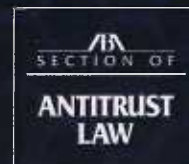




**SELF-REGULATION OF ADVERTISING  
IN THE UNITED STATES:  
AN ASSESSMENT OF THE NATIONAL  
ADVERTISING DIVISION**

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



**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.

**Table of Contents**

	<u>Page</u>
Foreword .....	i
Executive Summary .....	iv
WORKING GROUP REPORT .....	1
I. INTRODUCTION .....	1
II. ANALYSIS & RECOMMENDATIONS .....	2
A. <i>History and Mission of NAD</i> .....	2
1. Funding .....	4
2. Monitoring .....	6
3. Additional Programs .....	7
B. <i>Bringing a Complaint</i> .....	9
1. Jurisdiction .....	9
2. Confidentiality Procedures .....	10
3. Content and Format of Complaint and Briefs .....	11
4. Identification of Claims .....	12
5. Administrative Closings .....	12
6. Private Settlements .....	13
C. <i>Presenting the Case</i> .....	14
1. Burden of Proof .....	14
2. Consumer Surveys .....	16
3. Briefing Format .....	17
4. Counter-Challenges .....	18
5. Timing & Extensions .....	19
6. Meetings .....	20
D. <i>The Decision and Press Release</i> .....	21

**Table of Contents**  
**(continued)**

	<b><u>Page</u></b>
1. Form and Length of NAD Decisions .....	21
2. Online Archive Limitations .....	23
3. Transparency of NAD’s Consultation with Outside Experts and Reliance on Material Information.....	24
4. Timing of NAD Decisions .....	25
5. Expedited Review Process.....	26
6. Simplifying the Advertiser’s Statement.....	27
7. Dissemination of Decisions and Alternatives to the Press Release .....	27
E. <i>The Appeals Process</i> .....	29
1. The Role of NAD in the NARB Process .....	29
2. Advertising During the Pendency of an Advertiser Appeal .....	30
3. The Right to Appeal.....	31
4. Composition of the NARB Panel.....	32
5. The Briefing Process.....	32
6. Standard of Review.....	33
7. The NARB Decision and Advertiser’s Statement .....	34
8. Compliance .....	34
F. <i>Post-NAD Review</i> .....	35
1. Timeframe for Compliance.....	35
2. Procedure for Compliance Proceedings.....	35
3. FTC Referral Process.....	38
4. Risk of Class Action Litigation.....	40



**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.

John E. Villafranco  
David Mallen  
Amy R. Mudge

**WORKING GROUP MEMBERS**

<b>Name</b>	<b>Affiliation</b>
Farah Ahmed	Personal Care Products Council
Elizabeth Anderson	Personal Care Products Council
Vildan Altuglu, Ph.D.	Cornerstone Research
Lauren Aronson	Manatt, Phelps & Phillips, LLP
Neil Austin	Foley Hoag LLP
Catherine Bate	Miller Thomson
Jessie Beeber	Venable LLP
Andrea Bernard	Colgate-Palmolive Company
David Bernstein	Debevoise & Plimpton LLP
Jill Bollettieri	General Mills, Inc.
Roger Colaizzi	Venable LLP
Bruce Colbath	Sheppard, Mullin, Richter & Hampton LLP
Christopher Cole	Crowell & Moring LLP
David Conway	Venable LLP
Barry Cutler	Baker Hostetler LLP
Shalini Dogra	Outlook
Daniel Edmondstone	McMillan LLP
Dina Epstein	Crowell & Moring LLP
Kathryn Farrara	Unilever United States, Inc.
John Feldman	Reed Smith LLP
Nancy Felsten	Davis Wright Tremaine LLP
Christopher Fitzpatrick	Smith, Gambrell & Russell, LLP
Michele Floyd	Sacks Ricketts & Case LLP
Linda Goldstein	Manatt, Phelps & Phillips, LLP
August Horvath	Kelley Drye & Warren LLP
Jorge Jaeckel	Jaeckel/Montoya Abogados
Rick Kurnit	Frankfurt Kurnit Klein & Selz PC
Andrew Lustigman	Olshan Frome Wolosky LLP
David Mallen	Loeb & Loeb LLP
Michael Mallow	Sidley & Austin
Limor Mann	Colgate-Palmolive Company
Donnelly McDowell	Kelley Drye & Warren LLP
Catherine Miller	Sprint Corp.
Christine Miller	Patterson Belknap Webb & Tyler LLP
Claudia Montoya	Jaeckel/Montoya Abogados
Amy Mudge	Venable LLP
James Musgrove	McMillan LLP

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

Lynn Neuner	Simpson Thacher & Bartlett LLP
Rosemary Orr	Unilever United States, Inc.
Char Pagar	VLP Law Group LLP
Ken Patel	Procter & Gamble
Kenneth Plevan	Skadden, Arps, Slate, Meagher & Flom LLP
Beverly Porway	Euro-Pro Operating LLC
Ron Rothstein	Winston & Strawn LLP
Gregory Sater	Venable LLP
Jeremy Schachter	Kilpatrick Townsend & Stockton LLP
Terri Seligman	Frankfurt Kurnit Klein & Selz PC
Jeanne Siebert	Sun Products Corp.
Norman Simon	Kramer Levin Naftalis & Frankel LLP
Jeffrey Smith	Comcast Corp.
Rosa Son	Johnson & Johnson
Rachel Straus	Sidley & Austin
John Villafranco	Kelley Drye & Warren LLP
Maria Votsch	Sprint Corp.
Svetlana Walker	The Clorox Company
Chad Wiegand	Nature's Way Products, LLC
Lawrence Weinstein	Proskauer Rose LLP
Ross Weisman	Kirkland & Ellis LLP
Clifford Wilkins	Colgate-Palmolive Company

# ***SELF-REGULATION OF ADVERTISING IN THE UNITED STATES: AN ASSESSMENT***

## **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.<sup>1</sup> The Group’s findings and recommendations on the foregoing topics are summarized as follows:

---

<sup>1</sup> 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.



## ***SELF-REGULATION OF ADVERTISING IN THE UNITED STATES: AN ASSESSMENT***

### **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.

## ***SELF-REGULATION OF ADVERTISING IN THE UNITED STATES: AN ASSESSMENT***

- 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