



## Podcast Transcript

Phyllis!

**Date:** May 20, 2025

**Guest:** Amy Mudge & Daniel Kaufman ft. Phyllis Marcus from the NAD, **Host:** Randal Rubenking

**Run Time:** 28:05

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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 Randal 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 welcome a very special guest to their show, Phyllis Marcus, the new Vice President of the BBB National Programs' National Advertising Division and former FTC staffer of many years. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Phyllis.

Mudge: Welcome back, and thank you so much for joining us once again for AD Nauseam. And the AD Nauseam team, that is Amy Mudge and Daniel Kaufman, is giddy with excitement today, as our guest is someone that we've known for years and years and who has recently been named, dut da da da! The new Director of the BBB National Programs' National Advertising Division, or what we refer to as NAD. And she started the job on April 1, and that, friends, is no joke.

Kaufman: And we are indeed giddy. She left to the private practice maybe about 10 years ago, where she represented a lot of very impressive clients and became Chambers-ranked in advertising. And now, she is in charge of NAD. And we welcome the very wonderful Phyllis Marcus to our show.

Marcus: I am so happy to be on AD Nauseam.

Mudge: Phyllis, we know that NAD has a podcast too, which we are always happy to promote. What is that one called?

Marcus: That is called Ad Watchers. And our two hosts are the wonderful Annie Ugurlayan and Eric Unis, and they have multiple seasons out, of a podcast where they break down everything National Advertising Division for those ad watchers out there.

Mudge: So, listen to AD Nauseam first. But as your second go-to, it is Ad Watchers. But Phyllis, there is so much we want to discuss with you. Certainly, your time at the FTC, because we know you, we love you. But folks in the advertising community do because it is a small bar, it is a small community. But there are lots of companies and industries that use NAD. So we just wanted them to get to know you a little bit, and also to get your initial thoughts after you've been at the helm of NAD for a month and so much more.

But first, of course, we like to lollygag a bit before we get into the meat of things. And we'd like to spitball with you. We've got some very important questions.

Kaufman: Yeah, really quite important. And Amy and I, to be clear, we will be judging you based upon your responses.

Mudge: And Daniel will be even more giddy if they're really boneheaded. Just saying.

Kaufman: I want to kick it off with the most important question, because, Phyllis, it is a bit of an old-school name. We don't hear many Phyllises these days. I love the name, it is wonderful. But do you have a favorite Phyllis? Either Diller; Lindstrom from Mary Tyler Moore, of course; or Phyllis Vance from The Office?

Marcus: I am going with none of the above.

Kaufman: Ooh!

Marcus: I am coming in with stealth answer from left field. My favorite Phyllis is Shari Lewis, who is the puppeteer who had the puppet Lamb Chop, the sock puppet. And Shari Lewis was born Phyllis Naomi Hurwitz, and, in fact, my name at birth was Phyllis Heather Hurwitz. So, it is Shari Lewis for the win.

Mudge: Oh, I love Lamb Chop. My two poodles fight over their Lamb Chop doll. Yay!

Marcus: Okay, Daniel, what is the score now?

Kaufman: Okay, I give you points for creativity. Though, I'm a huge Mary Tyler Moore fan though, so Phyllis Lindstrom would always be my answer.

Mudge: You get extra points from me for just going against Mr. Kaufman. But please, Daniel, what other questions do you have for dear Phyllis?

Kaufman: Bucking the hypo, I don't know if I approve of that. Okay, most embarrassing movie that you love?

Marcus: Oh, off the top of my head and I don't have to think about it for even a millisecond, Valley Girl.

Mudge: Yes. Melt with you, I'll stop the world. Yep, that is where that song came from.

Kaufman: Excellent choice. Mine would be Babe, the pig. I cry every time I see it. That is for another day.

Mudge: That is not embarrassing. That is like, they won an Oscar or something. That is a quality...

Kaufman: It is a talking pig movie at the end of the day.

Mudge: Okay, alright. Alright.

Kaufman: Okay, favorite dance floor song from the 80s?

Marcus: Has to be Push It! by Salt-N-Pepa.

Mudge: Is that 80s, or are we, did we creep into 1990?

Kaufman: Oh, it is 80s. It is totally 80s.

Marcus: It is 80s. It was on my tape machine. And it was the song that played when people didn't get me in my dorm room in college.

Kaufman: They actually performed at my college when I was there. I did not get to see them, but yeah.

Mudge: Oh, that is a hard one. You're never getting over that.

Kaufman: Yeah. Well, it was before they were famous. And I remember people leaving the show and were like, what on earth was that? Little did we know, we would all be singing that song. Okay, favorite Madonna song?

Marcus: Material Girl.

Mudge: Very appropriate for the AD Nauseam podcast.

Marcus: That surprise you?

Kaufman: And finally, what is your favorite vacation spot?

Marcus: I would have to say Kiawah Island, South Carolina, with its miles and miles of beaches and quiet surf and bike paths to ride on. Do I sound like a commercial now? Because I just love it down there.

Mudge: You do sound like an ad. Wouldn't you love to be an influencer for Kiawah Island so you could get there for free? That would be even better.

Marcus: \_\_\_\_\_ would give me a house, yes.

Kaufman: We've gotten many deals coming in from doing this podcast. You wouldn't believe it.

Mudge: We need to, Daniel. I would be even more giddy if we could start making some money on this thing.

Kaufman: I know.

Mudge: For our dear listeners, when you have the opportunity to meet Phyllis, she is someone you could always go to for vacation advice, because she has been some lovely places and has great stories to tell about vacationing with her husband, vacationing with her extended family, vacationing with the girls. So, that is one of the things I like to pick Phyllis's brains over, and she always has a great answer as to what was your most recent vacation spot.

But alright, we put it off long enough. Phyllis, let's get back to NAD. Tell us, what are your initial, right out-of-the-box thoughts after one month in this new role? We want to know, how is it going? Are you okay? It is a notoriously tough job. Can seem like glass is half empty with challengers and advertisers feeling like the process could be improved. And we'd love to know what your thoughts are and how you might tweak things.

Marcus: I have to say, it is going great. It is a big job. It is a fast job. It is a fun job, and it is the job that many of us in the advertising world and in the advertising bar might want at this stage of our career. So, I was just thrilled by the opportunity when it arose.

What is not surprising me, but you have to see it to believe it, is the volume of cases, the diversity of cases that come through, and then the deep passion and commitment to the process that practitioners before the National Advertising Division bring. There are strong personalities, and there are strong positions, and there is really impressive advocacy. And sometimes, passions get high. It's been fascinating that in the six short weeks since I've been in the position, I haven't seen it all, but I've seen an awful lot.

Kaufman: So, what should we expect from NAD in 2025? There are, of course, the cases you have to, and will continue to, decide. But of course, NAD's monitoring cases allow you to create an agenda as well. So, any areas or issues you are particularly interested in delving into?

Marcus: Yeah. As you point out, Daniel, a big portion of our docket are cases that are brought by challengers of one company against another company. But the NAD does bring a certain number, certain percentage of cases in our own name as what we call monitoring cases. We started a little while ago, and you have started to see these cases come out in the area of AI. And that is one of our key monitoring priorities. In fact, we have an attorney who is dedicated to looking at the marketplace and finding AI cases. And so some, as I said, have been issued. And there are certainly more to come.

In other industries, in other areas, this is where I get to bring my own observations to the table and work with the NAD team on certain priorities. I think you might see products advertised to teens as a category of cases that we'll take an interest in. In fact, there were two cases involving cosmetics and teens and children. One of which, of, a recent case, we partnered for the first time with our sister division CARU, the Children's Advertising Review Unit, on. We may take a broader dive into the cosmetics field and industry.

In other areas, we may look at financial services. And especially some Fintech and cutting-edge products and services in those areas. But we're going to take some time, look at the marketplace and really think through where it makes the most sense for us to focus our attention in the coming year.

Kaufman: Phyllis, when you were at the FTC as chief of staff at Ad Practices, there were changes to how the FTC processed referrals from the NAD, including creating an easy-to-find page on the FTC website with details of all the referrals and the ultimate FTC disposition. I know you were instrumental in setting that process up, and are there changes you hope to add regarding how FTC referrals are handled?

Marcus: I don't think I envision any changes in this area. Advertisers don't like referrals. People don't want to take referrals. We hope that referrals are few and far

between. We will continue to have a strong relationship with the FTC going forward. And we've always appreciated how seriously the agency takes our referrals and the fact that they are transparent in the way that such referrals are resolved. I think that process is working pretty well.

Mudge: Well, Phyllis, with this new FTC taking perhaps some different approaches towards advertising issues including things like we've heard Chairman Ferguson say he doesn't think much about the FTC's "up to" case claims. Do you have some thoughts about how NAD might respond or change as things evolve at the FTC over the next few years?

Marcus: Our baseline legal structure and guidance comes from the regulatory enforcement agencies around us. So we aren't creating that law on our own. That said, we have an entire body of what I'd like to call jurisprudence that interprets the cases as they come to us. The thought is that as things may wax or wane at the Federal Trade Commission, we're going to continue to see the steady stream of cases that we've always seen at the National Advertising Division. They're really of a different nature, in many respects, from the kinds of cases that the FTC takes on.

Now, there are some overlaps, and we'll be looking closely at whether standards change coming out of the FTC. I'm thinking of things like Made in the USA cases, or the positions that the FTC takes on influencers and endorsements more broadly, or health claims, for example. But we'll really have to see how things shape up and change at the Federal Trade Commission to determine whether things may change accordingly in our application of the law at the NAD.

Kaufman: So Phyllis, backing up. What were you most looking forward to as you took on this new job?

Marcus: So, I view this job, and this is a very personal answer. But I view the job as really a culmination of where I have been before and where I'd like to focus this next phase, maybe the last phase, I'm not sure, of my career. When you pull together the regulatory and the enforcement work and the deep knowledge in advertising standards, and then my application of those standards directly to clients, working closely with and hand in hand with clients as a counselor, and then stepping back one step and helping to resolve disputes between brands, it really feels to me like a capstone position.

Mudge: I love that. I love that, Phyllis. I'm so excited for you. I'm so excited for us and for industry. But I want to go back just a minute to those FTC referrals, because that really is, that is the stick that NAD wields. If you don't participate, if you don't agree to abide by an NAD recommendation, that the file gets sent over to the FTC. And do you have any initial thoughts on whether this FTC will be more or less interested in NAD referrals? And if you're comfortable commenting, one of the things that I think under Laura Brett's tenure we saw is trying to expand those sticks to develop a takedown relationship with some of the platforms like Facebook, and maybe to widen the relationship with state AGs and other

potential referring agencies. I'm not sure if you see other ways that you might move into to making sure that NAD is respected and listened to.

Marcus: I think you've hit upon a lot of the sticks that we may wield and to greater or lesser effect with any one of the entities and agencies that you've discussed. I can't say how a referral will be handled or viewed if we pass it along to the Federal Trade Commission going forward, or to the FDA, or to a state AG, for example. My hope is that they will give it the respect that it is due, and take it seriously and help us do our job as we can assist in monitoring truth in advertising.

Now, one of the initiatives that you mentioned I'd like to give a little bit of attention to, which are the referrals to the platforms. So, we have a formal referral program with several of the platforms by which we can send over a decision. And the platform, so Facebook or Google as examples, will review the decision pursuant to their own advertising policies. And if they find that decision or the advertiser's claims violate the platform's policies, they have committed to taking down the advertising. And we're very pleased by that commitment. And I think it provides another tool in the toolkit on the compliance end, once practitioners and the attorneys at the National Advertising Division have done our work to make sure that our findings are implemented.

Kaufman: I know it has been a short time, but any helpful tips you got for practitioners based on what you've seen in six weeks?

Marcus: I'd like to say that my six weeks in the job have been a bit of a capsule collection of what the job can be. So, some tips here. Keep up the excellent advocacy. I can't say enough about how impressed I am by the quality of what comes before us and the deep thinking about the implications of our decisions, one way or another. I would say remember some of the fundamentals from kindergarten. Always be kind, always be patient, always have faith that we're rowing in the same direction. And that to keep the system robust and credible and healthy, we all have a role to play. Should I also say, take a nap and wash your hands? I don't know. But here are some of the reminders.

Mudge: That was lovely, Phyllis. I've not been in a kindergarten class for a long time, but yes. But I want to turn back, you mentioned influencer issues as an area for monitoring. And it is going to be a, likely, a continued focus of monitoring under your watch. And this has been a consistent topic of discussion. And actually, in some of those cases that you mentioned, including those cosmetic teen cases, there was a focus on disclosures. And what I see is really reinforcing some of the guidance we've gotten from the FTC, but maybe guidance that they haven't brought enforcement on. But that disclosures, for example, be phrased in audio and in writing when the testimonial appears in both cases. And this has a really broad impact on the audience. As you said, it is a basis of jurisprudence. Where do you see this heading?

Marcus: So, a couple of thoughts on that, Amy. I am not sure our cases are going to slow down in this area. Just when you thought there, you've said everything there was

to say about influencer marketing, either new formats or new confusion crops up. You can see some of that in our recent monitoring cases involving the SKIMS brand and some of the celebrities who participated in those ad campaigns.

Ultimately, we are hoping to develop a monitoring program in the name of self-regulation that could certify trained influencers, who could go out into the marketplace and represent that they have been through a best practices guidance. And they themselves go out and train others and can collaborate with each other using resources that we are hoping to stand up. So, I think there is a lot of opportunity in our program at BBB National Programs to working with industry to help shore up what seems to continue to be a problematic area of marketing.

Mudge: But wow, outside of your enforcement and thinking more broadly and creatively, that is, wow. Stay tuned for that, folks.

Marcus: Yeah, I'm excited about that.

Kaufman: Let's turn back the clock and chat a little bit about your career at the FTC, where you played a pivotal role in the development of the COPPA rule and modernizing that rule. But where you also had a really long career doing a lot of really interesting law enforcement. What are some of your favorite FTC matters that you worked on?

Marcus: Maybe not favorite, but certainly wacky. I was in charge at some point of a sweep of cases looking at whether old mattresses had been recovered with new ticking or covering and were being sold as new. Imagine what that investigation entailed.

But that is not all. At some point, I became known by the alliterative name, Pestilence Point Person Phyllis. And I was in charge of some cases involving lice removal products. And the key there is you have to comb, you have to comb, you have to comb, even after you have killed. See, the lice lady in me never ever goes away.

There was another set of cases involving the bridal gown industry, and this was when the marketing online of bridal gowns was just coming to the fore. And brides were going into salons picking out their favorite designer dress, not buying it at the salon, but then going to find it online. And somewhat in retaliation, bridal salons were cutting out the tags. And it was brought to the FTC's attention, and we had to take a look and see whether those practices violated the Textile Act. So, yeah, I go way back into the archives and into the attic and into the basement for those cases.

Mudge: Well, I'm all itchy. Phyllis, do you have a favorite NAD case or cases from over the years?

Marcus: A favorite NAD case. I really was interested, when I was in private practice, in the cases brought by grocers. I know this is going to sound crazy, but the competition in the grocery market based on price and promotions week by week

really concerned my clients. And so, we followed that set of cases to a T. And if you were claiming a certain price savings in your grocery basket over your competitor's grocery basket, boy, those prices needed to be up to date, accurate on a realistic basket, and changed over weekly. I have those absolutely imprinted in my brain.

Mudge: Locked and loaded. I think it is still good law. It is still what that side of the industry really follows. But NAD's had a very open relationship with industry, certainly over Laura Brett's tenure, and I think viewing it as really part of the job for the staff lawyers to interact with individual companies and with industry segments, certainly like cosmetics. How do you feel about staying close to industry? Or might you approach it a little bit more like the FTC, where there is a little bit more distance between industry and the folks deciding the cases?

Marcus: I think the pure nature of the organization necessitates, or certainly recommends, a close engagement with industry. Both to learn about the areas of focus to understand the industry itself as we are deciding cases relating to particular industry, and also to serve in a bit of an evangelical role, that is, to teach new industries about the benefits of BBB National Programs and our pretty unique process.

Kaufman: We've seen the role of the NAD director change over the years. And typically, directors have sat in on all the meetings and participated in all of the decision-making. Should we expect that to continue under your tenure?

Marcus: So, things changed a little bit over COVID and made the ability to participate a bit easier. So, virtual meetings became, if not the norm, at least an option that was on the table. I am located in our McLean office. We have two primary offices at the organization. Many people are located in McLean, and many people are located in New York. Typically, the in-person meetings have taken place in our New York offices, and not all meetings have reverted to in-person after COVID resolved itself.

There are a lot of practitioners who still like the virtual format. Some people like to do meetings in person. We're playing around with the possibility that where it makes sense, perhaps some of those in-person meetings can take place down in our McLean offices, where we certainly have the space to hold the same style of meeting as we do in our New York office. Or where I can't quite get to New York, I may participate virtually. I anticipate being in the meetings in one way or another, and I certainly anticipate being a part of the decision-making for the cases that come before us.

Mudge: Interesting. So a little, maybe a little bit more of a hybrid approach to, it is really, I think NAD has been so focused in New York. This is probably a welcome development. I'm excited about that.

Kaufman: Phyllis, we noticed that the new BCP Director, Chris Mufarrige from the FTC, is scheduled to speak at NAD's annual conference this year, which is September 16 and 17 here in Washington, D.C. What else should we look forward to at the

conference this year? It is always a really interesting and enlightening conference.

Marcus: We're going to be holding a pre-conference workshop for the first time this year for practitioners and younger attorneys who aren't quite familiar with the ins and outs of the actual process of bringing a case to the NAD. And that will take place in the afternoon of the 15th. So, if September 16 is a Tuesday, I believe, in the afternoon of the 15th, we're going to gather for a couple of hours and do a roll-up-your-sleeves workshop. So I do hope your listeners will register for the workshop in addition to the main stage conference.

Other things to look forward to, I'm going to be doing a fireside chat so more people can hear from me and pick my brain. We are hoping to hear from a party, a practitioner, or both who are new to the process who can share some of their insights as they have come into the fold. Because as both of, there are long-standing practitioners before the NAD, and you guys know the ropes and can do it with your eyes closed. But it might be interesting, we think, to hear from people for whom this was their first experience. And hopefully, we'll get some good feedback from sessions like that.

We'll be talking bread and butter issues as well. We'll be going through a hypothetical in depth. We're going to be talking about marketing to teens. That is one of the priority areas that I mentioned earlier. Of course, we'll be talking about influencer marketing. Very much look forward to hearing from the new BCP director. If all goes well, we're also hoping to have a demonstration on how AI is deployed to create ads, so that we can see the creative process before we break into some discussion on the effects of, and implications of, that new tech.

Mudge: Phyllis, thank you so much. This was your word from your sponsor. We really hope everyone joins us, all of our listeners, at the NAD conference. Early bird pricing is available online. So, make sure that you Google that and take advantage of that. But we can't wait to see you in our fair city of Washington, D.C., and welcome the advertising community for what is, really, a do-not-miss conference.

But Phyllis, we want to thank you so much for agreeing to join us on AD Nauseam. We hope to get your commitment now to come back. We'd love to get your thoughts after a year. And really, you have an open invitation anytime. You want to shoot the breeze or discuss vexing advertising issues, we are always here anytime you want to dial in. And we wish you the best of luck in the new position. We have complete confidence in you and just are really excited for what the future holds at NAD.

Marcus: Thank you, guys. This was great.

Rubenking: Thank you, Amy, Daniel, and Phyllis. If you have any questions for Amy, Daniel, or Phyllis, 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](http://www.adventures-in-law.com). And check out all AD Nauseam episodes by

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