

Product Endorsements and Testimonials

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Remember the television announcer: that man or woman with the smooth voice telling consumers which products they absolutely had to have? He's part of a bygone era now. Even celebrity endorsements are looking more like [The Joneses](#) and less like [Troy McClure](#). Today's consumers value authenticity. They believe websites like Yelp, UrbanSpoon, and Amazon provide "real" opinions, and, more and more, consumers researching a purchase turn to social media for advice.

Savvy marketers are following consumers into these new media channels to communicate their advertising messages. The Federal Trade Commission ("FTC") has, in turn, followed marketers and established guidelines concerning the use of endorsement in advertising, both in old and new media. Before launching any advertising campaign which includes product endorsements or testimonials, advertisers must follow the FTC's guidelines. These guidelines spell out just what endorsers may say about a product.

What FTC Considers an Endorsement

FTC defines an endorsement to mean "any advertising message (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) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser." What matters is what a consumer is likely to believe, not an advertiser's or endorser's intent. Endorsements and testimonials are treated identically for purposes of FTC enforcement, so the word endorsement is used herein to refer to both. A "product" can be a product, service, company or industry.

Rules That Apply to All Endorsements

Endorsements must always reflect the honest opinions, findings, beliefs, or experiences of the endorser. Advertisers must be able to substantiate any claims made through endorsements in the same manner that they would be required to do if they'd made the claim themselves. All representations made by the endorser must be ones that the advertiser could make directly, and advertisers may not distort the endorser's opinion or experience. If the advertisement represents that the endorser uses the product, the endorser must, in fact, have used the product at the time the endorsement was given, and for as long as the advertisement is run. Both advertisers and endorsers may be liable for false or unsubstantiated statements or failure to disclose a material connection between the advertiser and the endorser.

Consumer and Celebrity Endorsement

A consumer or celebrity endorsement which portrays his or her experience with a product must be representative of all consumers' experience. If this is not so, the advertiser must clearly disclose what the generally expected experience will be, or disclose the limited applicability of the endorser's experience. According to the FTC, disclaimers such as "individual results may vary" or "results not typical" are insufficient, because they fail to reduce the communication that the experiences depicted are generally representative. In addition, advertisements which represent that "actual consumer" endorsements are used must use actual consumers, unless the ad clearly discloses that actors were used.

Celebrities need to disclose their relationships with advertisers, no matter what medium is used to communicate the endorsement. A blog post or a tweet is the same as a television commercial or print ad for FTC enforcement purposes. The same goes for bloggers or online product reviewers. If paid by an advertiser or regularly receives free product in exchange for reviews, they need to disclose the relationship with the advertiser.

Expert and Organization Endorsements

Whenever an ad represents that the endorser is an expert, the endorser must possess the qualifications represented. It follows that the expert's endorsement must be supported by the endorser's actual use of his or her expertise in making an evaluation of the product.

Further, if an ad includes an endorsement by an independent testing organization, that organization must actually be an expert testing organization that has conducted valid scientific tests on the advertised product. Naturally, such tests results must support the endorsement message.

If the expert or organization endorsement is based on comparison, and the overall impression created by the endorsement is that the featured product is superior to other products, then the endorser must actually have found such superiority.

Payments for Endorsements

Unless the endorser is an expert or well known personality, any payment of money to an endorser in exchange for his or her endorsement must be disclosed. In addition, advertisers must disclose when there exists a connection, other than an endorsement fee, between the endorser and the advertiser which might materially affect the weight or credibility of the endorsement. This includes independent research paid for by advertisers.

As stated earlier, both the advertisers and endorsers are potentially liable for violations of the FTC's rules regarding endorsements. For example, the FTC ordered Synchronal Corporation and Dr. Steven Victor, a dermatologist, to stop making unsubstantiated claims about the product Omexin in the infomercial "Can You Beat Baldness." In the infomercial, Dr. Victor provided an expert endorsement that the product Omexin was scientifically proven to curtail hair loss and promote hair growth. The FTC charged Dr. Victor with failing to conduct the required level of substantiation for his expert opinion or to use his expertise to conduct an examination of the product to support his endorsement. The company agreed to pay \$3.5 million to settle these and other charges.

In March 2011, Legacy Learning Systems, Inc. and its owner agreed to pay \$250,000 to settle charges of deceptive advertising through online affiliate marketers. Legacy Learning hired affiliates to post endorsements of the company's guitar lesson DVDs in articles, blogs, and other online sources. The FTC charged that the affiliate material was deceptive because it appeared to reflect the views of ordinary consumers and did not disclose that the affiliates were paid by Legacy.

In May 2011, the FTC issued an order against a consumer endorser for the first time. Marsha Kellogg was ordered to stop making false claims about the amount of money she earned as a result of an infomercial program "Winning in the Cash Flow Business." The FTC charged Ms. Kellogg with claiming that she made \$50,000 more than she actually made using the program. The suit against Ms. Kellogg was filed in addition to a larger suit against the CEO of the company behind the program. Ms. Kellogg agreed to an order settling the charges against her.

Using a product endorsements and testimonials can be a powerful advertising device. Make sure you follow the FTC's guidelines to guarantee the strength of product endorsements works for you, not against you.

Kelley Drye & Warren LLP

The attorneys in Kelley Drye & Warren's [Advertising and Marketing practice group](#) have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

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