

MEMORANDUM

TO: Howard Feller (Chair, Long Range Planning Committee & Section Vice- Chair)

FROM: Private Advertising Committee
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SUBJECT: **DRAFT** Private Advertising Litigation Committee 2013-15 Long Range Plan

DATE: November 15, 2012

The following is the proposed Long Range Plan for the Private Advertising Litigation Committee. The memorandum is organized as follows: (1) Committee overview, (2) Anticipated policy issues likely to arise over the next three to five years, and (3) long term proposals to strengthen the committee.

I. Committee Background

A. Scope of Current Charter

The Section launched the Private Advertising Litigation Committee three years ago as part of its commitment to expand its Consumer Protection offerings. The Committee is to devote our time to the substance and procedure associated with private litigation alleging false advertising or unfair or deceptive marketing practices. Our description on the PAL webpage summarizes our charter quite well:

The Private Advertising Litigation Committee (or “PAL”) is your resource for tracking and understanding false and deceptive advertising and marketing issues and litigation developments. Specifically, PAL focuses on competitor challenges under Section 43(a) of the Lanham Act, and State law false advertising and class action litigations. We will provide guidance on implementing compliance programs, educating marketers and marketing departments, how to work with lawyers and legal departments preparing for and anticipating possible litigation, and how to respond to false advertising by competitors and charges that your client’s advertising is false. Litigating these claims entrails mastery of discovery and privilege issues, consumer perception surveys and experts, and basic trial strategy and tactics.

B. Interaction with Other Committees

PAL has worked, and intends to work, closely with other committees in the Section. Our “sister” consumer protection committees are the Consumer Protection Committee (“CP,” which focuses on consumer protection regulation and enforcement) and the Privacy & Information Security Committee (“PRIS”). We are, and will remain, in close contact on all projects seeking to maximize resource efficiencies and expand the consumer protection content the Section offers. We co-sponsor events where it makes sense (e.g., has a privacy or data security angle for PRIS, a regulatory angle for CP and a private litigation angle for PAL).

We have also established a relationship with the other Litigation Committees, Trial Practice and Civil Practice & Procedure, and co-sponsor events related generally to litigation skills (e.g., class certification, expert work, etc.). For programing that relates to the substance of advertising law and relevant to counseling, we coordinate with the Corporate Counseling Committees. We also work with the Section’s substantive committees including offering on social media and web-based marketing with the Communications and Digital Technology Committee, programing related to consumer financial protection issues with the Insurance and Financial Services Committee, etc. In the next three years, we would like to continue these collaborations but also work with the International Committee as we focus on expanding the consumer protection offerings to include a global focus, similar to the broadening of scope and focus by the antitrust committees. It is a testament to how much SAL has embraced consumer protection that we are doing so much with committees with an historic competition focus. We have coordinated to a limited extent with the other ABA Sections, primarily the IP Section and its Promotions and Advertising Committee.

Another way to define the charter of PAL is by comparison to the focus of the CP Committee. The CP Committee focuses on regulatory oversight of advertising and marketing, including by the Federal Trade Commission (“FTC”) and state attorneys general. PAL focuses on private disputes by consumers or competitors related to advertising and marketing, including arising under the Lanham Act, private challenges under state consumer protection laws, and challenges at the National Advertising Division. Both committees will share responsibility for substantive developments in what constitutes deceptive or unfair practices. For example, we recently co-sponsored panels in the FTC’s revised Guides for Environmental Marketing and decisions involving maximum performance or “up to” claims.

C. Membership

We have close to 250 members. We grew steadily in 2009 and 2010, but we have tapered off in terms of attracting new members. The majority of our members are from the private defense firm bar in Washington, DC, and New York. The potential pool of new members is huge but there are other competitors for their professional affiliations, budgets are tight, ad outreach is challenging.

There are many other groups from which we can grow membership, including young lawyers, the Plaintiff’s bar, international lawyers, in-house lawyers and government lawyers. We have made concerted efforts to attract law students and younger lawyers to the committee through law school outreach programs. We have also made and will continue to make efforts to interest the Plaintiffs’ class action bar in our committee. We make best efforts to include speakers from this bar on all of our class action focused programs. While these efforts have been

well received, and grown our Linked In community, we have not significantly increased our membership by this outreach, but feel it is important and will continue to do so. Part of the challenge with recruiting new members from outside the Section is in providing membership benefits substantial enough to overcome the financial obstacles of Section, and even ABA, membership for consumer protection practitioners. This is especially true with respect to the plaintiffs' bar; they perceive the ABA as a defense-oriented organization and many plaintiffs' attorneys have noted that their firms will not cover ABA membership. We are working with PRIS and CP to develop a plan to grow our international membership. We are also implementing a plan to work with state bars with consumer protection committees to grow our membership in other states. We have an in-house Advisory Board to help us try to attract in-house advertising lawyers to Committee membership, as well. We have had great success in having government lawyers speak on our programs, including state enforcers for our state consumer protection law series we ran in 2010-2011, and attorneys from the CFPB and FTC. We have had less success than the competition committees in attracting enforcers as members, and need to continue efforts to highlight the benefits of membership for consumer protection regulators.

It is difficult to state a precise goal for increased membership on a five-year plan given the challenges of the task and the present economic environment, which has resulted in reduced budgets for attorney professional affiliations. However, given the pool of potential members in the legal community – especially outside of Washington, DC and New York; it does not seem realistic to hope to increase the size of the committee by 100 – 200 members over the next five-to-ten years.

D. Recent Accomplishments

PAL focuses on providing free, high quality regular “brown bag” programming. In this ABA year (since September 2012), we have coordinated three such programs and have three more planned through the end of 2012. We co-sponsor the popular monthly updates that CP and PRIS offers, but PAL tries to take the laboring oar on implementing timely programs on topics of interest. Our efforts continue this year with our popular series on Social Media Marketing, recently offering a panel on cause marketing, and offering an upcoming panel on social platforms and self-regulation. We hosted panels on the FTC's revised green guides and “up to” maximum performance claims cases. We have a panel planned for December looking at recent cases challenging *cy pres* settlements and a panel on class actions challenging “all natural” claims.

We also sponsor events to give members and potential members a chance to network and interact. We host networking events that have been very well-received, doing several each year in Washington, DC, and New York, as well as hosting events in Chicago, and California. We have developed a law school program where we visit law schools to discuss the SAL's consumer protection offerings and consumer protection careers in general, as many law schools do not offer regular advertising law classes. We have offered the program at six DC law schools in the past year, and are scheduling events in NY schools currently. We plan to expand to offer the program on the west coast and around the country. We view these programs as not only a means to inform law students about the opportunities in this area, but also to give our young lawyer members meaningful opportunities to speak.

PAL has embarked on its first book project, and is in the initial drafting stages of a handbook on advertising claims substantiation. PAL is also participating with the International Task Force in identifying appropriate opportunities to comment to non-US authorities on consumer protection-related issues.

PAL continues to publish its PAL Developments, a bi-weekly compilation of advertising case decisions and filings. We have published 95 of these updates to date. It gives a substantive writing opportunity to our younger members. We have also made efforts to give all of our younger members who contribute to the PAL Developments an opportunity to moderate or speak on PAL panels. We continue to hear from members how valuable PAL Developments is and how much they appreciate the publication.

We continue to support women's events as part of the SAL's diversity plans and membership goals, but also because the consumer protection bar is made up on a very large number of women relative to the competition bar, including more women regulators and more women in-house lawyers supporting marketing. PAL, CP and PRIS coordinated a SAL women's reception two years ago when Commissioners Brill and Ramirez were confirmed, and one earlier this year when Commissioner Olhausen was confirmed and to recognize the accomplishments of Christine Varney and Sharis Pozen at the Antitrust Division.

II. Anticipated Policy Issues

A. Major Anticipated Policy Issues Within Committee Charter Likely to Arise Within Next 3-5 Years.

1. Decline of Traditional Role of Advertising Agencies

Over the last fifteen years the work previously handled by marketing services companies has moved to the advertisers and marketers. The result is that the legal review of advertising content and compliance, as well as clearance of rights to use creative materials, is no longer handled by the marketing service companies and their counsel. Thus, both in-house and outside counsel to marketing companies and any entity with a website are in need of instruction in the law pertaining to marketing communications.

2. Movement of the Class Action Bar from Product Liability and Securities to Bringing False Advertising cases

The Class Action bar is finding that it is easier to bring false advertising cases under state unfair competition laws than to bring failure-to-warn product liability actions. The burden of proof to move beyond the initial pleadings stages of the case and through class certification is much higher if the allegation relates to whether a product caused harm and the manufacturer should have provided a warning than in cases where the allegation relates to a manufacturer overpromising the benefits of a product. The hurdles are also perceived to be lower for pleading a false advertising case than a securities action. This is particularly true in states where there is no requirement that a plaintiff show he/she relied on the allegedly false statement or whether the statement was material but simply that a false or misleading statement was made. The trend recently has focused on more food litigation, including challenges to "all natural" claims and an increased focus on health claims.

3. Increase in Lanham Act False Advertising Cases

There has been a steady upward trend in the number of Lanham Act false advertising cases filed over the last ten years, that has somewhat leveled off, but has not declined. We expect the number of cases to continue to rise, but perhaps at a slower pace, and to be coupled with increased use of the self-regulatory system for competitor challenges.

Further, case law has evolved such that it is now easier for successful plaintiffs in Lanham Act cases to prove and obtain damages. Under earlier cases, the focus and the action was always in the preliminary injunction or the request to halt an allegedly false advertising campaign, and after this preliminary decision, the cases largely settled. As we are now seeing more of these cases advance to the liability stage, we can expect the case law doctrine to develop and mature.

4. Increase in Companies Facing Multi-Forum Challenges to Advertising

Along with an increase in class action and competitive false advertising challenges, there has been a significant upsurge in companies facing challenges in multiple forums for a single advertising campaign. Well-known examples include Nestle, Dannon, Kellogg, Reebok and Sketchers as FTC investigations, state AG investigations, competitor challenges and class actions proceeded simultaneously, often preceded by an NAD opinion. Defense planning and settlement now involves complex tactical coordination.

5. Globalization of Advertising

With the mounting in importance of online and social media marketing, companies are seeking to standardize their advertising globally and seeking advice on a single campaign that complies with all applicable international and local laws. Coordination between lawyers in different countries is becoming increasingly important for counseling.

B. Plans to Address Anticipated Policy Issues

Bases on the trends we see in advertising law practice, which really are not anticipated but have been and are happening, we see an opening for the committee to fulfill fairly distinct niches. There are already well-established trade association groups for marketers and their lawyers, such as the Promotional Marketing Association and the Association of National Advertisers. These organizations and others tend to provide legal training or content in fairly pricey full-day or multi-day conferences. With the change in the way advertising services are being sourced, there will be expanded interest for in-house lawyers and business people to understand the basics of claim substantiation. We believe we can add tremendous value and make membership attractive to in-house counsel if we give them the tools to keep informed and provide in-house training and compliance programs packaged in formats other than the multi-day several thousand dollar conference.¹ We hope that our Handbook on Claims Substantiation will

¹ These remarks are not meant to disparage the successful SAL Consumer Protection conferences done every other year in Washington DC. These outstanding conferences have been unique in that they focus more on scholarship and policy than on the “to dos” of advertising.

become an important at-desk reference tool and will be a means to attract more in-house counsel to our programs and to membership.

We also do not see a competing intellectual home for the advertising bar. There is a particular demand for (a) significant publications geared to practitioners containing worthy, thoughtful scholarship, (b) shaping policy, where appropriate, focused on developments in this area and (c) providing real-time updates on important advances in the law in such areas as class certification, federal preemption of state law claims, and credible consumer survey design. SAL's relationship with the FTC and other federal enforcers is equally important on the consumer protection as the competition side. Engaging with regulators to discuss their cases and business guidance is key to our success, as the law that is applied in private cases often tracks the standards set by the FTC. The Antitrust Section is a home for serious antitrust practitioners, and we believe we will increase our level of success by modeling our efforts on the same core strengths of our ABA antitrust colleagues. We want to strengthen on what PAL has started by adding active members from states outside the DC/NY corridor and outside the U.S.

III. Long Term Plans to Strengthen the Committee

A. Modification of Scope of Charter

At present we are satisfied that we have the right charter.

B. Plans to Strengthen/Expand Committee Membership

As discussed within, we hope to attract members from government, additional states, internationally, and to attract younger members. We would also like to attract additional in-house counsel members. We have an active Advisory Counsel of in-house lawyers to assist in advising how to best reach out to this community. In a time when in-house CLE and association budgets are thin, we work to engage this group through participating in our free programs, however.

C. Principal Weaknesses/Impediments Limiting Committee Progress

The advertising bar is well known for its presentation style and skill. Many training presentations include clips of advertisements, both to entertain but moreover to teach. The advertising bar is also less concentrated in DC than the antitrust bar, with significant practices in California, Chicago and New York. As such, improved ability to provide at-desk content will enhance our ability to attract members – largely the ability to offer webinars where presentations can be seen in real time by participants and include the ability to view video clips.

D. Infrastructure for On-Going Activities

PAL would benefit from one to two additional Vice Chairs. Given the amount of class action litigation in California, a west coast litigator would be a useful addition to the leadership ranks. We would also suggest adding a plaintiffs' class action attorney.