Podcast Transcript

AD Nauseam: Testimonials and Endorsements – How Many Disclosures Is Too Many

Date: January 9, 2024

Guest: Amy Ralph Mudge and Daniel Kaufman

Host: Leah Brave

Run Time: 23:36

For questions and comments contact:

Amy Ralph Mudge

Partner
Washington. D.C.
T: +1.202.861.1519 | amudge@bakerlaw.com

Daniel Kaufman

Partner
Washington. D.C.
T: +1.202.861.1523 | dkaufman@bakerlaw.com

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.

On today's episode of AD Nauseam, Amy and Daniel talk about how the revised testimonial and endorsement guides are raising some new issues that marketers and agencies need to consider, some of which reflect a shift in common practices. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back, folks, to the new episode of AD Nauseam. Thanks so much for joining today. And today, Daniel and I are going to focus on the revised testimonial and endorsement guides. Now, folks might say, wait a minute, Amy and Daniel. You're usually far timelier than this. These things came out in June. Well, the short answer is, we didn't really see much new news in the guidelines at the time. And I thought it was more about updating the guides to include some of the examples that the FTC staff had added over the years into its business guidance Frequently Asked Question document.

And based on, I would say, some recent FTC activity, and also some conversations we've had with staff, FTC staff and NAD staff around ANA and elsewhere, we think that there might be some changes afoot, particularly in how disclosures are placed and phrased. So, we thought it was high time to talk about this now. So, Daniel, what influencers do you follow and do you listen to any of their suggestions?

Kaufman: Amy, so I don't know, maybe I'm just old-fashioned this way. There are a lot of people I follow on a lot of different platforms, but they're not necessarily people who I'm going to be listening to in terms of what am I going to purchase and what am I going to buy. Tara Reid, for example, I follow her on multiple platforms. I'm not necessarily buying what she might be promoting. I'm intrigued by it. But yeah, no, this has just not been my universe really in terms of my purchasing skills. It is much more my entertainment value, and I spend far too much time on social media entertaining myself _______.

Mudge: Yeah, we know you're a TikTok addict, Daniel.

Kaufman: Totally, totally.

Mudge: We know how much time you spent on TikTok over the holidays.

Kaufman: How about you? Look, it is interesting. Before I get to you though, it really is like, I didn't think we were going to be talking about endorsements and testimonials again so soon. But it, I feel like we're hearing so much more murmurs about higher expectations. It is really a good time to be looking at this. But I know you are, I'm going to guess, a little more influenced by some influencers in terms of your purchasing.

Mudge: Oh my gosh, are you saying, I think that is saying I'm more gullible than you. But that is probably true. I don't follow a bunch of what I call the mainstream influencers. But as far as people that have been around for a while and still recommending things, which are still endorsers, I would say I listen a lot to chefs. I love to cook. I'm not a trained cook. I always want to know what the best ingredients are. I will buy anything Barefoot Contessa tells us to buy, and there is a brand of California olive oil I bought for years. Even the salt I buy is what Barefoot Contessa told me to buy. And I like another local blogger, Once Upon a Chef. She's also got some great ideas. But I do follow the Kardashians. I'm not going to shy away from that. I don't know if I bought much. I buy SKIMS, I buy SKIMS and Good American. So, I put some money into their family coffers.

Kaufman: So, Barefoot Contessa is my all-time favorite chef. I've got all of her books. I cook a lot of her stuff. Her orzo with shrimp and feta is one of my favorite dishes. So, huge Contessa fan here.

Mudge: I will tell you before we get into the influencers, actually, I know one of your other favorite recipes from the Barefoot is the turkey lasagna which you turned me onto, and it is absolutely fantastic. My favorites are her shrimp scampi, her macaroni and cheese, and her meatballs. But that turkey lasagna is nothing to sneeze at. Alright, Daniel, give us a little bit of the history of the testimonial endorsement guides. They've been around for a long time, and you know I love history.

Kaufman: Yeah. Look, it is an important document, and the last time they updated it, it was 2009. So, it is now 2023. We've got the revised guide. A lot has changed in the world since then. I mean, go back to 2009. At that point in time, I don't think influencer was really a word. The FTC was focused a lot on bloggers and mommy bloggers, and you'd hear those terms all the time and the focus was on disclosing and social media, pretty straightforward. And there were some, probably the biggest change was the FTC put that line in the sand and said no more shall you say, results not typical, as a disclosure. I mean, and that was certainly one of the big changes back in 2009.

Mudge: Yeah, I do remember that. That was pretty seismic. But yes, and I do remember the mommy bloggers. I think unboxing came out just right, certainly after that. But it took a few more years. I mean, I don't think I had a smartphone in 2009. Maybe a, maybe had a BlackBerry. We had Twitter, we had Facebook, but we certainly didn't have the breadth of the platforms that we have today.

Now, I know that the FTC looks at its guidelines about every 10 years generally, 2009, something should have been out before this. This took quite a while. And I know also, well, I'd love any insight you have about why this took so long. And I also, in the intermediate time between the last endorsement guide updates and this, the staff did put out this companion guide called What People Are Asking, that I think is a real must-read next to the guidelines. And tell us about how that came about, because we don't have those in, I think any other guidance?

Kaufman: Yeah. I mean, we probably have it with a few other guidance. But it is just, I think endorsements and testimonials are an area where there is just so much gray and so much different situations, and questions, and ambiguities. And I think it is a really good thing. And historically, with respect to these guides in the particular, staff would hear the same questions over and over again and would realize there are questions in the market about how to do this. So let us not just answer these questions from the one or two people we hear from, share it with people more broadly and update it as new cases come out with maybe some new principles.

Now, the FTC, I think we used to see a lot more of that years ago. I think they're doing a little bit less of that updating. But of course, they've been so focused on getting those guides out. And look, it took a while to get the guides done. I think there was a lot of thinking, a lot of analysis, they redid almost all of the examples and they take time. These things are very time intensive, and the words are really important. As opposed to when I'm writing a blog and I'm just in front of my typewriter just…

Mudge: You're just blah, blah, blah-ing.

Kaufman: …yeah, like…

Mudge: Yeah, and I know how you blog, Daniel.

Kaufman: …_______ typewriter. They're really focused on the words, and the words are really important. They're carefully chosen.

Mudge: Well, I mean, look, that is what I call good government. I mean, that is exactly, you want to have if the FTC is thinking something new, you don't want to wait 10 years for an update. Or you might not catch it in a speech. But having FAQs and guides that are updated, understanding it is what the staff thinks, it is not a formal guideline. But one of the things that I really appreciated was when the guides came out, there was a lot of talk of them, when we first heard about influencers, about what should the disclosures be. And it was, well, it should be #advertising or #ad and the influencers hated that. And the FTC staff, a lot of your compadres said, look, it is easy. It is simple. It is 3 characters, #ad. But they thought even at the time, words like sponsored and paid might be ambiguous. But what I really liked about the FAQs is, over time the staff got more comfortable that people are more social media savvy and understand concepts like brand ambassador or brand partner. And so through the FAQs told us, these might be things that can work. So, I think it was not just an example of giving new, tighter guidance. It was also loosening things up as situations changed.

Kaufman: Yeah. Look, I think that is a really good point. And part of it is there is so much change in this area, how people are disclosing, what they're disclosing, what is going on. One thing that jumped at me as, it was a good thing to throw out an FAQ about was the advent of virtual influencers. That wasn't a thing in 2009. But putting out an FAQ that says, hey, we're hearing a lot about these virtual influencers, same rules apply. That is very helpful for a law enforcement agency to do that, to get rid of the ambiguity and just make a clear, definitive statement. It is a staff statement, but it is also a not surprising one.

Mudge: I think more paper was shed about virtual influencers than there actually were virtual influencers.

Kaufman: Yes, exactly.

Mudge: But that is a really good example. Alright, so let's cover the updates to the guides. And really, I didn't really think these were updates, and I think largely because a lot of this had been incorporated into the FAQs. And by my reading in June and a couple readings since, I really thought mostly what they were doing was incorporating some of that stuff from the FAQs more formally into the guidance, is really what I saw. Things like saying tagging a brand can be an endorsement even if the influencer doesn't say anything directly about a brand.

So, let's cover updates to the guides that I don't really think are updates. And I guess I should say why I didn't really think they were updates. When I read these hot off the presses back in June, my sense was most of these really were taking the FAQs that had been updated over time and incorporating those into more formal guidance. So, I thought we know these things, now it is in a different format. Things like tagging a brand can be an endorsement even if the influencer doesn't say anything directly about the brand. An admonition that if a post is a video post that disclosure should be in the video itself, not just in the caption or in written text. And that platform tools themselves are likely not sufficient in the FTC's view.

Kaufman: Yeah, Amy, I definitely want to talk more about videos and how that is evolving because there is a lot of noise on that lately.

Mudge: Oh, we're going to talk about videos, Daniel. Don't, it is coming.

Kaufman: Yeah. But then look, there is a lot of other stuff in the guides. And again, we know the FTC is broadly looking at theories of liability and who is liable for the dissemination of problematic posts, and they make that clear in the guides as well. One thing that did strike me that they're starting to open the door just a little bit. And this is where things evolve over years, and sometimes the FTC takes a little bit of time. But there is starting to be a recognition that there are some influencers that everybody just knows is getting paid. Now, the FTC is not going to say, you don't need a disclosure, but they're starting to think about that. And there is language to that effect that there may be some people in this universe, Kardashians, for example, where you might not have to disclose the material connection because we all know they're getting paid.

Mudge: You know I love the naughty and nice words. The, can you say ad, can you say paid, can you say sponsored? One of the things the guide did give us is a few more words. The staff said that saying #endorsement is probably ambiguous. I'm not sure why, but that was on the ambiguous list. The staff said that #paid post by brand x was probably okay, but…

Kaufman: Just a probably? Oh, come on.

Mudge: It was, it, you used to write these things, Daniel. I don't know. But I do want to say, as an aside, I had a really recent conversation with staff where I was told that they thought that just #paid might be ambiguous. So, this is getting into some kind of wonky areas. But the FTC said that free product or even saying gifted can work as long as you couple that with the brand name. In another conversation I had with staff, they said they thought it was important that when using the name of the brand in a disclosure, that it should be the product name. And this was not something I had, I was surprised by this. So, something like, not #PandG_Partner, but #Charmin_Partner.

Kaufman: So, I have just modest surprise on that, and it is, every once in a while I look at it and, if it is a small company selling a product that is known, people often won't know the name of the company. And so, #CompanyNobodyKnowsPartner, depending on the name of it, it can be ambiguous. So, I definitely can see situations where the company name might not cut it, and you really want to focus on product name. Look, do I think there is going to be a case at the end of the day where you're doing one versus the other? Maybe if it is a really obscure company that people don't know the name about. But look, this is, we're dancing on the head of a pin. I hate that analogy. But this is getting really difficult.

One new thing I thought was important was addressing when brands send influencers products for free in the hopes they're going to use and write about them. Even though there is no contract, there is no agreement. The FTC does make it very clear in the guides that when a brand is doing that, providing free gifts, they should ask the influencer if they post about the product, they should disclose they got the product for free. And the FTC comes knocking, they're going to want to see proof that, all well and good to give people free stuff. Please send it to me, care of my law firm here.

Mudge: Me too. Me too.

Kaufman: I know Amy and I, we're eager. You can find our address. But include the note that says, if you talk about this and you promote it and talk about it, you got to disclose that it was a free gift from us.

Mudge: You know what, I think it is probably good that they included that. But in my experience, this is really what brands were doing generally. I think this was intuitive and is not new news to anyone. The guides also had some discussion of compliance expectations, far more specific than I remember seeing before. But again, I think what they articulated probably are the best practices that a lot of brands look to. Things like preclearing posts in advance is better than cleaning them up on the back end and that brands should monitor what an influencer is posting while they're under contract with them. But they should continue for some reasonable time thereafter to continue to watch. But not in perpetuity, which was nice to have the FTC acknowledge.

Kaufman: Yeah. So, I know we're going to talk a little bit about some recent warning letters that the FTC sent out that caused quite a kerfuffle all around. But one of the big things in here that I was hearing a lot about was just the focus on disclosures having to be unavoidable. The word is unavoidable. It is not…

Mudge: Unavoidable. Yes.

Kaufman: It is a pretty strong word.

Mudge: What happened to clear and conspicuous? The five Ps, or how many ever Ps there were?

Kaufman: Yeah, and I got to say, look, this has been the evolution we've been seeing in the FAQs and we've been seeing it in consent orders certainly. When you look at all the consent orders for the last few years, that concept of unavoidable, it's been there.

Mudge: I think it is a good, it really puts more of the burden on, I think, the advertiser. Come on, you know where people are looking, make it unavoidable. But this is one where I think we've got to get into the meat of what I think might be a little bit different. Now, the guides also say if an endorsement is in a video, and the endorsement is audio, the disclosure should be in audio. And then if the endorsement was in pictures or visually in a video, that an in-video written disclosure was needed. Okay?

And I can tell you, I for one did not think they would ever think about requiring multiple forms of disclosure in video as long as there was a good prominent one. Something like if there was a TikTok video and overlaid on top of the video, not in the text on the side, there was a starburst maybe that was embedded in the video that said Charmin partner. And to me, that was an unavoidable disclosure. This idea maybe you have to also have a speaker saying, yep, this is an ad, yep, I'm the partner of Charmin, kind of seems like some overkill.

Kaufman: So, I couldn't agree with you more. Look, I'm getting concerned about where this is heading directionally with written disclosures, oral disclosures, ever-present disclosures. And the part, what I think is happening is the FTC isn't necessarily thinking about the different unique mediums and how people absorb them. People might listen but not watch maybe or watch but not listen. But those are, I think, the exceptions. I think, again, there is the need to back up and look at it. What is a reasonable consumer seeing here or experiencing here? And I am concerned that there is just, this is taking it a little bit too far.

Mudge: I completely agree. I mean, we've, this is not a new concept, right? With television disclosures, I mean, people get up and they get a snack. Right? People might watch the game with the sound turned off, and this was never something that the FTC felt they needed to come out and really talk about. But this is really, I mean, let, if there is a mention of the product in the written text that is accompanying the video, right, on the side of it. I mean, that might mean we got to have a disclosure there, too. And then there are platform tools and maybe some of the platforms are starting to require or at least encourage that the influencers use those even if the FTC doesn't think a lot of them.

You can see a case where we might have, stacking one, two, three, four disclosures in a single post. And to me, that is just a lot of overkill. I mean, I will tell you, even though there are those words that are in the updated guidance, I sort of read right by them, because I just never thought this was actually what would be in the FTC's minds. And even conservative brands and their agencies are not going to these lengths.

Kaufman: Yeah. I think also one of the things that strikes me is so many of these platforms, so many of the users are there a lot. They get used to what the platform disclosures look like. So, although the FTC may look at it fresh and think, oh my gosh, this isn't quite unavoidable enough. For the typical user, who is the reasonable user, they are so used to how these platform disclosures work. So, I think there is a lot that needs to be taken into account here that probably isn't. But look, at the end of the day, the standard is, does the consumer understand and appreciate the needed disclosure? So, it'll be interesting to see what the next case is going to be. Look, we shouldn't be counting up disclosures. That is not how to assess…

Mudge: Yeah.

Kaufman: …whether or not a consumer is understanding that a post was paid for, and it has to be something else.

Mudge: Alright. So, Daniel, what do you think brands, conservative brands, upstanding brands that invest a lot in influencer marketing are supposed to do now?

Kaufman: Look, I think it is a good time to step back a little bit, to rethink how you're instructing your influencers and maybe think a bit more about how users are consuming content on a particular medium. And that is going to make it difficult. And how and where are the endorsements appearing, and what do they look like? And look, I'm surprised to be saying this, but we might be entering a time where we might need a text written, video written, and an in-video audio disclosure, and I don't like the look of that in my advertising.

Mudge: Well, hopefully if that comes to pass, it will be the rarity. But let's talk about something else I think is new and I think you don't. In some cases, the FTC has said it might not be sufficient even to say #ad or #advertising. But you need to say #brand_ad or have some kind of indicia that the advertising is by this brand. So, when is this needed?

Kaufman: Yeah. So, look, I'm surprised that it is sort of being a big issue now. In the background, it's always been maybe sitting there because sometimes what does ad mean? Whose ad is it? And there are some situations where it may be ambiguous. I don't, look, we're talking not the majority of cases. Maybe in 1 or 2% of the time that this is going on, there may be a question, well, who is putting forth this ad? But this concept was never emphasized, but there are some situations. For example, if you've got a diet food brand and they're paying influencers to promote weight loss generally. If it just says ad, you don't know that it is diet food brands that are promoting it. So again, it is going to be unique situations.

So, look, I don't want to ring the alarm bell and say, oh my god, ad is not sufficient, because that is certainly not the case. But again, it is a good time to step back and say, oh, is there going to be some real ambiguity if I just use ad in terms of who is sponsoring it, and what is a reasonable consumer supposed to know? So again, not a big alarm bell, but I do think there can be unique situations where it is worth a closer look.

Mudge: Yeah, I hadn't really processed through that. But I can see you might have a situation where a beauty influencer or a cooking influencer is promoting multiple brands, but they were only paid to promote one. Something like that, you'd want them to say, hey, this is the brand that I was paid to promote versus the other ones that I'm doing organically. I think that the NAD has thought a lot more about that, and has certainly had a bunch of cases recently, at least in the listicle context. And I know they're really focused on that.

Kaufman: I had to look up the word listicle at some point when someone started looking at using it. I just wasn't sure what a listicle was.

Mudge: It is just a list of stuff. Top ten, recommendations, stuff to buy.

Kaufman: It, I had not heard the term listicle until I came to the law firm from the FTC. That was a new thing to me. I mean, I know what it is, of course. But just, I throw that out there for you. But look, the other area where the endorsement guides punted was certainly the issue of kid influencers.

Mudge: Yes.

Kaufman: The FTC staff who…

Mudge: Yes.

Kaufman: …basically said…

Mudge: …that was something new, yeah.

Kaufman: They basically said, this is a thing, we're worried about it. But of course, staff followed this fall with a staff report about what they call stealth advertising to kids. And they really admonished advertisers that when you are sending messages to younger or less sophisticated audiences including, and it can also include, look, you've got teenagers with perhaps autism or things like that. That even a clear brand ad disclosure might not be enough for some audiences, and that some more detailed explanation when you're dealing with younger audiences might need to be included. Such as, I was paid to talk about this toy because the toy company hopes you will buy it. I mean, it seems a little bit excessive. But I get what they're talking about.

Mudge: Yeah. Alright. So, to wrap up, look, I don't think we were wrong. I think mostly the revised testimony was…

Kaufman: We're never wrong, Amy.

Mudge: Oh, thank you, thank you.

Kaufman: Back up there. Come on.

Mudge: Well, or even if we are, we might not admit it.

Kaufman: Okay.

Mudge: But I think the guides really didn't break any new ground or provide surprising new information. I mean, that said though, what we're seeing and hearing from staff, there certainly is a little bit more of a focus on what it means to have a disclosure be unavoidable. And maybe that means there needs to be more than one good disclosure and particularly in a video post. And maybe we need to begin thinking about more words than just ad, and it is a good time to take a fresh look. And so, with that, thank you so much for joining us for another episode of…

Kaufman: AD Nauseam.

Mudge: …AD Nauseam.

Kaufman: Thanks so much, everybody.

Brave: 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 AD-ttorneys Law Blog at www.adttorneyslawblog.com and check out all AD Nauseam podcasts by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.