

Self-Regulation: The Advertising Industry's Commitment To Truth And Substantiation In Advertising

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The Editor interviews Ronald R. Urbach , Partner, Davis & Gilbert LLP, and C. Lee Peeler , President and CEO, the National Advertising Review Council.

Editor: Mr. Urbach, would you tell our readers something about your professional experience?

Urbach: I am co-chair of Davis & Gilbert's advertising, marketing, promotion and media department and have been an advertising lawyer at D&G for 30 years. From concept to distribution, we represent advertisers and their advertising and marketing agencies in all contractual, intellectual property, media and business law issues that relate to advertising, media, promotion and marketing. In our regulatory practice, we interact with the Federal Trade Commission, state regulatory agencies, state attorneys general and the industry's self-regulatory bodies - NAD, the National Advertising Division of the Council of Better Business Bureau ("CBBB"), CARU, CBBB's Children's Advertising Review Unit, and NARC, the National Advertising Review Council.

Editor: Mr. Peeler, you had a distinguished career at the Federal Trade Commission prior to joining National Advertising Review Council, NARC, last September. Would you tell us something about your FTC experience?

Peeler: I was at the FTC for 33 years, a period that saw the agency develop from being called the "Little Old Lady of Pennsylvania Avenue" because of its ineffectiveness in the 1960s, to being known as the "Tyrannosaurus Rex of federal regulatory agencies" during the 1970s, to becoming one of the government's most respected consumer protection institutions in the 1990s. With respect to advertising, the FTC developed a unique perspective during this period. In its consumer protection mission it had an aggressive enforcement program to ensure truthful and substantiated advertising claims, while at the same time its competition mission recognized that aggressive advertising is fundamental to making markets work well. That dual role enables the FTC, in my opinion, to act as an informed regulator of advertising.

I began to follow the self-regulatory mechanisms in 1982. In time, I became head of the FTC's Division of Advertising Practices, the place to which all the referrals from the advertising self-regulatory bodies are filed. I was always impressed by the quality of the program I saw, and I jumped at the chance to lead the self-regulatory program when it was offered.

Editor: Please tell us about NARC.

Peeler: The NARC is the nation's premier advertising self-regulatory mechanism. It is a coalition of three major trade associations, the American Advertising Federation, the Association of National Advertisers and the American Association of Advertising Agencies. Together with the Council of Better Business Bureaus, they formed the NARC in 1971 in response to a growing tide of consumerism and an FTC-launched advertising enforcement offensive. The NARC programs have evolved into an outstanding example of the advertising industry's commitment to truthful and substantiated advertising. These programs show that the advertising industry not only says that it is committed to promoting truthful and accurate advertising, but it has put into place an industry-sponsored mechanism to ensure that its members meet that commitment. One FTC Chairman referred to the NARC programs as the "gold standard" for effective industry self-regulation.

Editor: And NARC's mission and goals?

Peeler: There are three key elements of our self-regulatory mission: to preserve the integrity of the advertising process by ensuring that advertising is truthful and substantiated; to provide a forum for the discussion of the crucial issues that come before the industry, like advertising to young children; and to provide a means for the expert resolution of advertising disputes. The latter is a key role. It provides an expeditious and less burdensome alternative to litigation. And although participation is voluntary, well over 95% of our decisions are complied with.

Concerning goals, when I first arrived at the NARC, I had lunch with an NAD attorney. He said our goal should be to be the best advertising self-regulatory organization in the world. That seems exactly right to me.

Editor: I understand you are also Executive Vice President, National Advertising Self-Regulation, of the Council of Better Business Bureaus. Would you tell us about your role there?

Peeler: The CBBB's role is to administer the program. Going back to 1971, the advertising industry realized that to be most effective and most credible self-regulation had to have a measure of independence from the industry it regulated. They wisely went to a neutral third party with a reputation for integrity and trustworthiness, the CBBB, and asked them to house this function. My role, in effect, is to ensure that both the advertising industry and the public are aware of many benefits of self-regulation.

Editor: Why is self-regulation so crucial to media, marketing and advertising in this country?

Urbach: It shows that the industry has the ability to police itself and to deal with those who do not act responsibly. It is a way in which the industry can impose policy changes so that, as it reacts to changing media and technologies, it does so as an industry and not on a company-by-company basis. It is also a way to show that there is an alternative to governmental regulation. And it is more effective than governmental regulation because it has the capacity to react more quickly to changing circumstances.

Peeler: Self-regulation is inherently more agile and flexible than government rules which often adopt a "one-size-fits-all" approach to dealing with problems that may vary significantly from company to company and from industry to industry. It also brings the accumulated expertise of the industry to bear on the best, most market-oriented, approach to dealing with a particular issue. It is really a mistake not to step forward with an informed self-regulatory solution to many problems.

Urbach: There is always the possibility for competitors to take their dispute to federal court, which is time consuming and expensive. The alternative, resolution through the self-regulatory process, is respected because it leads to a resolution without recourse to litigation, is accomplished very quickly and inexpensively, and is perceived as fair and objective.

Peeler: One of the most significant features of the NAD process is that each of its decisions is publicly reported. That transparency serves to validate the entire self-regulatory process. Knowing that there is an independent process in place that, from start to finish, is transparent, enables the government to direct its limited consumer protection law enforcement resources elsewhere.

There is also an important level of accountability in the process. Although we have very high voluntary compliance rates, from time to time a party will decide not to follow an NAD decision. Referrals from the self-regulatory system are made to the FTC. The government is committed to encouraging compliance with the self-regulatory process. That encouragement doesn't always occur through a formal case or litigation. Sometimes a reluctant participant might receive a call from an FTC staff attorney to the effect that a civil investigative demand - a formal name for an FTC subpoena - is about to be issued, and that often is sufficient to bring them back into the self-regulatory process.

Urbach: At the end of the day, the success of the process has to do with people. The reason why the NAD has engendered such respect is because of the experience, expertise and integrity of the people who work there. I think Lee Peeler is a good example of the image that the NAD projects to the industry and to the government.

Editor: Television has evolved to being at the center of how we communicate. Would you tell us about self-regulation in this industry?

Urbach: Originally, the National Association of Broadcasters had a system in place that centralized the clearance of television advertising before airing. Today, the major networks each have departments dedicated to clearance, where they implement their established guidelines. Others follow generally accepted industry guidelines. Ultimately, there is an obligation to act in the public interest, which is reinforced by FCC license.

There are concerns unique to television - public taste, appropriateness of content for a particular audience, as well as business issues - a network may decide not to accept a commercial featuring elements of or talent appearing in a competitor's show.

Let me add that, as television becomes less important to marketers with the advent of new media, there is an opportunity for the NAD to become more actively involved in this area. At the moment, there is no dominant regulatory force for new media.

Editor: Speaking of which, what self-regulatory structure, if any, exists with respect to the Internet?

Peeler: One of the big issues for advertisers on the Internet is information collection, and that raises a variety of privacy issues. The Children's Advertising Review Unit was one of the first bodies to address children's privacy issues on the Internet in the mid 1990s, and the experience gained there helped in fashioning workable legislation. Similarly, the truthfulness of claims is just as much of an issue on the Internet as any other media. Both the government and self-regulatory bodies are focused on it. Most recently, the Council for Responsible Nutrition, a trade association for dietary supplements manufacturers, came to us and agreed to fund a full-time attorney to examine dietary supplement ads, which are often found on the Internet. We have a similar program with the Electronic Retailing Association, which also supports a self-regulatory program to evaluate the truthfulness of "core claims" in national direct response advertising.

Urbach: The pace of change with respect to interactive marketing is so rapid that it is difficult to predict what is going to occur - both with respect to governmental and self-regulatory initiatives - other than to say a critical component across all new media marketing will be self-regulatory.

Peeler: One challenge for self-regulation is to keep pace with changes in the media environment. Just recently we had our first decision involving an advertisement - a product demonstration sponsored by a manufacturer - that ran on YouTube. As we move from a three-network market to one with a variety of outlets, our self-regulatory decisions provide important guidance on the application of traditional principles to claims in these new media. Advertisers, product development specialists and the media can review them to determine what is appropriate and what is not.

Editor: Is this collaborative relationship, between the industry and the FTC and among those who constitute the industry, something unique?

Urbach: These relationships have evolved over time. In the early 1970s there was some perception at the FTC and with some consumer groups, that advertising was bad. Over time, this perception yielded to a greater degree of sophistication as people came to the agency with an economic model that demonstrated that truthful advertising served to improve consumer welfare dramatically; that such advertising pointed consumers to better products. This led to a confluence of interests.

There are difficult issues, however. Products that are advertised to children are a case in point. A group of large food advertisers have announced that they are going to change the foods they advertise, something that the government encourages. This development may reflect the increasingly important influence that the self-regulation movement has come to have in recent years.

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