



GLOBAL ADVERTISING LAWYERS ALLIANCE

ADVERTISING IN BRAZIL - THE SUCCESS OF SELF-REGULATION

By Valdir Rocha, Carolina Hungria and Denise Umekita¹

1. Introduction

The first regulations on Advertising in Brazil were enacted in the 1960's, such as Law No. 4.680 of June 1965 and Decree No. 57.690 of February 1966. At that time, Brazil was under a dictatorship that harshly censured advertising. Thus, the Government tried to approve in Congress a bill of law requiring prior government approval of any advertisement before its dissemination in the media. In view of this public control, the Brazilian advertising community was encouraged to create self-regulating rules.

So, in 1978, the 3rd Brazilian Advertising Congress was held, with the participation of national advertising agencies, advertisers, the mass media. The result was the unanimous approval and enactment of the so-called "Brazilian Advertising Self-Regulation Code".

The Code was the result of a comprehensive, long study conducted by a group of broadcasters who researched ethics in advertising in Brazil and abroad.

The main purpose of the advertising self-regulation study was to find an alternative between two extremes: (i) the total lack of regulation, which allowed disordered practice in detriment of fair competition and truthful allegations to consumers, and (ii) the total control of the regulatory function by the Government.

The concept of advertising self-regulation is based on the awareness of a self-discipline comprising the following basic issues: (i) establishment of ethic rules for the advertising industry; (ii) establishment of a system of dispute resolution procedures; and (iii) assurance of a fast, prompt and objective solution for the disputes.

The advertising self-regulation ideal was approved and enforced by more and more followers in subsequent years, as it and that showed growing advantages to the theory and the practice of advertising in Brazil.

Apart from the Self-Regulation Code, it should be noted that advertising is also regulated on a Federal basis, through the Consumer Protection Law (Law No. 8,078/90), the Industrial Property Law (Law No. 9.279, of May, 1996), and the Copyright Law (Law No. 9.610 of February, 1998).

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To fully enforce the Brazilian Advertising Self-Regulation Code, in 1980 a non-governmental organization was founded: the **Brazilian Advertising Self-Regulating Council** (“CONAR”).

2. CONAR

CONAR is a non-governmental organization that was founded to enforce the **Brazilian Advertising Self-Regulation Code**, acting throughout the Brazilian Territory. In general terms, it defends the freedom of expression through advertising and the constitutional prerogatives regarding commercial publicity, regulating only the advertisement that has already been exposed in the media, with no prior censure of it.

Since its foundation, CONAR has decided over 4,000 cases, and has reached the conciliation of many of its associates, which include, among others, Asta Médica Ltd., At&T do Brasil Ltda., Ceras Johnson Ltda. and Effem Brasil Inc. e Cia.. CONAR has been winning an important position in the judgment of advertising disputes in Brazil, as it is considered the most specialized entity in the country. Despite the fact that it is a non-governmental organization, its decisions are surely respected and normally accepted by the parties involved, and are rarely challenged in Courts of Law. However, even when the dispute is brought before the Judiciary, most decisions uphold CONAR's ruling on the matter.

This organization is financially maintained by the most renowned Brazilian Advertising Entities, including advertisers, advertising agencies and media companies, and has its head-office in the City of São Paulo, State of São Paulo, Brazil.

3. Brazilian Advertising Self-Regulation Code

The primary purpose of the Code is to regulate the ethical rules applicable to commercial advertising, that is to say, all activities designed to stimulate the consumption of products and services and promote institutions, concepts or ideas.

Due sense of social responsibility, commercial principles of fair competition, conformity to the purposes of national economic, educational and cultural development, are some examples of the main principles established in the Code.

The ethical behavior standards set forth therein shall be observed by all professionals involved in advertising activities, including advertisers, advertising agencies, media, broadcasters, journalists and all other communication professionals taking part in the advertisement process.

Not only are the general ethical rules applicable to advertising mentioned in the Code, but also specific principles to be observed in national advertising, such as:

(i) Respect

Advertisements shall not encourage nor stimulate any kind of offense or racial, social, political, religious or national discrimination, respecting the dignity of human being, privacy, social interest, national institutions and symbols, authorities and family.

(ii) Decency

The advertisement should not contain statements nor visual or audio presentations that might be offensive to the decency standards of the audience it intends to reach.

(iii) Honesty

The advertisement should not exploit the consumer's credulity, lack of knowledge or inexperience.

(iv) Fear, Superstition, Violence

The advertisement should not cause fear without a relevant social reason, exploit any type of superstition or contain anything that might lead to violence.

(v) Truthful Presentation

The advertisement should make a truthful presentation of the product and/or service that is being offered. There are some aspects that should be respected, as follows:

- Due description of the product and/or service;
- Assertions: the advertisement may not mislead the consumer about the product and/or service that is being advertised;
- Value, Price, Conditions: the advertisement shall clearly state the value of the product, avoiding unrealistic or exaggerated comparisons with other products or prices, down payments, installments, credit information, fees or expenses, among others;
- Truthful Use of the Word "Free";
- Appropriate Use of Claims: Expressions such as "directly from the manufacturer", "wholesale price", "no down payment" and other similar expressions cannot mislead the consumers;
- Nomenclature and Language: The advertisement shall use proper grammar and avoid slang and foreign expressions;
- Survey and Statistics: The advertisement shall not refer to any survey or statistic which does not have an identifiable, responsible, reliable source;

- Technical Information: The advertisement shall only use pertinent, defensible, duly proved information that is clearly expressed;
- Testimonial: the advertisement shall only show personalized, genuine testimonies; and
- Advertising Identification: The advertisement shall be clearly identifiable as such and the advertiser shall always be clearly named.

(vi) Comparative Advertising

Comparative advertising is acceptable, provided it conforms to the following limits:

- its primary purpose shall be the clarification or protection of the consumer;
- its basic principle shall be the objectiveness of the comparison;
- the purported or implemented comparison shall be capable of being supported by evidence;
- there shall be no confusion between the product and/or service advertised and the competitor's brands;
- there shall be no unfair competition, denigration of a product and/or service or a competitor's image; and
- whenever the comparison is made between products of different prices, this shall be clearly informed in the advertisement.

(vii) Safety and Accidents

The advertisement is disapproved if it shows disregard for safety, stimulates the dangerous use of the product offered, fails to mention special care to prevent accidents or to mention third-party liability when necessary, or fails to specify special care in the use of the product by children, elderly, or ill persons.

(viii) Protection of Privacy

The use of images or speeches of living persons, without their prior, express consent, disrespect to religious belief or to the dignity of the human being and family, and the lack of respect for private property and its limits is forbidden.

(ix) Pollution and Ecology

Any advertisement that directly or indirectly stimulates air, water, forest pollution and the pollution of other natural resources and urban environment, the depredation of fauna, flora

and other natural resources, visual pollution of forests and cities, sound pollution, and waste of natural resources is strictly prohibited.

(x) Children and Teenagers

Advertisement directed to children and teenagers shall always pay special attention to the psychological aspects of the target audience, respecting their naivety, credulity, and inexperience. Besides, it should not morally offend minors, or induce them to socially reprehensible behavior. Overall, the advertisement shall always have safety as its main concern.

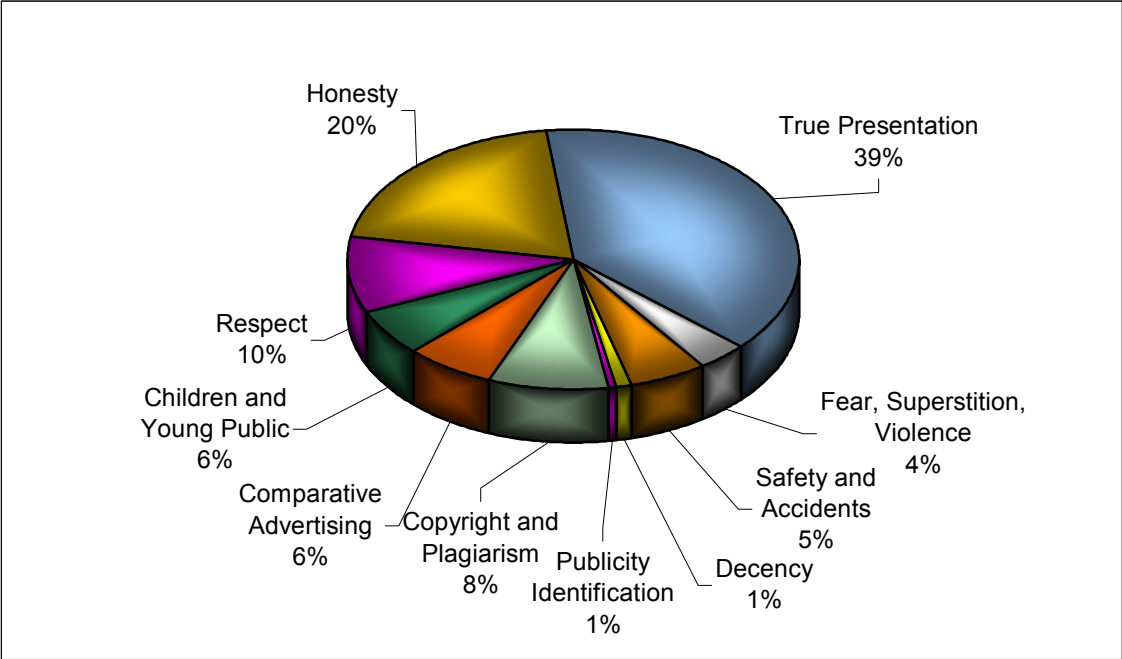
(xi) Copyright and Plagiarism

All advertising activities shall respect copyrights and associated rights involved therein. The advertisement shall not use background music, clips or parts of songs of Brazilian or foreign authors without respecting their copyrights.

Creativity and originality are protected. The advertisement shall not violate the marks, appeals, concepts and rights of third parties, even those used outside Brazil.

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The following chart shows the average occurrence of the aforementioned specific principles in the disputes decided by CONAR²



* * *

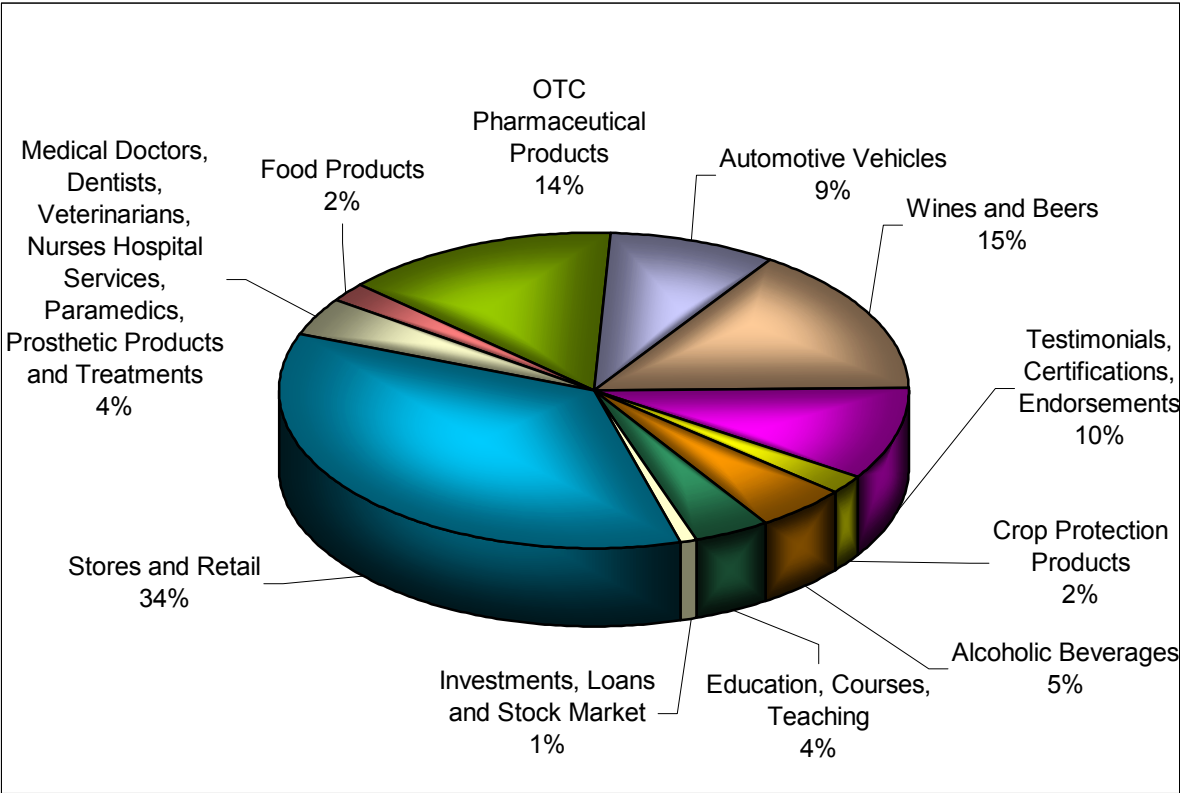
² This is an unofficial chart, prepared for the specific purpose of this paper with information provided by Conar.

Special Advertisement Categories:

Because of their economic or social relevance and public repercussion, certain advertisement categories are subject to specific rules, in addition to the general rules set forth in the Brazilian Advertising Self-Regulation Code. Those specific rules are included as "Exhibits" to the Code, and are divided as follows:

- A - Alcoholic Beverages;
- B - Education, Courses, Teaching;
- C - Employment and Opportunities;
- D - Real Estate Property: Sale and Lease;
- E - Investments, Loans and Stock Market;
- F - Stores and Retail;
- G - Medical Doctors, Dentists, Veterinarians, Nurses, Hospital Services, Paramedics, Prosthetic Products and Treatments;
- H - Food Products;
- I - Over the Counter ("OTC") Pharmaceutical Products;
- J - Tobacco Products;
- K - Smoking Inhibitors;
- L - Independent Contractors;
- M - Mail Orders and Direct Mailing;
- N - Tourism, Travel, Tours, Hotels;
- O - Automotive Vehicles;
- P - Wines and Beers;
- Q - Testimonials, Certifications, Endorsements;
- R - Crop Protection Products; and
- S - Firearms.

The following chart shows the average occurrence of the aforementioned categories in the disputes decided by CONAR³:



* * *

Liability

All advertisers, agencies and media companies shall be liable for complying with the rules set forth in the Brazilian Advertising Self-Regulation Code. It should be noted that anyone that has contributed to the production and dissemination of the advertisement is subject to liability.

Violations and Penalties

Consumers, authorities, associates, as well as the members of CONAR may request the filing of a procedure before the body, which will be analyzed and decided by the **Ethics Committee of CONAR**. If the Ethics Committee finds that the advertisement subject to the

³ This is a unofficial chart, prepared for the specific purpose of this paper with information provided by CONAR.

procedure is unethical, it may impose the following penalties: a) warning; b) recommendation to change or correct the advertisement; c) recommendation to the media to suspend the publication, airing or broadcasting of the advertisement; and d) the disclosure to the media of CONAR's position regarding the advertiser, the agency and the media for the non-compliance with the steps and measures determined by CONAR.

A party may appeal the decision handed down by the Ethics Committee to CONAR's **Superior Committee**, which is its highest instance.

4. Internal Statute of the Ethics Committee (“ RICE”)

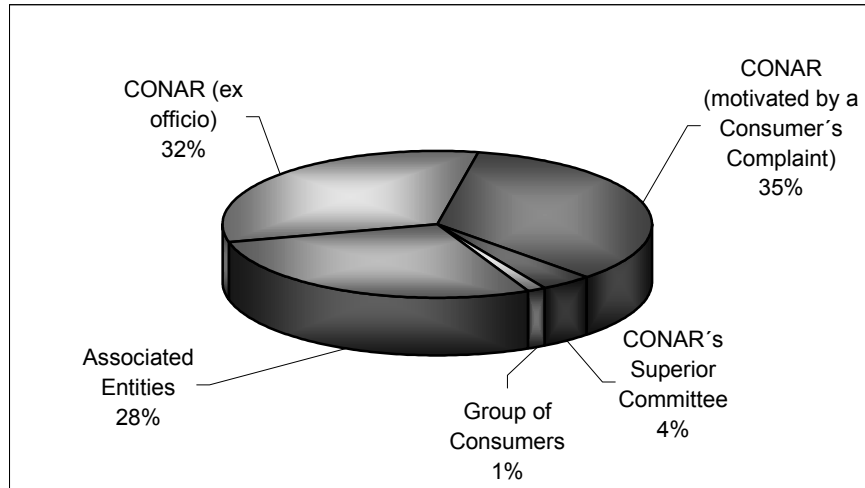
The Ethics Committee has six (6) panels, headquartered in São Paulo, Rio de Janeiro, Brasília and Porto Alegre, and consists of one hundred and thirty two (132) members, with ample knowledge and experience in advertising within Brazil. We note that no member of this Council is remunerated.

The Ethics Committee, through its members, has the role of deciding any and all disputes brought before CONAR, offering the main advantage of agility and simplicity in the forms and steps provided for under the procedural rules of RICE, which fully respect the parties' right to defense.

RICE regulates the steps of ethical procedures, from the claim to the final decision, which may be handed down by the Ethics Committee or the Superior Committee, in case of appeal.

Please note that the filing of a procedure may result from a complaint by a group of consumers, by an entity associated to CONAR, or by CONAR itself, ex officio, or motivated by a consumer's request.

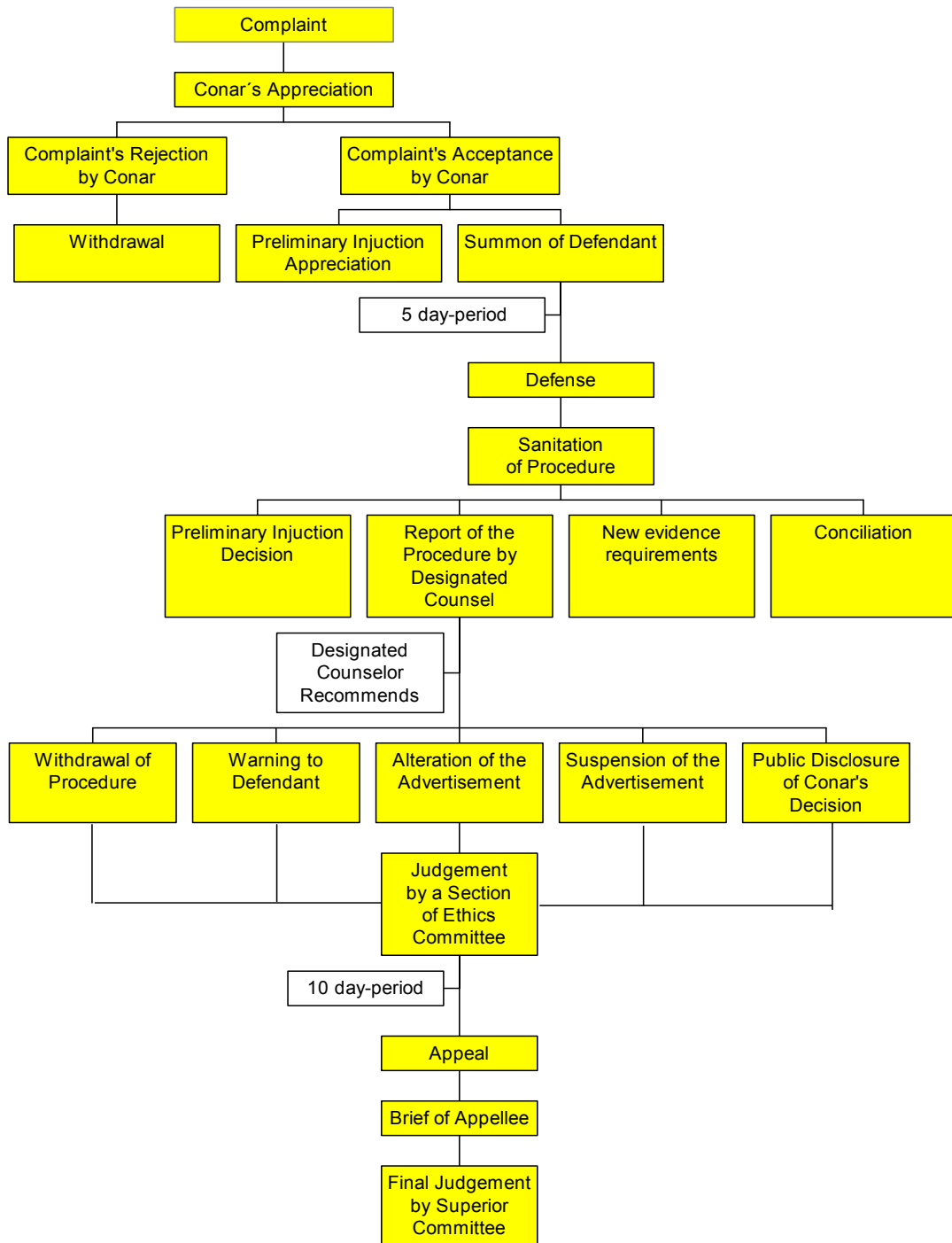
Most of the ethical procedures are established by a claim filed by CONAR, motivated by a consumer's complaint. The chart below shows the plaintiffs in the procedures filed in the year 2002:



As soon as the complaint is filed and its legal grounds are checked, the ethical procedure begins. CONAR randomly distributes the procedures among the members of the Ethics Committee. The defendant is then informed of the complaint, and may file its defense in writing. After the parties have presented all relevant arguments for the judgment of the case, the Ethics Committee meets to decide the conflict. The parties may present additional arguments, orally, during the hearings. When the hearing is finally finished, a CONAR Counsel presents his/her conclusion to the consideration of the other members of the panel, who then vote. When all the members in attendance have voted, a decision is rendered by CONAR. The decision is immediately communicated to the parties and, if necessary, to the media, normally by fax. The parties may appeal the decision to an appellate body of CONAR.

It is worth noting that if the RICE is silent on a given matter, the General Principles of Law and the provisions of the Brazilian Civil Procedure Code should be applied to the disputes before CONAR.

5. Flowchart of an Ethical Procedure before CONAR:



6. Important Cases decided by CONAR

Please find hereunder the summary of three (3) ethical procedures decided by CONAR, which are shown as the most common subjects before the body, according to the graphic on page 5:

a. True Presentation

CONAR, motivated by a consumer's complaint vs. Stafford-Miller and Grey Brasil

On a television commercial, an actor wearing a white jacket, in a place that reminds to a laboratory, speaks of the qualities of the "Sensodyne" toothpaste.

All the characteristics of the actor, as well as his speech, indicate the testimony of a Specialist, as per Exhibit "Q" of the Brazilian Advertising Self-Regulation Code. Nonetheless, the name and qualification of the deponent are not mentioned in the advertisement, as required by that Exhibit.

Stafford Miller argues that there was no intent to present the actor as a Specialist, but an ordinary employee of the Company.

However, this allegation was rejected by CONAR's Ethics Committee, which found that there were too many elements that could easily persuade the consumers that the product actually had those qualities. So, the Committee recommended the suspension of the Advertisement.

b. Honesty

CONAR, ex officio, vs. Boehringer Ingelheim and Young&Rubican

The subject of the case was the newspaper advertisement of a children's syrup ("Mucosolvan"). Although the Advertiser expressively advertises this medicine to be administered to children, the advertising is illustrated by a large photo of a packet of a product indicated for adults. Moreover, the three (3) versions of this medicine (children, adults) are shown in the commercial in very small wording.

CONAR understood that the syrup version shown in the advertisement could lead consumers to confusion, making them administer indiscriminately the adult medicine to children. So, it explained that the versions of the products shall be clearly displayed in the newspaper.

The Ethics Committee proposed that the ad be changed, and Boehringer Ingelheim met the requirement.

c. Respect

CONAR, motivated by a consumer complaint, vs. Fiat and Leo Burnett

A Television Commercial shows an elderly woman who is shocked when she realized that a dark-skinned man is not the driver of a white woman, but her husband. A consumer wrote to CONAR, saying that the advertisement conveys a racist, prejudiced message.

In its defense, FIAT argued that the advertisement stimulates the change of concepts. CONAR's Ethics Committee agreed with the allegation, dismissing the complaint, since the advertisement shows, very strongly, that the main purpose of the advertisement is to promote the change of concepts on the image of FIAT automobiles.

The advertisement was understood to show a particular individual's prejudice, and not to promote the dissemination of racial discrimination. On the other hand, it showed the real need to change long-lived, immoral concepts.

* * *

Conclusion

Notwithstanding the existence of Federal Laws in Brazil applicable to advertising, the Self-Regulation Code and the RICE are observed by most advertisers and advertising agencies in Brazil, which strictly follow the principles set forth therein.

The reason for this compliance is that the mass media has accepted them as ethical guidelines to be respected by the advertising industry, although they are not a binding Law.

Moreover, part of their strength derives from the fact that they are enforced by CONAR, which is a specialized organization, renowned for its impartiality, whose decisions are abided by most associates, even though they are also not binding.

Self-regulation is a success story in Brazil, and companies have saved millions of Dollars by settling disputes out of court, without having to use the court system, which can be very slow in some jurisdictions.

Veirano Advogados is a full-practice law firm with 200 lawyers and 194 law clerks (trainees), and offices in eight cities of Brazil, including Rio, São Paulo, Brasilia and Porto Alegre, among others. The firm's Intellectual Property and Advertising Department is headed by Mr. Valdir Rocha (rocha@veirano.com.br), who is an active member of The Global Advertising Lawyers Alliance (GALA), the International Trademark Association (INTA), the International Bar Association (IBA) among other international associations. Forty six professionals, including 20 attorneys, form the IP and Advertising Department, most of them working in the Rio de Janeiro and São Paulo offices. Besides dealing with

trademark, patent, industrial design, copyright, software and domain names filings, prosecution, licensing and litigation, the firm's Department also represents advertising agencies and corporations in any legal matter, including, but not limited to, advertising clearance, promotions, sweepstakes, internet advertising, contract negotiations, copyright and trademark protection, litigation and self-regulation proceedings before CONAR, the Brazilian Advertising Self-Regulation Council. More information on Veirano Advogados' legal practice may be found in its website at www.veirano.com.br.

The Global Advertising Lawyers Alliance (GALA) is an alliance of attorneys throughout the world with expertise and experience in the fields of advertising, marketing, and promotion law. Among the services GALA is able to provide is a "one stop shopping" to individuals and corporations interested in answers to questions and solutions to problems involving the complex legal issues affecting global advertisers and marketers. For more information on GALA and its membership please visit www.gala-marketlaw.com or contact Stacy Bess, GALA's Executive Director at sbess@halldickler.com.

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