



DANICA MATHES LOOKS AT SOCIAL MEDIA INFLUENCERS IN DALLAS BUSINESS JOURNAL ARTICLE

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Bell Nunnally Partner Danica L. Mathes authored the article titled, “Best legal practices for brands using influencer marketing,” featured in the Dallas Business Journal. In the piece, Mathes delves into the issue of social media “influencers” and how their association with and promotion of a company’s brand can be beneficial, but also detrimental – if not properly disclosed and regulated. Beyond offering suggested language to clarify an influencer’s relationship with a company, Mathes also looks at intellectual property considerations, and why and how to formalize influencer-company relationships in writing by addressing issues such as dates and compensation concerns, how to manage giveaways and sponsorships, and best practices for crafting guidelines and monitoring influencer activity. She concludes with the following insight, “Social media platforms and influencer marketing have opened the doors to new and exciting ways for brands to connect with consumers. Being thoughtful about using these resources will make them more effective and help to keep your brand out of trouble.”

Full text of the article is below, and can be viewed on the *Dallas Business Journal*’s website by clicking [here](#).

Best legal practices for brands using influencer marketing

I help people protect and profit from their brands and talents, and I love educating people about legal issues related to branding and creativity. However, you may have noticed that this article is “Sponsored

Content." That's because my law firm, Bell Nunnally, advertises with the Dallas Business Journal, which allows us and other advertisers to provide helpful articles like this one. Or, as the cool kids would say, this article is #sponsored.

Why am I telling you this? Because I have to. Although I probably don't need to be quite this overt, you should now have a clear understanding of my business relationship with the Dallas Business Journal and Bell Nunnally.

Influencer marketing is not new, but marketers have more recently begun to understand the power influencers have and what a great alternative influencer marketing can be to traditional advertising. This is especially true in a world that bombards us with marketing messages to such an extent that we are literally willing to pay a premium to avoid them.

Consumers prefer to interact with products and services in more authentic ways, which is why product placement in TV shows, films, and video games is so prevalent. Similarly, many people are more likely to take the recommendation of – or be influenced by – someone they respect or trust – whether that someone is a celebrity, an industry expert or thought leader, or just an everyday person who has become known for her knowledge about a particular niche.

Because these influencers have the power to affect purchase decisions of others as a result of their authority, knowledge, position, or relationship with their audiences, they can be extremely valuable to a brand. However, as these influencers typically appear to be so authentic to their followers, it can often be difficult to tell whether an influencer genuinely just loves a product or is getting paid big money to promote it.

If a consumer knows the influencer's motivation for endorsing a product is at least partially motivated by cash or getting free stuff, the consumer may not take a recommendation the same way as if it was given out of the endorser's pure adoration of the product. This is one of the main reasons that, in 2017, the Federal Trade Commission ("FTC") sent letters to 90+ individual influencers and marketers reminding them that they must reveal their business relationships when posting sponsored content.

Influencer marketing or sponsored content is probably not illegal unless it's not clearly labeled as advertising. So, here are some details to consider before working with influencers to amplify your brand message.

1. *Disclosure.* Although disclosure requirements are still developing, especially as social media platforms evolve, the FTC has provided some guidance as to types of disclosures that are likely to be acceptable in various situations.

- The FTC requires that influencers disclose anything "material" that is not obvious to the reader...and disclosures must be included in all media, including Twitter. If someone talking about your brand has

been paid to do that, is an employee, etc., that information needs to be “clearly and conspicuously” disclosed in the post.

- Even small incentives – such as sending a free product sample to a blogger hoping that he'll write about it – must be disclosed. The letter that accompanies the product should request that the influencer disclose that fact if he writes about it.
- Depending on the situation, #ad, #sponsored, or #client may work, although full-sentence disclosures such as “Thanks [Brand] for the free [Product Name]!” or more descriptive disclosures are better. Placement of the disclosure matters, too. General disclosures such as “some of the posts on this blog are sponsored” or relying on social media platform-provided “Advertisement” or “Sponsored Content” disclosures are probably not sufficient.
- Provide influencers with guidelines for disclosure requirements and offer several examples of acceptable disclosures for use in various situations.

2. Protect and respect intellectual property.

- Would you be OK if an influencer turned your product into a meme? Provide guidelines for use of your company's marks, products, and branded materials that address this and other situations.
- The safest way to avoid infringement and other third-party claims is to use original content. You'll want the influencer to promise that the photos, videos, and content he publishes as part of your campaign is original to him, and you might also provide the influencer with approved content to use.
- If you want to own or have a license to use the content created by the influencer, that will need to be addressed in your agreement.

3. Get it in writing. In most instances, you'll want to have written agreements with your influencers. In addition to other points raised in this article, you'll want to address the following:

- Spell out expectations about which social media channels will be used, how many posts are required, details about specific deliverables and content (e.g., number of words, products or events to be covered, etc.), and compliance requirements.
- Clarify what influencers will receive from your brand (free product to give away, links to guide consumers to a brand's site, etc.).
- Specifics about how your brand can use, re-use, or modify content and the influencer's name, photo, etc.
- Remedies if the influencer doesn't follow through, does something that could get your brand in trouble, or gets arrested.

4. Effectives dates and compensation.



- *What are the start and end dates for specific campaigns, and any related milestones or deadlines?*
- *What will the influencer receive in exchange for promoting your brand? A specific fee? Free products? Travel expenses to attend a launch party? When and how will payment be made?*
- *How is success defined for this collaboration? Is it the number of social shares? The number of clicks to a campaign-specific link?*

5. *Contests and giveaways. Promotions are frequently used in influencer marketing. However, the related legal issues are pretty complex, and special attention should be paid to this area.*

- *If an influencer receives sample products and decides to run a contest or "giveaway" to generate buzz, is that OK? If so, specify in your agreements that influencers must comply with any local, state, national and international laws that apply, as well as each social media platform's rules.*
- *If the influencer runs a promotion in which users submit photos, videos, or other content, you'll want to require him/her to provide a link to the rules for the promotion (which you should provide or at least review) that also require participants to include #contest or #sweepstakes disclosures. You'll also want rights to use the user-generated content elsewhere.*

6. *Monitoring and guidelines. In the end, it's up to the brand working with the influencers to make sure they are complying with disclosure, advertising, and other legal requirements. For this reason, regardless of whether you have a written agreement with your influencers, you should provide guidelines that cover the basics, such as disclosure requirements. Preventing legal issues is key, so consider the following:*

- *If a brand can't substantiate a claim made in its advertising, an influencer can't say it about the brand/product either.*
- *Will the company have approval rights over the posts? If so, how far in advance and in what format do you want to receive the content to review? Provide details about the approval process.*
- *How will you monitor your influencer's activity related to your brand?*

Social media platforms and influencer marketing have opened the doors to new and exciting ways for brands to connect with consumers. Being thoughtful about using these resources will make them more effective and help to keep your brand out of trouble.

Related Practices

Entertainment, Advertising and Media
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