

#AdLaw - A Quick Wrap-Up From The 2020 ANA/BAA Marketing Law Conference

November 18, 2020 – The TMCA

by Fara Sunderji, Sarah Robertson, Tiffany Shimada, and Evan Everist



Related People

- Fara Sunderji
- Sarah Robertson
- Tiffany Shimada
- Evan Everist

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

Last week we quickly pivoted from watching the 24/7 "[Map Show](#)" to spending our screen time learning at the ANA 2020 Marketing Law Conference. It was a great three days in Chicago in our pajamas of educational seminars. If you didn't make it this year, don't worry – here's a quick wrap-up of the highlights:

- **Influencers** – This has been a hot topic at the law conference for many years now. So you may be asking, haven't we already covered influencers from every possible angle? You might think so, but there are still lessons to be learned in influencer advertising and things in this area are always changing. But some things never change - the keywords for influencers and the advertisers who hire them are transparency and flexibility. Influencer contracts are highly recommended, the more specific the better, so that influencers understand very clearly what's expected of them. Also, did you hear that #ad is back? It is transparent, simple and works in almost any situation, but influencers and brands have long shunned it, while lawyers loved it. Are we finally all going to agree on something?
- **Consumer Reviews** – With access to brick and mortar stores limited in 2020, online shopping and consumer reviews became increasingly important. For that reason we are often fielding questions from clients about using consumer reviews in advertising. The quick take from the conference is that advertisers should be careful about filtering or reordering reviews on their own sites.
- **Original Content** – How are media companies creating and promoting original content during the pandemic? In-house counsel from new and old media discussed. Production of film and television has mostly resumed, but with strict testing and physical distancing protocols. In many cases, studios are also using remote recording or asking talent to step into the role of videographer at home. To promote content, COVID-friendly solutions included sending influencer boxes (with proper posting guidelines, of course), creating virtual concert and art experiences, and drive-in viewings. Bottom line: creative people are finding creative solutions to the pandemic's challenges.
- **Promotions** – Most promotions, sweepstakes, contests, and games have gone virtual, and yes, state laws around promotions still apply in addition to platform rules, so remember to check both to ensure compliance with all applicable laws. Remember the basic tenets of promotion law, which is to remove at least one of the following elements to avoid an illegal lottery: prize, chance, and consideration. Beware that even a giveaway or gift with purchase can potentially create the element of chance if supplies are limited.
- **Product Claims and Labeling** – Claim substantiation was a focal point this year, particularly concerning food, beverage, and nutritional supplement labeling, as many warning letters have been sent and lawsuits filed against companies that produce

products with claims of mitigating the novel coronavirus and promoting additional health benefits or immunity from a number of ailments. Remember that implied claims are scrutinized along with express claims, so look to the context as well as the wording to make sure that you aren't communicating anything about the product that is unsubstantiated.

- **CBD and Alcohol Marketing** – While the FDA continues to work on regulations governing CBD, uncertainty surrounding the marketing of CBD products remains. FDA has been taking enforcement action against sellers of products containing CBD making health, drug and/or false claims. However, it is generally tolerating sales of CBD products, such as tinctures, gummies and dietary supplements, where no such claims are being made, even if the products are technically unlawful under the Food, Drug and Cosmetic Act. In actions involving CBD product claims, courts are making inconsistent rulings on whether to stay those actions until the FDA's regulations are issued. On the alcohol side, the impact of the pandemic on longstanding ways of doing business may end up having a beneficial effect in causing a reconsideration of the archaic U.S. regulatory structure for the sale and marketing of alcoholic beverages (i.e., the current three tier system of producers/distributors/retailers) as well as standards for the advertisement and marketing of alcoholic beverages.
- **Looking Ahead to 2021** – Aren't we all?! In 2021, we can expect that the FTC will be releasing an updated version of its Endorsement Guides to address the changes (especially in social media) since the last version released in 2009. Will we see aggressive enforcement following the release of the updated guides? Maybe, but it is clear that the FTC and other regulators are expanding their enforcement focus beyond just advertisers to others in the chain, such as influencers, ad agencies, PR agencies, publishers and even retailers. The NAD is also looking ahead to 2021 and we can likely expect to see NAD-initiated actions in new industries – potentially consumer electronics or appliances and other areas that we don't often see in competitor challenges at the NAD.

We hope to see everyone in person on November 15, 2021 in San Diego!