

Luncheon Recap: "Addiction, Depression, And the Bar, Oh My! - Attorney Competence In Troubling Times."

By Brett Weaver



Brett Weaver

On July 28, 2016, the ABTL held the second of its three specialty lunch programs this year: "Addiction, Depression, And the Bar, Oh My! - Attorney Competence In Troubling Times." The program, which was sponsored by Shelburne Sherr Court Reporters, was given by attorney and mediator Stephen McAvoy from ADR Services, Inc. McAvoy's

presentation was alarming, entertaining, and educational.

The alarming — Most people know the legal profession is extremely stressful. But did you know that, according to researchers at John Hopkins University, lawyers have the highest rate of clinical depression of all professions studied? Or that female attorneys have a higher rate of depression than their male counterparts (though male lawyers have a higher rate of suicide than female ones)? As a result, lawyers have twice the rate of addiction than the general population. That's because common personality traits — such as high achievement, an adversarial, competitive and controlling nature, obsessive compulsive behavior, and being more comfortable with thoughts than feelings — predispose attorneys to self medicate.

Self medication, in turn, leads to increased scrutiny by the state bar. Nearly 70% of all disciplinary cases involve alcohol or other substance abuse. Indeed, one of the surest ways to invite the state bar to go over your entire practice with a fine tooth comb is to get arrested for driving

(see "Luncheon recap" on page 8)

Navigating the Social Media Minefield: Exploring the Legality of Sponsorship and Endorsements in Advertising

By Katrina Wu



Katrina Wu

The use of social media has become so prevalent as to be an integral tool of every business. At the same time, the platforms are new enough that the rules of the game — including the legality of sponsorships and endorsement — are not always clearly understood or adhered to. While videos and posts may have started off with a strong "homemade" and "independent" connotation, one cannot help but notice an increase in product placements and endorsements in the supposedly "uncommercialized" media. This commercialization coupled with new Federal Trade Commission ("FTC") Guidelines warrant a closer analysis of how businesses advertise online.

(see "Navigating the Social Media Minefield" on page 5)

Inside

President's Letter

By Brian A. Foster p. 03

Appellate Tips

By Rupa Singh p. 10

Maintaining Public "Secrets:" Ethical Pitfalls of Disclosing Publicly Available Client Information

By Brian Hazen..... p. 12

Judges Are Human Too: Who Knew?

By Sara McClain p. 15

Shifting Expert Witness Fees in Contract Litigation.

By Rebecca Reed p. 16

In Defense of Arbitration

By Charles Dick p. 18

Navigating the Social Media Minefield

(continued from cover)

In 2009, the FTC published endorsement guidelines, and in 2015, supplemented its guidelines to provide a FAQ covering a range of marketing techniques from product placement to endorsements to testimonials and online reviews. While the Guide is merely an administrative interpretation of the laws and does not have the force of law, the FTC does have authority to bring enforcement actions against violators of the FTC Act.¹ These guidelines are invaluable in guiding clients to a compliant and effective social media presence. Below, we discuss a few key guidelines to keep in mind.

What is Social Media Marketing?

A marketing expert would refer to YouTube marketing as a form of “native advertising”², where the advertisement is seamlessly integrated into the video content itself, so the viewers are not disrupted from the experience of watching a YouTube video. Product placement is a representative example of such, where brands and logos are meticulously placed into posts or videos to trigger both a conscious and subliminal registration of the product. An “advertorial”³, includes a post or video that is tutorial and educational by nature, but the content is sponsored by a brand. Sponsored activities can largely be found in three forms: explicit sponsorships, based on an agreement between the sponsoring company and the content creator, affiliated marketing, resembling commission-based arrangements and involving affiliated links where purchases are made through a link or coupon code; and free product sampling, perhaps the most elusive kind of marketing where companies send out free products to content creators with an eye towards increasing product exposure. The ultimate goal is to induce the content creator to feature the product in a video or create a review of the product, thereby generally achieving exposure.

Engaging in marketing through social media channels allows companies to select the desired target segments based on a particular audience. Because of this possibility to target desired segments with heightened precision, social media

marketing can be much more effective than traditional above-the-line marketing.

What is an Endorsement?

The Guide defines “endorsement” as “any advertising message... that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”⁴ The Guide then proceeds to provide an objective facts and circumstances test to determine whether there is a deemed endorsement, and these factors include: whether the speaker is compensated by the advertisers, whether the product or service was provided for free by the advertisers, terms of any agreement, the length of the relationship between the advertiser and speaker, the previous receipt of products or services from the same or similar advertisers, the likelihood of future receipt of

any such products or services, the value of the items received, and the degree of advertiser’s control over the statement.⁵

Thus, endorsements can include the traditional paid celebrity sponsorship based on a flat fee or a certain amount per view; commission-based marketing affiliate arrangements where content

creators earn commissions on sales from affiliated links, or even product placements, in some circumstances.

The Endorsement Guides apply equally to all types of media and forms of endorsement, whether they have been around for decades (like television and magazines) or are relatively new (like blogs and social media), including Facebook, Twitter, YouTube and LinkedIn.⁶

Disclosures Are Required For All Endorsers

A disclosure is required when some consideration is given by a company to an endorser, particularly when the endorser receives compensation or another incentive to provide a testimonial. “The question you need to ask is whether knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation. If it could, then it should be disclosed.”⁷ As set forth by the FTC, even the

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(see “Navigating the Social Media Minefield” on page 6)

Navigating the Social Media Minefield

(continued from page 5)

opportunity to be entered into a sweepstakes or contest to win a prize is deemed consideration that must be disclosed.⁸ Specifically, the FTC recommends that promoters require entrants to use a hashtag that includes the words "sweepstakes" or "contest" in their entry to notify readers that posts were incentivized.⁹

Endorsers Must Include Clear and Conspicuous Disclosures.

In determining whether a disclosure is clear and conspicuous, the FTC considers the proximity of the disclosure to the advertising statement, the prominence of the disclosure, whether the disclosure is unavoidable, whether other parts of the ad distract the attention from the disclosure, whether a disclosure needs to be repeated at different places on the website, and whether the language of the disclosure is understandable to the intended audience, whether the disclosure displays properly across different programs/mediums such as on iPhones versus Android devices.¹⁰

For example, disclosures on YouTube generally run afoul of the test in two ways: disclosures are either inconspicuous, or if they are, are inconsistent channel to channel.

For many sponsored posts or videos, the disclosure often appear at the very bottom of the description box, which requires a user to actively click on a "show more" button and sometimes scroll down through a long field of text before finally reaching the disclosure. This renders the disclosure neither unavoidable nor proximately close to the claim in the video. The FTC warns that the presence of scroll bar alone is not sufficiently effective of a visual cue to encourage viewers to reach the disclosure.¹¹

For affiliated links, some companies notate the links with an asterisk,¹² and some include a general disclaimer at the bottom that some links are affiliated.¹³ The FTC recommends that to meet this requirement, the disclosures should be: (1) Close to the endorsement or claims to which they relate; (2) in a font that is easy to read; (3) in a shade that stands out against the background; (4) for video ads, on the screen long enough to be noticed, read, and understood; and (5) for audio disclosures, read at a speed and cadence in words that are easy for consumers to follow and understand.¹⁴

Overall Suggestions for Social Media Endorsements

FTC's revisions to its Endorsement Guides demonstrate its intent to apply well-settled principles of false advertising law to social media platforms. Companies that are actively engaged in using social media marketing to promote brands, products and services, must adhere to the FTC's requirements to ensure compliance with transparency and disclosure requirements for all testimonials and product endorsements. Companies should continue to review advertisements in social media to confirm compliance with Section 5 of the FTC Act.

(Endnotes)

¹ 16 C.F.R. § 255.0 ("The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers"); F.T.C., .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 2 n.5 (2013).

² "Native advertising" is defined as marketing strategies that allow brands to promote content by integrating the ad into the endemic experience of a website or app. Native advertising differ from traditional digital ad formats such as pre-roll commercial because they are integrated to the visual design of a publisher's site. What is native advertising?, SHARETHROUGH INC. (Mar. 16, 2013), <http://www.sharethrough.com/2013/03/what-is-native-advertising>. "Stealth advertising" is defined as a way of advertising your products so that people do not realize that you are trying to make them buy something. Stealth Marketing Definition, CAMBRIDGE DICTIONARIES ONLINE, <http://dictionary.cambridge.org/us/dictionary/business-english/stealth-marketing> (last visited Feb. 18, 2015).

³ "Advertorial" as an advertisement that imitates editorial format. Advertorial Definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/advertorial> (last visited Feb. 10, 2015).

⁴ 16 C.F.R. § 255.0 (b) ("including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization.").

⁵ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53126 (Oct. 15, 2009) (amending 16 C.F.R. § 255).

(see "Navigating the Social Media Minefield" on page 7)

Navigating the Social Media Minefield

(continued from page 6)

⁶ F.T.C., THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING, at 1 (2015) https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf.

⁷ Id., at 4.

⁸ F.T.C., supra note 6, at 4.

⁹ Id., at 14.

¹⁰ F.T.C., supra note 5, at i-ii.

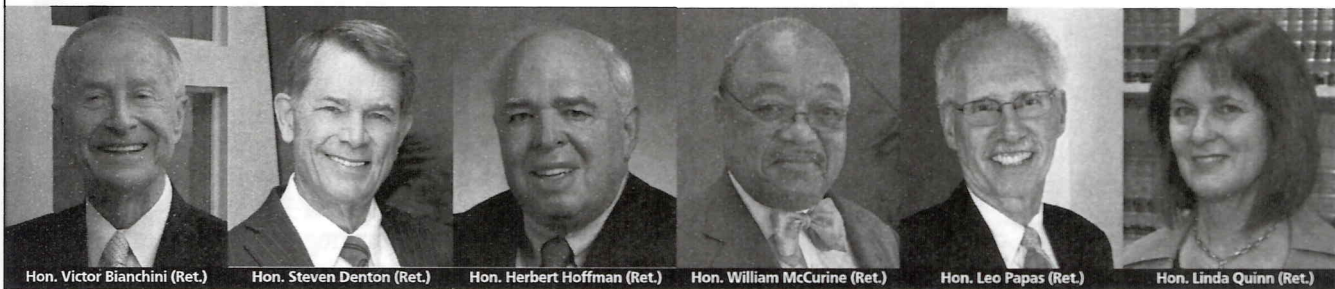
¹¹ F.T.C., supra note 5, at 9 ("Although the scroll bars may indicate to some consumers that they have not reached the bottom or sides of a page, many consumers may not look at the scroll bar and some consumers access the Internet with devices that don't display a scroll bar.").

¹² E.g., RachelJade, YouTubers getting FREE STUFF? Behind The "Tube, YOUTUBE (Sept. 20, 2014), <https://www.youtube.com/watch?v=FBxHmkMmbkQ>.

¹³ E.g., ItsJudyTime, Thank You for 1 Million, YOUTUBE (May 9, 2014), <https://www.youtube.com/watch?v=JPY1bDPMRW4> ("*Amazon link(s) are affiliate links."); FrmHeadtoToe, January 2015 Favorites, YOUTUBE (Jan. 31, 2015), <https://www.youtube.com/watch?v=JOt7NAXsWQc> ("Disclaimer: This video is not sponsored by any of the companies mentioned. Some of the links above are affiliate links. Thanks for your love & support!").

¹⁴ Lesli C. Esposito, Intellectual Property and Technology Alert (June 3, 2015), DLA PIPER PUBLICATIONS, <https://www.dlapiper.com/en/us/insights/publications/2015/06/ftc-updates-qa-on-endorsement/>.

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