

PBPA Podcast Transcript
Episode 23 - Like, Follow & Subscribe: Legal Considerations for Nonprofits
Working with Social Media Influencers
(34:45 minutes)



Sireesha ([00:00](#)):

Nonprofits are always seeking new and creative methods to spread awareness about their mission and raise funds. Social media influencers are a real market force, and you may be trying to figure out if and how your nonprofit could work with an influencer. In this episode of the PBPA Podcast, Jim Dudukovich will talk to us about legal considerations for nonprofits working with social media influencers.

Sireesha ([00:34](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:45](#)):

Jim Dudukovich is Counsel at the law firm of Brian Cave Leighton Paisner. I'm thrilled to have such a seasoned advertising, marketing and social media attorney with us today to share his expertise. Thanks for joining us, Jim.

Jim ([02:00](#)):

Thanks for having me.

Sireesha ([02:01](#)):

So to start, why would a nonprofit even consider working with an influencer?

Jim ([02:09](#)):

Well, it's a great question. I think, as we've seen the, the world of media and advertising evolve, use of influencers and social media have become part of the marketing mix for every brand and company. Anyone who's trying, trying to get their message out, it's an important tactic. And influencers in particular, um, whether it's for a nonprofit or, or any other organization, they can reach audiences that you may not otherwise know how to reach. They can reach them through channels that you may not use. They can reach them with messaging and in a style that you may not have. And so it really opens up the door to connections between your organization and audiences who may be willing to help if the right message can get to them. And, and most importantly, influencers have influence. They can compel behavior. People listen to them.

Sireesha ([03:05](#)):

Wow. So you're telling me that social media influencers go beyond just teenagers or fashion. How can influencers help a nonprofit though?

Jim ([03:15](#)):

Well, much, much like the work that influencers do for brands. Um, but perhaps with less of a commercial spin influencers can raise awareness. They can compel action. They can drive people to your page. They can drive people to donation pages. They can, you know, spread the word about what your organization does, who it helps some of the benefits and impacts that your organization makes. They can even play a more active role, although it, it can get a bit more complex in terms of the relationship, but they can even collect donations on your behalf. They can partner with local businesses to help drive donations at the cash register. There are a lot of things they can do that may be more appealing to audiences coming from an influencer than it would be coming from you directly.

Sireesha ([04:08](#)):

So now let's look more closely at the legal concerns. What are some legal considerations nonprofits should keep in mind if they want to work with an influencer?

Jim ([04:20](#)):

Well, there, there are certainly a host of them. I think let's start with the premise that nonprofits are bound by many of the same rules and regulations that commercial enterprises are. There certainly are some exemptions and they get some special dispensation in some regard. But when you're working with influencers, I would say there are three general buckets of legal considerations that you want to be aware of and familiarize yourself with. One are social media platforms terms because each of the platforms has its own community guidelines and advertising policies and, and different rules of the that they lay out for how organizations and influencers can work together on the platform, how messages can be posted, uh, things like that.

Jim ([05:11](#)):

Secondly, there are just a more general bucket of laws and rules and regulations that can come into play depending on the specific tactics that you're working with, an engage with an influencer on. For instance, influencers sometimes they might auction off a, an event or, or an appearance, or they may run a contest or a sweepstakes, uh, where, you know, the prize has something to do with them, or they have some swag they're gonna give away. They use that to try and leverage donations. And that triggers a lot of additional laws, rules, and regulations around, you know, state lottery laws and compliance with those and running a lawful contest or sweepstakes. So that's outside the scope of this podcast. I won't get into that in detail, but I wanna make sure people are aware that if you work with an influencer and they say, "Hey, I'm gonna run a contest to help drive donations." Your antenna should go up and you should know that there are some hoops that you'll need to jump through in order to do that. Um, I, and part of that has to do, and I'll talk about this, I think a little bit later on with the fact that the influencer is essentially acting as an arm for you, and you're gonna be responsible for what they do because they're doing it on your behalf. So we'll get to that later. But the heart of what I wanna talk about are the FTC Endorsement Guides, which is something that I think everybody has heard about, but I'm not sure everybody truly understands what they are and what they mean.

Sireesha ([06:45](#)):

So what should nonprofits know about the FTC Endorsement Guides?

Jim ([06:52](#)):

Well, the, the FTC Endorsement Guides, the first thing which I'm going to explain and going to say, why you should not listen to my explanation is that the FTC Endorsement Guides are not law. They are not a statute. They are the FTC's articulation of how it views the application of section five of the FTC act, which prohibits unfair and deceptive practices in advertising and commerce. How that section applies in the world of influencers and endorsements and testimonials. Okay. So it is, it's almost like a white paper or an opinion written by the Federal Trade Commission to put people on notice that this is what we think the law means in this space. So you cannot be sued for violating the Endorsement Guides. They're not a law. However, if you violate the Endorsement Guides, what's happening is you are doing something that the Federal Trade Commission has said. We think this is a violation of this broader statute. Okay. So, um, that that's probably some legal mumbo jumbo that may, may be neither here nor there.

Jim ([08:12](#)):

But the important thing to realize is that the Federal Trade Commission has put some stakes in the ground regarding how brands including nonprofits can work with influencers. And there are three fundamental principles that are articulated in the Endorsement Guides. First is the issue of transparency. And we'll talk about each of these in more, in more detail. The second is truthfulness. And the third is typicality. So in essence, what this really means is that if you are partnering with an influencer, whether they're paid or not, audiences that they speak to have a right to know that that influencer has a relationship with you. They're not just speaking independently off on their own with no connection. And you are responsible for making sure that what that influencer says about your organization, about your mission, about all the things that you do with, with donations, you collect are true, that it doesn't misrepresent what you as an organization do.

Sireesha ([09:20](#)):

So, Jim, can you tell me, or explain more about why transparency is so important and how are appropriate disclosures to be made?

Jim ([09:30](#)):

Well, this is really, I think where a lot of people focus when they think about the Endorsement Guides, it's where a lot of the chatter that you'll hear is focused. Transparency means, think about it this way. If I come to you and I say, "oh my gosh, I just tried this product and it's fantastic. You ought to try it". Okay. Maybe you think that I'm credible and you'll listen to me. However, if you knew that I worked for the manufacturer of the product or that the manufacturer of the product was paying me to promote them, that might impact the weight of credibility you give to what I say and to my recommendation, right? I mean, that's kind of common sense. So that's what the transparency of the Endorsement Guides is focused on. Making sure that audiences understand, if there is a connection that they should be aware of [it], because it'll impact the credibility of the message.

Jim ([10:28](#)):

So people think about this and what you'll see is, you know, hashtags have become everywhere. They're ubiquitous, and they're used for lots of different reasons. None of which are the reasons hashtags were originally created, but hashtags are often used as a means for disclosing the existence of what's called a

"material connection". So when you see #ad or #sponsored or #paid, um, those hashtags are being used to put the audience on notice that whoever is writing the post has a relationship with whoever they're writing about.

Jim ([11:09](#)):

Now, there are a lot of details in the Endorsement Guides and a lot of supplemental materials that the Federal Trade Commission has issued to, uh, explain parts of them. And the most important things that they continue to pound the table on are that disclosures need to be clear and conspicuous. They need to be in proximity to the message. So other words, I can't just put a disclosure on my profile page that says, "Hey, I'm a partner with this nonprofit" because people who see my posts in, you know, Twitter or Facebook or Instagram, they're not gonna see that disclosure when they see the message that I post, right? So the disclosure needs to be with the message. It needs to travel with the message. It needs to be understandable. Um, and so I think people, some folk can get lazy and use hashtags, even if the hashtag they use is commonly used, but it doesn't really fit the relationship. So #ad, when it's an employee talking about their company seems kind of weird, but people just do that. And there's nothing wrong with that, but it's it. I think it undermines the legitimacy of the message. So when you're, when you're talking about a nonprofit, you don't need to use necessarily #ad or #sponsored. You can use something like #charitypartner or something else that conveys or tips people off that there's a relationship here. The disclosure can also be in line. And what inline means is in the content itself, Hey, I'm working with this great organization, you know, in certain name of organization here and blank, blank, blank. So disclosures can be made that way.

Jim ([13:07](#)):

So there there's a lot to it. And what I want people to understand is that transparency is critically important. And I would say probably more so for nonprofits whose entire mission is really based on their credibility and their reputation and their integrity. They want to be transparent about how they're raising money, who they're working with, what they're doing with their funds, right? It's so transparency itself is important, but you don't need to feel confined or pigeonholed to *this means every single post by every influencer we work with has to start with #ad*. You can be creative, #Iworkwith____, or things like that, or in my disclosures.

Sireesha ([13:56](#)):

And do those disclosures, are they required if the influencer is just, they're not being paid, but they're just a big fan of the nonprofit?

Jim ([14:07](#)):

If there is not a relationship between the influencer and the nonprofit, if the nonprofit has not asked the influencer to go out there and things they're not getting paid or anything like that, then no. If I, Jim, Dudukovich want to talk about a nonprofit that I think very highly of, I can do that. There's no disclosure required because I don't have a relationship with that nonprofit. It's only when there's a relationship that exists that audience should know about in order to assess the credibility. And when you get into influencers, asking people to part with their hard-earned dollars, to donate them, it's really, really important that they understand that there's a relationship. Even if the influencer isn't getting paid a commission or isn't, you know, getting paid six figures to go out there and, uh, and, and promote the nonprofit. Just the existence is enough of a relationship.

Sireesha ([15:07](#)):

And what about truthfulness and typicality, the other two principles you had mentioned?

Jim ([15:15](#)):

So this is another really big component of the Endorsement Guides, which basically stand for the principle. That just because you, the nonprofit are not saying something, you've, you've gotten somebody else to say it for you doesn't mean that what they say, shouldn't be true and shouldn't be substantiated. So if you engage an influencer to talk about your mission, for instance, and the influencer goes out there and starts posting things that are untrue about where the donated funds go, what they're used for, what some of the projects they've been used for are, then that's problematic and you're responsible for that. So you have to think of the influencer as essentially a hired spokesperson. If you can't say it yourself, they can't say it either. Now that doesn't apply to statements of opinion. You know, if an influencer says, I love this organization, that's not a verifiable objective fact. That's a matter of opinion. And that's okay. Although the Endorsement Guides do say that statements by influencers should reflect their honest opinions, experiences, and beliefs. So if you're working with an influencer who has never donated a penny to you and has never done anything for your organization, and yet they're posting and saying how involved they are and yada yada, yada, that could be problematic. Okay.

Jim ([16:49](#)):

And typicality is another one. When you think of typicality, what you usually think of are infomercials and weight loss. And I lost 150 pounds in one week or something like that. And then you'll see the little thing that says "results not typical". Well, the Endorsement Guides attempt to rectify the abuse of the use of outlier or atypical results. So if, uh, use of a product would normally result in certain benefits, those need to be explained. And if you're using a spokesperson who experienced atypical benefits, extreme results, you can't hold them out as an example. And you gotta, do you just say what normal would normally experience under normal use, how this applies in the nonprofit case, I would say, and I'm, I'm just trying to think out loud here is that if the nonprofit had one project that had some unbelievable results, positive impact on a community, whereas most of the time they don't, um, then having the spokesperson talk about that one instance as if this is what always happens when the organization, you know, puts its boots on the ground and works on something, then that could potentially be problematic.

Jim ([18:18](#)):

I do think it's in terms of truthfulness and typicality. The other thing that I want to mention is that this means that the, the influencers that you work with have to be very careful. If they start talking about the specifics of how the operation works, how donations are used, projects that the nonprofit has engaged in and things like tax deductibility of donations. You know, if the influencers out there saying things that make people think that their dollars will go somewhere different than they actually will, that they'll be used for something different than they actually will or that the tax treatment of their donation is different than it normally will, then that's problematic. And these things apply regardless of whether the influencer is being paid by you or not. If they're engaged by you to, to get out there and talk about you, whether you pay them or not, these things apply.

Sireesha ([19:19](#)):

That's a good point, Jim, because influencers often work with nonprofits on a volunteer basis, but it's important for nonprofits to remember that doesn't mean it's a free-for-all. I'd also like to take a few

seconds to point out that if a nonprofit does engage with and pay a social media influencer, there are some fundraising issues to keep in mind. These considerations are outside the scope of this particular episode, since we have other resources that go into more detail. I, but I do want to briefly mention them now.

Sireesha ([19:54](#)):

Depending on the specifics of an influencer arrangement, a nonprofit may need to consider whether the influencer would be characterized as a professional fundraiser or paid solicitor. The influencer may need to be registered with the Georgia Secretary of State, particularly if they would be collecting funds directly on a nonprofit's behalf, an influencer [who] could qualify as a solicitor may even need to be, go through a background check and be bonded.

Sireesha ([20:26](#)):

Also consider whether you'll need to comply with Georgia's commercial co-venture in situations where the influencer might be partnering with local businesses to help raise money. Um, it's critical that a nonprofit identify and manage against these potential issues as well as possible ethical issues, particularly if the influencer, if their pay is based on the amount of funds raised, which is not a compensation scheme, we recommend. If you are considering paying a social media influencer, please check out the resources that I will link in this episode's webpage [and above], and then work with your accountant and legal counsel. But Jim, back to the concerns related to both paid and unpaid influencers, how can a nonprofit manage issues like transparency and truthfulness in their influencer agreement?

Jim ([21:28](#)):

Well, I think that nonprofits, this is where I would say nonprofits and regular commercial enterprises are essentially the same, which is you should document the rules of engagement with your influencers, whether that's in a formal contract or whether that is in some participation guidelines that they have to accept in order to participate. Somewhere, somehow you should put this stuff in writing. And this is not just a CYA thing either. This is not just a, well, if something goes south down the road, we want to be able to point to the contract and say, Hey, we had a contract. They weren't supposed to do that. That's part of it. You want to be able to look at the public in a straight face and say, "Hey, that was rogue behavior, that was not something we condoned or that we asked them to do". And they went outside the bounds of our contract, but it's also, I think of a contract in some ways as an instruction guide, it's a set of instructions to the influencer that say, Hey, we need you to be transparent. And this is what that means. It doesn't, you don't just include a, I recommend not simply including something that says influencer will comply with the FTC endorsement guys. Maybe they haven't read them. Maybe they don't know what they mean.

Jim ([22:49](#)):

What I like to do is include very specific examples. You're gonna comply with the FTC Endorsement Guides. Here's what that means in terms of transparency. It means making sure that your audience understands we have a relationship. Here are some ways you can do that. Include examples. As far as truthfulness goes, include clear guidance on talking to points. What is the organization's mission? What does it do? What doesn't it do? Maybe there are some sound bites or talking points that you can include. Maybe you're even gonna do some supplemental training, spend a half hour on the phone with the influencer to say, "Ask us any questions you want about who we are so that you're armed with the right information".

Jim ([23:30](#)):

There are some other things that you'll wanna consider including in the contract. Is there a specific number or type of posts that you want them to do? Which platforms do you want them to do them on? Are there specific hashtags that you want them to use with their posts? Maybe there are hashtags that are related to transparency, but there may be other hashtags that are more campaign related that you want to be searchable. So that people who are talking about the campaign can find everybody else who's talking about it. You may want to talk about the usage rights. You want to have the right to, to amplify posts made by your influencers, right? You wanna talk about the intellectual property rights in them. You want to include reps and warranties that they're not gonna include intellectual property that they don't have rights to. So if you work with an influencer and they go out and they do a social post and that social post, uh, somehow links your campaign to a professional sports team that you don't have a relationship with, and that they didn't have authorization to do. Or they use music in the post that hasn't been licensed. You know, those are, those can be problematic. So you wanna raise awareness of that, put in reps and warranties on those things.

Jim ([24:48](#)):

Now in the "careful what you wish for" category is the idea of review and approval rights. Some organizations that hire influencers, they want to see every post before it goes live. And, and you can maybe ask for that and that gives much more control over it. But if you're working with a slew of influences who are doing a lot of posts, do you have the, do you have the time and resources to actually review them all? It may be more about making sure you give clear guidance about as long as you're in this swim lane, we don't need to see it. You know, you can do these things as long as you comply with, the guidelines we've given you.

Jim ([25:31](#)):

And then the, the last couple that I'll talk about are morals clause. You know, morals, clauses used to be really offensive. Influencers, whether they be celebrities, actors, actresses, uh, athletes, they didn't like to agree to morals, clauses as a nonprofit, as a charitable organization, you wanna do some due diligence on the folks that you work with. Which doesn't necessarily mean a full background check, but know who they are, know what they talk about. Know some of their history decide if they're the right fit for you. And if they are, you wanna include a moral clause that basically says, "Hey, if you do any of these types of things, we may terminate our relationship because you no longer represent what we are about".

Jim ([26:25](#)):

Exclusivity. You know, asking for exclusivity is kind of a weird one, particularly in a nonprofit area, but there may be some categories of products that you tell the influencer. As long as you are partnering with us, we don't want you doing work with pick industry. I won't throw out examples, but you can think of some, um, where you don't want an influencer. Who's known for promoting certain types of products or services. You don't want them associated with your organization.

Sireesha ([27:00](#)):

Are there other things a nonprofit should do once they have a contract in place?

Jim ([27:06](#)):

Well, that, that's another great question because, what the Federal Trade Commission has been doing over recent years is really looking at the sort of downstream impacts of influencer relationships. And basically what they're saying is "it's nice to have a good policy, a social media policy. It's great that you have a good contract in place, but are you watching and monitoring what's happening?" You know, if the influencer relationship is not a set it and forget it kind of thing, where you sign them up to this beautiful contract, and then you just look away and don't pay attention you to what they're doing. You do have a duty to keep an eye on your influencers and make sure that the posts that they're putting out there or other activities where they're promoting you comply with the direction given in their contract. And if they don't, if they're either not being transparent, or if they're making false statements, you've got a duty to take corrective action. And you know, a few slaps on the wrist with an influencer who is not doing the right things, you may need to sever that relationship. So that's a really important thing to think about is things aren't over when the, when the ink dries on the contract.

Sireesha ([28:21](#)):

And Jim, let me ask you about the situation. What if an influencer is excited about your mission approaches you and says, "Hey, I wanna help you guys out". But then the nonprofit says, okay, well, we need to sign a contract, but a nonprofit might be scared about burning that relationship or potential relationship. Do you have any advisor input for an small nonprofit who might be wary about approaching a social media influencer with an agreement?

Jim ([28:52](#)):

Yeah. And what I would say is I am not recommending to anybody who's listening here, that you should over-lawyer these things, and that you should have a 35 page contract. What I'm saying is, should be mindful of how the relationship's going to work, what the influencer understands their duties and obligations to be, and you want to get some record of that. Now, does that mean you've gotta sign a 30 page contract? No, but what it does mean is you should have something reflecting what the understanding is. That could be an email. It can be a, you know, one page summary of guidelines for, you know, ambassadors or influencers to work with your organization that say always be transparent, make sure that your audience knows that you have a connection and are working with us. Always be truthful. Don't lie about what we do and, and what we do with your money.

Jim ([29:55](#)):

You know, you can have four or five or six bullet points on, on a sheet. And as long as you've got some record that the influencer understands, and it's your expectation that they're going to abide by those, you know, you're probably okay. That's better than nothing. And if you think about what could go wrong, um, again, if an influencer is out there promoting you, and they're not disclosed that they've been in discussions with you or that you've given them some, you've armed them with something to go out there and, and help, um, spread the word about your mission, give them a call, tell 'em, "Hey, we see these posts, we appreciate it, but you've gotta be transparent. Can you go back and add, you know, #organizationpartner", whatever it might be to these posts and continue to use that going forward. So I, I don't want to make anybody feel like the sky is fall or scare them away from working with influencers because it's incredibly valuable. What I don't want people to do is to work with influencers without understanding that you've got duties and responsibilities in terms of what those folks are saying on your behalf,

Sireesha ([31:09](#)):

Jim, that's a lot of great information. It's very helpful. Do you have any other parting thoughts or closing remarks to share?

Jim ([31:18](#)):

Well, as much as I just said, I didn't want to scare anybody. And I don't! What I'd say is that right now, 2022, we are in the middle of a new administration. And the FTC, as currently constituted, has been very vocal about its strategic priorities. And there are a whole host of things that are not particularly relevant here, that they want to focus on (privacy, antitrust, some other things). But one of the things that the commission is very focused on is protecting vulnerable populations. So the elderly, rural populations, and they're also very, very attuned to charitable scams. So when people are parted with their money, because they thought it was going someplace charitable, when in fact it wasn't. Now, I hope that nobody listening to this podcast is one of those bad guys. Um, however, those bad guys try to look like good guys when they're out there soliciting money. And so to the extent the FTC or any other regulators might, uh, put "fundraising by nonprofits and influencer awareness campaigns by nonprofits" on its radar, it will be because of those bad actors. And so you want to be able to look back to the FTC with a straight face and explain what you've done and why what you've done is okay. So I, I hope that makes sense to you. I would not say that the use of influencers by legitimate nonprofits is something that is on the FTCs priority list. However, to the extent bad things are happening, fraud is happening, they will pay attention to it. And they could sweep some of the good guys in with the bad guys as they're doing their investigation.

Sireesha ([33:41](#)):

Jim, thank you so much for sharing your insight and expertise into this area that is constantly evolving and changing right now. And it's great to be able to know how this could benefit nonprofits, but also what they need to be cautious and wary about going forward. Thanks for being here today.

Jim ([33:59](#)):

Thanks for having me. It's a pleasure and a privilege.

Sireesha ([34:03](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.