Podcast Transcript

AD Nauseam: The FTC’s Updated Endorsement Guides: Get into the Groove

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Brave: 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 Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. Today, they have invited their fabulous new media and ad law partner, Sarah La Voi, to join them. Sarah recently joined Baker from a commercial general counsel role at one of the world's largest advertising and marketing agencies, making her an expert on today's content.

And with that said, on today's episode of AD Nauseam, Amy, Daniel, and Sarah will focus on a real hot topic, dealing with endorsements and testimonials from multiple angles and viewpoints. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Sarah.

Mudge: Thanks so much, Leah. This is an exciting day for us at AD Nauseum. We have a hot topic, one we can talk about, do talk about ad nauseam, which is testimonials and endorsements. Most particularly, that FTC update that everybody's been talking about. But we also love special guests as our audience knows, and today is extra special. We have an awesome new partner to welcome to her inaugural AD Nauseam podcast.

Kaufman: Hey, Amy. So, I know we have pretty exacting standards here at AD Nauseum.

Mudge: Well, you do.

Kaufman: So, tell me, why are we so excited to have Sarah here?

Mudge: Well, we're excited to have Sarah here just because she is awesome. But I think it is particularly prescient for and what we're going to be talking about today. I have known Sarah for years and years, I won't say how many. And I first met her when I worked for her when she was in-house at an ad agency that was the subject of an FTC enforcement investigation, the first FTC enforcement investigation looking at influencers and influencer disclosures. And that is how I got to know her and had some mad respect for her. And we were sort of looking at this and really creating it in real time and seeing how the FTC is thinking about these things that we used to call bloggers. That influencer word was new then, if you can imagine, and worked with her closely to see how she took what the FTC was doing and put it into place internally in terms of, I think, the first, and quite robust, compliance program for making sure that influencer content complied with the FTC's guidance. So, we're going to talk about that today, and a whole bunch of other things with Sarah.

Kaufman: Okay. Sarah, welcome aboard. Tell us more about yourself.

La Voi: Yes, thank you. It is wonderful to be here, Amy, Daniel. What a warm welcome. I'm Sarah La Voi, I have been an advertising attorney from day one. It is all I ever wanted to do when I went to law school, and I was lucky enough to get into this field. And as Amy said, we have connected before. We worked together while I was in-house at an advertising agency overseeing the media team on the legal front, and we worked together to form an excellent influencer compliance program.

Mudge: That, I think, has really stood the test of time. We move on, we evolve, we improve things. But all of those bones were there that the FTC really put in place back in the day, and we're certainly going to talk more about that.

Kaufman: Okay. So that is all well and good. I get it. But more importantly, we want to get a better sense of some of your pop culture cred. And today, one of the original influencers, Madonna, of course. Sarah, got to know your favorite song, album, and Madonna movie.

La Voi: Alright. Well, this is a fun one and I'm glad Madge is out of the hospital and doing well.

Kaufman: Yes.

Mudge: Yeah, but she put her concert tour off. So, you know, my September just opened up.

La Voi: Right. Hey, hashtag self-care. It applies to everyone, right?

Kaufman: Even Madonna.

La Voi: Okay. So, you want my favorite, did you say song, album, and movie?

Kaufman: Yep.

La Voi: All right, I'm going back into the archives here. It may be my Catholic upbringing, but I absolutely love *Like a Prayer*, which I believe that is the titular song for the album as well…

Kaufman: Okay.

La Voi: …*Like a Prayer*, so I'm going to double up. It was excellent, I loved it. And movie? Oh, there are so many. I'm going to go with the classic where she wasn't necessarily the star, and I thought she did a great job supporting, *A League of Their Own*.

Kaufman: Okay.

La Voi: The original, I like the new version.

Kaufman: I respect your choices. I think they're all good. I think mine are better. The best song, it is just objective, like it is not subjective. *Into the Groove*, by far the best Madonna song ever. And the best movie she is in, *Desperately Seeking Susan*, which also features *Into the Groove*. But best album, I would say, is *Ray of Light*.

La Voi: Right. I think you may have just given our listeners an earworm, but it is a good one. So that is okay. And *Desperately Seeking Susan*, love it. Susanna Arquette, though.

Kaufman: I mean, she really is amazing, Susanna Arquette, in that movie. But I saw the movie a million times.

La Voi: What about Amy?

Mudge: Okay, alright. First of all, Sarah, no, and no, no. The great thing about Madonna is that she spans generations. And given that you were a mere tot in the 80s, I figured you would skew a little older on this. I don't know what you were doing, walking away with my two. But I don't think you were using a fake ID when *Like a Prayer* was playing in the clubs like I was, but alright. And *Ray of Light*? You know, Daniel just likes to look young, but God bless. Alright, I have to go, and I've got it, I've got it. There is so much to choose from. I think for album I'll go with *Like a Virgin*. And my reason for that, I know it is a bit controversial, is it was the first tour I saw, not my first concert, but certainly an incredible tour. And for song, I'm going to do two. I'm going to do *Holiday*, I still play that song. It is a great summer anthem; it is a happy song. I'm also going to sneak in *Vogue* because it was just seismic and life changing and incredibly important, and still is. It is a song that Beyoncé is playing on this tour in a mash up. So, *Holiday* and *Vogue*, and oh, movie, movie. I'll tell you, I just love Madonna so much, but she is not a good actress. I'm going to go *Who's That Girl*. It is a super fun movie. I think it stands the test of time, and I encourage you if you haven't seen it, to go watch it. We will not talk about her movies, not to watch, because there is a fair number of those.

Kaufman: Excellent. So, lots of good choices here, and today, let's turn to the business at hand. Testimonials and endorsements. We thought Sarah is going to help us bring a new and unique perspective to what the FTC is doing here, what it means for practitioners. But first, Amy, why don't you give us a sense, big picture, of what are your takeaways from the recent FTC announcement of the finally revised endorsement guides.

Mudge: Okay. Pre-warning here, there might be a little ranting on my part, alright. So just to set the table. So, the biggest take away for me is that this was not seismic news. And if I had a nickel for every time a client has reached out and said, Amy, why haven't you told me about this jaw-dropping change that I keep reading about in the legal press? I say these are, I don't want to say minor, they're really important. Anytime the FTC comes out with new guidance, which it only does every decade or so, and particularly in an area like this, it is important. But these have been around for some time. They were in draft at the end of the Trump administration. They've been kind of sitting around. They were put out for comment. They were held for a while, and we didn't know what was going to happen. Were they going to be dramatic changes? And no, sometimes things just get delayed.

The big takeaway is the current testimonial and endorsement guides. The big update is they incorporate a lot of the things the FTC has told us by way of their FAQs, or really important staff document what people are asking, and what they've told us in speeches when they've been out at conferences and things like that. So, things like virtual influencers that we're going to talk about in a little bit, are influencers as well. Things like tagging a brand is itself an endorsement that may require a material connection disclosure. Reiterating and confirming that there is broad liability for anybody in this ecosystem, not just the advertisers and the influencers, but the intermediaries themselves. So, I would say it was just really putting a bow on everything that we've known. And if you've been keeping up with what the FTC has said all along, and moving your program along, you're going to be just fine. There is no need for panic in the streets. The influencer guidance is largely unchanged.

That said, and, Daniel, I want to ask you about this. There was some discussion about typicality disclosures, and we focused so much when we talked about endorsements on the material connection disclosure. Does it have to be made? How should it be made? That it is easy to forget these other prongs that a testimonial has to reflect the true experience of the endorser. But if it is making a product claim then it has to be typical. Can you walk us through the example they gave and what you think this means?

Kaufman: Yeah. I thought it was a really interesting example, and it is a reminder that, look, you got to look carefully at actually what disclosure is saying, and is your disclosure deceptive? The example they give is sort of weight loss. Are you making a claim people on a study lost ten pounds? And if the disclosure just says based on people who completed the study, the FTC said that might not be enough if only 20% of the people completed the study. That has to be clear in your disclosure. So, it is actually a really good reminder that it is not just about having a disclosure, it has to be a disclosure that is accurate and that it isn't in and of itself, potentially deceptive on its own.

Mudge: Okay, whoa. Wow. You know, remember, back in the day when we thought how in the world are we going to have a disclosure in 44 characters? And the FTC said hashtag ad, that is three. Well, this one, I will say, how are you going to get a disclosure that lengthy in a TikTok?

Kaufman: Well, you know, creativity. There just has to be some clear indication. In that example that one out of five people completed the study. Again, I'm sure there are more creative ways to trim it down and to sort of get the point across. But a very simple based-on-people-who-completed-the-study is not going to cut it. If it is a study where you've got a huge number of peoples who don't finish.

Mudge: And you know, I hate to say no, we never say no. But I think maybe this is one where you also say, maybe take a step back and not everything is right for influencer marketing. And if it is too complicated that it requires a lot of extra explanation, maybe this is something that is more appropriate for a brand social post as opposed to a third-party social post. Just saying.

Oh, but my last thing before we dive in, and I want to talk to Sarah about her reactions. My last rant is what the guidance didn't do, and that was give us any meaningful advancement in how we look at influencer content directed at children. And essentially, the guide ends with a whimper or a bang depending on your viewpoint, to say hey, when you're using influencers with kids, they're a vulnerable audience. They might be confused. Do the right thing. Be careful. But we're not going to give you any real guidance in this area. That, to me, was quite disappointing.

Kaufman: Yeah. No, I had the same reaction, and I was definitely ranting about that. I thought we were going to, particularly given the workshop they did last year on self-advertising, is what they're calling it, I really was expecting some more clarity on kids. I guess the starting point is, kids understand what an ad is, they might not understand what sponsor is. The FTC is clearly stating you got to be really careful if you're doing influencer marketing and it is targeting kids. But they're not telling you what exactly to do and what are the messages you can and can't convey.

La Voi: Right, that did feel like a missed opportunity. I feel like we were going to see more there, and we just didn't.

Mudge: I don't think they know. That is the real problem, and the only people who are saying we know kids is the children's advocates that really do believe that advertising to children, period, is an inherent evil. Hopefully, we'll see a staff report in this area and maybe the FTC itself will invest in some of its own research. Alright, Daniel, I know we're here to talk about influencers, not just the kiddos, and I also know that you don't necessarily have any love lost for the kiddos. But I am going to ask you, does your crystal ball tell you if the FTC might come out with a staff report in that workshop to advance this discussion, and if so, when?

Kaufman: Yeah. Look, it is interesting. Not every workshop the FTC does leads to a report or paper or something like that. Often, they do. Sometimes it guides them in terms of education or business education. So, I kind of think it is a little more likely at some point they're going to synthesize it into some form of business education. Because look, the issue of kids, teens, and influencers is a very significant one. The FTC sort of avoided addressing it now, but I think they will address it. And I think by early next year, we'll see something from the FTC. Whether it is a full-blown report on the workshop or some more limited, look, it could be updates to the FAQs that evolve and something like that. But I do think this issue is not going away and we will definitely hear more about them in the next six months.

Mudge: Okay folks, you heard it here. Pencil in your calendar, not a pen, pencil in for at some point next year, we'll see if Daniel is right. And if he isn't, of course I'll make merciless fun of him. But he usually is.

Kaufman: So, I want to get some thoughts from Sarah on some broader implications of the guides. Sarah, from your perspective, do the guides address any advancements in technology that maybe weren't contemplated originally?

La Voi: Sure. I do think that this version of the guides is firmly planted in 2023. The FTC understands where consumers go to get information to make their buying decisions, and it absolutely is social media. So that is reflected in the FAQs and throughout. Amy mentioned that tagging is an endorsement, and now that has been clarified. But one other evolution here is how the FTC decided to define endorser.

So, the definition of endorser now includes what appears to be an individual group or institution. So that what appears to be, I'm using air quotes here, is key. What they're trying to address is virtual influencers. We've all seen cartoons selling goods and services for years. That is tried and true. But this new evolution of influencer marketing includes hyper-realistic-looking influencers. So, if you were to be scrolling through, you may not know that someone who is wearing a certain cool outfit is not an actual human being on first glance. And the FTC wants to make it clear that the rules that apply in the real world, they apply in the virtual world as well. So, if you get that question, or you get that call from your marketing team saying, can we engage with the virtual influencer? Look at it, consider it, and just know that all of the same rules apply.

Mudge: Can you flesh this out a little bit, Sarah? I mean, I see, because we love Madonna, but we love Barbie even more right now. And goodness knows, Barbie, if she had a bank account, she'd be raking it in with all the endorsements that she is doing. And she really is the influencer *du jour* as far as what to wear, what to buy, and is this the kind of person or company that you're talking about?

La Voi: Right. Well, Barbie, hands down, super popular. She has a huge following, and she absolutely does engage in brand promotions. When I was online yesterday, I saw Barbie playing UNO at the beach. Right? That is an intra-Mattel type of promotion. But the issue with Barbie, everyone knows it is a doll. Right? This new wave of virtual influencers, there is two different kinds, really. One looks like a cartoon. You look at the influencer and while they have a personality and a following and a point of view, it is clear that they are art, come to life. The next level of virtual influencer, they really do look hyper-realistic with the help of AI. And this is the type of influencer that we need to consider carefully in terms of marketing and advertising claims and endorsements. And the FTC has made it clear the rules apply across the board.

Kaufman: You know, obviously the guides also make it clear that ad agencies can be on the hook and there is a lot of old FTC cases on that. Would that also include when ad agencies are hiring influencers on behalf of the brand? What is your sense of the scope of potential liability for ad agencies here?

La Voi: Yeah. I think originally, in the original guides, it was clear that everyone within that service chain was responsible. And in this updated version of the guides, the FTC has reiterated that. They think every entity that is in the service chain needs to be diligent and take care. So, advertising agencies and other intermediaries, as they're referred to here in these guides, have to take responsibility to make sure that the rules of engagement are clear.

I think what is interesting, it is not just in the contracts with the influencers; that is one way we mitigate risk. An agency will engage an influencer on behalf of a brand. That is the most common approach. Sometimes there is an additional intermediary in there. If an influencer has an agent or is part of a group, at every point in that contracting chain, it needs to be clear that the influencer is responsible for a clear and conspicuous disclosure, that they have, in fact, been hired. This is a hashtag ad. But that is not enough. I think the agencies and the brands need to work hard to put together a really practical process and training program so that influencers know what their responsibilities are and how to make it clear to consumers.

Kaufman: Well, certainly the first thing the FTC asks when they're looking at influencer issues is, what is your monitoring program? What is your training program and what do you do when people run afoul of your guidelines? And that will continue to be an important area of focus anytime the FTC is looking at influencer issues.

La Voi: Right. What is interesting is what the FTC doesn't necessarily ask, which is let me see your contract with the influencer. That is a given. But to your point, Daniel, they want to see robust compliance. I think now is a great time with the issuance of these updated guides for brands to take a look at their monitoring practices and their training.

Mudge: Let's drill down to that a little bit more and, Daniel, I'm going to pick at your crystal ball a little bit more. We know that you have to do monitoring and auditing. And I think we hope we know that does not necessarily mean looking at every piece of content that is posted. Although certainly the FTC did in this guidance say, hey, it is a better idea to look at content before it is posted. That is not always possible if you're dealing with really massive campaigns. Particularly campaigns where there is no contract, where there is no money changing hands, but say free product is sent to a broad swath of influencers. Daniel, do you have a sense from your time at the agency of what is sufficient monitoring and auditing. How many of these posts need to be looked at on a consistent basis by the agencies, by the brands, maybe by both, to constitute that robust program?

Kaufman: Yeah. Look, everybody always wants the magic number. Is it 10%? Is it 30%? And it depends, unfortunately. And I know everybody hates that answer. But look, if you're running a small program and you've got six influencers, yes, you should be looking at all their posts. But obviously the much larger brands and much larger platforms have to have a program that is robust. They're looking at a significant percentage, and they're also doing triage. They're looking particularly heavily at the influencers who have the highest reach, and that they're cycling them and making sure they're trying to look at every influencer as part of the program at some point in time. So, it really does require some creativity to make sure you're looking at the more high-profile influencers. Not forgetting the other ones, but definitely more of an emphasis on the high-profile because of the extent of the reach. So, look, there is no magic number. It has to be a reasonable program, but it also, it is interesting. One thing I always tell clients is, if you're sort of looking at 10%, let's say, and you're seeing a lot of problems with the 10%, you got to start looking at more than 10%. So, it does have to be sort of a reactive program that grows and develops. And as you see problems, that is a signal that you need to sort of look at more of the traffic to see what is going on.

La Voi: I think that makes a lot of sense, Daniel. And the magic words in the guides themselves are that brands and agencies need to take action to remedy noncompliance and prevent future noncompliance. So, something to add here, if an agency in a brand is engaging an influencer who continually misbehaves, doesn't post the proper disclosures and won't remedy the post quickly, it would behoove them, as my mom would say, to address that. I do think that the FTC will look at goodwill and a robust compliance program. But if a specific influencer won't follow the rules, I think brands and agencies should reconsider.

Mudge: Okay, and with that, we definitely got into the groove together on testimonial and endorsements.

Kaufman: Amy, before we wrap up, I have one request if anyone is actually still listening to this podcast. If there are other things you think we should be talking about, topics that are important to you, shoot us an e-mail, let us know. We're having a blast doing these podcasts, and we definitely want to make sure we are addressing topics that are important to the people who are listening.

Mudge: Well, with that, that is a wrap for AD Nauseam, Testimonials and Endorsements. Thank you, Daniel, as always, for being my partner in crime. And Sarah, thank you so much for joining us. We look forward to having you back in the future.

La Voi: Thank you. It was wonderful.

Brave: Thank you, Amy, Daniel, and Sarah. If you have any questions for Amy, Daniel, or Sarah, their contact information is in the show notes. For more information on the latest developments in ad law, visit our AD-ttorneys Law Blog at www.ad-ttorneyslawblog.com, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. And as always, thanks for listening to BakerHosts.