

The Levine Legacy: 20 Years and 2,600 Decisions – Andrea Levine Takes a Look Back

Twenty years ago, I appeared at NAD's offices armed with 7 years' experience in the NYC court system defending poor people from the consequences of "trickle down" economics, a decade on the front lines of multi-state consumer protection advocacy as an Assistant Attorney General for the State of New York, and a stint as Special Counsel for a Medicaid Managed Care Company. The advertising industry was not thrilled to have a regulator take over as NAD's Director, the staff wasn't thrilled to have someone new come in with marching orders to raise the bar, and I (completely overwhelmed) knew I wasn't in Kansas anymore. So where to begin?

It made sense to start by getting a handle on NAD precedent—but that was easier said than done. NAD's prior decisions existed only in paper format and those papers had been scattered to the winds. So I forged ahead into case handling virtually blind as to what NAD had held before. Without the benefit of precedent I did what any good lawyer would do—I turned to the law. And that turned out to be genius. There were well-established rules regarding the commercial speech limitations, the need for substantiation, regulatory definitions of terms (like the use of "fresh" in describing foods) and reams of guidance from the FTC on the sufficiency of disclosures, competent and reliable scientific evidence, deceptive pricing, environmental marketing claims and the newly emerging enormous challenge of the Internet.

In the early years, as a flow of decisions began to be published, everyone relaxed; self-regulation began to emerge as a harmonizing voice with the regulatory world and the courts and leave behind its early reputation as an arbitrary and superficial forum. Staff development became my highest priority – hiring the best people we could get, training them, mentoring them to become highly skilled and respected members of the advertising bar. Their decisions became more detailed, more thoughtful, more scholarly, providing guidance well beyond the resolution of a dispute between two parties. As the decisions became more substantive and valuable it became increasingly important to collect them all together and make them searchable and accessible. Enter Bruce Hopewell, then-executive director of the National Advertising Review Board, the mastermind behind what is now one of NAD's greatest assets: the online archive of "NAD Jurisprudence," the largest compendium of decisions on claim substantiation and advertising law in the country.

As the routine handling of cases settled down, and with competitors bringing a steady stream of challenges in industries that had embraced voluntary self-regulation, it was time to expand NAD's reach to new advertisers and product categories. So we began to target consumer trouble spots through our monitoring efforts. The Atkins craze had reached a fever pitch and every product, regardless of its nutritional content, was on a quest to position itself as "low carb." Cookies promised "zero sugar carbs," pastas "no net carbs" and dietary supplements touting "carb absorbing" or "carb blocking" superpowers

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abounded. The Food and Drug Administration quickly set about rulemaking to define these terms – but as is so often true, the regulatory world could not begin to keep up with the marketplace. So fleet of foot, NAD stepped into the breach and started bringing cases and drawing some bright lines. We may not have had regulatory definitions but there was nothing to stop us from analyzing what messages were being conveyed by these claims and whether advertisers could support them. And lo and behold, as soon as we began deciding cases, competitors started challenging each other's claims. The craze was long over before a single definition was ever drafted.

Over the years, NAD has never shied away from even the most daunting of cases. When the Natural Resources Defense Council challenged the Nuclear Energy Industry's "environmentally friendly" claims for nuclear power plants, NAD took it on. While we agreed that it was true that nuclear power plants do not themselves generate greenhouse gasses, the coal they burn to produce the uranium-rich fuels needed to power the plants pollutes the air and the radio-active waste they produce will be a pox on the earth for eons—so "environmentally friendly" is not the most accurate descriptor for nuclear energy. When Compassion Over Killing challenged the truthfulness and accuracy of the "Animal Care Certified" seals being used on egg cartons nationwide, NAD took it on. While it is clearly not NAD's role to establish what are appropriate conditions for egg laying hens, if you claim to treat your hens humanely – then packing them in so tightly they can't spread their wings, de-beaking them so they cannot peck each other to death and keeping the lights on 24/7 so they never stop producing eggs – probably won't cut it.

Looking back over two decades it is hard to discern any clear pattern regarding the type of products, legal issues or the sheer number of cases that came before us. Certainly during tougher economic times as competition heated up, denigrating claims and value proposition marketing increased. Similarly, product innovation often sparked an increase in challenges in a particular product category. For example I will never forget "the foot fungus summer," when advertisers of athlete's foot products filed 6 challenges in two weeks. For decades, athlete's foot had proved very difficult to cure because the products available had to be applied for 30 days to effectuate a cure and people stop applying it as soon as their symptoms were relieved. A new product was developed that only had to be applied for 7 days, but it, too, took 30 days to effectuate a cure. Competitors decried that the company was making unfounded 7-day cure claims and the innovator challenged its competitors' claims of instant symptom relief. After five (very hard) months of work, NAD's attorneys untangled the mess and I am happy to say we have not had a foot fungus case since (although toenail fungus has recently crept on to our docket.)

Looking ahead, with advertising metamorphosing into so many different formats that appear in new and rapidly evolving media, I think identifying "what is advertising" is going to be the biggest challenge. Simply educating paid influencers and bloggers about the need to clearly identify their postings as paid promotions is not nearly enough. By requiring these disclosures, we change what appear to be simple expressions of opinion (protected speech) into commercial speech, which by law must be truthful, accurate and not misleading. And figuring out how to have any meaningful impact on the information produced by hundreds of thousands paid endorsers— much less ensuring that the content is truthful and accurate—seems, right now, to be a herculean task. So I pass the torch to a new generation who has the energy and the technical savvy to take this on and I wish them well.

It's hard to believe that 20 years have passed and that my time at NAD is drawing to a close. This job has been a true labor of love – endlessly interesting, intellectually challenging and great fun. To all of you who have worked so hard with me to build NAD into the extraordinary forum that it is today, thank you. I could not be prouder of the more than 2,650 decision legacy or the fantastic and brilliant team that I leave behind. Andrea "out."