



Podcast Transcript

AD Nauseam: NAD Trips and Tricks 2026

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Corbett: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Connor Corbett, your new host of AD Nauseam, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives.

On today's episode of AD Nauseam, Amy and Daniel share practical tips for navigating challenges before the National Advertising Division, from selecting the right track and building an effective strategy to presenting substantiation and managing confidentiality concerns. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel for this week's episode.

Kaufman: Welcome to AD Nauseam, everybody. Amy, your big summer trip is just around the corner, and we really want to thank you for squeezing in a podcast episode for our wonderful listeners before saying bon voyage to you.

Mudge: Thank you so much, Daniel. Yes, my family and I are headed to a Mediterranean cruise involving stops in Turkey and Greece, Croatia and Italy. We are very excited, but I think as I mentioned last episode, a little trepidatious. We're not quite sure the Mudges are cruise people, but your good experience in part has inspired me. We do have a long flight to get over there and the Mudges, we are coach flyers, not first or even business class. So, I was hoping you could give me some recommendations for airline movies to pass the time.

Now, I do I have to tell you, there is something about being in the clouds that makes me extra sentimental. I do not know why, but one time I was going to Africa and I watched the episode of The Office where Pam and Jim got married, and I literally was bawling. And the same thing happened some other trip when I watched the World's Greatest Showman. Not something I would think you'd be like pulling yourself off the carpet, but there I was. I need nothing with pulling on your heartstrings because I will tear up, but what you got for me?

Kaufman: So, I'll give you two, though I will say I think both of them have the potential of making you tear up at moments. First one with Hugh Jackman also, and I may get a lot of flack for this, but The Sheep Detectives was an awesome movie. Really loved it. Some very touching moments, incredibly well done. So, if that is streaming yet, highly recommend it. And the second one, definitely my favorite movie of the year so far, Project Hail Mary with Ryan Gosling. Really well done. Again, it is not a sci-fi geek movie, but it is space-based, but really well done and funny and touching and smart and exciting. All that stuff you want to have in a movie on a plane.

Mudge: Okay, I 100% agree on Sheep Detectives. Frankly, dear listeners, if there is anyone out there who disagrees with that, just stop listening to this podcast because we are Sheep Detective positive here. It was the closest thing I'd seen to Babe, which I think was, yeah, I guess they come out really early on. I will say I have a much lower tolerance. I can watch really bad movies on the airline and still enjoy them. So, I actually try to watch movies I never see in the theater.

Kaufman: I will confess, Babe is one of my top five all-time favorite movies, period. I love that movie so much.

Mudge: Daniel, this is why you, one of the many reasons why you and I are so simpatico. Amen to that. Alright, any other travel tips for me, either for long flights or for cruises and for our dear listeners as well?

Kaufman: Oh gosh, everyone says hydration, but then you don't want to use the bathrooms on the airplane. So, I just don't know what to say. I love that the Mudges are in coach class. I love that if there is a Motel 6 to be found, the Mudges will be at a Motel 6 as well. But no, it is out. The cruise sounds wonderful. You're going to

have a great time and very quickly forget about the torment of the flight. So, I hope you and the family have a wonderful time there.

Mudge: From your lips to God's ears. That is all I have to say. Alright? Now, I know we are waiting for some really exciting FTC decisions. I think they're going to come out while I'm gone. So, we might do an episode or two without me, perhaps engaging our resident professor, Randy Shaheen.

Kaufman: Yeah, no, look, Supreme Court term is ending soon. And as of this recording, we have not yet seen the decision in the case involving the president firing Commissioner Slaughter from her position as a commissioner at the FTC. This is a really big decision that is going to address the continued viability or lack of viability of Humphrey's executor and has a lot of potential to affect what the FTC looks like now and for decades in the future. So that is going to be a really big case, and I am looking forward to reading it once it comes out.

But today, we thought we would explore some tips and tricks for being at NAD. It is such a great forum for self-regulation in the ad industry, and it's been around for over 55 years. Of course, Phyllis Marcus came to AD Nauseam when she had just taken over as director, but it's been well over a year now for her, and we thought it'd be a good episode to talk about what is new there under new management and what is going on that advertisers should be aware of.

Mudge: Daniel, I can talk about NAD all day long.

Kaufman: I am not surprised to hear that, Amy. But so far, so almost halfway through 2026, and we do have some preliminary stats that NAD recently shared. So about 40% of the cases are regular track and 20% each for monitoring, compliance, and SWIFT cases. Complex challenges are pretty rare anyway and are down this year, but that might change. We're also seeing the most cases in the health and wellness space, followed pretty closely by Telcoff, and also multiple cases in the pet food, household products, and cosmetic spaces. And some themes we see this year are cases involving number one claims, puffery claims, and also exploring the age-old issue of what is and is not advertising.

Mudge: I was surprised, Daniel, that not more of the cases were SWIFT. It feels like companies are getting smarter and smarter about how to use the expedited process. I think NAD is also getting smarter about what works and what doesn't. Of course, it is a track that is reserved for single claim cases where the evidence is not complicated and where NAD really has the ability to issue a decision in 20 business days. But that cuts down the process by months and months. So sometimes having a narrower focus can really be worth it. And it really allows companies to challenge newer claims or even new product entrants far more quickly.

Kaufman: So, what I wondered, how useful is it to get a decision in a single claim area, particularly where the filing fee for SWIFT cases is a premium price. You pay more for speed, even if the decision is narrow.

Mudge: Well, smart marketers are looking at picking exemplar cases, things to use as a test case or even a warning shot. And NAD will issue a narrow decision that will focus on the one claim you challenged, but it will give you leverage really to follow through on cease and desist exchanges, to let them know, hey, the same findings here are going to apply to other claims as well. So, you may be able to get course correction sooner than if you've gone through the six months or so with a full-blown case. And SWIFT can also be really useful to get a quick decision from NAD in a new area. For example, P&G brought several SWIFT challenges recently over the use of the TikTok affiliate program and really got NAD to issue some guidance that is important for how affiliates disclose their connections to brands in this newer media more generally.

Kaufman: So, at the outset, there is a lot of strategy that may come into play. Now for SWIFT, there is of course a threshold determination by NAD as to whether the case is appropriate for a 20-day review, particularly if they believe they really can decide the case in that abbreviated time. Now, after they open a case in SWIFT and alert the advertiser, they have a short period of time in which to contest SWIFT jurisdiction. Now, in the early days of SWIFT, some advertisers would say they planned to do a survey or that they had complex evidence, and NAD has gotten comfortable allowing more cases into the SWIFT process with some tweaks to the process. And now they're reserving the right to ask for a second written submission from each party. But the bottom line is for the process to work, it has to be quick, but it also has to be fair. And you don't want to recommend discontinuing truthful advertising in a rush to decision, of course.

Mudge: Exactly. But they are getting a really good sense of what can and can't be done in 20 days with more experience. So, for example, when the SWIFT Trek started, it was supposed to be only for express claims. And there was a lot of initial fighting over is this an express claim or an implied claim. But I think NAD found that was really too narrow. NAD is really good at quote unquote, stepping into the shoes of the reasonable consumer and determining when a claim is reasonably implied. So, if it is a claim the advertiser didn't intend to make, probably they don't have substantiation for it. And that can be decided fairly quickly.

For example, we had a case where the advertiser said beer shouldn't taste like water. We said that was an implied taste claim that the competitor beer tasted like water. And for that, we said they need a consumer taste study. The advertiser said, come on, it is funny, it is humorous, it is puffery. Nobody would take that seriously. So that really was the issue. NAD found there was a claim, and because the advertiser didn't say, hey, got to go to the regular track because I have a taste test, it ended up staying in SWIFT. And because NAD found that a claim was being made, they recommended that the ad be discontinued. So, if there is any substantiation that needs to be analyzed, and that is more complicated than, say, market share data supporting a number one claim, then SWIFT is not the right track. But there is a lot that can be accomplished in that 20-day look.

Kaufman: So, what about the complex track? That was started to better handle cases where the substantiation is more complex, such as cases involving multiple

clinical trials. It was contemplated as a longer track with longer briefing where NAD and the parties could be more deliberate. It hasn't been widely used. Any thoughts on why that is the case?

Mudge: I just don't think the parties really see the benefit of it yet. I mean, it costs more. If you're the challenger, you don't want to both pay more and have the case take longer. Okay? Now the advertiser has the decision to move a case in the complex. So, NAD has been more active in terms of telling challengers when they think they need to streamline a case or when they think they need to move it to complex. But I think we're still really seeing growing pains here.

Now, we have used complex where there was a claim that the advertiser was using across a line. So, in this case, I'm thinking of whether the cosmetic products were natural, whether they were simple. And this did include multiple products, shampoo, deodorant, different cosmetics, but the claims were all the same. And I think that is an appropriate use of a complex track.

Now, what I'm starting to see it used for, and I don't think is appropriate is basically bringing multiple different challenges that you smush together, challenging different claims for different products. Frankly, I think that is a misuse of the process. But like I said, it is a work in progress. And just like they flexed and morphed SWIFT, I think NAD is going to do the same for complex. NAD in its current iteration is far less rigid than it once was and is really open to always exploring improvements but also being mindful that the process has to work for both challengers and advertisers. So, I'd say don't sleep on complex just yet, but it is certainly not very common.

Kaufman: Yeah, I really like that thoughtful evolution we seem to be seeing. And we've seen some recent rule changes and practice changes on how evidence needs to be presented. In particular, NAD seems to be asking for more detailed substantiation. So old test reports, not summary reports and test methodology, not explanations presented via company declaration. And there have been some changes to when and how companies can present evidence confidentially and not share with the other side. And let's talk about this a little bit on how the evidence is presented. I'm not really surprised about this at all, being at the FTC for so many years, of course we would ask for every document about a test, the reports, the drafts, even the raw data. But of course, there is no discovery at NAD and the process is limited to what each side affirmatively puts in.

Mudge: Indeed. And, I think in years past, advertisers would work hard sometimes to put in as little as possible to support the claims, but not wanting to overly complicate a case and also, not wanting to share more than necessary with a competitor. And I get it, but in a nutshell, there have been several cases recently where NADs decided against an advertiser because they didn't feel they had the ability to really assess the validity of the testing.

So, it is becoming increasingly important to submit, for example, a full test methodology and the full test report. Summary assessments or top lines or explaining what happened in a test through a company declaration are really

risky. And as the challenger, you should push for this, or you should work to really show NAD that the advertiser has not substantiated their claims with such abbreviated submissions pointing out gaps or questions that remain on _____.

Kaufman: So, let's go back to that issue of confidentiality. Now, what if the testing is something the advertiser designed and is particularly proprietary or they just don't want to share it? There is a process where materials can be submitted only to NAD as long as there is a robust description of the testing for the challenger. Now, in earlier days, NAD really limited the use of confidential submissions. Now, the current trend is to defer to the advertiser and allow them the benefit of the doubt when they say that something is confidential but this has been really frustrating for challengers who didn't have the ability to meaningfully respond. And challengers really can help NAD to evaluate the evidence.

We had a recent case involving hair color where the advertiser didn't want to produce any test methodologies, only results, and we were not able to give our views as to whether what they did was fair and reasonable and representative, we were able to work it out where we got more robust summary information, but NAD now reserves the right not to credit confidential submissions if the challenger can't substantively weigh in. And this is going to open up a new can of worms to fight over, but it seems to be a fair outcome if the challenger can articulate what they are in fact missing and why it matters. Now, of course, the burden at NAD is similar to the burden in enforcement actions. The advertiser has the burden to substantiate the challenged claims rather than the challenger proving the claim is false. That said, we usually suggest the challenger submit any evidence it has to help NAD conclude that claims are misleading and not supported.

Mudge: And this is also part of the initial strategy for a challenge, not just what track you're in. You don't want to overly complicate things, but you did not, and you certainly don't want to turn the focus of NAD on the quality of the challenger's evidence, whether where it should be, it is on the advertiser's substantiation. But our focus is always on whether the advertising is false or misleading. And it really shouldn't be about trying to game the system. So generally, I think putting in what you have as a challenger that will help NAD, I think is a really important part of being a repeat player in NAD because the quality and integrity of the system really does matter.

Kaufman: It is a balance, of course, because look, in any given challenge, you are in the moment and you want what is best for your client at that moment. But the companies that rely on NAD and the lawyers who appear there regularly do need the system to be trustworthy for sure. But let's pivot and talk a bit about what happens after a decision comes out and the confidentiality obligations both parties have.

So, during the pendency of the case, both sides do commit to keeping the fact that a challenge has been filed and is pending in confidence. That is pretty easy, but let's talk about what happens after NAD issues their decision.

Mudge: Well, the advertiser gets a copy of the decision first and then needs to let NAD know its intentions. Will the advertiser agree with NAD's recommendations? Will the advertiser appeal to the NARB, or will the advertiser not agree and accept a referral to a government agency? And then after the advertiser adds what is known as the ad statement, then it goes to the challenger. And during this time, everything is still confidential. But now, NAD writes a press release and shares it with both parties and lets each side know when it will be published.

Kaufman: And of course, once a decision is published, the cat is out of the bag and it is no longer confidential. But both sides still have obligations not to use the decision for commercial gain. And what this means is neither side should be issuing their own press releases. Neither side should share the decision or the press release with customers. Basically, all a party can do is respond to a request for comment from the press. And even then, really needs to be careful about not misrepresenting the decision.

Mudge: And it is really important that potential challengers understand this up front. What NAD will get you is a determination on whether a claim or the claims you've challenged are true and not deceptive or whether there are issues. But in most cases, an advertiser will modify advertising in line with any NAD recommendations. And that is what you get. And that is a big deal. What you don't get are bragging rights. So, the ability to use an NAD case to try to improve your shelf space or anything like that. And really making sure your lawyer clients know this so they can make sure their marketing clients know it is key. And really having that communication to the marketing and the sales team and the comms team is a must.

Kaufman: Yeah, and if there is a breach of this expectation, NAD will actually issue a separate press release detailing that there was a breach and they're very disappointed in the party that didn't uphold these obligations.

Mudge: And sometimes, depending on the nature of the breach, there can be even additional consequences. In one case we had, the challenger actually sent the decision to key customers during the time of year when shelf space was being negotiated. Now, that was huge. The advertiser was appealing a portion of the decision, and NAD decided to remove the challenger from the proceedings so they didn't get to participate in the appeal.

But I think we all play the long game at NAD as well, and companies don't want a reputation for flouting the rules. Your reputation matters there over the long haul, and being a company that respects the process is important. One other thing happened to me recently I wanted to flag, while the parties have a duty of confidentiality, NAD can and does promote its work. And we had a client that didn't fare as well as they'd hoped in an action. And a few weeks after, they were at an industry conference where NAD was on a panel and discussed their case. And the company really felt blindsided by that. And it was a really good learning lesson for me. And it is something I'm going to make sure I prep companies to expect going forward. Surprises during, before, or after a challenge are things you want to help your clients avoid. I did raise it with NAD and I suggested you

might want to consider a cooling off period before discussing new cases at industry conferences. We'll see if they, what, if anything, they do with that. But it was a new learning for me as well.

Kaufman: Yeah, everyone is always eager to talk about the newest case that has come out. So, keep us posted on that. Okay, so we get through a case. And another thing about NAD is compliance with decisions. At the FTC, after a case is settled or after there is some court order in a consumer protection case, there is a whole division of enforcement that picks up the order and monitors it for compliance months, years, and even sometimes decades later. And they'll bring cases for order violations where appropriate. NAD is a self-funded or isn't quite up to having such a function and relies on challengers in cases and even other third parties to watch for compliance. And if an advertiser has not timely implemented promised changes, the challenger, or actually again, any third party, can ask NAD to open a compliance challenge. So, Amy, how does that all work?

Mudge: Currently there is no cost for this service. Usually, compliance challenges are initiated by a challenger, but not always. I've opened a few on behalf of competitors in the space who didn't bring the original challenge, but were still quite interested parties. And a party outlines in writing for NAD its concerns and then asks NAD to investigate. At that point, NAD takes over. There is no briefing back and forth. NAD works directly with the advertiser without consulting the challenger again to understand if the advertiser is in compliance, and if not, how soon they can get into compliance. And then ultimately, they'll issue a decision, which is posted on their database, not a new press release, but the fact of a compliance action is memorialized. Now, in the old days, there were lots of fights focused on packaging changes and how long these reasonably should take. But now I think we're actually seeing more and more compliance challenges opened earlier and earlier.

Kaufman: That makes a lot of sense. Look, in the era of digital advertising, ads are put up so quickly, so it seems they should be able to be taken down pretty quickly as well. And more and more challengers are expecting very quick updates to web and social content. Now, one thing that sometimes does surprise advertisers is the NAD expectation that an advertiser will look through older social posts and remove older content with the relevant claims. And this, of course, can be a long and arduous process. And we've wondered whether this is necessary because so few older social posts will get traffic. But the idea is if NAD is recommended that a claim be discontinued, there is an expectation that this really happened. And there is no statute of limitations at NAD. So, if a party challenges a claim that's been around for years and years, such as when P&G was challenged over whether Febreze eliminates odors, they have years and years of content to potentially edit or take down.

Mudge: Yeah, another bone of contention for compliance is often content that appears on retailer or other third-party websites or social platforms. And often advertisers would say they don't control these websites, so it shouldn't really be part of their NAD compliance obligation. And NAD has taken the position, I think rightly so, that the advertiser should at least make a stab and advise third parties of the

decision and the need to make the change. So basically, to make best efforts to have third-party assist with compliance. And this is true of influencer content or other third-party content as well.

Kaufman: Well, Amy, I hope we provided our listeners with some things to think about when considering NAD as an avenue to go after a competitor's advertising, which they don't believe is supported. So, if our listeners liked this episode, we may be back with some practical advice on FTC investigations as well. But let's sum up.

So, NAD is a great place to help discipline the market. Before filing a challenge, you need to think carefully through your goals and what will be a success, as this will help you decide if SWIFT or regular or even complex track makes the most sense for you. Also, part of the strategy is whether to put in affirmative evidence that a claim is false. This is something, again, to work through with your counsel. Generally, putting your best foot forward with an affirmative story is the way to go. Also, you want to focus on the quality of the evidence the advertiser submits. If it is in summary format or too much is redacted as confidential, this may form part of your argument as to why the advertiser has not supported the claims. And finally, look, make sure your clients understand confidentiality obligations and the limits of what they can do commercially with a decision in order to avoid frustrations on the back end. And with that, Amy, I hope you and the rest of the Mudgetts have a wonderful trip, and I hope all of our listeners are planning some fabulous summer vacations as well.

Mudge: Ciao, ciao, dear listeners, and we hope you'll come back later this summer for another issue of AD Nauseum.

Corbett: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in Ad Law, visit our Adventures in Law blog at www.adventures-in-law.com. You can check out all AD Nauseum episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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