a Complaint*, Linda Goldstein (Manatt, Phelps & Phillips, LLP), Norman C. Simon (Kramer Levin Naftalis & Frankel LLP), and Svetlana Walker (The Clorox Co.)
- *Presenting the Case*, Michele Floyd (Sacks Ricketts Case LLP), Andrew Lustigman (Olshan Frome Wolosky LLP), and Larry Weinstein (Proskauer Rose LLP)
- *The Decision and Press Release*, David Bernstein (Debevoise & Plimpton LLP), Ken Patel (Procter & Gamble), and Terri Seligman (Frankfurt Kurnit Klein & Selz PC)
- *The Appeals Process*, Chris Cole (Crowell & Moring LLP), Kathryn Farrara (Unilever), and Nancy Felsten (Davis Wright Tremaine LLP)
- *Post-Review*, Chris Miller (Patterson Belknap Webb & Tyler LLP), Ron Rothstein (Winston & Strawn LLP), and Chad Wiegand (Nature's Way Products, LLC)

The Group Leaders and Editorial Teams worked together to produce a working draft report. Meetings were held with ASRC and NAD, and with attorneys at the FTC's Division of Advertising Practices within the Bureau of Consumer Protection. Findings and conclusions were presented to the full Group and all Group members were invited to respond, both during the meetings with the Editorial Teams and in writing following review of the working draft. As a final step, the Report was submitted for peer review outside of the Working Group. Comments were considered and implemented, and a final report was produced.

II. ANALYSIS & RECOMMENDATIONS

A. History and Mission of NAD

The Group considered the history of advertising self-regulation and discussed the underlying mission of NAD. The identification of NAD's mission is, in many respects, central to the project because any discussion of the effectiveness of the self-regulatory process and the appropriateness of any recommendations must necessarily be guided by a clear understanding of the mission of NAD (and advertising self-regulation, generally). ASRC programs, and NAD in particular, are recognized as the country's premier self-regulation programs for national advertising issues. NAD is widely supported by the industry and the public and it has been recognized by the FTC and others as a model of industry self-regulation. Nevertheless, different understandings of the underlying mission were expressed among Group members. This prompted the Group to consider the history of advertising self-regulation, how the process and system evolved over time, and NAD's mission and value to its stakeholders today.

History

The advertising industry's system of self-regulation originated in 1971 in response to increasing governmental scrutiny of advertising, as well as the concerns of consumers, advocates, and public officials. The American Advertising Federation ("AAF") had been the prime mover in an effort to create the new mechanism. Ultimately, the trade associations then representing the advertising industry – the AAF, the Association of National Advertisers ("ANA"), and the American Association of Advertising Agencies ("AAA") – joined with the newly created Council of Better Business Bureaus ("CBBB") to form a strategic alliance in the form of the National Advertising Review Council ("NARC," now "ASRC").² NARC set policy for the

² An eight-member NARC Board was created and was comprised of the Chairman and President of the American Advertising Federation, the Chairman and President of the American Association of Advertising Agencies, the Chairman and President of the Association of National Advertisers, and the Chairman and President of the Council of Better Business Bureaus. In 2012, NARC rebranded as the Advertising Self-Regulatory Council. The ASRC Board meets regularly to review current policies and consider proposed changes to *The Advertising Industry's Process of Voluntary Self-Regulation, Policies and Procedures (Procedures)*. In 2009, the NARC Board of Directors was expanded to include the chief executive officers of the Direct Marketing Association ("DMA"), Electronic Retailing Association ("ERA"), and Interactive Advertising Bureau ("IAB").

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National Advertising Division of the CBBB, and the National Advertising Review Board. The NAD served as the investigative staff and the NARB as the appeals mechanism.³

From its inception, NAD primarily drew its cases from the process of independent monitoring, as well as through consumer complaints. The model and inspiration for NAD originated from the mechanism for advertising self-regulation in the United Kingdom, which engaged in periodic monitoring of print advertising in addition to investigating consumer complaints.⁴

The early model also called for proceedings to be held privately and only publicized in the event that an advertiser refused to comply with the final decision of the NARB.⁵ There were critics, however, who felt that the secrecy of the proceedings undermined the legitimacy of advertising self-regulation. The Washington editor of *Advertising Age*, had this to say in 1972:

Under the ground rules, the self-regulators don't discuss their cases. This assures advertisers, who prefer to settle disputes without the kind of damaging publicity they encounter at [the] FTC. But it also shields incompetence and non-performance, which betrays the hopes of those who believe a competent program of self-regulation is the industry's best protection against more government intervention.⁶

In the face of growing criticism, NARB announced that all panel decisions would be published and parties named. NAD decisions also were made public. The move to transparency helped win over skeptics at the FTC. In 1973, FTC Commissioner Mary Gardiner Jones, a consumer advocate, declared the system to be “a self-regulatory effort of truly historic proportions.”⁷ By 1998, Robert Pitofsky, while Chair of the FTC, pronounced the program “the best self-regulatory system of any industry in the country.”

In addition to consumer complaints and monitoring, competitor complaints are a well-established and effective way of identifying problematic advertising claims. Over time, challenges between competitors have come to form the majority of NAD's caseload as advertisers recognized the value of a trusted self-regulatory system that could help resolve disputes in a cost-effective way. The development of a case archive of NAD decisions has provided advertisers with detailed analysis and guidance on complex issues of claim substantiation and has contributed to the growing body of advertising and marketing law.

³ In 1974, the self-regulatory system expanded to include the Children's Advertising Review Unit (“CARU”) and in 2005 added the Electronic Retailing Self-Regulatory Program (“ERSP”), which was established in cooperation with the Electronic Retailing Association.

⁴ See E. Zanot, *The National Advertising Review Board, 1971-1976*, 5 ASS'N FOR EDUC. IN JOURNALISM (1979).

⁵ *Id.* at 11.

⁶ Stanley Cohen, *Consumerists Feel Self-Regulation Ad Program Is Not Getting Results*, 4 ADVERTISING AGE (1972).

⁷ See E. Zanot, *The National Advertising Review Board, 1971-1976*, 22 ASS'N FOR EDUC. IN JOURNALISM (1979).

Today, the results of NAD cases are detailed in decisions and press releases that are publicly disseminated and published online. To date, NAD has decided more than 5,800 cases. Detailed case reports are available to businesses through an online subscription (a principal source of funding) and without charge to universities and government agencies. The majority of NAD cases today result from competitor challenges; although NAD continues to pursue a monitoring program where it reviews advertising at its own initiative.

Mission

NAD has traditionally been identified by ASRC and the CBBB as the “investigatory arm” of advertising self-regulation. In discussing NAD’s mission, the Group identified several roles played by NAD. These included the following: (1) promote fair competition among advertisers; (2) prevent consumers from being misled or otherwise injured by false or misleading advertising; and (3) foster trust in the marketplace by advancing consumer confidence in advertising. Significantly, the Group also identified NAD’s role in providing a reliable resolution to advertising disputes between competitors, even if there is disagreement regarding the substance of a particular decision.

In pursuing the general mission of reviewing advertising for truth and accuracy, NAD plays both an adjudicatory role and an investigatory or enforcement role. Competitive challenges involve two parties: a challenger contending that advertising claims made by a competitor are false or misleading and an advertiser who defends its own advertising. In competitive challenges, NAD is a neutral arbiter acting on behalf of the public interest by considering the arguments of both parties, reviewing evidence, meeting separately with each party, and finding either that the advertising claims are substantiated or that they are not and recommending that the advertising be modified or discontinued.

NAD’s monitoring program is distinguishable in that NAD itself initiates the process, having identified the advertising as potentially problematic, or at least questionable – often in areas of public concern or where one competitor is unlikely to launch a challenge against another competitor. In both competitive challenges and through monitoring, however, NAD provides a public service.

The Group examined several issues related to the mission of NAD, including (1) the sources and adequacy of NAD funding; (2) the role of NAD monitoring; and (3) partnerships with third-parties and trade associations.

1. Funding

Summary

The Group recognized that an effective system of advertising self-regulation requires an effective funding model and considered whether NAD’s current funding model is effective and sufficiently transparent. Elsewhere in the Report, the Group recommends areas where NAD may be able to maximize limited resources. The Group acknowledges that other recommendations may require greater resources (*e.g.*, investments in the search functionality of the case database, reliance on video conferencing to facilitate scheduling of meetings, maintaining a skilled and stable expert staff capable of dealing with the increasingly complex issues raised in cases, and

potentially hiring additional attorneys to lighten the increasing case load and improve the timeliness of decisions).

The Group recommends that additional information about NAD's current funding be made public by ASRC and/or CBBB and that new funding mechanisms be explored. Possibilities include permitting advertisers to give directly to NAD and encouraging *cy pres* awards arising out of false advertising litigation.

The Group's Conclusions

The Group acknowledged the value of self-regulation and expressed its strong support for NAD's robust system of self-regulation. The Group recognized that, because of the busy caseload, the increasing complexity of the cases, and the desire for quicker outcomes, ensuring that the self-regulatory system is adequately funded needs to be a priority.

Additionally, the consensus view was that the current mechanism for funding self-regulation could be more transparent. Increased transparency could reveal additional funding opportunities and instill greater confidence in the self-regulatory system on the part of advertisers.

The original partnership between the advertising industry trade associations and CBBB was intended to provide a separation between the administration and funding of self-regulation (through CBBB) and the function of the review process itself (through the oversight of ASRC). At the time of its creation, it was believed essential that the funding be entirely separate from the decision-making process. As the programs have grown, established credibility and diversified, other funding models should be considered.

The Group understands that NAD's funding is currently derived from (1) partnership dues paid by companies to CBBB; (2) filing fees paid by companies bringing competitive NAD challenges; (3) subscription fees for case reports from NAD and CARU; (4) other products and programs (*e.g.*, admission and sponsorship fees to NAD conferences); and (5) occasional *cy pres* awards in consumer class action cases.

When companies and law firms become national partners with CBBB, their dues support a variety of CBBB programs and services, including but not limited to, NAD and ASRC self-regulatory programs. The Group appreciated the importance of the CBBB and its programs, but several members expressed concern that they (1) did not know what percentage of their CBBB dues (or filing fees) fund NAD or advertising self-regulation; and (2) do not have the opportunity to direct all or part of their funding to NAD. All budgetary decisions, including approved staffing levels for NAD, are made by CBBB and must be balanced with the CBBB's larger budgetary concerns. The Group also does not have information and could not find reports about how resources were expended within the NAD budget – *i.e.*, what percentage of resources is devoted to competitor challenges, as opposed to NAD-initiated cases, appeals to NARB, and other matters.

The Group does not know enough about the funding to offer specific opinions regarding the effectiveness of the current model. Group members called for greater transparency. Certain

Group members noted that there was an increase in filing fees in 2014.⁸ Many hoped that the increased fees would contribute to the hiring of additional case attorneys, which would result in a shortening of the time to a decision (particularly once briefing is complete, and the principal obstacle to outcome is the reviewing attorney's available time). The Group expressed its interest in pursuing additional options for shortening the timetable for issuing decisions and for hiring new staff.

The Group also recommended exploring additional funding mechanisms, such as through *cy pres* awards arising out of false advertising litigation, that could permit increased flexibility in funding NAD activities. Courts have held that organizations like NAD that are "dedicated to protecting consumers from, or redressing injuries caused by, false advertising" are appropriate *cy pres* recipients in false advertising cases.⁹ NAD could attempt to leverage these holdings to encourage others to use *cy pres* funds to support the self-regulatory system.¹⁰

A minority also favored the creation of an expedited challenge process, with a higher filing fee, as a way to provide both faster decisions in appropriate cases and greater funding for NAD. *See infra* Section II.C.5.

The Group's Recommendations

The Group recommends that ASRC provide additional information about the funding of NAD and ASRC and explore additional funding sources. One possible way to do so would be to encourage *cy pres* awards arising out of false advertising litigation. The Group also recommends that ASRC reevaluate the current funding model to allow for companies that wish to support the NAD review process to direct their funding accordingly. A minority of Group members also proposed the creation of an expedited challenge process, with a higher filing fee, as a potential source of additional funding. All agreed that increased funding would improve timeliness and, in general, help advance the future success of industry self-regulation.

2. Monitoring

Summary

Although the majority of NAD cases are competitor driven, NAD also has a monitoring program in which it reviews advertising on its own initiative. NAD has stated that it generally focuses its monitoring efforts on two circumstances: (1) when NAD feels that a particular industry is not effectively self-policing or challenging one another's advertising; or (2) when the claims made in the ad, if misleading, pose a health or safety risk to consumers. Other than these general indications, however, NAD does not appear to have a formal policy that sets forth the manner in which it selects cases to challenge.

⁸ *See* <http://www.asrcreviews.org/2013/12/nad-filing-fees-to-increase-jan-1-2014/>.

⁹ *Dennis v. Kellogg Co.*, 697 F.3d 858, 866 (9th Cir. 2012).

¹⁰ *Beck-Ellman v. Kaz USA, Inc.*, No. 2134, 2013 WL 1748729, at *6 (S.D. Cal. Jan. 7, 2013) (false advertising action against maker of heating pads; court approved *cy pres* funds to be distributed among Consumers Union, AARP Foundation, the Better Business Bureau, and the Consumer Federation of California); *see also Salcido v. Iomedix Cold Int'l SRL*, No. BC 387942 (Cal. Super. Ct. Nov. 2, 2009).

The Group considered whether the process and criteria for choosing NAD-initiated cases was sufficiently clear and transparent.

The Group's Conclusions

The Group acknowledged that NAD's monitoring function advances NAD's mission and agreed generally with NAD's two broad criteria for identifying NAD-initiated cases. Some members expressed concern, however, about a lack of understanding of how the criteria is applied in practice. These members questioned whether more specific criteria would be helpful in assuaging a perception of inconsistency in NAD's identifying of NAD-initiated cases.

A minority of members expressed interest in the issuance of an NAD policy statement to set forth clearer and more detailed criteria for identifying NAD-initiated cases or an explanation in the opening letter about how the advertising challenged by NAD meets the NAD criteria for monitoring. The majority of members believed that such additional explanations were unnecessary and could prove problematic. The Group recommended, however, that the attorney who identifies the advertising at issue in a self-monitoring case not be the same attorney who reviews the evidence and renders the decision.

Some members of the Group questioned whether monitoring is still necessary given that NAD's credibility and reputation for serving the public interest are now well-established. A minority favored discontinuing monitoring cases to allow NAD to focus its limited resources on competitor challenges. The majority recognized, however, that the monitoring program is consistent with and important to NAD's mission of ensuring that advertising is truthful and accurate.

The Group's Recommendations

The Group recommends that NAD consider implementing a system where the NAD attorney who investigates the case, and determines that a case should be opened, is not the same attorney who reviews the evidence, decides the case, and writes the decision.

3. Additional Programs

Summary

The Group considered NAD programs involving support from third-party organizations such as the Council on Responsible Nutrition ("CRN"). While the Group acknowledged beneficial aspects of programs involving industry associations, the Group recommends that NAD remain mindful of its dual roles as both investigator and adjudicator in such cases and avoid, to the extent practicable, having the same attorney open a case, review the evidence, and render a decision. The Group also recommends that NAD continue to ensure that the criteria for opening cases are applied equally across the industry, regardless of whether a company is a member of the industry group with which NAD is partnering.

The Group's Conclusions

Funding from CRN allows NAD to focus additional review on advertising for dietary supplements and provides an additional source of revenue for advertising self-regulation.

CRN is a leading trade association of the dietary supplement industry. In 2006, CRN formed an initiative with NAD and ASRC to increase consumer confidence in the truth and accuracy of advertising claims for dietary supplement products and to encourage fair competition within that industry. A series of multi-year grants from CRN have allowed NAD to hire an additional attorney to focus “solely on the dietary supplement product category.” Recent funding for this program has come from the CRN Foundation through *cy pres* payments in a settlement of a California consumer class action. The initiative has “taken aim at substantive claims that are deceptive or misleading and clearly go beyond what's supported by research and allowed by law—claims that feed the public's distrust of the supplement industry.”¹¹ Under the initiative, NAD reviews national advertising for dietary supplements, including print, broadcast, infomercials, and internet advertising.

CRN files challenges before NAD where it believes that advertising for dietary supplements may be misleading or unsupported. Some members of the Group expressed concern that, because CRN challenges companies that are not CRN members, the initiative might appear to place non-member companies at a disadvantage.¹² NAD also receives complaints from consumers and competitors and opens cases pursuant to its monitoring efforts.¹³

At various legal conferences, FTC commissioners and senior staff have complimented the program as one that “empowers supplement companies . . . by encouraging them to file a competitive [challenge] with NAD if they see a supplement ad that's misleading, untruthful, or includes claims that can't be substantiated. . . . [and as a] program that is helping to clean up the industry.”¹⁴ “[T]he year before the original monitoring initiative began, NAD opened fewer than 10 cases involving dietary supplement advertising. During the [original] three years of the program, with the increased resources provided by CRN, NAD opened more than 75 cases, with almost all resulting in voluntary compliance.”¹⁵ In 2014, NAD reviewed 30 cases involving dietary supplements including 10 challenges filed by CRN and five competitor challenges. The remaining cases resulted from NAD's monitoring efforts.

¹¹ CRN Foundation, *CRN Foundation Announces Five-Year Grant to National Advertising Division for Review of Supplement Ads* (Nov. 9, 2009), available at <http://www.crnusa.org/prpdfs/CRNPR09CRNFoundationAnnouncesFiveYearGranttoNAD110909.pdf>. (last visited Jan. 27, 2015).

¹² As part of the initiative, CRN formed a task force of its Board of Directors that regularly reviews dietary supplement advertising and makes recommendations to NAD based on such factors as the nature of the claims, the size of the targeted audience, the likelihood that substantiation exists to support the claims, whether the claims suggest medical treatment that would cause consumers to forgo other healthcare options, and whether the claims, if found to be misleading, would impact consumer confidence in the dietary supplement industry generally.

¹³ NAD opens monitoring cases involving advertising by CRN members as well as non-CRN members.

¹⁴ *CRN Foundation Announces Five-Year Grant to National Advertising Division for Review of Supplement Ads*, *supra* note 11.

¹⁵ *Id.*

While the Group recognized that the CRN program benefits both competition and consumers, some members expressed concern that the process is potentially biased, because the same NAD attorney who is funded by CRN may identify and initiate a case through its own monitoring, and then review evidence and determine that those claims are not substantiated.

The Group's Recommendations

The Group recommends that NAD consider developing a process for industry association funding similar to that recommended for NAD-initiated cases generally whereby the NAD attorney who opens the case would not be the same attorney who reviews evidence and renders the decision. The Group also recommends that NAD continue to ensure that criteria for monitoring cases are applied consistently across the industry, notwithstanding whether a company is a member of the association partnering with NAD.

B. Bringing a Complaint

The Group considered several issues related to bringing a complaint at NAD, including (1) jurisdiction; (2) confidentiality procedures; (3) content and format of complaint and briefs; (4) identification of claims; (5) administrative closings; and (6) private settlements.

1. Jurisdiction

Summary

The Group considered whether the current scope of NAD's jurisdiction over "national advertising" is appropriate or should be modified in any way. The Group generally agreed with the scope of NAD's jurisdiction but recommends that ASRC clarify an ambiguity in its procedures concerning which entities constitute an "advertiser" and whether NAD has jurisdiction over charitable solicitation campaigns.

The Group's Conclusions

The Group was generally satisfied with the current scope of NAD's jurisdiction and the definition of "national advertising" in the rules,¹⁶ but a majority had a concern over a procedural ambiguity regarding NAD jurisdiction over claims made in connection with charitable solicitation campaigns. While the rules exempt political advertising, they are silent on charitable solicitations.¹⁷ The Group noted that NARB, in a recent decision, urged ASRC "to clarify whether charitable solicitations fall within NAD's jurisdiction."¹⁸ A minority believed that potentially false national advertising claims related to charitable solicitations should be

¹⁶ Rule 1.1(A) ("The term 'national advertising' shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.").

¹⁷ Rule 2.2(B)(vi) ("[P]olitical and issue advertising . . . are not within NAD/CARU's mandate.").

¹⁸ NARB Panel No. 185 (Oct. 13, 2013).

actionable before NAD just like other national advertising claims. One member also noted that there was confusion over whether NAD's jurisdictional reach extends to claims in press releases and user-generated content, although the Group did not reach consensus that ambiguity in these areas exists.

The Group also noted that additional clarification is warranted concerning the definition of "advertisers." Although NAD's procedures limit its jurisdiction to claims made by "advertisers," NAD has accepted cases involving parties who, though involved in the advertising eco-system, are not themselves "advertisers," such as recommendation widgets. The Group recommends that NAD either decline cases that do not involve "advertisers" or revise its procedures to better reflect its actual practice of accepting cases involving all types of entities involved in advertising.

The Group's Recommendations

The Group reached consensus that ASRC should clarify the scope of NAD's jurisdiction, including, in particular, the definition of "advertiser." ASRC should also clarify whether NAD should have jurisdiction over claims made in connection with charitable solicitation campaigns.

2. Confidentiality Procedures

Summary

The Group considered whether NAD's confidentiality procedures are adequate or should be modified, and specifically considered NAD's policy of designating material submitted by the advertiser as confidential on the basis that it is proprietary information and/or is a protectable trade secret. The Group recommends that NAD consider whether a pre-challenge conference call with an NAD staff attorney might be advisable to determine whether the default confidentiality rules are appropriate in a particular case.

The Group's Conclusions

The Group agreed that NAD's present confidentiality procedures are generally sufficient. In particular, the Group reached consensus that NAD should continue to restrict the right to designate portions of the record confidential to the advertiser alone.¹⁹ Some members, though, urged NAD to play a more proactive role in ensuring that the information submitted truly is worthy of confidential treatment. These members also urged NAD to take steps to ensure that the summary of the confidential information that the advertiser is required to provide to the challenger is sufficiently detailed to permit meaningful review and comment by the challenger; failing that, the remedy should be exclusion of the information at issue.

It was agreed that the challenger generally should not be able to shield its evidence by designating it confidential, although a few members believed that there should be a narrow exception for situations where the challenger submits a proprietary test. In this case, those members suggested that NAD hold a pre-challenge conference call to determine whether a

¹⁹ Rule 2.4(D) ("An advertiser may submit trade secrets and/or proprietary information or data (excluding any consumer perception communications data regarding the advertising in question) to NAD/CARU with the request that such data not be made available to the challenger," provided certain conditions are met).

confidential designation was appropriate. These members also suggested that an outside counsel “attorneys’ eyes only” designation might be appropriate under such circumstances, although other members pointed out that this could cause complications where only in-house counsel is involved in a challenge.

The Group’s Recommendations

The Group reached consensus that NAD should continue to limit the right to designate portions of the record confidential to the advertiser alone. A few members recommended that NAD permit the challenger to designate material confidential in certain cases.

3. Content and Format of Complaint and Briefs

Summary

The Group discussed whether the current procedural rules related to the content and format of the challenger and response briefs should be amended to address complex issues of fact and/or extensive substantiation documentation. The Group recommends that NAD consider revising and updating content and format guidelines for complaints, including considering adopting a tiered approach to a format depending on the complexity of the challenge. The tiered approach could be the subject of an initial conference between the parties and the NAD’s case attorney (either jointly or in separate calls).

The Group’s Conclusions

Rule 2.2(A) states that “challengers should strive to limit the length of their submissions to eight double-spaced pages.” The Group reached consensus that the current direction on page limits, while aspirational, was unrealistic. The Group, however, did not reach consensus about how the rule should be revised. Some members thought the rule should provide for longer page limits, while others suggested that NAD should adopt length and format restrictions on a case-by-case basis according to the complexity of the challenge.

The Group agreed that NAD should revise its procedures to permit a case management conference early on to discuss any issues related to length and format restrictions and scheduling issues. The case management conference should not toll the start of the briefing schedule. A minority of members believed that this conference should occur with the parties separately, rather than in a joint conference.

The Group’s Recommendations

The Group recommends that NAD revisit its suggested page limits for complaints and briefs, although it did not reach consensus on how this should be accomplished. The Group recommends that NAD revise its procedures to permit a case management conference at the outset of a case to discuss issues related to length and format restrictions and scheduling issues.

4. Identification of Claims

Summary

The Group considered NAD's current approach to characterizing and restating the claims challenged in its letter to the advertiser. The majority of the Group recommends that, rather than characterizing or enumerating the challenged claims in its opening letter, NAD should simply incorporate those claims in its letter by referring to the enclosed complaint; a minority believed that NAD should, in the public interest, be able to identify additional claims under review.

The Group's Conclusions

The ramifications of NAD's approach towards characterizing and restating claims is an issue that has a significant impact on both the initiating party and the responding advertiser. In general, the Group agreed that NAD's current practice of sometimes expanding on or modifying the claims initially challenged is not desirable.

In many instances, challengers choose to identify claims based on a variety of considerations. As such, when NAD expands or modifies the scope of the challenge, it may incorporate issues that (a) are not material to the challenge at hand, or (b) unfairly prejudice one or both parties, causing an unintentional chilling effect on future challenges. NAD's re-characterization and restatement of claims can also serve to inadvertently complicate issues and extend the length of the proceeding. As noted, a significant minority did not agree and would not alter current practice.

The Group's Recommendations

The majority recommends that NAD limit the scope of its opening letter and its decision to the claims identified and avoid re-characterizing the claims set forth in the challenger's complaint—with the understanding that NAD may elect to initiate a monitoring case in the event that NAD identifies additional claims or issues of concern.

5. Administrative Closings

Summary

The Group discussed the current rules governing administrative closings of pending actions. The Group agreed that NAD should refrain from characterizing administrative closings in a manner that suggests impropriety on the part of the advertiser.

The Group's Conclusions

The Group raised four issues related to NAD's administrative closing of pending cases. First, some members stated that NAD does not follow a uniform approach to closing cases and has, on occasion, retained jurisdiction notwithstanding the pendency of an order or litigation. Others noted that NAD must necessarily retain some discretion to determine whether the claims that are the subject of litigation are the same as those that are the subject of the NAD action.

Second, certain members noted that they believed NAD had administratively closed cases based on a non-public regulatory investigation, notwithstanding that Rule 2.2(B) states that NAD shall only close cases if the “claims complained of are . . . the subject of a federal government agency consent decree or order.”²⁰ This raises additional issues because NAD may insist on setting forth the basis for the administrative closing, which puts the advertiser in the difficult position of having to decide between moving for an administrative closing or making the pending investigation public. The Group agreed that this could be addressed with clear guidance that states NAD should not publish a statement if the reason for closure is a non-public investigation. The point was raised, however, that NAD should not be closing cases based on pending investigations (whether public or confidential) under its current rules.

Third, when NAD closes an investigation because the claims have been discontinued after the filing of a complaint, it sometimes includes a statement that it was “necessary and proper” for the advertiser to discontinue the claims, which may imply that the claims could not be supported. The Group agreed that NAD should refrain from characterizing a closing in a manner that suggests the claims were unsubstantiated when NAD did not reach the merits of the advertising. The Group noted that opining on claims that the advertiser did not defend could run counter to basic principles of fairness and due process.

Fourth, while the Group did not reach consensus here, a significant minority of the Group believed that Rule 2.2 should be revised so that the filing of a class action should not result in administrative closure. These members argued that class actions are less likely to reach the merits of a claim, and therefore closure is not consistent with NAD’s mission of promoting truthfulness and accuracy in advertising.²¹ Others believed that the rules should permit NAD some flexibility to evaluate how far along the case had progressed and the nature of the case before determining whether it should be administratively closed. A majority of the Group did not favor a revision of the rules and continued to favor the current rule that cases be closed upon the filing of a class action.

The Group’s Recommendations

The Group recommends that NAD refrain from characterizing the closing of a case in a manner that suggests the claims were unsubstantiated if NAD did not reach the merits of the case.

6. Private Settlements

Summary

The Group discussed whether parties should have the right to settle cases privately and withdraw a pending NAD challenge. The Group recommends that parties should be able to enter into private mutual settlement agreements that terminate the NAD case. The Group believes permitting private settlements will further NAD’s mission by conserving resources for NAD to focus on active challenges and cases identified through monitoring or other initiatives.

²⁰ Rule 2.2(B)(i)(c).

²¹ Rule 2.2(B)(i)(b) (providing that NAD shall close the case if the “advertising claims complained of are . . . the subject of pending litigation or an order by a court”).

The Group's Conclusions

The majority of the Group agreed that parties should be able to enter into settlement agreements and terminate the case at NAD without having to seek NAD's approval of the settlement agreement and without the issuance of a press release. Certain Group members commented that this is the procedure under the Canadian system of industry self-regulation. The majority believed that permitting parties to terminate cases pursuant to a private settlement would conserve limited NAD resources and permit NAD to focus on active challenges and NAD-initiated cases. The settlement would not preclude NAD from fulfilling its mission of ensuring that advertising is truthful and accurate. If NAD determines that a privately settled case merits further consideration, it can open a new case through its monitoring program.

Some members of the Group pointed to procedural issues that could arise if private settlements were permitted, although the Group did not reach consensus concerning these issues. Other members believed, for similar reasons, that NAD should permit administrative closures if the advertiser agrees to discontinue challenged claims early enough in the process so as to not prejudice either party, even without agreement by the challenger. These members noted that administrative closing under these circumstances would conserve resources that could be better expended on active claims. The Group did not reach consensus on this point.

The Group's Recommendations

The Group recommends that parties be able to enter into private settlement agreements and terminate the case without having to seek NAD's approval of a written settlement agreement and without the issuance of a press release.

C. Presenting the Case

The Group considered several issues related to presenting the case at NAD, including (1) the burden of proof; (2) consumer surveys; (3) briefing format; (4) counter-challenges; (5) timing and extensions; and (6) the parties' meetings with NAD.

1. Burden of Proof

Summary

In discussing the adequacy of the burden of proof presently imposed upon the challenger and the advertiser, the Group considered the following: (1) should the challenger be subject to a formal burden of proof; (2) should proof be required to support the position that a claim is unsubstantiated; and (3) is the advertiser's current burden of proof appropriate.

The Group's Conclusions

The Group largely endorsed NAD's current approach and concluded that (1) the challenger should not be held to a formal burden of proof; (2) proof should not be required to support the position that a claim is unsubstantiated; and (3) the advertiser's burden is appropriate. No changes are recommended.

The consensus was that strict burden of proof requirements may undermine the self-regulatory aspect of NAD proceedings because flexibility and discretion on the part of experienced NAD attorneys are integral to the intentionally fluid process. While the Group noted some evidentiary weaknesses in the current process, the potential impact of those weaknesses on the parties do not overcome the potential detriment to the process that the imposition of formal burdens may create. Accordingly, the Group does not recommend formal changes to existing challenger and advertiser burdens but encourages NAD to exercise its discretion in a manner directed toward ferreting out weak or meritless claims with the goal of reducing expense and delay.

The Group considered whether a formal burden of proof should be imposed on the challenger at the time of its initial submission. The discussion was prompted by a general acknowledgement that, because the challenger has no formal burden of proof under the current procedure, it can withhold its evidence until its Reply. Allowing the challenger to introduce evidence for the first time in its Reply can prejudice the advertiser, as the advertiser has only ten days to respond. Depending on the evidence that the challenger submits, the advertiser may be in a position where it cannot respond fully to the evidence submitted.

While certain members noted that this behavior may present timing issues, NAD has the discretion to extend filing deadlines to permit the advertiser adequate response time. Members of the Group also expressed a concern with the delay that late submitted evidence causes. The self-regulatory process is intended to resolve advertising disputes quickly while the challenged advertising campaign is running. The delay caused by additional briefing or extensions, therefore, undermines one of the primary goals of the process.

The Group consensus was that a formal burden of proof should not be imposed upon the challenger because the process must remain fluid to be effective. While burdens of proof are familiar in litigation, the NAD process is not intended to resemble litigation. Rather, it is intended to be a flexible, streamlined method of quickly resolving advertising challenges. The majority of the Group felt it important to maintain procedural distinctions between advertising challenges and litigation. There was general agreement regarding the following:

- NAD is aware of problems associated with late-submitted evidence and can use its discretion to prevent prejudice to the advertiser. Certain members supported requiring a challenger to submit consumer survey evidence as part of its opening brief, or providing an automatic extension for the advertiser's response if the challenger were to submit such evidence with its reply.
- Flexibility and discretion on the part of NAD's experienced attorneys are critical to the integrity of the process. The nature of the specific advertisement challenged dictates the proof and there are legitimate cases where the challenger does not or cannot know how the advertiser is supporting the advertising claim. This dynamic makes it difficult to require submission of supporting evidence in the opening submission.
- The most important consideration is that each party has a fair opportunity to respond to the other party's evidence.

The Group's Recommendations

There should be a balance between allowing the parties to submit all of their evidence and avoiding delay. To this end, the consensus was that NAD should encourage the parties to submit evidence, particularly technical evidence, early in the process. There was limited consensus, however, that it would be inappropriate to place a formal burden of proof on the challenger or impose strict rules regarding the timing of evidentiary submissions. The Group agreed that no formal change to the advertiser's burden was necessary.

2. Consumer Surveys

Summary

The Group considered whether consumer surveys should ever be required or prohibited.

The Group's Conclusions

Because flexibility is critical to the process, there was consensus support for the current approach; there should not be a blanket requirement or prohibition of survey evidence. A minority in the Group noted, however, that while NAD accepts and seems to appreciate survey evidence, it is sometimes critical of the methodology or the results. The minority further noted that parties, therefore, have little guidance regarding what type of evidence NAD finds persuasive. This, in turn, can result in unnecessary or unpersuasive surveys.

Since surveys take a significant amount of time, particularly in relation to the expedited NAD briefing schedule, a better understanding of the circumstances under which NAD finds survey evidence persuasive and the particular survey attributes that NAD finds reliable would provide useful guidance to practitioners. Note that a majority of the Group was of the opinion that NAD is in fact offering this type of guidance in its decisions and as part of panel presentations at the annual conference.

The Group made several additional observations regarding the efficacy of survey evidence:

- To prohibit surveys entirely would take away NAD's reasonable discretion.
- NAD appears to be more receptive to open-ended survey questions and more frequently agreed with survey results addressing implied statements.
- No Group member felt that his or her position had been prejudiced by not submitting a survey.
- The challenger has the advantage when it comes to survey evidence because a survey can take between four and six weeks to design, implement, and complete (although, with the growth of Internet-based surveys, it is now possible to conduct surveys in just two weeks, if the process is expedited). Thus, it can be difficult to conduct a responsive survey within the ordinary briefing schedule. Accordingly, NAD must have broad discretion to marshal evidence and keep the proceeding moving forward with as little delay as possible.

The Group's Recommendations

The Group agreed generally with NAD's current, case-by-case approach to survey evidence and did not endorse either requiring or prohibiting surveys. A minority in the Group believed that stakeholders could benefit from additional guidance concerning the type of survey evidence that NAD finds persuasive.

3. Briefing Format

Summary

The current procedural rules urge parties to limit all submissions to eight double-spaced pages. *See* Rules 2.2(A), 2.5, 2.6, 2.7. The Group considered whether this limit was realistic and whether ASRC should revise the rules.

The Group's Conclusions

As discussed above, the Group agreed that current page limits, even if aspirational, are not realistic. Consequently, the suggested limit is ignored. The Group considered whether the page limits should be revised. The Group also considered whether page limits should be "tiered" depending on the complexity of the challenge or, alternatively, whether challenges should be "tracked" depending on their complexity, with less complex challenges following a more expedited track than more complicated challenges.

Some members believed that a degree of flexibility on page limits, whether through tracking, tiering, or some other process, may enhance the goal of expeditious resolution. If alternatives are available, the challenger could determine at the outset whether it wants to proceed with a straightforward challenge or a more complicated one. The Group felt that discussing alternative tracking with clients and having them decide how many claims to challenge and how complex the substantiation likely will be would add value to the process. Specifically, it could allow the challenger some control in the length and expense of the proceeding beyond the current ability to shorten the process by waiving the right to reply under Rule 2.6.²²

The concerns with a revised, more flexible approach were twofold: (1) the challenger may not appreciate the complexity of a challenge before seeing the advertiser's response; and (2) the advertiser may not participate in a challenge "assigned" to a fast-track process. Given these challenges, the Group did not have any specific recommendations to advance.

The Group's Recommendations

There was consensus that current page limitations were unrealistic and seldom followed. There was limited consensus that a tiered approach to briefing, in terms of both format and content, based on complexity and number of claims, may be helpful. *See infra* Section II.C.5.

²² Rule 2.6 ("After the challenger has reviewed the advertiser's first substantive written response, the challenger may notify NAD/CARU in writing that it elects to waive its right to add to the record thereby expediting the proceeding.").

4. Counter-Challenges

Summary

The Group considered whether an advertiser should be permitted, as part of a challenge, to assert a counter-challenge against a challenger. The putative counter-challenge may or may not relate to the specific advertising practice or claim. The Group considered the benefits and disadvantages of permitting counter-challenges, including whether they would increase the complexity and thereby result in an increase in the expense in handling a challenge, as well as the impact on the timing of the challenge process. The Group concluded that counter-challenges should not be permitted in an NAD proceeding, but NAD should attempt to assign a separate challenge involving the same parties and products to the same attorney handling the initial challenge.

The Group's Conclusions

Frequently, an advertiser facing a challenge has its own concerns with respect to the challenger's advertising claims or practices. Facing its own obligation to defend its advertising, an advertiser may wish to assert a counter-challenge against the challenger. Currently, NAD does not permit counter-challenges as a part of a challenge.²³ NAD does not typically review a challenger's own advertising in a proceeding initiated by the challenger, nor does it consider whether other competitors make claims similar to the challenged claims (although such evidence may be offered to show industry custom).

Certain members of the Group expressed a need for fairness in stating that a challenger should not be permitted to engage in the same or similar practices that are the subject of the challenger's complaint. In such an instance, an advertiser may be forced to defend its claims at significant expense while the challenger is making similar claims. Worse, the advertiser may end up with a recommendation to cease or modify a claim or practice in which the challenger continues to engage.

Other members countered that one of the purposes of the self-regulatory process is to evaluate advertising from the consumer's perspective. As such, the challenger's and industry's practice should not be relevant to a determination of whether a practice should be discontinued. Members pointed out that a particular claim or practice often needs to be evaluated on its own, with a careful analysis of substantiation and consumer impact. Other members raised concerns that permitting counter-challenges could potentially transform the self-regulatory process into a process similar to litigation.

The Group agreed that permitting counter-challenges would ultimately result in increasing the time and expense of a challenge. The cost of a challenge, while significantly less than litigation, is nevertheless an expensive undertaking. The cost and impact of a potentially knee-jerk counter-challenge would likely result in fewer challenges, which would undermine the public

²³ Rule 2.5 ("The advertiser may not include a counter challenge (*i.e.*, a request that NAD/CARU review advertising claims made by the challenger) in its response. Such a request must be filed as a separate complaint . . .").

interest. The Group also expressed concerns that permitting counter-challenges would invariably increase the time to decision given the increased complexity of the evidence and issues being reviewed.

While the majority did not support permitting counter-challenges as part of the same challenge, the majority did support the assignment of a related challenge, in the form of a new complaint, to the same attorney handling the initial challenge.

The Group's Recommendations

The Group supported NAD's current approach and declined to recommend permitting counter-challenges as part of an initial challenge. The Group does recommend that, where practicable, NAD assign separate challenges involving the same parties and products to the same attorney evaluating the initial challenge.

5. Timing & Extensions

Summary

The Group considered whether existing timeframes are practical or whether more flexible rules should be developed based on the complexity of a challenge.

The Group's Conclusions

The Group expressed a significant concern with the duration of current challenges and that existing rules regarding timing were not practical and seldom followed. Rules 2.5 through 2.8 require the advertiser's first response within 15 business days, the challenger's reply and advertiser's second response within 10 business days, and meetings within 15 business days thereafter. The Group observed that these deadlines are often not met.

The Group discussed a number of reasons for the delays. First, the Group acknowledged that the parties themselves, and their attorneys, must take some responsibility. The Group recognized that schedules frequently conflict, which causes the need for extensions. The Group also discussed how the rules contemplate filings of eight double-spaced pages, notwithstanding that such limitations are only met in rare circumstances. *See supra* Section II.C.3. Indeed, most Group members recognized that submissions are frequently many times that length. These longer submissions invariably require a responding party to expend significantly more time to respond to the papers, thereby delaying the process.

Recognizing the correlation between challenge complexity and issues presented, the Group discussed establishing some type of tracking process for setting deadlines. For example, cases without survey data, limited science, fewer challenged claims, or only express claims could typically be handled on express tracks with shorter submissions and deadlines. In contrast, challenges that include consumer perception surveys, complex scientific studies, or a significant number of issues would be on a more complex track, with longer submission periods and longer deadlines.

While the Group did not reach consensus concerning details surrounding a tracking process, the Group agreed that scheduling a case management meeting soon after a complaint is filed may facilitate timelier meetings more consistent with current rules. Such a meeting could also permit the parties and NAD to confer concerning the uniqueness of a particular case and adjust response times accordingly. A minority of members favored having any such conferences in separate phone calls, rather than a joint call, with the belief that NAD would be able to give the parties a fair hearing and then more efficiently decide on an appropriate schedule; if the meeting is a joint one, parties may pontificate, obfuscate, and take less reasonable positions. Nevertheless, the majority favored a joint case management meeting at the outset of the case.

The Group's Recommendations

The Group recommends that modifications to the current briefing schedule be made so that deadlines are realistic and consistent with the issues before the parties. The Group recommends that NAD consider a tiered approach, with matters assigned tracks based on the complexity and types of issues presented. Such an approach could be discussed as part of a case management meeting that would occur soon after a complaint is filed to facilitate a timelier process consistent with current rules.

6. Meetings

Summary

The Group considered and rejected replacing the *ex parte* meetings following the completion of a briefing with a joint meeting. There was also limited support for setting hard-and-fast deadlines for meetings. The Group's consensus was that NAD should offer and encourage the use of a videoconference option with the objective of minimizing delay and completing the meetings as soon as possible after the final brief is submitted.

The Group's Conclusions

The first issue explored was whether NAD should adopt or consider a joint meeting format similar to that employed at NARB and in judicial proceedings. The concept of a joint meeting received little support. In theory, the benefits of a joint meeting would be to sharpen and clarify the issues and areas of dispute. But, consistent with an era where oral arguments are becoming less common even in judicial proceedings at the trial level, there was minimal desire to switch to a joint meeting format. There was widespread recognition that a joint meeting would be even more difficult to schedule than individual meetings, with the effect of further delaying NAD decisions.²⁴

The issue of imposing strict deadlines for individual meetings was discussed. There was widespread sentiment that delays by the parties in scheduling meetings with NAD were common

²⁴ One member suggested abandoning the meetings altogether. This suggestion, however, was made after the deadline for comment and it was not discussed among the Working Group. We include reference to it here as an acknowledgment that it would speed time to decision and as a marker for future discussion.

and that such delays contributed to the overall timing to decision. Nonetheless, a majority of the Group believed that imposing strict deadlines was impractical.

Currently, many if not most NAD challenges involve complex technical and/or marketing issues. To make sure a party's position is conveyed adequately to NAD, companies usually seek to have R&D and marketing representatives participate with legal counsel in NAD meetings. Because of the difficulty scheduling in-person meetings for such a diverse group, a majority of the Group did not believe it feasible to implement a rigid deadline for parties' meetings with NAD. That said, there was consensus that NAD should push hard for the meetings to be completed within two weeks of the final submission, and to insist on a meeting date deadline where NAD is not satisfied with the legitimacy of a particular party's request for delay.

Additionally, it was suggested that the use of videoconferencing technology, encouraging parties and/or their team members to participate remotely, would reduce scheduling delays. There was substantial support for this option because a person's unavailability on a particular day sometimes stems from an inability to travel but not from total unavailability.

Finally, the Group noted that NAD may wish to consider attempting to tentatively schedule meetings at the outset of a case, as part of a briefing schedule, rather than waiting for the briefing to conclude.

The Group's Recommendations

The Group does not recommend that NAD either begin holding joint meetings or impose strict deadlines on meeting times. The Group reached consensus that NAD should explore videoconferencing technology as a means to facilitate timelier meetings. Additionally, the Group noted that NAD should attempt to tentatively schedule meetings at the outset of a case rather than waiting for briefing to conclude.

D. The Decision and Press Release

The Group considered several issues related to the decision and press release, including (1) form and length of decisions; (2) online archive; (3) transparency of NAD's consultation with outside experts and reliance on material non-record information; (4) timing for NAD decisions; (5) expedited review process; (6) the Advertiser's Statement; and (7) the dissemination of NAD decisions and alternatives to the press release.

1. Form and Length of NAD Decisions

Summary

The Group considered the current form and length of NAD decisions and concluded that many are overly expansive, particularly in the recitation of the parties' positions. The Group recommends that decisions contain a single statement of facts synthesized by the NAD attorney that succinctly sets forth the advertising at issue (including, where appropriate, by reproducing the ads), the substantiation and testing issues, and survey evidence, if any, followed by NAD's analysis and decision.

The Group's Conclusions

NAD decisions have increased in length, particularly in describing the parties' positions. Though Rule 2.1(C) provides that NAD decisions shall contain "a summary of each party's position," in application, many NAD decisions incorporate wholesale each side's presentation of the facts, including facts that have little impact on NAD's reasoning, conclusions, or recommendations. This approach can make decisions difficult to follow because one party's responses on certain issues may be set out before the other party's position is explained.

To address voluminous facts, NAD recently began requesting that, pursuant to Rule 2.6(A), challengers submit as part of their reply an "Executive Summary summarizing the key points in the challenger's position on the case and cite to the supporting evidence in the record." This raised the question of whether publication of this summary, in lieu of NAD's lengthy recitation of the challenger's submissions, might be more appropriate. The Group rejected this possible approach because the publication of a short executive summary would not necessarily provide an adequate description of the challenger's positions. Furthermore, the Group concluded that it is more important for NAD to indicate what facts it found compelling, and on which it relied, rather than limiting the discussion to the challenger's Executive Summary.

Strong consensus emerged that a shorter recitation of facts would be preferable. Given the expert nature of NAD's review and the opportunity to discuss all issues at the meeting with NAD, NAD does not need to repeat the parties' submissions to indicate that the submissions were considered. Nor have parties found that NAD makes errors in its understanding of the facts that can be identified through the review of NAD's repetition of the parties' submissions.

The majority favored an approach whereby NAD would summarize the parties' positions in a more unified way. Instead of having separate sections on the parties' competing positions, the decision could instead discuss each issue in a synthesized fashion, summarizing the parties' positions on that issue in the same section. The Group acknowledges that it remains important for the principal facts and positions to be summarized so that third parties can understand the factual predicate for NAD's ultimate decision.

The Group discussed whether actual ads at issue could be reproduced in the decision, where practical. Many were in favor of encouraging inclusion of actual ads, but were not in favor of an absolute mandate that the ads be included. In considering whether inclusion of ads is appropriate, NAD could consider whether it makes sense to include print ads if television advertising is the main issue in the case (though, in those cases, storyboards might be reproduced, when available). Moreover, challenges involving many ads may make including all ads impractical and choosing representative ads may prove difficult.²⁵

The Group's Recommendations

The Group recommends that NAD revise its current practice of including separate statements of each party's facts. The Group recommends that the assigned attorney conduct his or her own

²⁵ The Group recognized that publication of advertisements may require addressing intellectual property issues.

synthesis of the relevant facts and draft a single factual recitation that reflects the positions of both parties, similar to the factual recitations presented in judicial opinions. The synthesized facts should include a summary of the advertising at issue (and may include the actual ads, where appropriate), a summary of the testing or other substantiation presented by both sides, and a summary of any survey evidence. The Group believes that such a synthesized set of facts will not only reduce the length of NAD decisions, but will provide a better resource to advertisers as guidance for their own advertising practices and precedent in future NAD challenges. As part of this recommendation, the Group suggests that NAD move away from requiring the Executive Summary. The Group acknowledges that implementation of this recommendation may require more NAD staff attorney time.

2. Online Archive Limitations

Summary

The Group discussed the current capabilities of the Online Archive of NAD decisions and reached consensus that modernization should be a top priority.

The Group's Conclusions

The Group discussed the use of precedent in NAD decisions. The Group believed that access to historical NAD decisions is useful for researching legal principles, seeing how NAD has applied its previous cases to similar fact patterns, and for counseling clients. Many members also noted that using NAD precedent in submissions can be an effective, if not required, method of presenting one's position.

Though members expressed a variety of opinions on the appropriate use and utility of NAD precedent, the Group was unanimous on one conclusion—access to historical NAD decisions must be improved.²⁶ The Group was aligned that the current Online Archive system is unreliable, cumbersome, and makes relying on precedent particularly challenging because it is hard to know if all relevant precedent has been identified.

Researching precedent is significantly hindered by the technical limitations of the Online Archive. Group members expressed their frustration that the search functions of the Online Archive are often inaccurate and unreliable. Some noted that decisions from the 1990s are not in a form that even permits the search function to identify these decisions. The monthly Case Reports do not provide a sufficient alternative. Group members noted that the Case Reports often do not publish decisions until months after they are issued, and thus, are not an efficient means of keeping current on NAD's views.

In addressing possible improvements, the Group considered (1) better search functionality; (2) highlighted search terms; and (3) potential partnership with Lexis or Westlaw.

²⁶ The Group notes that NAD has also expressed these concerns and several members of the Group have already contributed to support an Online Archives upgrade.

The Group's Recommendations

The Group recommends that ASRC and the CBBB make the Online Archive a priority for funding allocation (after assuring adequate staffing). The Group would like to see a modernization of the Online Archive's technical infrastructure to allow for reliable and efficient searching across all NAD decisions. This would include proximity search capabilities and functionality allowing for highlighted search terms within decisions.

3. Transparency of NAD's Consultation with Outside Experts and Reliance on Material Information

Summary

The Group considered whether current rules provide for sufficient transparency regarding NAD's consultation with outside experts and reliance on material information that is not in the record, and concluded that increased transparency would be preferable.

The Group's Conclusions

On occasion, NAD consults with outside experts to better educate itself on the issues presented or to gain a better understanding of conflicting expert opinions presented by the parties. Rule 2.1 provides that NAD may analyze complaints "in conjunction with outside experts, if warranted, and upon notice to the parties." Such notice to parties is typically limited to disclosing that an outside expert has been consulted but not the guidance that the expert provided. NAD also will often conduct its own research to help inform its opinion.

The Group supported a more informed NAD but believes that NAD should provide more information about the experts with whom it consults. The Group noted that CARU has a process in place for transparency with respect to the experts it consults. Specifically, Rule 2.4(F) provides as follows:

Whenever CARU has consulted an expert from the panel established under 2.1 G, or otherwise, in connection with the filing of a complaint, consideration of a complaint, or pre-screening, the expert's opinion shall be in writing, or summarized in writing by CARU. The expert's opinion and a brief description of the expert's qualifications shall be made available to the parties promptly. The advertiser or challenger may respond to the expert's opinion in any submission under 2.5, 2.6, 2.7, or 2.8. When furnished to the advertiser or challenger, CARU shall inform the parties that there has been no final determination by CARU on any matter contained in the expert's opinion.

(Emphasis added). Acknowledging that NAD does not have a set panel of academics and experts like CARU, the Group believes that the same spirit of transparency should apply to any expert that NAD consults. Similarly, to the extent that NAD relies on information outside of the record that is material to its decision, the parties should be given an opportunity to review and respond to the information. This opportunity to review material information is particularly

important in monitoring cases, where the advertiser does not have the opportunity to respond to a challenger's submission.

The Group's Recommendations

In the spirit of transparency and fairness, the Group recommends that the Rules be amended to require NAD to disclose material information obtained from outside experts, including their provided opinions. NAD should consider adopting a procedure similar to CARU's procedure set forth in Rule 2.4(F). The Group also recommends that the parties be given an opportunity to review and respond to information outside that submitted by the parties that is material to NAD's decision.

4. Timing of NAD Decisions

Summary

The Group considered approaches to expediting the timing of NAD decisions, consistent with the stated goal of the entire process taking no more than 60 business days.

The Group's Conclusions

Though the NAD process is intended to take 60 business days, *see supra* Section II.C.5, it is rare that challenges are resolved within this timeframe. The Group observed that, while cases are increasingly complex and parties themselves are partially responsible for delays, the prolonged process is also attributable to the time it takes NAD to issue a decision after all meetings and submissions have occurred. Though Rule 2.9(A) provides that NAD will issue a decision within 15 business days after the parties have made all submissions, resolution in that time frame rarely occurs. Moreover, the increasing complexity of the issues and the NAD attorneys' caseload often leads to further delays in the issuance of decisions. Anecdotal reports indicate that decisions can take as long as three to four months following submission of briefing and completion of meetings. Among the issues of concern expressed throughout the Group's deliberations, timing to decision was perhaps most often cited.

The Group agreed that every effort should be made to expedite timeframe for decisions, thus following more closely the spirit of the 15 business day rule for issuing decisions. As discussed above, the Group noted that NAD may wish to consider investing in videoconferencing technology or scheduling meetings at the outset of the case to facilitate timelier decisions. *See supra* Section II.C.6. The Group also identified the creation of a tracked or tiered briefing schedule as another mechanism for expediting decisions, perhaps with shorter deadlines for cases with fewer claims or shorter submissions. *See supra* Section II.C.5. While these recommendations may improve timing to a degree, the most significant way to improve the timeliness of the system would be to ensure there is an adequate staff of experienced attorneys to manage caseloads.

The Group's Recommendations

The Group recommends that NAD make it a priority to issue decisions in a more timely manner after the final meeting has taken place. Rule 2.9 should be revised accordingly. To facilitate

maintaining and keeping to an accelerated schedule, and consistent with recommendations addressed in Sections II.C.5-6 *supra*, the Group recommends that NAD consider (1) setting meeting schedules at the outset of a case; (2) investing in videoconferencing technology for the parties' meetings; and (3) creating tracked or tiered briefing schedules based on complexity and number of claims.

5. Expedited Review Process

Summary

The Group considered whether the expedited review process could be improved so that it is more frequently used.

The Group's Conclusions

Though Rule 2.11 of the rules provides for an expedited review process at the outset of a challenge, the Group acknowledges that the process is rarely used. The Group discussed alternative expedited review processes that might have more traction with the industry.

One suggestion was for challengers to pay a higher fee for an expedited track that requires an advertiser's response within two weeks and permits one week for a challenger to reply and one week for the subsequent advertiser's response. Participants would be required to meet a week later, and a decision would be required from NAD within ten business days of the meeting. Other members noted that this process could unfairly favor large advertisers with greater financial resources and present impracticable timeframes in more complicated challenges. Some noted that NAD might also consider a shorter time period for the Advertiser's Statement in expedited cases.

Another suggestion was to cut out the in-person meeting in expedited cases unless explicitly requested by NAD. In such cases, NAD's questions could be addressed over the phone or via videoconference.

A third suggestion was to allow expedited consideration of challenges only in cases involving a single issue, and to limit the amount of evidence that parties can submit in such cases.

The Group observed that the advertiser may have little incentive to participate in an expedited procedure at the outset of the case, making election of this option highly unlikely. Some suggested that shorter deadlines in the Rules and referral to regulatory authorities for failure to respond could provide the necessary incentive in the case of non-participating advertisers.

The Group's Recommendations

The Group recommends that NAD consider ways to make expedited review under Rule 2.11 more viable to challengers and advertisers alike, but offers no specific recommendations at this time.

6. Simplifying the Advertiser's Statement

Summary

The Group considered whether current procedures adequately reflect the purpose and use of the Advertiser's Statement.

The Group's Conclusions

Rule 2.9(B) permits submission of an Advertiser's Statement "stating whether the advertiser agrees to modify or discontinue the advertising or chooses to take the issues to appeal" along with an explanation of why it disagrees with NAD.

A majority of Group members agreed that the Advertiser's Statement has become a vehicle for parties to continue to argue their case. Most members agreed that the Advertiser's Statement should be limited to its primary function, which is to indicate whether an advertiser intends to comply with NAD's recommendations. The Group reached limited consensus that the procedures governing the Advertiser's Statement should be revised to provide the parties with standard language that they can use in the statement, indicating only whether the advertiser intends to comply (even if disagreeing and doing so only to support the system of self-regulation), not comply, or appeal. No opportunity would be provided for further explanation or argument.

An additional advantage of this approach is that the NAD staff attorney does not have to commit the time discussing and determining whether an Advertiser's Statement mischaracterizes the NAD's decision. Further, to more accurately reflect the nature of this new approach, the Group reached a limited consensus that the Advertiser's Statement be retitled from "Advertiser's Statement" to simply "Resolution."

The Group's Recommendations

The Group reached limited consensus that the Advertiser's Statement should be limited to a statement indicating whether the advertiser intends to comply with NAD's recommendation to modify or discontinue challenged advertising, not comply, or appeal the decision to NARB, and that any statement detailing the reason for disagreeing should be excluded. A minority would keep the statement as is. The Group reached consensus that the remainder of Rule 2.9(B), addressing the presumption of non-compliance if no statement is submitted, remain unchanged.

7. Dissemination of Decisions and Alternatives to the Press Release

Summary

The Group considered current policies and procedures governing the drafting and dissemination of ASRC press releases announcing NAD and NARB decisions. The majority of the Group concluded that the release of case abstracts or summaries, rather than the current form of press releases, would more effectively ensure consistency between the information publicly disseminated and the actual case decision. As such, the majority of the Group agreed that ASRC

should discontinue issuing press releases and instead publicly release a case abstract or summary drafted by the NAD attorney who decided the case.

The Group's Conclusions

Under Rule 2.9(C), ASRC will “make the decision available to the public through press announcements and publication of the decision in the next Case Reports.” The press release is not drafted by the NAD attorney assigned to the matter; it is drafted by ASRC’s communications office. The decisions themselves are available only by subscription.

Many Group members, while recognizing the importance of transparency to the self-regulatory process, questioned whether press releases are the best means of disseminating decisions. It was noted by one Group Member that the current practice is a relic of the early days of NAD, when there was a need to educate advertisers and the general public about the self-regulatory process. Today, the NAD process is well known and a standard mechanism for alternative dispute resolution in advertising, rendering the press release much less important as a mean of promoting advertising industry self-regulation. Additionally, NAD’s web presence and the use of abstracts or summaries of the decisions can satisfy the need for a self-regulatory process that is transparent. Some Group members questioned, therefore, whether press releases are necessary to further NAD’s mission.

Because decisions are currently only communicated to the public via press releases, and access to the decisions themselves are restricted to subscribers, the Group discussed alternatives to press releases that would maintain some level of free public access.

The first proposal was to make NAD and NARB decisions free to all. Many Group members were in favor of making NAD decisions available to the public without a subscription. It would be easy for such decisions to immediately be published on the NAD website and it would allow for broader, and more rapid, dissemination of NAD decisions. Supporters of this approach noted that it provides transparency by communicating full decisions and their rationale to all advertisers, not just those who pay the fees to see the decisions. All acknowledged, however, that losing the subscription revenue stream would significantly curtail resources available to support self-regulation.

The second proposal was to make abstracts or summaries of the decisions available to the public without a subscription, instead of a press release. One possibility considered was that the conclusion of the decision could form the basis of the abstract/summary. The full decision would remain restricted to subscribers. This proposal would maintain NAD’s current revenue but avoid some of the problems created by press releases, including the time-consuming debate that often ensues between challenger and advertiser over the release’s content.

Given that NAD relies heavily on subscription fees for funding, the majority of the Group concluded that the proposal to use abstracts or summaries in lieu of press releases was the most practical approach. The Group, however, agreed that press releases should continue to be used where an advertiser has refused to participate or to accept NAD’s recommendations and where NAD has therefore referred the matter to regulatory agencies or law enforcement for further investigation.

The Group's Recommendations

The Group recommends that ASRC explore alternatives to the current form of press releases and consider the use of case abstracts or summaries to conserve resources and ensure consistency between the information publicly disseminated and the decision itself. Press releases should continue to be used, however, in cases where an advertiser has refused to participate or to accept NAD's recommendations.

E. The Appeals Process

The Group considered several issues related to the appeals process, including (1) the role of NAD in the NARB process; (2) whether to continue advertising during the pendency of an advertiser's appeal; (3) the right to appeal; (4) the composition of the NARB panel; (5) the briefing process; (6) the standard of review; (7) the decision and advertiser's statement; and (8) compliance.

1. The Role of NAD in the NARB Process

Summary

The Group's considered NAD's role in the NARB process and concluded that NAD should not be a formal party to contested appeals, nor should it submit a separate brief on appeal. The Group believed that the presence of NAD as an advocate in defense of its decision is akin to having a trial judge appear at an appellate court argument and unduly favors the party aligned with NAD's decision. The Group also noted that NAD's participation at NARB conserves resources that might be directed to resolving other cases in a timely manner.

The Group did not reach consensus on exactly what NAD's role should be. Most felt that NAD should be in the room during the NARB meeting but should not be an advocate, submit briefs, or give *ex parte* advice to the panel. Some felt that NAD should have a role in the NARB hearing to answer NARB panel questions regarding NAD's process or decision.

The Group's Conclusions

Currently, NAD is always a party, submitting a brief and appearing at the NARB meeting in support of its decision. The Group recognized that NAD's participation in the appeal process may initially have been rooted in the need to have a disinterested party that represents the goals of self-regulation, which may differ from those of the participants. The Group also recognized, however, that in practice, NAD does not generally serve this function as a party to the appeal.

The majority believed that NAD should not be a party to any contested appeal (advertiser or challenger), nor should it submit briefs. The Group largely agreed, however, that NAD should be present to answer questions (though not *ex parte*).

Several reasons were offered for NAD's continued presence. NAD may be asked to respond to questions from the panel about how the underlying decision would be applied beyond the parties or how NAD viewed evidence submitted confidentially. NAD also may be asked to respond to questions stemming from comments raised during the rebuttal that the underlying decision does

not address. Finally, NAD's presence would allow it to understand how the decision is being interpreted and applied. Although these possibilities were raised, the Group arrived at no consensus regarding the scope of NAD's role, beyond that it should not be a party to a contested appeal and should not submit a brief.

Many members noted that NAD expends significant resources in briefing, preparing, and arguing challenger appeals. Excluding NAD from this process will free these resources to focus on competitor challenges and NAD-initiated cases, which should improve efficiency and timeliness.

Most participants agreed that, for NAD-initiated cases, NAD should continue to be present as an advocate. One participant disagreed entirely and argued that NAD should not be present at all during the appeal process. This view emphasized that NAD's decision should speak for itself, and that if present, NAD will inevitably advocate for the decision.

The Group's Recommendations

The Group recommends that NAD not function as an advocate or a party to contested appeals. NAD however, should be present at NARB meetings, although the Group did not reach consensus regarding the scope of NAD's role.

2. Advertising During the Pendency of an Advertiser Appeal

Summary

The Group considered but did not reach consensus on whether current rules should be modified to require the advertiser to discontinue the advertising at issue during the pendency of an advertiser's appeal. Many expressed the belief that advertisers file appeals to extend the run of the advertising at issue.

Some noted that requiring discontinuation of advertising as a condition to accepting an appeal would not be realistic, particularly for television, print, in-store advertising, and product packaging. These members were concerned that such a requirement might dissuade advertisers from participating in the self-regulatory process. Some suggested that, at a minimum, online materials within the advertiser's control could be halted or revised during the appeals process.

The Group's Conclusions

Currently, if an advertiser appeals NAD's recommendation that it discontinue or change its ads, the advertiser can continue to run the challenged advertising during the pendency of the appeal.²⁷

The majority expressed concern that advertisers may appeal decisions with the objective of extending the life of the advertising campaign and pointed to the dramatic increase in the number of appeals as possible evidence of this practice. The Group considered whether to recommend a mechanism for requiring parties to comply with NAD decisions as a condition of filing an appeal. It also discussed whether to recommend that the advertiser appealing an adverse

²⁷ See Rule 3.1.

decision should be required to request a “stay” of NAD’s decision to keep the campaign running pending NARB review.

In response to this suggestion, several members noted that this would pose significant logistical issues, bring more complexity to the process, and extend the overall timeline of the appeal. Others pointed out that full compliance with the underlying NAD decision prior to filing an appeal may not be realistic across all formats, especially packaging, television, and print. Finally, others questioned whether this would cause advertisers to stop participating in the self-regulatory process.

The Group also considered whether there are other options that might prevent abuse of the appeal process, such as significantly increasing the cost of filing an appeal, or requiring the advertiser to agree to implement the decision within an expedited timeframe post-appeal. One member suggested that the advertiser be required to discontinue or revise online materials pending NARB disposition to the extent they are within the advertiser’s control.

Although the majority agreed that the current process is subject to abuse, there was no consensus of majority opinion about how best to address the various issues.

The Group’s Recommendations

The Group did not reach consensus or majority opinion regarding any changes to the existing rule, which permits challenged advertising to continue running during the appeals process.

3. The Right to Appeal

Summary

The Group discussed whether the challenger should have an automatic right to appeal an NAD decision. A slight majority of the Group was in favor of revising the procedures to permit the challenger an automatic right to appeal.

The Group’s Conclusions

Currently, the advertiser has an automatic right to appeal NAD’s decision, but the challenger must seek permission from the NARB Chair to appeal.²⁸

The Group was largely split on whether the rules should be revised to permit an automatic right to appeal from the challenger. Members opposed to the change suggested that adding another layer for the challenger to contest the advertising at issue may be unfair to an advertiser that has already successfully defended the advertising at issue. Members in favor of the change suggested that establishing a right to appeal for both parties would lend additional credibility to the program and eliminate a round of submissions to NARB. These members also contended

²⁸ See Rule 3.1(B) (“Within ten business days after the date of receipt of a copy of NAD/CARU’s final case decision, the challenger may request a review by the NARB by filing a letter, not to exceed 20 double-spaced pages plus any relevant attachments from the NAD/CARU case record, explaining its reasons for seeking review.”).

that most requests for appeal by the challenger are granted and criteria for granting the appeal are unclear and not predictable.

The Group's Recommendations

A slight majority of the Group was in favor of a rule revision that would permit the challenger an automatic right to appeal.

4. Composition of the NARB Panel

Summary

The Group discussed, but did not resolve, whether it would be beneficial to add scientific experts and/or lawyers to the panel, either routinely, or in special cases. There were concerns about an expert taking over the panel and about conflicts of interest if lawyers were added.

The Group's Conclusions

Currently, each panel must be “composed of one ‘public’ member, one ‘advertising agency’ member, and three ‘advertiser’ members.”²⁹ Three members must vote in favor of a decision.

The Group discussed whether having five panelists makes sense and concluded that no change was necessary. There was an extensive discussion, however, regarding the composition of the panel. The Group considered adding either a lawyer or someone with a scientific background, depending on the nature of the case and the evidence submitted as part of the record. One member raised the concern that, without a lawyer, the panel could arrive at a conclusion that would prevent a legal activity.

The Group concluded that requiring the addition of a lawyer or scientist in every case could be counterproductive. Members raised concerns that a panelist with a scientific or legal background could have a disproportionate impact on panel deliberations. In addition, several members noted that the panel and the self-regulatory system as a whole, was intended to be a jury of peers in an advertiser-driven process, not a federal court proceeding.

The Group's Recommendations

The Group did not reach consensus regarding any changes to the current composition of NARB panels.

5. The Briefing Process

Summary

The Group agreed that new arguments (as distinct from new evidence/facts) should be acceptable, including citing new cases, as part of the appeal briefing process. The Group agreed

²⁹ See Rule 3.5.

that new or proposed advertising should be considered new evidence that should not be placed before NARB. Likewise, the parties agreed that the panel should not consider new testing.

The Group's Conclusions

Currently, each side submits a single brief. The Group agreed that the current briefing process works unless there is a cross-appeal. The Group recommends that, on cross-appeals, both sides submit a brief for the first deadline and both respond with a second brief for the second deadline. While one participant noted that this process may be complicated for NAD, the above recommendation to preclude NAD from acting as a party to the appeal would mitigate this concern.

Next, the Group discussed whether new evidence and new arguments should be allowed on appeal. The Group agreed that new arguments should be accepted (including citing to NAD cases that were not referenced in the underlying proceeding). As for new evidence, while many comments were raised noting specific circumstances where it might be helpful to allow new evidence, the Group concluded that allowing new evidence, including revised advertising, should not be allowed.

The Group's Recommendations

The cross-appeal process should remain as is, but the briefing schedule should be altered to permit the cross-appellee a chance to read and respond to cross-appeal arguments, possibly by requiring all appellant/cross-appellant briefs to be filed simultaneously. Additionally, new arguments (but not new evidence) should be accepted in NARB appeals, including the citation of cases that had not been initially cited.

6. Standard of Review

Summary

The Group agreed that the Board should only consider claims and findings affirmatively appealed by one or both parties. The Group also agreed that the standard of review should be *de novo*, based on the record created at NAD, which it presently appears to be, although not expressly specified.

The Group's Conclusions

The NARB's standard of review is not specified in the governing procedures. The Group agreed that the standard should be *de novo* (which it appears to be) and should be explained clearly to the panel, which does not have a legal background. Finally, the Group agreed that the panel should only review claims that have been appealed and should not consider issues that were not raised by either party.

The Group's Recommendations

The Group recommends that NARB review decisions *de novo*, but the panel should only consider issues that were affirmatively appealed.

7. The NARB Decision and Advertiser's Statement

Summary

The Group considered whether any changes to the NARB decision format or Advertiser's Statement are warranted.

The Group's Conclusions

Currently, NARB issues a single decision, although the rules allow for dissenting views.³⁰

The Group discussed whether a dissenting opinion should be provided and whether decisions should cite legal authority or provide a more detailed explanation for the conclusion. Overall, while some expressed dissatisfaction with the level of detail in NARB decisions, others noted an improvement in the time taken to publish the decisions. The Group concluded that the current process does not require modification.

Next, the Group considered whether NARB should continue to allow the advertiser to draft its own Advertiser's Statement. The Group was split concerning whether an advertiser should continue to be permitted to draft its own statement. As with the Advertiser's Statement in NAD decisions, *see supra* Section II.D.6, many members commented that the Advertiser's Statement may mischaracterize the real outcome of the case. Others indicated that they did not think the Advertiser's Statement instilled any harm and should continue to be permitted.

The Group's Recommendations

The Group does not recommend any changes to the decision itself. The Group was split on whether the Advertiser's Statement should be limited to a statement indicating whether the advertiser intends to comply with the decision, with a slight majority favoring a simple statement indicating whether the advertiser intends to comply with NARB's recommendation.

8. Compliance

Summary

The Group considered current enforcement of NARB's decisions and whether it makes sense for NAD to enforce NARB's decisions, even if they overturn an NAD decision.

The Group's Conclusions

Currently, NAD enforces compliance with NARB's decisions. Some members noted that NAD should not be the party who decides whether an advertiser is in compliance with a NARB decision. The Group's consensus was that the enforcement of decisions by NARB should be the responsibility of the NARB Chair. In addition, the Group considered whether there should be

³⁰ *See* Rule 3.5 ("Any panel member may write a separate concurring or dissenting opinion, which will be published with the majority opinion.").

some form of a timeline in place for compliance with a decision by NARB, but the Group did not reach consensus on that issue.

The Group discussed whether advertisers should be required to agree to comply with the decision at the time of instituting the appeal, but concluded this would be both unwieldy and possibly unfair. The Group also considered, and rejected, whether advertisers who fail to comply with NARB's decisions should be prohibited from bringing new challenges before NAD for some period of time.

The Group's Recommendations

The Group recommends that the NARB Chair enforce compliance with NARB's decisions and further review whether there should be a set timeline for compliance.

F. Post-NAD Review

1. Timeframe for Compliance

Summary

The Group discussed whether there should be a standard timeframe for compliance as opposed to NAD's current practice of assessing compliance on a case-by-case basis.

The Group's Conclusions

Most members believed that the current standard, which requires compliance within a reasonable time, is appropriate and that NAD should not adopt a more concrete timeframe for compliance.

The Group was split on whether ASRC or NAD should provide guidelines for compliance. Some members thought that guidelines explaining NAD's expectations for compliance based on various criteria (*e.g.*, type of media, ubiquity of claim) would be helpful for both NAD and the industry.

The Group's Recommendations

The Group recommends that no changes be made and compliance continue to be determined on a case-by-case basis.

2. Procedure for Compliance Proceedings

Summary

The Group considered NAD's current procedure for compliance proceedings and concluded that the Rules should permit consideration of new evidence in support of a claim that NAD had previously found unsubstantiated or in need of modification. ASRC has expressed concern that allowing reconsideration of a claim could result in an abuse of process whereby an advertiser continues to submit substantiation after the NAD case has been decided. The Group believed that the potential for an "endless loop" problem can be mitigated and is offset by fairness

considerations. More importantly, the Group considered options that would protect the process and further NAD's mission of promoting truthfulness and accuracy in advertising by permitting new substantiation for a claim following an NAD decision that directs the advertiser to discontinue or modify the claim.

The Group's Conclusions

There was consensus that NAD should have a process for the consideration of new evidence. The Group appreciates the importance to the advertising industry of finality to the review process. The Group also appreciates the impact on available resources if reconsideration is permitted as well as the need to encourage advertisers to have adequate substantiation before an advertising claim is made. The Group believes that given the competing priorities, there should be a process for the consideration of new evidence that is consistent with the objective of promoting truthfulness and accuracy in advertising and timely resolution of advertising disputes. Consider the following hypotheticals:

Example 1: Advertiser develops a novel product that makes a health claim which, if true, confers an important benefit to consumers. A competitor brings an NAD complaint. NAD finds the claim unsubstantiated due to a defect in study design (*e.g.*, wrong target population, insignificant power). The advertiser fields the same study but corrects the defect, following NAD's direction. The advertiser goes to market with the claim and the competitor brings a compliance challenge.

Example 2: NAD finds that an advertiser has communicated an implied claim (which it did not intend to convey) and NAD recommends the advertiser discontinue the claim. Because the advertiser did not believe it was making the implied claim, it did not possess substantiation. The advertiser develops substantiation for the implied claim and reinstates the advertising. The competitor brings a compliance challenge.

In both examples, the case would be referred to the FTC if the advertiser stated it would not comply with NAD's direction to discontinue the advertising.

The ASRC has asserted that Rule 3.8 permits reconsideration of decisions under extraordinary circumstances.³¹ Rule 3.8 states that once a case is decided, "the case will be closed and, absent extraordinary circumstances, no further materially similar complaints on the claim(s) in question shall be accepted by NAD/CARU, except as provided for in Section 4.1."

As an initial matter, it is unclear how a request for reconsideration fits within the definition of "materially similar complaints." More importantly, the Group was not aware of any cases where the "extraordinary circumstances" exception to Rule 3.8 had been used to permit new evidence in a compliance proceeding. NAD, at a minimum, should make clear that this option is available, if that is the case. It should also define the term so that it expressly states that an

³¹ See A. Wes Siegner, *NAD Advertising Policy Purposefully Differs from FTC Legal Standards for Substantiation*, available at http://www.martindale.com/antitrust-trade-regulation-law/article_Hyman-Phelps-McNamara-PC_2104826.htm.

advertiser can submit new evidence in a compliance proceeding if that evidence could reasonably lead to modification or reversal of the underlying NAD decision.

In the alternative, Rule 3.8 should be revised so that an advertiser is permitted to petition NAD to reopen a closed matter and consider new evidence in support of a claim that has previously been found to be unsubstantiated or in need of modification. Consistent with Rule 2.2(B), NAD would be required to accept the petition unless it were to conclude that it was “without sufficient merit to warrant the expenditure of NAD’s resources and, therefore, is inappropriate for formal investigation in this forum.”

Further, if accepted, NAD could require the advertiser to pay a modest filing fee and the same NAD attorney would be assigned to the matter. The question for NAD would be whether the new evidence warrants a modification or reversal, *i.e.*, a finding that the original claim was substantiated. The filing fee could serve as a disincentive to frivolous attempts to argue new evidence (the “endless loop” argument) and could help address the resource issue. Just as an advertiser has to pay a filing fee to appeal to NARB, it would be required to pay a fee to offset the cost of the additional review associated with the petition. Assigning the matter to the same case reviewer would promote consistency and efficiency. It could be left to NAD’s discretion, upon reviewing the “petition to reopen,” whether to also involve the original challenger in the evidentiary process.

This Rule change could be modeled after the FTC’s Rules of Practice, 16 C.F.R. § 2.51 “Requests to Reopen.” Section 2.51 allows a party to petition the Commission to “reopen the proceeding to consider whether the rule or order should be altered, modified, or set aside in whole or in part.” The petitioner is required to make a “satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part, or that the public interest so requires.” This requirement “shall not be deemed satisfied if a request is merely conclusory” and the petitioner must provide specific facts “demonstrating in detail . . . the nature of the changed conditions and the reasons why they require the requested modifications of the rule or order.” It is then up to the Commission to decide, in its discretion, whether to reopen the rule or order.

With respect to a timetable for compliance proceedings, it was proposed that Rule 4.1(A) be amended to increase the time for the advertiser’s initial response. Under the current rule, after a decision where the advertiser has indicated that it is willing to comply with a recommendation to discontinue or modify the claims, “NAD/CARU, either on its own or at the behest of a challenger or a third party, may request that the advertiser report back, within five (5) business days, on the status of the advertising at issue and explain the steps it has taken to bring the advertising into compliance with the decision.” It can be difficult to collect all the relevant facts in five business days as required under the current rule. Members proposed that the timeframe be extended.

It was proposed that Rule 4.1(C) also should be revised. This rule currently gives the advertiser 10 business days to notify NAD of its response to NAD’s initial recommendation, after which NAD has 15 business days to render a final decision on compliance. This is not the practice that NAD currently follows and it seems unnecessarily long.

There was a split of opinion regarding whether the challenger should be able to see and respond to the advertiser's compliance submission. On the one hand, the challenger may be in a better position than NAD to assess the advertiser's factual representations. For instance, NAD does not have the resources to obtain a Competitrack Report to determine whether a commercial remains on air. On the other hand, participation by the challenger will delay the process.

Additionally, there was a brief discussion of whether compliance decisions should be appealable to NARB, particularly when the decision involves a revised ad, a new ad, or a different product. In some situations there may be genuine disagreement between the advertiser and NAD regarding the interpretation or scope of NAD's decision. One possibility is to allow the advertiser to petition the NARB Chair for permission to appeal an NAD compliance ruling in exceptional circumstances.

Finally, the Group expressed concern that NAD, in compliance proceedings, occasionally addresses claims and/or advertisements that were not at issue in the underlying action. This practice can be highly prejudicial to the advertiser. Accordingly, the Group emphasized that NAD should adhere to Rule 4.1³² and address only those advertisements and claims at issue in the underlying action.

The Group's Recommendations

The Group recommends that NAD:

- Allow advertisers to introduce new evidence in support of a claim following the issuance of a decision finding the claim to be unsubstantiated or in need of modification. NAD could permit new evidence if that evidence could reasonably lead to the modification or reversal of the underlying NAD decision. In the alternative, NAD could implement a new rule that would allow parties to petition NAD to reopen a matter upon a satisfactory showing that changed conditions of law or fact require NAD's decision to be altered, modified, or set aside.
- Amend Rule 4.1(A) to increase the time for the advertiser's initial response.
- Revise Rule 4.1(C) to shorten the timeframes for the advertiser's response to NAD's initial recommendation and NAD's final decision;
- Allow the advertiser to petition the NARB Chair for permission to appeal a compliance ruling in exceptional circumstances.

3. FTC Referral Process

Summary

The Group considered whether the FTC referral process is effective or should be modified.

³² See Rule 4.1(a) (NAD/CARU "may request that the advertiser report back, within five (5) business days, on the *status of the advertising at issue* and explain the steps it has taken to bring the advertising into compliance with the decision") (emphasis added).

The Group’s Conclusions

The Group recognized the work of the NAD and FTC staff to improve the transparency of the referral process noting improvements such as the issuance and posting of closing letters in appropriate cases and the inclusion in FTC press releases when an FTC enforcement action involves a case referred from NAD or other ASRC enforcement programs. The Group concluded that the referral process is generally effective. Over the five-year period from January 1, 2009 to December 31, 2014, NAD had referred a total of 57 advertisers to the FTC. The table below shows a breakdown of how those referrals were addressed.

Status of NAD Referral	Number of Cases from 1/1/2009 to 12/31/2014
Advertiser returned to NAD	14
FTC staff initiated a formal investigation, which it subsequently closed	12
FTC staff resolved the matter short of an investigation	10
FTC staff decided to take no action or outcome unclear	7
Matter related to existing FTC investigation/litigation	5
FTC took no action because matter related to non-FTC litigation	2
FTC enforcement action	1

Fourteen of the 57 advertisers referred to the FTC ultimately returned to the NAD – the single largest group according to the FTC staff’s categorization. Moreover, only one matter has ultimately resulted in an FTC enforcement action, although the numbers make clear that the FTC takes NAD’s referrals seriously.

The Group reached consensus that it would be useful for information concerning the resolution of NAD’s referrals to be available on the FTC website in a single location in a readily searchable manner. The Group thought that this would be a positive development in terms of encouraging transparency and participation in the NAD process.

Additionally, some members believed that NAD should provide advertisers referred to the FTC with the same materials that NAD provides to the FTC, although consensus was not reached on this issue. Members in favor of this change believed that providing the forwarded materials would further support transparency and encourage expedient resolution of the claims at issue.

The Group’s Recommendations

The Group recommends that the referral process generally remain the same, but encourages NAD and FTC to continue their work to provide transparency concerning NAD’s referrals and closing letters on both the FTC and NAD website.

4. Risk of Class Action Litigation

Summary

The Group considered whether participation in the self-regulatory process exposes parties to risk of class action litigation.

The Group's Conclusions

The Group acknowledged industry concern that adverse NAD decisions can lead to costly demand letters and class action litigation. While large companies in particular were vocal about these concerns, no member indicated that the problem was acute enough to cause them to forego using NAD as a self-regulatory advertising dispute resolution mechanism.

The question was posed whether any parties were utilizing private arbitration or other dispute resolution mechanisms. Some members volunteered that they either currently or previously represented a company that entered into such arrangements with competitors. Based on the discussion, it was apparent that these arrangements tended to be complex and generated their own set of issues.

The concern raised most often was that the detail contained in the preamble to the decision laid out a roadmap for class action attorneys to use as a basis for their demands and complaints. The Group questioned whether less detailed opinions could help alleviate some of those concerns.

The Group also concluded that the identification of discontinued claims was unnecessary and a possible indication to class action attorneys of claims they might target in allegations, particularly where NAD has expressed its opinion that discontinuation was “necessary and proper.” The Group also believed that this problem was exacerbated by the issuance of a press release in its current form.

The Group's Recommendations

The Group recommends that NAD not comment on claims that an advertiser decides to withdraw after a challenge is filed and limit any public statement regarding a case to the summary or abstract, as discussed above, with the exception of when a matter is referred to the FTC.