

APPEARING BEFORE
NAD – TEN
PRACTITIONER’S TIPS

By
Terri J. Seligman*
Loeb & Loeb

RULES OF THE ROAD FOR ADVERTISERS AND CHALLENGERS

The National Advertising Division (NAD) of the Council of Better Business Bureaus is a forum where companies can challenge competitors’ claims made in national advertising. (NAD also monitors advertising and can initiate a proceeding on its own.) And although the NAD procedure for resolving disputes is less costly, faster and less complicated than litigation in state or federal court, there are nuances and rules that are important for practitioners to understand. Below are Ten Tips that may help you decide whether or not to participate in an NAD proceeding and, if you do, help you prepare for such a proceeding. These tips are based on a recent presentation I gave at the American Conference Institute’s Regulatory Summit for Advertisers and Marketers on June 18, 2008.

1. NAD Is Different.

An NAD proceeding is not litigation in court. There is no discovery, no sanctions, no motions, no damages, and no press until a press release is issued by NAD at the conclusion of the matter. Advocacy is important but gamesmanship is not effective or, indeed, welcome at NAD. Whether you are representing the advertiser or the challenger, you should go directly to the substance of the case: Is the advertising truthful? Are the claims adequately supported? What is the consumer takeaway? Your job as advocate is to marshal the facts and present your arguments. But, ultimately, NAD’s own view of the ads and support for the claims made in the ads is more important than what you say about them.

2. Read the Case Reports.

NAD Case Reports are available by subscription on the NAD website (www.nadreview.org) and can be searched. If you represent advertisers, start reading them now before you’re involved in a case. This is where the body of ad law resides. Use them to help you counsel clients, to understand the pitfalls of your claims and what you’re using to support them. Get guidance on survey design and clinical study design.

When using Case Reports in your papers at NAD, note that precedent can be helpful but it is rarely dispositive because each ad is different. *Stare decisis* is not the guiding principle in NAD proceedings. One of my recent cases

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*Terri Seligman (tseligman@loeb.com) is a partner in the Advertising and Promotions Law Group at Loeb & Loeb LLP in New York. She regularly appears before NAD, representing both advertisers and challengers in different industries, including telecommunications, food and beverage, baby formula and others. Ms. Seligman thanks Jill Westmoreland for her assistance with this article

involved the name of a product. NAD's earlier cases suggested that in the absence of extrinsic evidence of consumer confusion, NAD would not require an advertiser to change the name of its product. However, in my case, although there was no extrinsic evidence of confusion, NAD still recommended a name change "to avoid the potential for consumer confusion." Lesson learned? NAD is more concerned with the impression created by the advertising currently under review than simply adhering to its own precedent.

3. The More "Impactful" the Claim, the More and Better Substantiation NAD Will Want.

If you read a lot of NAD Case Reports, you will notice several things about NAD's approach to substantiation. First, the more serious the claim, e.g., claims that involve health, or babies, or social responsibility claims, or claims for products or services that require a significant expenditure of money, the more NAD will want. Second, the more compelling the claim itself, no matter the product category, the more NAD will want. Ultimately, what NAD wants to see is a "good fit" (an expression frequently used by NAD) between the support and the claim. For example, don't try to support a claim about the health benefits of a product with just studies about the individual ingredients – you'll need studies to support the claims for the product as a whole.

4. Humor is Good, But It Won't Save You If the Claim is Unduly Disparaging or Not Truthful.

Humor does not equal puffery. The claim inside the humor must be truthful. You have some license to exaggerate if it's clear that the exaggeration is over-the-top, but you can't overstate the benefits in a way that consumers will believe. Likewise, you can't trash your competitors. Use humor to highlight and entertain but not to lie.

Here is an example where NAD found the humor didn't quite work: in Case # 4538, as part of NAD's routine monitoring program, NAD requested substantiation for product performance claims made in television commercials for the Mercedes-Benz GLClass. In particular, NAD requested substantiation for the claim, "We gave it more safety and strength," as well as an implied claim of extraordinary passenger safety and protection stemming from a laboratory test setting, depicting a battering ram hitting and being deflected off the side passenger panel of the Mercedes GL with no damage to the automobile. In its response, the advertiser stated that the commercials communicate in a very humorous and extreme manner the advances pioneered by Mercedes in the large vehicle class, including increased

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headroom, automatic height adjustment capabilities, ratio of engine displacement to horsepower, and stronger unit body construction. Given the clearly humorous, “over-the-top” tone of the commercials which, Mercedes argued, is particularly apparent in the crash-sled scene, no reasonable consumer would take away the message that the Mercedes GL is impervious to damage when struck from the side. NAD disagreed, stating that “a product demonstration, even one that is humorous or exaggerated, can be interpreted as a demonstration or a product attribute or how the product performs (i.e. offers extraordinary crash protection).” Accordingly, NAD recommended that Mercedes discontinue the “crash sled” impact demonstration.

Similarly, in one of my own recent cases, NAD found that the humor of the spot couldn’t save the denigration of the competitor’s products. In Case # 4764, Cablevision challenged several Verizon commercials advertising Verizon’s FiOS service. The spots included lines like “hooking up great high-tech stuff to cable is a waste” and “watching FiOS is as good as live, and watching cable is like watching radio.” NAD found that since there was no evidence in the record to support these denigrating claims, the advertiser’s permanent discontinuance of these claims was necessary and appropriate under the circumstances. NAD disagreed with the advertiser’s argument that these claims constituted mere puffery. “When one company advertises that another company’s product is a ‘waste’, the line between puffery and denigration is crossed.”

5. Claims and Their Substantiation Must Be Consumer-Relevant.

It is a “black letter” principle of advertising law that a claim can be truthful but still misleading. Picture a car ad that touts its superior torque while showing the car handling difficult terrain or harsh weather conditions. Say that the superior torque claim is truthful and well-supported but perceptible and of benefit only to professional drivers. NAD could be concerned about the torque claim, when coupled with the visuals, if NAD determined that the consumer takeaway from the spot was a superior handling claim for everyday (non-professional) drivers, particularly since how a car handles in adverse conditions, as shown in the commercial, is very impactful.

Testing (in addition to the claim itself) must also be consumer-relevant. Thus, testing should recreate real world conditions. If testing a household grease remover, you need studies showing the product removes the kind of grease a consumer would confront in his or her own kitchen.

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6. Consider a Survey.

You don't have to have a consumer perception survey at the NAD because NAD can and will evaluate an ad's takeaway without one, but there may be circumstances when a survey is helpful such as when the takeaway is ambiguous and you're not confident that NAD will see the claim the way you do, or when the claim is not so ambiguous but you think NAD may want to buttress its own decision. Commissioning a consumer perception survey will increase your costs, but in such circumstances, it may be worth it.

If you decide to use a survey, make sure it is properly designed and conducted. It can be an Internet survey, but it too must be well-designed and executed. Here are some things NAD will want to see in a survey: NAD prefers open-ended questions ("what was the main message of the commercial?") and will want to see the verbatims. If using close-ended questions, they shouldn't be leading. The order of questions is very important because of the potential to focus respondents' attention on certain attributes. You also need to be careful of fatigue risk – so keep surveys short. And you generally need to show respondents the actual ads in question.

A recent case with considerable discussion about consumer perception surveys is NAD Case Report # 4581 in which NAD initiated a proceeding against ConAgra Foods over its commercials for Hebrew National Beef Franks. The commercials touted the high-quality meat in the franks and that they are kosher. NAD wondered whether there was an implied claim that the kosher beef franks were healthier or more nutritious than non-kosher beef franks. ConAgra submitted two consumer perception surveys as support for its position that consumers did not take away these claims. However, NAD found the surveys flawed in many respects: the actual advertisement was not shown in the Internet survey; in the telephone survey, the participants were asked questions about the commercial one day after watching a half-hour comedy program during which the advertisement was shown; most of the close-ended questions were positive in nature as to general messages or attributes about the product ("told you something important"; "portrays what a really good hot dog should be like"; "makes you think about Hebrew National in a new way"), with very few negative attributes, and questions with negative attributes were grouped at the end of the survey; and the verbatim answers were not provided.

Note that even if you use a survey and even if it's well done, NAD is not bound by it. "It is well settled that in evaluating the reasonable messages conveyed by a commercial, NAD need not limit itself to the results of consumer perception surveys submitted by the parties but may also independently examine the contested advertising and carefully consider its

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net impression.” (Case #4581) In the ConAgra case, NAD determined that, notwithstanding its criticism of ConAgra’s surveys, the commercial did not make an implied claim that the kosher beef franks were more healthful or nutritious than non-kosher beef franks.

7. Consider Expediting the Case.

Here’s where gamesmanship can be helpful. If you’re the challenger and the advertiser puts in a superficial response to your challenge letter, you can waive your right to submit a reply. The advertiser is then foreclosed from putting in additional papers and NAD will issue a decision based just on the initial papers (and, of course, its own impressions of the advertising materials). Remember, then, that if you’re the advertiser, you shouldn’t try to game the system by holding back arguments for your second letter because you may never get the chance to submit a second letter. Therefore, whether you’re the advertiser or the challenger, your initial papers should be thorough.

8. Remember “Routine Monitoring.”

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

9. Ignore the NAD at Your Peril.

Participating in an NAD proceeding is voluntary, but there are consequences for advertisers who choose not to participate or choose not to comply with an NAD decision. NAD can and does refer cases to the FTC and those cases are said to go “to the top of the pile.” Moreover, NAD probably won’t take kindly to a case initiated by a company that refused to participate earlier. Courts are starting to pay attention, too. For example, earlier this year, a case involving vodka ads was stayed in court pending resolution of the NAD proceeding involving the same claims.

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10. NAD Lawyers Like Their Jobs.

NAD is leanly staffed by experienced lawyers, many of whom apparently really like working at NAD because they've been there for several years and are likely to remain. Remember that if you practice regularly before NAD, you'll probably work with the same NAD lawyers on multiple matters. So behave well and build relationships!

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See, generally, NAD Case Reports.

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