



# Advanced Media and Technology Law

Advertising Disputes Law



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## ABA Working Group on NAD Process: Make It Even Better

An American Bar Association working group last week issued its report reviewing and suggesting improvements to the advertising industry's self-regulatory adjudication system. The 52-page report, "[Self-Regulation of Advertising in the United States: An Assessment of the National Advertising Division](#)," concludes that the current system of advertising self-regulation administered by the National Advertising Division of the Council of Better Business Bureaus "works well" overall but has room for improvement. The April 15 report also acknowledges that implementing many of the working group's recommendations would require additional funding and staff. Notable recommendations include suggestions to help the NAD issue its decisions in a timelier manner, as well permitting advertisers to reach settlement agreements without the issuance of a press release. The report also urges the NAD to clarify the definition of "advertisers" to better define the scope of its jurisdiction.

### The Working Group and Its Report

In June 2014, the Advertising Disputes & Litigation Committee and the Consumer Protection Committee of the American Bar Association's Section of Antitrust Law convened a working group to review and offer ways to improve the 44-year-old system of advertising self-regulation in the United States. The working group comprised 59 individuals representing consumer product companies, industry associations, and advertising lawyers with extensive experience

representing challengers and advertisers at the National Advertising Division. Loeb & Loeb partner David Mallen, co-chair of the firm's Advertising Disputes group and former Deputy Director of the NAD, served as one of three leaders coordinating the review. The group met multiple times between August 2014 and March 2015.

The report covers a number of areas, beginning with the NAD's history and mission, and including the various stages of the NAD's procedures – the process of bringing a complaint, the presentation of the case, the NAD's issuing of a decision and press release, the appeals process and post-review. The report points out that the working group did not vote whether to accept any specific recommendations, and that any changes must be approved by the Advertising Self-Regulatory Council, which establishes policies and procedures for the NAD.

### The NAD's History and Mission

At the outset, the working group recognized that consideration of the history of advertising self-regulation and the underlying mission of the NAD were central to its evaluation.

The NAD is charged with monitoring and evaluating truth and accuracy in national advertising. NAD claims are identified through complaints from both consumers and competitors, and most of the advertising disputes

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the NAD currently considers are based on competitor complaints, although it also monitors advertising independently. The NAD is funded by partnership dues paid by companies to the CBBB; filing fees paid by companies bringing competitive NAD challenges; subscription fees for NAD case reports and other sources, including admission and sponsorship fees to NAD conferences; and the occasional consumer class action award.

The report recommends that the ASRC explore increasing both the NAD's funding and transparency to improve efficiency and ensure success. The working group suggested exploring additional funding mechanisms, direct contributions to the NAD and *cy pres* awards from false advertising litigation. A minority of the group supported higher filing fees for expedited cases.

### **Bringing a Complaint**

The working group considered a number of issues related to bringing a complaint to the NAD, including jurisdiction, confidentiality, the content and format of complaint and briefs, and the identification of claims, as well as administrative closings and private settlements of complaints.

While agreeing generally with the jurisdiction of the NAD over "national advertising," the group called for the ASRC to clarify the definition of "advertisers," noting that the NAD has accepted cases involving parties who, though part of the "advertising ecosystem," are not actually advertisers. Following this clarification, the NAD should 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 related to advertising, the report recommends.

In addition to general recommendations about procedural rules related to page length of complaints and briefs, as well as the availability of case management conferences, the working group called for specific changes, suggesting that the NAD refrain

from recharacterizing the challenged claims in its opening letter to advertisers, and instead incorporate by reference the claims in the enclosed complaint, in order to avoid expanding or complicating the dispute (with the understanding that the NAD may initiate a separate monitoring case related to additional or different claims).

The working group also recommended that when the NAD closes a case for administrative reasons (for example, when the dispute is the subject of litigation or a government investigation or consent order), it should not characterize the closing in a way that suggests the advertising claims at issue were unsubstantiated when the NAD did not reach the merits of the case. Parties should also have the option to enter into private settlement agreements and terminate the case without having to seek the NAD's approval of a written settlement agreement, and the NAD should not issue a press release in those cases.

### **Presenting the Case**

In this section of the report, the group considered issues – both substantive and procedural – related to presenting the case at the NAD, including the burden of proof, consumer surveys, the briefing format, counter-challenges, timing and extensions, and the parties' meetings with the NAD.

Chief among the concerns raised by the group was the problem posed by late-submitted evidence by both the challenger (which has no formal burden of proof under the current procedure) and the advertiser (which may be prejudiced by not having sufficient time to respond to later-submitted evidence and may need an extension of filing deadlines or additional briefing). Acknowledging the NAD's need to balance the parties' ability to submit all of their evidence against one of the primary goals of the process – to resolve advertising disputes quickly while the challenged advertising campaign is running – the working group recommended that the NAD both remain as flexible as possible regarding the timing of evidentiary submissions and encourage the parties to submit

evidence, particularly technical evidence, early in the process (but without placing a formal burden of proof on the challenger or imposing strict rules regarding the timing of evidentiary submissions).

The report suggests that the NAD consider adopting different tracks, or a “tiered approach,” to case management that require certain page limits and briefing timelines depending on the complexity and number of claims. The NAD should also consider revisions to its current expedited review procedures that would limit the number of pages in submissions and the number of witness statements, and/or would impose a higher filing fee.

### **Decision and Press Release**

For this section of the report, the working group considered a number of issues related to the decision and press release, including form and length of decisions, the online archive, the transparency of the NAD’s consultation with outside experts and reliance on material non-record information, the timing for NAD decisions, the expedited review process, the advertiser’s statement, and the dissemination of NAD decisions and alternatives to the press release. The group has made a number of recommendations that would expedite and streamline the NAD’s decision-making process. In particular, the NAD should issue decisions in a timelier manner after the parties submit their final briefs. To help maintain an accelerated schedule, the report suggests that the NAD set meeting schedules at the outset of a case, invest in videoconferencing technology for the parties’ meetings, and create tracked or tiered briefing schedules based on complexity and number of claims.

The working group also recommended that the ASRC stop issuing press releases in their current form and instead publicly release case abstracts or summaries taken from the NAD decision, in order to conserve resources and ensure consistency between the information publicly disseminated and the case decision itself. The NAD should continue to issue press releases in cases where an advertiser

has refused to participate or accept the NAD’s recommendations.

Finally, the ASRC should update the online archive, the report adds. Proposed improvements include an efficient search function across all NAD decisions and the ability to highlight search terms within decisions.

### **Appeals Process**

The working group considered a comprehensive list of issues related to the appeals process, including the role of NAD in the National Advertising Review Board process, whether advertising should continue during the pendency of an advertiser’s appeal, the right to appeal, the composition of the NARB panel, the briefing process, the standard of review, the decision and advertiser’s statement, and compliance.

Under the current process, the NAD is a party to all NARB appeals, submitting a brief and appearing at the NARB meeting in support of its decision. The working group recommended that the NAD should not be a party to an appeal, but should be present at proceedings. While the group discussed a variety of possible roles for the NAD (to answer questions that arise, for example), it did not reach consensus regarding the scope of the NAD’s role. In addition, the majority of the working group believed that this change should not apply to NAD-initiated cases that are appealed.

The working group debated whether current procedures should be revised to give the challenger an automatic right to appeal to the NARB (at present the advertiser has the automatic right, but the challenger must seek permission). A slight majority of the group were in favor of this change, while some members argued this would be unfair to advertisers that had successfully defended their advertising, according to the report.

A significant topic of discussion by the group was whether the current rule permitting advertisers to continue challenged advertising pending an appeal

of an NAD decision should be revised to require that challenged advertising be discontinued or changed. While the majority of the working group agreed that the current process is subject to abuse, including the filing of appeals to extend challenged advertising, the group did not reach a consensus about better options.

## Post-Review and Compliance

For the final section of the report, the working group considered compliance issues. In general, the group concluded that the NAD should continue its case-by-case approach to compliance proceedings (rather than adopting a concrete compliance time frame).

In circumstances wherein new factors call the underlying decision into question, the report recommends that advertisers be allowed to offer new evidence in support of a claim previously found to be unsubstantiated. New factors may include supplemental testing or product revisions, the report says. In addition, the report recommends that the NAD consider allowing advertisers to petition the chair of the NARB for permission to appeal a compliance ruling in exceptional circumstances.

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