



Podcast Transcript

AD Nauseam – Senses Working Overtime

Date: August 28, 2025

Guest: Amy Mudge and Daniel Kaufman, **Host:** Connor Corbett

Run Time: 18:02

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

Corbett: 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 Connor Corbett, your new host of AD Nauseam, 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 explore how advertisers can substantiate sensory claims such as taste, smell and feel through rigorous testing, with a focus on guidance from the ASTM E1958 standard and decisions from the National Advertising Division. They'll also discuss key cases involving recognizable brands, emphasizing the importance of clear comparisons, appropriate test design and statistical validity. With that

welcome to AD Nauseam, and let's turn it over to Amy and Daniel for this week's episode on sensory claims.

Kaufman: Welcome back to AD Nauseam. Well Amy, D.C. is kind of messing around with us. We've got 70 degree weather in D.C. in August, creating the illusion that summer is winding down and we are heading to fall, though I think we are both well aware this is deceptive and summer will come back with a vengeance but right into fall. It is back to school for some, leaves falling, temperatures dipping hopefully and fall brings some of my favorite things, most notably not sweating to death, pumpkin spice latte, all things apple, brisk feel of the morning and fall and of course, the sight of the leaves turning red and orange. And it made me think we should tackle sensory claims as we are soon, I pray, going to be surrounded by all of these new sights, smells, tastes and sounds, of course.

Mudge: Daniel, that is a great idea, and I do know you love all these things, although probably not school buses. But otherwise...

Kaufman: There is a little schadenfreude watching kids having to go off to school that I enjoy.

Mudge: I love fall too. And you're right. In D.C. we don't get much fall in September. It kind of kicks into October, November, but I think I think we're here. I love getting out my black tights. I don't like putting my sandals away, but fall is on the horizon so, and I love sensory claims and what is really great is if we talk about this, we're going to really focus on NAD because that is where we get the body of law that we turn to most frequently in terms of how to support sensory claims, feel, taste, touch, smell, claims.

But you know what, Daniel? If we are going to really talk about fall, I cannot think about fall without thinking about Halloween. And you know, when I was little, the store bought costumes were so crappy. They were like these lawn bags with those little thin face masks with the strap across the back that broke. So, we had to really get started early on our costumes, because we had to make them. So, what was your favorite?

Kaufman: So, look, I had two favorites when I was a kid, and I think I have photographic evidence of both. One was going as Luke Skywalker.

Mudge: Oh.

Kaufman: I had a lightsaber made out of tin foil, so that was pretty exciting. I was dressed in all white because I think that is what he wore on Tatooine. Randy can verify that, but no, the best I ever did, and I've got evidence of this, is a great picture of me and my mom, and I am dressed as Paul Stanley from Kiss with star makeup on my eye. It is the coolest.

Mudge: You have the boots? You, as a little kid, were you rocking the heels?

Kaufman: Yeah. We didn't go that far on Halloween. I was lucky enough to be able to finance the makeup for my, putting the black star on my eye.

Mudge: You're giving me Mark Hamill vibes. I will not be able to forget that. So, mine was definitely, I know the date. I don't know if I have photographic evidence. If I do, it is probably as a very faded Polaroid, right? It was the bicentennial and my mom painted sheets silver and she made me a paper mâché torch, and I was the Statue of Liberty. And my little brother, because we love a family theme costume, was Uncle Sam or he was so little, he called himself Huncle Sam.

Kaufman: Aw.

Mudge: Yes, yes. And I carried on that tradition when my kids were little and we dressed in a family theme. And my oldest daughter loved Disney princesses. So, one year we did Aladdin. We dressed around her. I was the genie. My husband, Will, was Jafar. Annabelle, my daughter, was, of course, Jasmine. And then Emmett, my son, was the monkey and my mom, who is the costume maker extraordinaire, made her own magic carpet costume, which is really the pièce de resistance of the whole thing.

Kaufman: Okay, that is pretty impressive. But speaking of taste, what about your favorite Halloween candy? For me, I need a direct sugar delivery system, so I'm all about Smarties or Nerds, and I will say I have definitely horrified some people because I love me some candy corn, and I know that is a very controversial take.

Mudge: I have no words, Daniel. I know it is a podcast, and I must have words. That, all I can say is you truly love sugar if candy corn is on your list. It is interesting, not chocolate, and I'm a not chocolate person either. I would trade in all my chocolate to get the Mike and Ikes or the Dots. That was, or I will, in your vein of Smarties, the most joyful candy was the Pixy Stix. If I saw any of those, that was just, that was delightful.

Kaufman: Oh, my God. Okay, Amy, before I start focusing a little bit too much on sugar, let us get back to the topic at hand, sensory claims. Now, for this we need to start with the ASTM Standard Guide for Sensory Claim Substantiation E1958. This lays out things like testing protocols and processes that are reliable for supporting sensory claims, including parity and superiority claims, with details on sample size, data collection, framing of questions and statistical analysis.

Mudge: Indeed. That is the definitive source document to turn to anytime you are designing research to support a sensory claim, and it is kind of nice that we have that because not everything in advertising law has a little manual. But before we dive into some of what is required, let's talk for a bit about when you actually need such support. Because a full on consumer sensory test doing a blind comparison of two products and whether one is softer than the other, one smells better, it is a lot of work and a lot of expense, and a lot of times our clients tell us, look, we only want to show somebody picking a product over the other. We don't want to make specific claims like 9 out of 10 consumers think our product is beefier than theirs. How can we do that?

Kaufman: Well, and that is the rub, of course. NAD has been pretty consistent in saying, if you show something that says or implies that consumers find your product

superior based on a sensory attribute, chances are good you are going to need rigorous support to back up that this conclusion is typical. Yoplait did a national taste test comparing its Greek blueberry yogurt to Chobani's and found that two thirds of people preferred Yoplait. We'll come back to this test in a minute, but the campaign included a user generated content invitation on social media also inviting people to try Yoplait Greek compared to their favorite yogurt and post about it with the hashtag taste off and Yoplait Greek. These posts were displayed next to the taste test claims and NAD said the presentation was too broad and suggested there was taste preference evidence across the full line of products, not just the blueberry and NAD recommended that Yoplait separate its taste preference claims from those UGC posts.

Mudge: Yeah. Similarly, there was a case involving claims that Miller Lite had more taste. A lot of these cases do involve taste claims, but the basic idea applies whether it is touch, whether it is smell or taste. But in this case, NAD found the testing supporting this claim was good but then there were digital ads showing consumers participating in a blind taste test with people saying things like I chose Miller Lite. It was a better beer, but NAD said the test itself focused on consumers choosing which beer they thought had more taste. They didn't ask questions about which did they prefer, which did they think tastes better? One over the other. So, basically, NAD said that these Internet ads purporting to show a taste preference had to be discontinued because the evidence that Miller had just didn't fit with that.

Kaufman: Interesting. Now, going back to the Yoplait case, we were talking about before, before we talk about test design, I think it is important that NAD does not require an advertiser to test the most similar products. In the yogurt case, Yoplait tested its blended blueberry yogurt with Chobani's fruit on the bottom yogurt. Chobani said that was not fair and they should have tested the Chobani blended Greek yogurt and NAD said that advertisers can test dissimilar products so long as, and it is an important, so thing as the basis of comparison has to be clearly disclosed, and here the claim was that people agree that Yoplait Greek blueberry tastes better than Chobani blueberry with fruit on the bottom and NAD said that was okay.

Mudge: Yeah, absolutely. And that is the rub though, that making sure that basis of comparison is really clear. So, you don't have to do a pure apples to apples test, but if you don't and you're doing what sometimes we'll call the apples to orange test, that is going to have to be super clearly presented. I don't think I've seen it presented as clearly as that Greek yogurt one.

There was an earlier case involving taste preference claims for lasagna where the claim was the one lasagna was preferred over the leading meat lasagna and NAD found that is literally true. That was the product that was tested. The number one in the market leading meat lasagna but any decent consumers wouldn't necessarily know what brand this is, let alone what product in that lasagna line was the number one. So here, found that iteration of the claim was too broad and the comparison was not clearly laid out. We hear a lot that companies are nervous to name a specific competitor and a specific competitor's

product in their advertising but honestly this is going to be far less risky when you're trying to be clear about exactly what you are comparing.

Kaufman: So, let's get to some of those test design issues that we've been alluding to and NAD and the ASTM Guide requires you to do a sensory test using a sample of consumers who customarily use the products being paired, and this is of course going to be different from consumer perception tests where you can test the target buying audience. For sensory tests, it is about what people who use or likely would use the product.

Mudge: Yeah, and one NAD case I come back to a lot for instruction, is the Malt-O-Meal or *MOM Cereal* case. And there they were doing another taste preference test. It was for multiple cereals, testing a chocolate, a fruity, a honey and oats. And so, it was a lot of taste testing to get that many products in. But they had cereal eaters in their test ages 30 to 60 and NAD was concerned that they didn't test younger people because maybe the people who buy the cereal are usually in that age bracket but people under 30 are a large part of the cereal eating audience. And so, it was a big miss to leave them out.

Kaufman: And that is a good case for all of the detail. In addition, for separate sensory claims, it is really important to get good geographic distribution. The rule of thumb is two locations in each of the four census regions, and it is well known that there are different geographic preferences, and these must be accounted for. In the cereal case, Malt-O-Meal only went to one northeast location while they went to two locations in each of the three of their census regions. They argued that they had less market share in the northeast but NAD said, uh-uh, that was not sufficient.

Mudge: Yeah, I was, when I read that case, when it came out, I was like, wow, that is really picky. We have the ASTM Guide, and it is very literal and it sets out these baseline requirements and NAD has been pretty consistent that we are going to hold the line at requiring at least these minimum standards. And how the test is set up is really something that advertisers need to think very carefully through. Who are you going to test and where are you going to do the testing is important, but there are lots of other ways to err along the way. And good protocols will always make sure that the test is double blinded. In other words, the people who are testing the product don't know which product is which, and the people who are leading the testing don't know. Sometimes this is really hard because the products physically look different, but you got to give it your best shot at double blinding.

And then the products that are tested should be purchased at retail, including the advertiser's products. So, if you buy a competitor product at retail, but you pull your product from the manufacturing line, yours might be fresher. And so, you should always test products with similar shelf life that are purchased in that test market. And then if somehow preparation is involved, you got to cook food, you got to mix hair dye, something along those lines, both products should be prepared according to the product instructions. And then, the product should be presented in the same way, and if it is a taste test, participant should cleanse

their palette prior to tasting each product. And then, of course, all of the results should be subject to statistical analysis and produce statistically significant results.

Kaufman: And Amy, your talk about items being pulled from the manufacturing line just makes me want to get some candy corn fresh.

Mudge: You can have all of it, Daniel. All of it is yours.

Kaufman: But look, other important choices are how the questions are framed. There should always be a no preference answer choice. The ASTM Guide has detailed instructions for how these no preference answers are to be handled when you tabulate the results. You want to make sure the questions you ask, match the claim that you want. If you want a preferred claim, this should be something consumers are specifically asked about.

Mudge: Yeah, I think the biggest take away today is that comparative sensory claims, they're hard, and they need to be based on rigorous testing that is well designed. And the good news is that there is an established road map with the ASTM 1958 Guide. There is also a really good body of case law, the NAD, that really do touch upon almost any way that a test can go awry. So, really good to go back and do some searches if you want to understand how NAD has looked at feel claims, pain claims or of course, taste claims. And it is also really important that you make sure you're working with the testing facility that has experience in claim substantiation and just that they know what they're doing and they're going to be good partners. But it is also important that is no substitute for having advertising lawyers involved early in the design of the testing, in the execution of the tests, and then, of course, in the aftermath reviewing the results and reviewing the ad copy with how those results are presented.

Kaufman: Amy, this was such a nice, refreshing break from focusing on FTC developments and of course, a really good reminder of how much is found in the NAD body of precedent. We, of course, hope to see you all at the NAD Ad conference coming up in September in D.C. as well, and thank you so much for joining us on AD Nauseam.

Corbett: 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.

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