

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic behind the firm's name. The name is written in a clean, sans-serif font, with 'astrachan' in black and 'gunst thomas' in blue.

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www.agtlawyers.com

Transparency in the New Media

By: James B. Astrachan

One of our "friends" in the mass communications business came up with a great scheme to promote its client's audio equipment. It "enlisted" a number of its, and a few of its client's, employees to participate in chat rooms where high end audio is the topic of conversation. The idea, of course, is to tout the client's products. "Do these chat roomers identify their connection with the manufacturer?" I asked, knowing full well the answer. "Why would they?" came the reply. "That would destroy the purpose of our assignment." The purpose, of course, was to inject favorable opinions into the marketplace in an effort to stimulate sales.

Soon after this discussion, I ran into a related issue. Another agency client had been hired to locate bloggers with fishing expertise and a readership. This client represented a manufacturer of good-quality, made in the USA, fishing rods and reels that cost over \$500 in combo. The goal behind this project was to put "samples" in the hands of bloggers for their public review. The bloggers would get to keep the product and while they were not told what to write it was pretty much assumed that an unfavorable public review would not result in supply of any new samples. I asked whether the blogger was told to let his readers know that his review was based on a free sample provided by the manufacturer. "Wouldn't the disclosure of that relationship bias the review? Shouldn't his readers know this?" I queried. "Maybe, but that's not the result we are looking for," said the account executive.

It was clear to me that there are practices going on that some might consider deceptive, and that the "new media" was fertile ground. Apparently, this was also clear to the Federal Trade Commission which recently issued *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, effective December 1, 2009. While the Guides target new media practices to some extent, they are of general application to all advertisers. They are important and anyone involved in advertising must be aware of their contents.

The Guides explain to advertisers on how to ensure that endorsements are not false or misleading under the FTC Act. They drill down into what constitutes an endorsement. The Guides were first published in 1975 and later revised in 1980. Because the last revisions were published in 1980, prior to the development and

emergence of the Internet and other new media, the current revisions are the first to address the dissemination of endorsements through new media such as blogs, street teams and social network websites. Some important changes include guidance on the use of endorsements and testimonials offered by bloggers, the liability of advertisers for false and unsubstantiated statements made by their endorsers and for failing to disclose their material connections with the endorser (must reads), the elimination of certain disclaimers as effective means to prevent consumer endorsements from being false or misleading, and the liability of endorsers for their statements.

Honest Opinions

An endorsement is any message that consumers are likely to believe reflects the opinions or beliefs of a party other than the sponsoring advertiser. Endorsements must reflect "the honest opinions, findings, beliefs or experience of the endorser." The endorsement may not convey an express or implied representation that would be deceptive if made by the advertiser. If a material connection exists between the endorser and the advertiser, the advertiser must carefully monitor the content of the message, an easy feat for traditional media where the advertiser writes the script, but far less easy in the cases of blogging, message boards, street teams and other forms of viral advertising where the endorser is let loose to create the buzz.

The Guides cover celebrity, consumer and expert endorsements. The expert is a person, or entity, "possessing, as a result of experience, study or training, knowledge of a particular subject which knowledge is superior to what ordinary individuals generally acquire." An obvious example might be an endorsement of tires by a well known NASCAR race driver. A less obvious example, cited in the Guides, is a blogging college student who has "earned a reputation as a video game expert," of whom his readers frequently ask questions.

Disclosure of Endorser-Advertiser Relationship

The Guides generally require that where there is a relationship between advertiser and endorser that is not inherently obvious, it must be disclosed. That relationship, however, must be one that an ordinary person would believe would materially affect the weight or credibility of the endorsement (as viewed from the FTC's perspective). It is well known that celebrities are paid a fee to endorse products, and consumers factor that into their decision to buy. It is not necessary to make the disclosure where the connection is obvious. It may not be obvious to viewers that a sports celebrity touting a medical clinic by name on a talk show has been paid by the medical clinic to talk up the clinic when she can.

An advertiser may use the endorsement of experts and celebrities only as long as they have good reason to believe that the endorser maintains his or her product-related views. If an advertiser wants to use the endorsement over an extended time it must secure the endorser's views over reasonable intervals. What is reasonable might be

affected by new products, alterations, performance changes and the like. Also, if the advertiser represents that the endorser uses the products, the endorser must have been a user at the time the endorsement was made. The advertiser can only use the endorsement as long as it has good reason to believe the endorser remains a bona fide user of the product.

Consumer Endorsement

Consumer performance endorsements will be interpreted as representing that the product is effective for the depicted purpose. The advertiser must possess at the time the ad ran, adequate substantiation to support the claims. If appropriate, the FTC will require that substantiation be of a scientific nature. Specifically, the Guides provide, "consumer endorsements themselves, are not competent and reliable scientific evidence." Thus, where the claim is capable of scientific substantiation or testing it is not sufficient to rely on the endorsement of consumers, who may have good faith beliefs, to establish the claim. The burden falls on the advertiser, and its agency. Disclaimers, such as "results not typical," or "testimonials based on experience of a few people – you are not likely to have similar results" are not adequate or effective. The Guides, however, do recognize that in some, undisclosed instances, a strong disclaimer could be effective even when the advertiser does not possess reliable, empirical testing.

Transparency

The Guides provide examples that are helpful in understanding the FTC's transparency concerns and the often intended purpose of social marketing – that there be no transparency can easily run afoul of the Guides.

- A tennis star had laser vision correction surgery. She speaks highly of the clinic by name on TV talk shows, does not appear on commercials and has a contract that pays her to publicly tout the clinic when she can. Without a clear and conspicuous disclosure, the Guides provide that "this endorsement is likely to be deceptive."
- A physician who endorses an anti-snoring product must disclose that he owns part of the company.
- An online message board discussing new music download technology is frequented by MP3 player enthusiasts, including an employee of a leading playback device who touts her employer's product on the message board. Knowledge of the affiliation would likely affect credibility and must be disclosed.

- A street team talks to friends about a product. Points are awarded for each interaction and results in the ability to claim valuable prizes. This relationship must be disclosed.
- A college student video game blogger, who reviews for free a new video game system from the manufacturer must disclose this.

The purpose of transparency is simple. Consumers must understand what relationship exists between advertiser and endorser that is likely to affect the endorser's endorsement.

The Guides attempt to restate old, and create new, rules. What comes through loud and clear for these advertisers who use new social media and viral methods to advertise their products is that the FTC has announced that advertisers and their agencies will bear responsibility for the contents of their endorsers' messages to consumers. To avoid liability, advertisers must direct their endorsers, employees and ad agencies to comply with the Guides and they need to monitor the activities.

Employees must be prohibited from anonymously posting touts for their employer's products, and the prohibition should be written and often communicated.

Advertisers should require by contract that their agencies are aware of, and will comply with, the Guides. Advertisers and agencies are obligated to insist that their endorsers also comply and this should be written. Procedures should also be established to monitor compliance. Where product is provided for review, for example, the reviews should be monitored for sufficient disclosure of connection.

A copy of the revised Guides can be found at the FTC's website, <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.