Podcast Transcript

AD Nauseam: The AD Legend Series – Featuring Mary Engle

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Rubenking: 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 Randall Rubenking, 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 have a special guest, Mary Engle, the Executive Vice President of Policy at BBB National Programs and former Associate Director for Advertising Practice at the FTC, and they discuss a wide range of advertising issues. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: And welcome back to AD Nauseam. We have a special, special guest today and it is so special. It is our first special guest that does not actually work for BakerHostetler, although this lady has a standing job offer anytime she wants with Daniel and I. We have the wonderful Mary Engle. Welcome, welcome, Mary.

Engle: Thank you, Amy. I can't tell you how honored I am to be the first non-BakerHostetler guest on your podcast. I'm a huge fan of the podcast. I have it on my phone, in my podcast app. I can't wait for every new episode that comes out, so thrilled to be here.

Mudge: Mary, we are so happy to count you in our tens of followers. We, always, always awesome to have a celebrity listener.

Kaufman: Mary, it is so wonderful to have you here, and I'll give you 20 bucks for all the wonderful things you just said about our lovely little podcast. And I was lucky enough to have you as my boss for so many years at the FTC. And of course after your FTC career, you went to work for the BBB National Programs, which among other things runs the National Advertising Division, which, of course, we talk about here all the time. But before we get to the substance, we wanted to get an understanding of your pop cultural and other leanings, and we wanted to present you with a few different pairings and see which are your favorite. And maybe I will kick it off by asking, Madonna or Gaga?

Engle: Definitely Gaga.

Mudge: I was going to say neither, Mary. Brian Ferry. Brian Ferry or nothing.

Engle: That is true. I have seen Brian Ferry in concert a couple of times, and I haven't seen either Madonna or Lady Gaga in concert.

Kaufman: I saw Gaga's show in Vegas, the jazz show, and it was really good. She was, she is an impressive performer.

Mudge: Okay. Next one: Melrose Place or Beverly Hills 90210?

Engle: So, it was really hard because I was big fan of both of them back in the day. In fact, so much so that in my office at the time, we kept a diagram of all the different personalities on the show and who was hooking up with whom, and who was having liaisons there, and whether they were married or not, and it was very complicated. It was a very interconnected weave, but I'd have to choose Melrose Place over the two of them.

Kaufman: Yes, yes, totally agree with you.

Mudge: And this was at your FTC office? Does the Office of Budget Management know about these fine extracurricular activities?

Engle: We were, it was in a Commissioner's Office, so it was okay.

Kaufman: Okay. Taylor or Beyoncé?

Engle: I'm actually not a huge fan of either of those either. I would say Taylor, though. I do actually like her songs more than, yeah. I know. It is a terrible thing to admit.

Mudge: Daniel, we need to vet this person, yes. We need to vet these special guests a little bit more. Alright. I really hope the answer here is going to be neither. Star Wars or Star Trek?

Engle: No, definitely Star Trek. Definitely Star Trek.

Kaufman: Okay, yes, yes.

Mudge: Daniel is going to give you 20 bucks for that one too. Okay, I just.

Engle: Live long and prosper.

Kaufman: Finally, are you a New Yorker or Los Angeles?

Engle: It is definitely New York. Born and raised on Long Island, so got to be New York.

Kaufman: Excellent.

Mudge: Okay, well, that was an awesome, very quick drive-by into some of Mary's predilections in pop culture. But since you are basically, not basically. You are an advertising legend, and it truly is an honor to have you join us. But for our listeners, all dozens and dozens of them, talk to us a little bit about your career trajectory.

Engle: Sure. Yeah. So, I started as a staff attorney in the FTC's Division of Advertising Practices back in 1990 when Lee Peeler was associate director. And over the years, I worked for a couple of different Bureau directors, including Barry Cutler, who then went on to become a partner at BakerHostetler. I went over, got into management as an assistant director in the Enforcement division. While I was there, I headed up the FTC study of the marketing of violent entertainment media to kids which was a big deal back in the day over 20 years ago. And then in August of 2001, right before 9/11, so I remember that timing very well, I became associate director for advertising practices, heading up the Division of Advertising Practices as Lee Peeler became deputy director of the Bureau of Consumer Protection. So, I held that job basically 18 years until January 2020, when I left the FTC and joined BBB National Programs as Executive Vice President for Policy where I am today.

Kaufman: Mary, let's talk a little bit more about your time at the FTC. And I'm always amazed because the role of ad practices associate director has been held by three people since the 1980s. You, Lee, and Serena. Not a lot of turnover in that position but I'm wondering, during your time as the head of ad practices, are there any projects or matters you oversaw that you think are particularly significant for the advertising community?

Engle: I mean, there are really so many things, but I would say definitely the work on ad substantiation that we did, especially in the area of health claims and the need to have good science there. The media screening project for bogus weight loss claims that we did under Chairman Muris where we identified a number of weight loss claims that could never be true when reached out to the media to ask them to stop running those ads. Updating the endorsement guides, that was a pretty big deal, big project.

But I would say one of the things that I'm most proud of actually is the enforcement policy statement on deceptively formatted advertising that we put out in conjunction with the native advertising guidance. And this is where the Commission stated that advertising should be identifiable as advertising and explained why that was so and pointed to the various cases and advisory opinions from over the years that had touched on the concept but hadn't stated it very directly. And the significance of the policy statement was that the Commission was really putting it all together, explaining why advertising should be identifiable as advertising, and providing a place where people could really understand what the Commission policy was and point to that as the policy. And I think it was really important for the Commission to reinforce that principle, especially as the marketing and media landscape were evolving, and all sorts of new ways of advertising coming about and making it less easy for consumers to identify what was an ad and what was not an ad. So, I think it was a very timely policy statement as well.

Mudge: Certainly since you left, things have changed for a lot of reasons, from AMG now that the FTC is really focused on rules instead of guidance. But certainly during your tenure, I mean, the guidance that was issued was so incredibly important. And seeing you at conferences, and I remember being at the NAD conference when you had updated endorsement and testimonial guides and just hanging on to every word. And I think we had a really good run with the Mary Engle govern guidance.

Engle: Well, and you mentioned the endorsement guides in those updates, and I have to say that I feel vindicated about those amendments because we were considering those amendments back in the middle 2000s. And so, and it was at the NAD Conference in 2009 where we updated the endorsement guides. And I remember having to step out of the conference to take press calls because it was very controversial that we stated that the guides would apply to social media marketing. And we talked about bloggers because back in the day, that is what it was, it was bloggers. It was before the word influencer was even used.

But we said that material connections between advertisers and bloggers or other people who are being paid or incentivized to post about the advertiser should be disclosed. That this same principle of material connections that's been the guide since the beginning also applied to social media marketing. And when we had put that out for comment, the ad industry basically had a coronary. They literally said this was going to be the end of digital advertising. They just were completely opposed to it. But we went ahead and updated the guides anyway, and lo and behold, from the distance of 15 years, we can say that digital advertising landscape is flourishing. Influencer marketing.

Kaufman: You did not break the Internet. Are you saying you didn't break the Internet, Mary?

Engle: We didn't break the Internet. We didn't kill digital advertising. Influencer advertising is booming. And not only that, but governments and self-regulatory organizations around the world have all embraced the concept that material connections between advertisers and influencers should be disclosed. It is not controversial anymore, but it was so controversial at the time.

Mudge: I remember that. But you know what, though, I do think there is, and I put this in the good government category, you evolved as well. Back when those guides came out, you really said, these things have to be labeled as advertising, right, or ads. And over time, as social media use became more ubiquitous and more understandable, you loosened up a little bit and you allowed words like sponsored, like partnerships, like ambassadors. So, I think it was also a combination of the FTC going with and recognizing changes in how consumers use the medium. So, I think it was a good partnership, but there was good evolution on both sides.

Engle: Yeah. I mean, and I think that is something that the FTC will always try to do was to look at consumer understanding, and of course if that evolves then you want your principles to evolve as well.

Kaufman: Yeah. It is funny though, when you are at the FTC, you're working on stuff. There are times where your name becomes associated with a thing. And for you, one of the things I always think of is 2005. You respond to a, forgot if it was a letter or an inquiry or a request for a petition on product placement, and that 2005 letter of yours on product placement is cited too constantly. It is the Mary Engle letter. I mean, how does it feel having that? It is not just a guide that you worked on, but your name is not associated with it, you are the product placement letter.

Engle: Well, I will say it is one of the cool things about being the associate director of a division at the FTC is you get to sign your name to all sorts of things and really articulate policy for the Commission, and that was one of the things I enjoyed about the job. The product placement memo was a really good, or letter, is really good example of that. It, the opportunity to think hard about advertising issues and what the policy ought to be and how you get there based on existing precedent. And it was just, that was a really fun aspect of the job. And then, especially as technology evolved, like I mentioned earlier with the endorsement guides, there was a chance to think about how to apply this 100-year-old FTC Act and the 25- or 30-year-old Deception Policy statement to forms of marketing that no one would have foreseen when those things were written.

Mudge: Let's switch over to your move to the National Advertising Division. And obviously, when you were at the FTC, referrals for noncompliance from the NAD generally go to the Advertising Division. So, you were on the receiving end of NAD referrals and then to make the jump over to now have oversight for the NAD. I'm very interested to see how your perspectives have changed from being on the hardcore regulator side on to the self-regulatory side. And one of the things that's always struck me is the critical difference in that the FTC has enforcement discretion. You can open cases, but you can close them. You can close them with a whimper, not a bang if you decide to do that, which NAD doesn't have at all. NAD has to decide every challenger case that is before it, even if it says, gosh, this is really close. Not really sure about this. No room to say, not going to get to this today. How do you view that? And do you have a different view about it now that you're on the self-reg side versus the regulatory side?

Engle: Yeah. So, enforcement discretion is a great thing, right? So, for the FTC to have that, because there are so many times where you may look at a practice, you start looking at a potential case, and then you decide for various reasons that you're not even going to open an investigation. You do some digging around and then put it aside, or you may open a formal investigation but decide for various reasons that it is not worth pursuing as a case. So, maybe you looked at it and the facts weren't what you thought they were at the beginning, or maybe the company quickly cooperated and got into compliance and it didn't seem worth pursuing. Or maybe you just got really busy on something else, and you didn't have time for it, so you could just close it. And it is nice to have that discretion.

But as you said, at the NAD, we don't have that same discretion. NAD has to decide the cases before it. You can't just put something aside, even if it seems complicated or hard or you're busy. You've got to address it. In terms of NAD referrals, I would say, I don't really think my perspective has changed too much since I switched from the FTC to BBB National Programs. I mean, I will say there seem to be fewer referrals now to the FTC than there were when I was at the FTC. I'm not sure the reason for that exactly, but they don't happen as frequently.

My perspective then was that, and now, is it is really important to have the FTC as a backstop. That is a really important part of industry, self-regulation, to have that kind of threat. But understanding that the FTC's priorities are different. It is not going to be able to take up every case. But that it is important for the FTC, as a matter of policy, to back up industry self-regulation so to look at every referral that goes to it and try to get the company to participate if they didn't participate or to just make some changes to their advertising, if it can be easily addressed.

Kaufman: It is so common to have clients ask us how seriously does the FTC take those referrals? It is a very standard question. But I was wondering, thinking 2024, what are you seeing in the advertising industry that concerns you most of late?

Engle: Well, I would say, and setting aside political ads and AI and deep fakes and misinformation, because I do think that that is a real problem, but setting that aside and just looking at the commercial space where NAD and FTC have jurisdiction. I don't know. This may sound so mundane, but I'm concerned about the continued practice of advertisers hiding important information in minute disclosures or fleeting disclosures that consumers will never read or see or understand or hear. And it is a part of the practice of dark patterns. I mean, dark patterns is a relatively new term, but the hiding of information that consumers need to make decisions is part of the dark patterns practice. And I feel like this is an issue that the FTC and the NAD have been banging the job on for so long.

I remember back in 2001 the FTC and NAD held a joint workshop called Disclosure Exposure that was addressing this very issue of inadequate disclosures. And then in 2014, so that is 10 years now, at the FTC we sent over 60 letters to advertisers highlighting, and a lot of them major advertisers, highlighting their poor disclosures. And it just seems like it doesn't get much traction. It is a continued problem that the NAD addresses day in and day out.

Kaufman: Say what you will about the FTC, they are really good at coming up with names for their workshops and seminars.

Mudge: Vaguely sexual sounding. I don't know, a little, that is, can we still do that in 2024?

Engle: It was Operation Full Disclosure in 2014, so we had a name for that too.

Mudge: Blurred lines. I mean, I don't know if this would stand up under the Lina Khan administration. I mean, you couldn't even call them workshops for a while, right?

Engle: That is true.

Mudge: So, those are your concerns, and I would be remiss if we didn't actually recommend to all of our advertiser listeners to consider attending the NAD Annual Law Conference. This year, it is back in New York. It is September 16 and 17, and a lot of these concerns, how they can be addressed, and really tips for best practices are shared at that conference. It is a do-not-miss couple of days, certainly for our team.

But let's focus on opportunities, where there's gaps in regulation. Where do you see where self-regulation can step in? I mean, we've got the Supreme Court *Chevron* decision that's got everyone in a tizzy. What are your thoughts about that, and can self-regulation save the day?

Engle: Yeah. So, I don't, I won't necessarily say it will save the day, but there is certainly a role for self-regulation. And when you think about the idea of *Chevron* was statutes being ambiguous or unclear and deferring to the agency's interpretation, and now the Supreme Court is saying no. So, the question is, who is going to fill the regulatory gaps? And I think in a lot of cases, industry self-regulation can help do that. If there are industries who think they've got the better interpretation of a statute that there are certain practices, procedures, processes that make sense and are in line with the statute, they can put those into place on a self-regulatory basis. They don't have to wait for the government to act. And I think it is really incumbent on business leaders to show leadership and to be able to agree to standards and hold themselves accountable. It shouldn't necessarily always be under the thumb of the government, and I think that is a really important part of industry self-regulation.

Kaufman: So, Mary, one of the other cool things about working at the FTC is every once in a while, the opportunity exists to get to testify before Congress, before the House, before the Senate. And I was lucky enough to do it twice. I know you did it multiple times. One time, however, you did get to testify with a very well-known individual, Dr. Oz, and I was wondering if there are any tidbits you want to share about that.

Engle: Okay. Yeah, that was definitely my 15 minutes of fame. It was relatively easy for me as a witness in that hearing because all of the ire was directed at Dr. Oz, really. And so, I got off pretty easy in terms of answering the Senators' questions. But after the hearing, my team and I spent about 45 minutes with Dr. Oz back in one of the Senator's offices talking to him about what he could be doing differently on his show. So, and it was really surreal. I kept thinking to myself, I can't believe I'm standing here talking to Dr. Oz. And then, and Amy, I know you will appreciate this. About a month after the hearing, I was getting my nails done, and I was flipping through an Us Weekly at the nail salon, and there was a picture from the hearing. Dr. Oz and half of my face in the photo. And I was so excited.

Oh hope it was your good side.

Mudge: I showed it to everybody in the salon. Look, it is me.

Engle: Was it your Mariah Carey good side? Hey, Mary, half of you getting into Us Weekly is half more than I've ever made. So, I bow to you. I think we only have

Mudge: time for one more question, and Daniel has paid me money.

And that is, who was your favorite staff attorney when you were a manager at the FTC?

Kaufman:

It was this guy named Daniel Kaufman. Yeah. You heard of him.

Engle: That is the correct answer. Thank you. No, you were a wonderful boss. I learned so much from working for you, and you're just a role model for so many people.

Kaufman: You've done so much for the advertising community, but you were just an amazing boss. I mean, so it is really fortunate for people who are at the FTC to have you to look up to, to learn from, and to work with. So, I got to say it is an honor to have you on our little podcast, but you really are just a wonderful person to work with, to work for and, I don't know. I'm going to get all teary-eyed about it. You're one of the best bosses I ever had.

Well, thank you so much. That is very nice.

Engle: You are, listen up. You were her boss too for a good long while. You might have been her boss for longer than she was your boss.

Mudge:

That is true. Actually, what goes around comes around.

Engle:

Mudge: You all just get up and rotate there. Alright. Mary, we always end with some tips. With your last minute, is there anything that you would like to share with industry that is coming up?

Engle: Yes, you mentioned the NAD conference September 16 and 17 and just put on people's radar or calendar the following week, September 24, Tuesday in Washington, D.C., we are going to hold our second annual Soft Law Summit. Soft law self-regulation being a type of soft law as distinguished from the hard law of government regulation, talking about the ways in which industry can set standards and rules of the road and when it makes sense for it to do so, what are the conditions that make self-regulation work, why it works and why sometimes it doesn't, and how we can learn from successful practices of industry self-regulation. So, that is September 24 in D.C.

Mudge: And if anyone is interested in joining that, they should reach out to whom at the BBB National Programs for more information?

Engle: So, go to our website, bbbprograms.org, and if you search for Soft Law Summit, information about it will come up.

Mudge: Excellent. Well, thank you again so much for joining us, and that is a wrap for this edition of AD Nauseam.

Rubenking 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, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.