

Consumer Perception Surveys in NAD Cases

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Last Friday, our friend August Horvath of Foley Hoag presented at an Advertising Self-Regulatory Council (ASRC) conference on consumer perception surveys. Among the many interesting observations made by August were the following:

- *Over a 5+ year period, June 2013 to present, only 36 cases or 8 percent of total NAD cases, included reference to a consumer perception survey. I would have expected it to be slightly higher.*
- *42 surveys were submitted in support of the challenger and 10 were submitted by the advertiser. This distribution makes sense, given that the challenger has the time to design and field a survey prior to filing, whereas the advertiser must submit its response in accordance with the briefing schedule.*
- *In 28 percent of cases decided, the NAD mentioned “the absence of consumer perception evidence,” suggesting that NAD would be receptive to more extrinsic evidence as it considers cases involving implied claims. Of course, this could simply be boilerplate introduction for the case reviewer’s unaided interpretation of the message being conveyed.*
- *Where the NAD has rejected a survey, the most-cited reasons have been leading closed-ended questions, issues with the control question or improper control stimulus, and questionable coding of open-ended questions.*
- *In assessing surveys, NAD frequently states that (1) the control stimulus should closely resemble the test stimulus, (2) test results from one ad will not be applicable to another ad, even if claims are substantially similar, (3) when testing an ad, it should be presented in the same context as it is viewed in the marketplace.*
- *Surveys that focus on the issue of materiality or whether a claim is puffery are of little use at NAD. The former is of no surprise, given that materiality does not enter in to an assessment of whether a claim is truthful or accurate, but the finding on puffery was unexpected. I would have thought there would be more instances where a party attempted to support its assertion that a claim was subjective and incapable of measurement (puffery) with extrinsic evidence.*

In addition to August’s presentation, we heard from survey experts Daniel Ennis, Hal Poret, and Joel Steckel, as well as NAD attorneys Annie Ugurlayan, Hal Hodes, Martin Zwerling, and Kat Dunnigan, who touched on generally accepted survey structure and principles, common flaws, and recent NAD cases involving consumer perception.