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Influencer Marketing: Legal Concerns and Best Practices

Influencer marketing has become one of the fastest growing channels for consumer acquisition, as well as one of the most cost effective. Brands are spending increasingly more of their marketing dollars to engage with influencers to endorse their products on Instagram and other social media platforms. As a result, attorneys advising brands should carefully consider the legal requirements and potential consequences of engaging influencers.

Who are "Influencers"?

Influencers are individuals who have the power to affect the purchasing behavior of consumers because of their experience, knowledge, position and/or relationship with their social media audience. Influencers typically fall into two primary categories:

(1) macro influencers, who have large social media followings and include celebrities, athletes and other public figures with devoted fans that want to emulate their lifestyle and product preferences; and

(2) micro influencers, who are everyday consumers who have become known for their experience, expertise, passion and/or niche in a particular market or industry and have significant social media followings, typically ranging between 1,000 to 100,000 followers.

Although micro influencers may have smaller followings than macro influencers, their audience is usually more interactive and engaged, which can hold appeal to marketers.

Legal Considerations

While influencer marketing may seem relatively simple on its face, it is critical for all parties involved to understand the legal framework at play, as influencer marketing has been a focal point for the Federal Trade Commission. Influencers and marketing brands can both be held responsible for noncompliance with regulatory and other legal requirements. Thus, attorneys advising brands should carefully consider and address the unique issues raised by influencer marketing, ranging from regulatory compliance, public relations risks and an assortment of issues relating to content, ownership and rights.

Generally speaking, long form agreements tend to be negotiated with macro influencers and their attorneys/agents, while micro influencers are often self-represented and engaged on a handshake, short form agreement, or even a text or email exchange of terms. Either way, the following considerations should be taken into account when structuring an influencer deal.

Initially, basic "truth in advertising" principles apply to an influencer's endorsement of a brand and its products or services. Endorsement are generally defined as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.[1] Endorsements can be any form of advertising message, including a social media post, photo, product review or even simply tagging a brand.

Endorsements must reflect the accurate experience and honest, truthful opinion of the endorser. To that end, influencers should not speak about their experience with a product if they have not tried it. If an influencer was paid to try a product and thought it was awful, they cannot say it was fabulous.

The FTC Guides

Terese L. Arenth

When someone is endorsing a brand and/or its products or services, and has a material connection with the brand, the Federal Trade Commission (FTC) Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "FTC Guides")[2] will apply. "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."[3] In 2009, the FTC Guides were revised to apply to blogs and social media.

Under the FTC Guides, a "material connection" can include payments, free product, event tickets, tester products, sweepstakes entries and other incentives to promote the brand. If unsure if something qualifies as a material connection, ponder this question: Would the weight or credibility given to an endorsement by a consumer be affected if the consumer knew that the brand had given the influencer the payment, gift, incentive, etc.?

By way of example, bloggers have a duty to disclose when they receive free products or payment from a marketer. Celebrities have a duty to disclose their relationships with marketers when making endorsements outside the context of traditional advertisements, such as on talk shows or in social media. Employees who promote their employer's products or services in social media should clearly and conspicuously disclose their employment relationship.

While the FTC Guides do not mandate any special language, the goal is to effectively communicate the influencer/marketer relationship with clear and conspicuous disclosures. For social media platforms, disclosures should be "above the fold" of the post. For example, when an Instagram feed is viewed on most smartphones, longer descriptions (currently more than two lines) are truncated, with only the beginning lines displayed. To view the rest of the post, a consumer must click "more". If an Instagram post makes an endorsement through the photo or beginning lines of the description, any required disclosure should be viewable without having to click "more".

Hashtags like "#ad" or "#paid" should be used at the beginning of a post and not buried amongst other links and hashtags. Hashtags like "ambassador", "spon" and "sp" are not sufficient, as the FTC views them as ambiguous and confusing. By contrast, "#XYZ_Ambassador" (where XYZ is the brand name) and "#Sponsored" are likely more understandable. Similarly, simply saying "thank you" to the sponsoring company has been deemed insufficient, as it does not necessarily communicate that the endorser got something for free or was given something in exchange for an endorsement.

Examples of acceptable disclosures include: "Company X gave me this product to try…" or "Thanks XYZ for the free product". Lack of space is no excuse for failing to make required disclosures. If those or similar statements are too long for the particular platform (like Twitter), the FTC recommends using #Sponsored, #Ad or #PaidAd. If an endorsement was incentivized by entries into a sweepstakes or contest, #contest or #sweepstakes should be used to make disclosure of the material connection (but not #sweeps, which has been rejected by the FTC).

YouTube and online videos require disclosures in the beginning of the video and multiple times throughout. The disclosure should be superimposed over a Snapchat or Instagram story and followers must have time to read the disclosure. In a series of disappearing posts, disclosure may only be needed on the first post if the disclosure stands out and viewers have time to process it before the next post appears.

To assist influencers and brands in making required disclosures, social media platforms have begun to offer built-in disclosure tools (for example, the "Paid" tag on Facebook, "Includes paid promotion" mark on YouTube or "Paid partnership with" tag on Instagram). However, the FTC has not officially sanctioned these tools, which depends on whether the tool clearly and conspicuously discloses the connection. For the moment, the FTC has cautioned that it does not think that these tools will suffice.

The key word is "transparency". While it is important that the influencer make the required disclosures, those disclosures must also be made effectively.

While regulators are paying attention to what brands do with their influencers, a brands' customers, competitors and consumer protection attorneys are likely also paying attention. In selecting an influencer to work with, due diligence is advisable. Brands are well-advised to assess a number of factors about the influencer, including whether the influencer is a good fit for its brand, if they have been associated with a competitor, have made past offensive statements or have skeletons in their closet, and whether or not their number of followers and impressions are legitimate.

Contract Best Practices

To mitigate against risks and potential exposure, several key provisions should be included in influencer contracts. The scope of services should be clearly defined, including volume, frequency and timing of posts, and the type of content that the influencer is expected to create.

The contract should provide detailed guidance and examples of proper disclosure. Simply providing that the influencer must comply with the FTC Guides is not best practice. As the advertiser can be liable for its influencer's endorsements, consider contractually providing for approval rights and/or creative control, by having a process for reviewing the influencer's posts, including when/how the influencer should present the brand with its posts and rights to edit and/or approve the posts. Influencer agreements

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also routinely include provisions outlining the parties' takedown and removal rights. For example, reserve the right to take down content that is inconsistent with the brand's guidelines or potentially infringing a third party's intellectual property rights.

Typically, influencers own any content that they create. Influencer contracts should specify who owns or can use the content. Depending upon the campaign, its duration and the content, a brand may want to own the influencer-created content and should have a "work made for hire" provision to ensure its full ownership of the copyright in the influencer-created content. As an added layer of protection, the contract should provide that if, for any reason, the influencer-created content is not copyrightable subject matter or for any reason is deemed not to be a "work made for hire," then the influencer assigns all right, title and interest in and to the content to the brand. If ownership of the content is not required by the brand, the contract should provide for a license to use the content and the type of license that is wanted/needed. For example, an exclusive, perpetual license to the content may be appropriate, contrasted with a limited, non-exclusive license.

If confidential marketing or other business information will be shared with the influencer, the contract should include a confidentiality provision. Since the influencer is only required to disclose that he/she has a material connection with the brand and is not required to disclose what, if anything, the influencer is getting paid, perhaps provide that any payment terms are confidential.

The influencer agreement should address if the brand wants exclusivity that prevents the influencer from partnering with competitors and/or posting competitive content during a specified time period and, if so, the scope and breadth of the exclusivity (for example, limiting exclusivity to certain competitors or product categories).

Another contractual provision that has become more common and, in some cases a necessity, is a "morals clause." Although it is good practice for a brand to thoroughly investigate an influencer to confirm that the influencer's views, image, behavior and reputation align with the brand image and marketing intent, it is better practice to protect the brand further by including a morals clause in its influencer agreement to protect against unforeseen events and conduct, or any past transgressions that may subsequently come to light. A morals clause holds the influencer to specified behavioral standards and prohibits socially irresponsible behavior that could tarnish the brand's reputation/image. Violation of a morals clause could include the brand's termination of the agreement and/or other remedies, such as rights to remove brand-associated content posted by the influencer, financial penalty or payment of damages.

Conclusion

This article highlights only a handful of the potential legal issues and best practices to take into consideration with influencer marketing. While having benefits, influencer marketing is under high scrutiny by regulators and the regulatory framework is under continuous evolvement to account for changes in technology, platforms and the marketplace, as well as consumers' expectations and understanding of it all. Most recently, on February 12, 2020, the FTC issued a Proposed Notice requesting public comment on whether to make changes to the FTC Guides, including with regard to disclosure of material connections, affiliate links, media aimed at children, incentivized reviews and other issues.[4] It is critical to stay abreast of the legal lay of the land to help clients stay on the right side of the law, as well as the right side of the regulators keeping a close eye on influencer marketing.

Terese L. Arenth is a partner with Moritt Hock & Hamroff LLP in Garden City. She chairs its marketing, advertising, and promotions practice group and co-chairs its cybersecurity, privacy, and technology practice group, both within the firm's intellectual property department.

1. 16 CFR § 255.0(b).
2. 16 CFR Part 255.
3. 16 CFR § 255.5.
4. Federal Register, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, available at https://bit.ly/2TSlXnU.

ACTIVE MEMBER ...

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Becoming Active While Being a Part of Something Larger

The NCBA exhibits an ongoing interest in all the members of our profession. The NCBA has an open committee structure in numerous practice areas, members do not require an invitation to join a committee nor are they charged a fee for joining a particular committee.

I first joined the Real Property Committee, because that was my background. I then became a part of the Construction Law Committee and the Business Law Committee as my interest in those practice areas blossomed. With every involvement, I was learning and growing as members worked to inform their committees and keep each other updated on changes in the law. During this journey as my career advanced, I became more involved with committee leadership roles.

Over time committees began co-sponsoring programs, understanding most legal developments are inter-disciplinary. This openness amongst committees is a tremendous benefit to NCBA members. Members are exposed to various areas of law, and colleagues practicing in other disciplines. In addition to the availability of NAL's unlimited free continuing legal education, this interaction affords members the opportunity to learn about other areas of law first-hand.

As the law touches all aspect of our lives, the NCBA continues to recognize and embrace this reality and its corresponding obligations. Members have been able to strengthen their minds and soul with the numerous public service programs the NCBA offers, through its charitable arm WE CARE and other community involvements. As members we proudly promote the NCBA's involvement in community outreach that includes: a foreclosure clinic, the Hurricane Sandy program, and the annual Law Day pro bono services.

Through WE CARE, in addition to its own initiatives to provide to needy children and seniors, the NCBA is able to support the efforts of numerous community programs. WE CARE partners with many community service organizations that uplift those who are troubled and less fortunate in our communities.

The NCBA also seeks to help its own through the Lawyer's Assistant Program (LAP). This program is designed for those within our profession who find themselves vulnerable to certain dependencies and related problems. The NCBA is truly a place where the good energy of our profession finds synergy, and moves each of us to become better lawyers, advancing our profession to benefit the communities we serve.

True Diversity and Inclusion

As our profession grows and becomes more diverse, the NCBA has kept pace with the reality of the legal world around us. As a woman, my involvement in the areas of my practice sometimes comes with its own challenges. These areas are generally dominated by male colleagues. As a female-solo practitioner, however, I do not ever feel alone because I can call on many colleagues to discuss various legal topics.

In life none of us succeeds on our own. There are always many people who are directly or indirectly involved with our success. Along the path to manifest success in our individual careers, NCBA members have been by each other's side. The members of NCBA continue to open doors for fellow members, resulting in a network system of support for each other.

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But more than that, the NCBA has embraced diversity not only by talking the talk, but its leadership has been more than willing to walk the walk. The newly formed Diversity and Inclusion Committee is but one aspect of this commitment. The NCBA as well seeks to educate and promote diversity with its Civil Rights Committee and its LGBT Committee.

As a member of the Diversity and Inclusion Committee, our focus has been to champion the beneficial aspects of a more inclusive legal profession while simultaneously addressing issues of concern such as implicit bias. Committee members educate by presenting reenactments of landmark civil rights cases. These reenactments are effective in bringing awareness and understanding of past actions, and the negative impact those actions have had on our society.

During the past two years, the Committee has presented *Meredith v. Fair: A Reenactment of a Landmark Trial and Fred Korematsu and his Fight for Justice. Meredith* depicted the legal struggles of James Meredith to be admitted to the then all-white University of Mississippi in 1962. Korematsu concerned the internment of Japanese Americans during World War II and its present-day ramifications. In 2020, the committee is planning a reenactment of the Amistad Case from the 19th century.

The committee also provides seminars which allow members to discretely evaluate their individual thoughts that may lead to unintentional but implicit biases. The Diversity and Inclusion committee is comprised of the NCBA' diverse members. The Diversity and Inclusion Committee members work toward a diverse and inclusive bar association and as with the NCBA's general membership, is open and welcoming to all attorneys and law students.

Join, get involved with NCBA—it is one of the BEST decisions you can make to advance your legal career!

Chandra M. Ortiz is a solo practitioner who practices in the areas of real estate and business transactional law that includes franchising. She is a past Dean of the Nassau Academy of Law, and was the first person of color to hold that role. She has been involved with many committees including Chair of the NCBA Corporation, Banking and Securities Law Committee, Co-Chair of the Real Property Law Committee, Judiciary Screening Committee, and Nominating Committee. She has written various articles for the *Nassau Lawyer*; and participates in various community service programs, including the NCBA Pro Bono Mortgage Foreclosure clinics.

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propriate.[12] This burden in opposition can be met by, for example, showing that the testimony would be cumulative to other evidence in the case.[13]

Justice Feinman's decision reiterates the structural framework of *Gonzalez* by reminding us that the Court "has never required the proponent of a missing witness charge to negate cumulativeness to meet the prima facie burden."[14] Trial lawyers and judges alike should be mindful that it may very well be impossible to argue or rule on cumulativeness pre-trial, as there has not been any testimony at that point.

Conclusion

A few practical considerations can be gleaned from the foregoing. The *Smith* decision should put a stop to the creeping attempt to shift the burden that has been going on for some time in both the trial courts as well as the respective Appellate Division departments regarding the charge. It also serves as a reminder that the term "control" is a term of art in these cases which must be interpreted broadly based upon the relationship between the witness and the party.

It does not require a certain type of relationship, such as employer–employee or principal–servant. Rather, in my opinion, it requires the trial court to take a common-sense approach to evaluate the on-going status of the people involved and determine whether under all the facts and circumstances the person in question should be expected to testify at the trial. Keep in mind that, even where the charge is denied, the case law is clear that the attorney of the proponent may comment on the failure of the witness to be called at the trial.[15] Finally, the rules and procedure surrounding the missing witness charge also apply to expert witnesses.[16]

See you next column!

1. PJI 1:75.
2. *People v. Gonzalez*, 68 N.Y.2d 424 (1986).
3. *Devito v. Feliciano*, 22 N.Y.3d 159 (2013).
4. *Gonzalez*, 68 N.Y.2d at 427.
5. *Id.* at 427.
6. *Id.* at 428.
7. *Id.* at 428–29.
8. *Id.* at 429.
9. *People v. Smith*, 33 N.Y.3d 454.
10. *People v. Smith*, 162 A.D.3d 1686 (4th Dept. 2018).
11. *Smith*, 33 N.Y.3d at 458–59.
12. *Id.* at 459.
13. *Id.* at 459–60.
14. *Id.* at 459.
15. *People v. Thomas*, 21 N.Y.3d 226 (2013).
16. *Hanlon v. Campisi*, 49 A.D.3d 603 (2d Dept. 2008).