



## Podcast Transcript

### AD-torneys@law Episode 2 – Consumer Reviews: Paid? Fake? Negative?

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Lee: Let's be honest, customer reviews and testimonials do influence buying decisions, and an online review can make or break the path to purchase. According to one study, 76% of US consumers trust online reviews as much as recommendations from family and friends. So, it should come as no surprise that reviews and testimonials attract considerable regulatory attention and that they raise a lot of questions for brand marketers who see real opportunity and leverage in them. I'm Leeann Lee, and you're listening to AD-torneys@law.

Our series devoted to all things advertising, marketing, and digital media law. Joining me today is partner and co-leader of Baker Hostetler's advertising, marketing, and digital media team, Amy Ralph Mudge. Amy represents world-class brands and fields questions about reviews and testimonials all the time. She's represented clients in cutting edge, first impression FTC and NAD challenges over the use of consumer reviews. Welcome to the show Amy.

Mudge: Thanks, so much Leeann. I'm happy to be here.

Lee: So, to kick us off, can you tell us why Advertisers care about consumer reviews?

Mudge: Sure, well consumer reviews are really the new good housekeeping seal of approval. The move to e-commerce is been happening for some time, but it has been dramatically expedited with Covid, and at least in these moments some consumers are shopping even exclusively online. And even when we return to

feeling safe and visiting stores. Consumers do research online, both for price comparisons but also to read those reviews. Consumers more and more expect e-commerce sites to post consumer reviews for each product that's sold. I mean they are actually suspicious of buying products or buying from website where there are no or few reviews, or where there are reviews, but they're only glowing reviews. Because of concerns with fake reviews or review manipulation. There really has never been a more important time to encourage consumers to write reviews, get them posted quickly after reviewing them, but enforcers and regulators are also looking with greater frequency at review practices so it's also really important now for advertisers, and advertisers lawyers to a hard look at how companies are soliciting, moderating and posting reviews.

Lee: Well speaking of that, what sorts of legal issues can arise within the context of a consumer review?

Mudge: Well for guidance we start with a federal trade commission testimonial and endorsement guides. These have been around for a long time and are our source of inspiration and guidance for things like expert reviews, celebrity reviews, or endorsements and they also apply to regular old consumer reviews as well there's really three guiding principals the first is, Any material connection between a brand and a reviewer that wouldn't be expected by a reader must be disclosed and this is an example would be if a reviewer is a paid brand ambassador, that, that has to be clear. The review should also reflect the real, authentic experiences of the reviewer, and then if any reviews are going to be incorporated into advertising it shouldn't include any product claims that the brand could not substantiate directly. Now, most of what we focus on in the space so far really revolves around that material connection issue. When does a disclosure need to be made and how, and the FTC's concern here is you know giving incentives for reviews can possibly introduce bias into those reviews, and even if there isn't any bias maybe it could affect the weight of the creditability that a reader would credit a review. So, these disclosure issues are really what tend to be front and center at this point and we are seeing more cases at the FTC were also seeing more interest and focus on consumer reviews at the national advertising division or NAD, the self-regulatory arm of the better business bureau and were even beginning to see review issues appear in private cases, including consumer clause actions and competitor challenges under the Lanham Act and we really expect this trend will continue.

Lee: So, let's talk about some scenarios. If an advertiser wants to use a great consumer quote in its own advertising is that legal?

Mudge: Sure, but with some caveats. So this idea is taking a portion of a review and highlighting it may be in a website, maybe in a print ad and we first want to start by looking at the quote in portion of the review and making sure that it's not taken out of context so if the review says "I hated this product, except there was this one feature that was pretty great." It wouldn't be appropriate to only focus on the positive portion of that review so even if you do exert you want to make sure you're really capturing the general tone of the overall review and then again whatever the reviewer says it should be something that the brand can support if

the brand said it directly. A classic example is that a reviewer says “You know I love these weight loss shakes, I lost 20 pounds last week,” that’s not something typically that a brand is going to be able to support would be expected for all users so really focusing on those product claims and making sure there something that would be typical of ordinary consumer use and that the brand, if they wanted to say it directly outside of a testimonial context that they would have the substantiation or the backup to say it and then we also need to remember there are IP issues as well as truth in advertising concerns, right of publicity issues, you shouldn’t use a persons name or likeness even generally a regular old person as opposed to celebrity without getting there permission for advertising purposes and so getting that permission, getting a release from reviewers to use there review in advertising is the best practice now sometimes this is not always possible so in a case like that if you just love a review and you can’t reach out and get in touch with the reviewer best to not use the reviewers full name or any other personally identifying information maybe excerpt it to first name and the city there from when quoting from there review.

Lee: Well how about a situation when an advertiser gives free product samples, a sweepstakes entry or some other incentive to users in exchange for a review now could that be a problem?

Mudge: Absolutely, if there’s no disclosure. This gets to the heart of that material connection piece that I mentioned a minute ago. So, if a reviewer is given anything as an incentive to write that review and if what there given is something that is material, not *de minimis*, then the FTCs position that must be disclosed, so if you have a sampling program, we see this a lot with new products because again consumers expect to see reviews on products before they buy and if a product is new to the market there’s not going to be a whole lot of consumer experience with the product so we see these sampling programs come up a lot and Amazon is a great example they have there vine program, perfectly legal, perfectly appropriate, as long as its disclosed that the reviewer got something free in connection with or maybe even paid in connection with giving that review and there’s lots of ways of doing that discloser it can be if you send product for example to bloggers or to folks who host a review site, you can make the request that they include the fact that they had this connection with you in the review itself, if the review is one your own website than a badge can be added like Amazon vine has a little logo that makes clear when a review is written as part of there sampling program. So, something like that to give consumers the information, ideally early in the review something that’s clear and conspicuous to make sure that something was given in exchange for a review. The sweepstakes issue is an interesting one and the FTC and the NAD have both looked at this a concluded that even though you’re not giving someone I actually something like free product or like payment your just giving them a chance to win something that if a sweepstakes entry for a considerable prize is given for a review then that is a material connection that also should be disclosed that’s also something that can be done fairly easily if you say, for example , want someone to post a review or post a picture of themselves wearing a product or highlighting a product in a post, that you add that you require they add a hashtag something along the line like #sweepstakes or #nameofyoursweepstakesentry or something similar like that.

Lee: Okay well what if the advertiser takes a different approach and they give a very small coupon towards a future purchase in exchange for a review?

Mudge: This is really a gray area at least right now and you're bordering on something that maybe be it said there certainly a connection, an advertiser is giving a consumer something, a coupon, but the question is really is that something material enough to require a discloser and we see these things all the time and it really highlights again the importance for advertisers of collecting a large body of reviews for there products to be able to post them on there website so often times after you make a purchase maybe a week or two later presumably after the products been delivered you might get an email or a pop up from the advertiser inviting you to leave a review with the convenient link and they might say something along the lines of as a thanks for your review we'll give you a coupon towards a future purchase. So far the FTCs position is that probably should be disclosed its an issue though that there looking at in connection will revisions to the testimonial and endorsement guides that are underway right now the FTCs asked for a lot of comments from consumers and brands alike and one of the questions that they've asked is do these small incentives given at the front end to solicit a review, do they really need to be disclosed, so we're probably going to get some more guidance on this in the near future sometime in early to mid-2021 but for the near term until the FTC clarifies its position on this its always going to be a good idea to include some form of discloser if you give anything even something quite small to a reviewer in exchange for a review.

Lee: Sure, that makes sense. So, with all of these different scenarios we've talked about is it okay to solicit consumers for a review or do they have to come in organically?

Mudge: No, solicitation is appropriate, and it's probably the best way that you can get a larger body of reviews quickly. I think it's human nature. There are some people who just really do want to share their experiences, but those folks are probably few and far between and getting a prompt to remind someone hey I sent you this product a couple of weeks ago what do you think of it, could you do me a solid, could you do me a favor and write a review. We see those invitations or solicitations more and more and again there absolutely appropriate if you are giving something in exchange for that review, disclosure again is probably appropriate if the thing you're giving is very small maybe it's not a super high risk at this point, but something to pause and really consider. Something that we really do see though. If you do solicit consumer reviews and you get back negative reviews. It's going to be important that you post the good, the bad and the ugly, and this gets into the moderation process which happens after reviews are solicited. It doesn't mean that every single review that you get has to be posted, and that probably wouldn't make sense. If people send reviews that are written in a foreign language. If people send reviews that are gibberish, or they send reviews in about a product they didn't even buy. Certainly, if they contain swear words or hate speech or other things. Those would not be appropriate to post on a website and there's no obligation on a brand to do so. That said, if a review is appropriate, it's in English, it doesn't have curse words, but they just don't like your product, there's been some attention and we expect to see more

about these moderation processes, and at least the NAD has said, there's an implied promise when you have reviews on your website that you are posting all relevant reviews and you're not curating just to post the desirable ones. So, good time to take a look at your moderation guidelines and make sure that, not just your 4- and 5-star reviews, but your 1,2- and 3-star reviews are getting posted as well. You know as a PS; this will help consumer trust in your reviews. Increasing literature says that consumers are very suspicious and if they see only 4 and 5-star reviews they assume there's some funny business going on. And if before the negative reviews at the brand actually responds and says "hey I'm so sorry that you didn't like my product, I'll direct message you separately, we'll make it right. Things like that, listening to consumer reviews and responding to them appropriately can actually increase consumer confidence in your products and your website. So, it's a way to turn those bad reviews potentially into something positive.

Lee: Now, let's talk about employees and vendors. Can an advertiser encourage employees and vendors to post product reviews?

Mudge: This is very tempting, especially when products are new to the market. You know you wanna build up reviews in the beginning. It can be done and it is fairly common, but if you're an employee of a Company and you write in a review and if you're an employee of an Ad Agency that's been supporting the creative for a new product. That absolutely is a material connection. Probably more so, more material because it's more ongoing than just getting free product or a sweepstakes entry. So, if you have an employment or any kind of financial connection to a company. If your mom is writing reviews, or if you're a relative of an independent company, disclosing that material connection is going to be very important. And again, how do you do that? Probably might be a little weird to have a badge to say employee review, but typically that kind of thing is done again in the review itself. "I'm so proud to work at this company. I love its new product line. I was lucky to try this first, give it a try". You can do it with a hashtag, we've seen things like #employee, #iworkhere. Things like that are way to alert a reader that you have an employment or a paid connection to the Company.

Lee: Sure, that makes sense. So, what if an Advertiser wants to promote that it has more 5-star reviews than competing products. Is there an issue with that?

Mudge: This is a great question. And in a slightly different term. So, moving away from the material connection disclosure issue. We've seen so cases that are very instructive from the National Advertising Division involving some vacuum manufacturers; Shark and Dyson. That give at least the NAD's perspective on highlighting your average star ratings, and then highlighting how you compare in star ratings to a competitor. The NAD had a few concerns with this practice. And the first was, in trying to source these reviews across the web. Different websites have different definition of what constitutes a 5-star, 4-star, 3-star. So, what Amazon calls a 5-star review might be different than what best buy calls a 5-star review. So, comparing these things across. Reviews might not be an "apples to oranges" comparison. And so, even if you decide to compare star ratings within a single platform. Like within an Amazon platform. Some of these reviews may be

compensated and remember if there is a material connection that's got to be disclosed. And some of these 5-star reviews, maybe somebody is reviewing you know, the platform or reviewing how long it took to have a product shipped, and not actually reviewing the product itself. So, understanding which of the reviews were written by verified buyers and which of those reviews actually focused on the product itself as supposed to some other experience with the ordering process. So, all of those issues make this a more complicated exercise than simply counting up 5-star reviews and comparing them. So, probably a better course is to focus not on comparative claims, but to focus on how many 5-stars reviews your products have. If you've got, you know mostly 5-stars and mostly 5-stars to promote that average-star rating. But once again, you either want to set aside those reviews that have been compensated from your aggregation, or you need to have a disclosure that makes clear that at least some of those reviews in your set, there is a material connection between the reviewer and the brand.

Lee: Yeah, that makes sense. And actually, I just have one last question as we wrap up. Now, what if customers post reviews on Amazon or on the brand's own website saying that the product did miraculous things, that the company doesn't have support for.

Mudge: This gets into the issue of truth of the review and also whether there is substantiation for a review. There's one school of thought that will say "well if the brand didn't encourage this, if there was nothing given for free, no payment, no material connection", that the brand can't really be responsible for what people say in reviews. This is something that the FTC and the NAD is looking at and really considering, at least particularly if the reviews are on a brand's own website. And the thought process is look; this is the brand's own real estate and certainly, they have control over the review portion of the websites, the same way they have control over the rest of the website. There is the computer decency act which suggests maybe a platform doesn't have an obligation to police user generated content. This is really an area where the FTC and the NAD are saying "look come on, if there are reviews that are just too good to be true. And the brand does have a connection or a control over them on their own website?" these are really things that should be removed, that shouldn't be posted. At minimum, even if you're going to leave up reviews on your website that say things that you couldn't say directly. If you take that next step and you engage in that. If you take that review and excerpt it on the main page of your webpage, or if you respond with some kind of comment to say "so glad to hear you had such a favorable experience with my products. That's taking into the next level and that's something that the FTC and the NAD would absolutely say a brand would have an obligation to correct, so best practice is after you solicit reviews and when you're in the moderation process. If reviews say something that you just know you couldn't support, and you know you couldn't state directly. Best not to post those reviews on your website. If there's reviews out in the world, on the Yelps, on other e-commerce platforms. That's one that the brand didn't solicit, there's not going to be that same responsibility there, but best to take a close look at the reviews that appear on the brand social media platforms and the brand's e-commerce platforms to make sure all of those reviews contain product attributes that can't be substantiated.

Lee: Well this has been a very insightful conversation. Thank you for joining us today Amy.

Mudge: Thank you so much Leeann, I had a great time.

Lee: If you have any questions for Amy, you'll find her contact information in show notes. And if you haven't already signed up? Be sure to subscribe to BakerHosts AD-torneys@law newsletter, and blog at Bakerlaw.com. I'm Leeann Lee, thanks for listening to AD-torneys@law BakerHosts podcast series covering all things advertising, marketing and digital media law.

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