

## Digital Planning Podcast (Season 6, Episode 2): Planning for Influencers

Speakers: Justin Brown, Jennifer Zegel, Ross Bruch, and Laura Giles

Justin Brown:

Welcome to the Digital Planning Podcast. I'm Justin, and I'm here with my co-hosts Jen and Ross. And today we are joined by one of my partners at Ballard Spahr, Laura Giles, who is a partner in our Phoenix office, and she is going to be talking to us about social media influencers. Laura, welcome to the Digital Planning Podcast.

Laura Giles:

Thank you for having me.

Justin Brown:

So before we jump into social media influencers, can you just tell us a little bit about yourself?

Laura Giles:

Absolutely. So as you mentioned, I'm a partner of Ballard Spahr. I'm in the corporate and M&A group. And as part of my practice, I represent influencers and professional athletes in their businesses. I'm from the Phoenix area, went to Arizona State for undergrad. Go Sun Devils. And I went to the University of San Diego for law school, and then came back to Phoenix to practice. I also have a four-year-old daughter who my husband and I have come to refer to as our boss. So now you know how that's going. So my life is work and play with a four-year-old primarily.

Justin Brown:

Well, Laura, I can only imagine what it's like having the boss at home. I was in your shoes at one point and I feel your pain. So let's talk about social media influencers. Can you tell us what exactly is a social media influencer?

Laura Giles:

It's a great question and one that you may not know the answer to if you're over the age of say 30. Celebrity endorsements have been around forever. So people often ask me what the difference is between the celebrity endorsements they've always seen and influencers. And the key really is social media. Influencers are people with substantial social media followings and influence their followers by promoting or recommending products, services, brands, things like that through their social media accounts.

So influencers can range from the mega celebrities that you typically think of, like Cristiano Ronaldo, the reigning king of Instagram, down to nano-influencers with very niche, small followings that are still important to companies and they're in every industry. So the real key for influencers to remember is just that their power is through social media.

Justin Brown:

And are there any specific types of social media that people tend to focus on or that you tend to focus on? Or is it really any kind of social media?

Laura Giles:

That is really dependent on the company or the product or what a company who's hiring an influencer is going for. So different niches, different industries will have followings on particular social media platforms. I would say broad brushstrokes

right now, the two hottest platforms, if you will, are Instagram and TikTok. So when you think of big celebrity or athlete endorsements, typically those deals are going to be for Instagram and TikTok posts.

Although companies do like to share content across all of their platforms, those two are really the focus right now. But again, you may see, for example, one company hiring an influencer to be really heavy on Twitter because that's where they know they have a really strong following just by nature of the type of company it is.

Ross Bruch:

So Laura, from a legal standpoint, how are you helping social media influencers?

Laura Giles:

I work with influencers in a number of ways. The bulk of what I do is help them negotiate contracts for their services, whether that's for a discreet set of social media posts or a broad endorsement deal. So their agreements can really run the gamut in terms of the services they're providing. In negotiating contracts, I help them think through legal issues and how they should be protecting themselves from risk.

I also help them with broader business issues and goals, like how they should structure their contracts, how their contracts work together for things like exclusivity that they've agreed to in some category and how they can manage their risk profile in doing business as an influencer. We also advise on things like FTC compliance to make sure that what they're doing is in compliance with regulations and all of the legal trends, as well as the rules of the platforms that they're using to work.

Jen Zegel:

Laura, could you give us a specific example, I mean, of course, not revealing any confidentiality, about how you navigate this area with clients? Or is there any specific story or interesting matter that you could share?

Laura Giles:

The main issue we're really trying to protect around is name, image, and likeness protection. That is the number one commodity that an influencer has, so to speak. And so a lot of my advice on contracts is around making sure that they retain their rights to their name, image, and likeness and how they can mitigate any risk associated with that. The other really important thing that I briefly mentioned is exclusivity.

So a lot of times a company is going to want to prevent an influencer from working with another company on the exact same type of product or brand for some period of time so that their celebrity endorsement that they're purchasing is not diluted. Those are the things that we really focus on when we approach agreements. I've worked on so many deals at this point from everything ranging from high fashion deals to cutting edge sports equipment, to eyelashes, to golf carts. It really has been an interesting mixed bag of products.

And I think what has been really rewarding or interesting and maybe sort of surreal is the word is to work on a deal and then within weeks to months to see that endorsement come to life on Instagram out there in the real world. And so it's been pretty cool to work with companies in all different industries of all different sizes with all different temperaments and to get deals done that really are out there in the marketplace.

Justin Brown:

That does sound cool to be able to be working on a deal and then see it on Instagram or social media and say, "I was a part of this." When you're structuring the deals, is there a specific type of structure that you are seeing people used to control their social media pages and their personas?

Laura Giles:

The main structure that influencers typically use is that they create entities that are typically referred to as loan outs. And what they do is the individual influencer will license their name, image, and likeness to the loan out entity. And then that loan out

entity is the one that goes out and enters into contracts for services of the influencer and for licensing out of the name, image, and likeness to a company.

So use of loan outs is really the number one way that influencers tend to protect themselves when entering into these agreements because the entity serves as a legal shield from liability into their personal lives.

Jen Zegel:

Laura, are you seeing LLCs being frequently used as a loan out entity or other types of corporate structures?

Laura Giles:

By and large, LLCs. I think partly just because they are the most popular and easiest kind of entity to administer from an administrative standpoint. It really goes back to a tax question, frankly, that clients will work through with their own tax advisor in terms of which type of legal entity they want to use, who the owners are going to be, whether that's going to be family members, a trust perhaps, or just themselves individually.

Justin Brown:

So with these entities, are they putting the social media accounts into the names of the entities or are they putting the social media accounts into their individual names, or both? And I guess to follow up on that, what would you recommend people do?

Laura Giles:

It's a great question, and I don't know that there is one singular answer to it yet because it's such a new and novel legal issue. So far when you look at the various social media platforms, sometimes their rules will dictate what type of account is opened and who the owner of that account is rather than any strategic legal planning. So for example, an individual account versus a business account on a particular social media platform may have different rights that come along with it.

It might look different. It might list the owner of the account in a particular way. And so typically influencers are going to open accounts that fit with the way they're branding themselves. I think by and large, so far that's been individual accounts. Now, on the back end, of course, we can make legal arrangements to help protect from liability and have ownership be structured in various ways. I'd be interested to hear from you all what you're seeing on the planning side.

For me personally, it's not a question that I run into that much yet, frankly, but I'm very curious to see how that evolves as social media takes over and it itself evolves.

Justin Brown:

So Laura, that's something that we talk about a lot in the planning world and especially on the Digital Planning Podcast because we've talked about some of the consequences for people holding these accounts in their individual names, specifically what happens when somebody dies. And if you have somebody who's a social influencer and has a TikTok account or has an Instagram account, the question becomes what happens to that account when they die and does it automatically pass to their heirs, does it stay in existence, does it get deleted.

And one of the things that we have seen is that there's the law that we've talked about here called RUFADAA, the Revised Uniform Fiduciary Access to Digital Assets Act, which has a hierarchy of access. And the first, it's the online tool and then whatever is stated in an individual's will, and then the terms of service agreement for the custodian of those digital assets. And to my knowledge, Instagram and TikTok do not currently have online tools that would automatically designate where or who has access to an account after somebody dies, right?

So you have a social media influencer, they die. If TikTok or Instagram had this online tool, then the person could designate somebody to be the person to access everything. So it's kind of created a problem in the estate planning world because the evolution of social media and social media influencers hasn't caught up to yet the estate planning world. And a lot of these

parties, these custodians don't have online tools in place that would otherwise aid somebody in designating who can access their accounts after they die.

So one of the things that I typically advise people to do is use an entity that is not going to die as opposed to having it in an individual person's name because you avoid all of those death issues if it's in a business entity as opposed to in an individual's name. Jen, what are you seeing on this front?

Jen Zegel:

I think there's a lot of uncertainty and potential inconsistency that can come in. I look at online tools which are agreements with service providers and a user separate from a terms of service agreement that allows the user to set parameters for access or complete deletion of an account at a triggering event, which could be inactivity or death.

And I really view these as akin to a beneficiary designation on a traditional financial account that you may be able to add a beneficiary designation or insurance policy where you can add a beneficiary designation without all of the well-settled case law and in some states state law that would invalidate these types of designations in a variety of situations. So if there's a divorce or if there's some type of abuse or misuse by the beneficiary, they cause the person's death, there's a lot of rules that could invalidate that potential designation through a beneficiary designation.

But with this online tool, it's so new, there's hardly any case law that has challenged it. We don't have these protections in place to invalidate a designation that wasn't changed by the user during their life or before they became incapacitated. And so I see this can create and will likely create a whole bunch of future issues as this evolves and as these influencers age or have things occur if they've set up online accounts and if they've used these designations. They might've designated people or individuals or accounts that are no longer in operation or weren't kept current.

So to Justin's point, through using these tools, it can be great, but it also can open up a whole bunch of other secondary issues that could come into play about actually accessing information and account data and being able to control it at a later point. I do think we're going to see and we have begun to see because Facebook, Google, Apple, they've all implemented these types of online tools on their platforms, we're going to continue to see a trend in that space.

But I think there needs to be a lot more consideration of these issues by service providers as they create these types of tools or having some type of joint ownership of accounts in the future.

Laura Giles:

Maybe The Golden Bachelor will speed up all the answers to these questions.

Justin Brown:

We'll see. So Laura, I'm sure that you deal with intellectual property rights a lot in advising social influencers. What are some ways that influencers can protect their IP rights and licensing agreements during their lifetime and at their death?

Laura Giles:

Well, the first way that we've already talked about is by creating that loan out entity. So having an entity entering into contracts rather than the individual helps add a layer of protection there in and of itself. Because if there was ever a claim for a breach of contract, the other party to the contract would pursue the entity and not the individual, not go after your house and your personal possessions, and instead go after the entity's assets. So that's the first way. The other thing is just to be really diligent in negotiating good contracts.

So making sure that the contracts are very explicit, that the influencer retains all rights to their name, image, and likeness, or the loan out company retains all rights to their name, image, and likeness. Where that becomes an issue is when the company owns the content that's being created and the content includes that name, image, and likeness, you just want to make sure that yes, the company owns the content, but notwithstanding the name, image, and likeness rights themselves remain back with the company or the individual.

The other thing is to really make sure that the contract has a lot of good parameters around how the name, image, and likeness can be used, whether there's any other intellectual property at play, any trademarks or other forms of IP that the influencer may have, how long they can use that IP and the content that's being created. And so just making sure all of those usage rights, approval rights, and all of those things are really well laid out in the contract is key.

Jen Zegel:

So not for your clients, of course, Laura, but do you see any really common mistakes that people who are new to this space and new to their new status as a social media influencer, common mistakes that they're making if they don't have counsel?

Laura Giles:

I think that the main thing really is just that a lot of these contracts start out very one-sided in favor of the company, and that's a natural thing. The company is drafting the contract. They're going to protect themselves. They serve up the draft of the contract. And the influencer doesn't perhaps feel like they have much bargaining power. They don't want to let go of the opportunity and they'll just sign whatever contract is put in front of them.

I think what influencers should realize is that they do have some bargaining power and there are plenty of changes that can be made to the contract that are going to be viewed as reasonable and not too much to ask. And so I think just advocating for yourself and, of course, getting good counsel is really important.

Ross Bruch:

How are you seeing advancements in AI impact influencers?

Laura Giles:

Well, it's interesting. For me personally, it hasn't impacted my work too much because I generally work with human beings who are famous people and they're providing their celebrity level endorsement to companies. But what we are seeing in the industry is a couple of things. Number one, you're having endorsements of some AI tools and products, which is interesting, and seeing how there's that interaction between the old school and new school. And then you're also seeing AI influencer accounts.

So perhaps it's an Instagram account not of a person, but of an actual AI created being, or I don't even know what to call it, but they're actual AI influencers. Now, of course, those are owned by companies, created by companies, and so it will be really interesting to see how that evolves. We've not gone down the legal path of representing AI, right? So it's just such a new space and will be super interesting to see how it evolves in the influencer industry.

Justin Brown:

I think it is interesting to see how it evolves. I had seen a story about a K-pop band that is entirely AI generated, and they have a social media account, they do videos, and they're apparently widely popular. And everything that they do is entirely AI generated. So it's going to be interesting to see how it all works out. Do you think that down the road you're going to be representing AI social influencers?

Laura Giles:

I have to think that we'd be representing the company who's responsible for generating the AI, but it'll be a wild ride, I think.

Jen Zegel:

It sure will. And I was reading a bunch of articles this weekend about AI girlfriends that are created based on someone's personality, but there are a lot of scams within them. And so as they have their boyfriends talk to them, they'll suddenly ask them a question like, "What's your mother's maiden name?" And then they'll ask a little bit later something else that's very

personal. If they were to somehow get access to some of their information, they would then be armed with all this data that could really cause a lot of damage.

The other thing that I think is going to be a big trend in this space that we're starting to see a lot of startups really take the lead on is creating essentially a Go Spot of somebody. And so this could be with artists, this could be with influencers, but this could also be with just a regular individual who wants to somehow preserve their likeness and personality and their history and pictures and videos in a generative AI bot for future generations to interact with. So I think it's going to be really exciting to see where this goes.

So in that vein, what are some nuances and key interests that estate planning attorneys should really be considering in connection with planning for influencers?

Laura Giles:

I think helping to plan for succession of the name, image, and likeness rights is really key. People are going to have opinions about how their legacy is carried on after they pass and how their image is used and portrayed. And all of that needs to be, number one, well-documented and number two, communicated to those who will carry out that legacy. I think, I'm sure you guys know this far better than I ever will, but so many people I think are hesitant to think through those issues.

It's hard. It's a hard topic. It's painful for them. But particularly where you've got this valuable asset in your own image, you need to think through how that may be used when you're not in control anymore. And so I think that's a really critical topic for folks who have a prominent image. But I think beyond that, this goes beyond famous people. I think the classic example is a family business where the dad is the spokesperson or they've got the kids and the ads and that becomes a part of the brand.

Thinking through how those rights are being used and how they might continue to be used into the future is really important.

Justin Brown:

I think that's an important point. Because I think starting this episode, a lot of people may have thought, well, I don't work with uber famous people, or this doesn't really impact me or my clients, but it does if your clients have a family business and they use the family name, as you said, Laura.

I think it is something that everybody should be thinking about if their name is out there or if their "brand" is out there in any way regardless of whether you are a billionaire or whatever. So along those lines, what types of proactive measures are you seeing people taking in connection with their planning for their social media accounts?

Laura Giles:

The real answer is just not enough. We are seeing the use of loan out entities become more common, which is a great and easy first step, but the estate planning side of it I think has not really become as important an issue as it should be. And I think part of it is that a lot of people feel like they don't need to plan until they've accumulated enough assets to make it worth it or something like that.

And like we said, sometimes people just don't want to deal with the tough issues or think about their deaths. So I think the more we can de-stigmatize that and make people aware of how important these issues are, the better because I just don't think it's being addressed enough.

Jen Zegel:

Yes. And it's not also just in the death context, because there could be sudden incapacity that somebody has created this brand that they need to have someone step in and then really take control over it, even if they may still be alive. In terms of loan out entities and structuring for planning, we're talking about LLCs, we're talking about trusts, what about a potential structure where the social media influencer creates a revocable trust and then that revocable trust creates a wholly owned entity that then would be the loan out entity?

So you have pass through status from a tax perspective, but you have an entity that's controlling if licenses were given for the name, image, and likeness, but then you have the trustee itself who could step in under certain circumstances to take control

over the company at a later point, or the user could just revoke everything at a later point as well, assuming they had capacity and were alive.

Laura Giles:

I think that all makes a lot of sense. And the good news is that from a company's perspective, when they're hiring the influencer, what they want to know is, who am I contracting with and does that entity have the right to license out the name, image and likeness, and does it have the legal ability to enter into this agreement? And they get representations of warranties to that effect, and they move forward.

They don't peer into the legal background and financial planning or estate planning that someone has done behind the scenes. So no company's ever going to take issue with that, for example. So that kind of structuring is exactly what people need to be doing to protect themselves, and it's not going to somehow hinder their ability to go out and do business as an influencer in any way.

Jen Zegel:

What types of proactive measures are you seeing influencers take in connection with privacy issues?

Laura Giles:

So that's a great question. And again, I think the answer is not a lot. The good news for influencers is that a lot of the privacy issues are going to fall on the company because a lot of times you've got the influencer creating content that is then provided to the company and the company is the one implementing the advertising campaign, if you will.

So a lot of times you don't have the influencer necessarily dealing in personal information of followers and things like that. But I think by and large, a lot of people are not really thinking through these issues and how they need to be complying with privacy laws that are, of course, ever-changing and rapidly increasing across the states.

Ross Bruch:

What are you seeing from a legal perspective on the horizon for influencers?

Laura Giles:

The biggest change right now is happening in FTC regulation. So the FTC is the biggest regulator of advertising in the United States, and in particular, endorsements in social media advertising. The FTC has given guidance on what is permissible and what is not. When it comes to endorsements in social media advertising, including things like customer reviews and all of those sorts of related social media items. The FTC is now taking those guides and changing them into rules.

So they're going through right now a rulemaking process, which makes those rules enforceable, and those rules will now carry penalties for any missteps. So it will be interesting to see, number one, what those rules look like when they're enacted, and number two, who's going to be liable? So is it going to be the influencer? Is it going to be the company? Is it going to be an intermediary, like an advertising company? It's really a changing area. And what we've seen so far is that the FTC is only increasing its reach, increasing its ability to regulate all of these things.

And then what we're expecting to happen from that is for states to follow suit, for there to be more regulation at the state level, for state attorneys general to have more ability to regulate. So it's really one of those areas where the law is the last to catch up. Business evolves and then laws come after to regulate it. And we're just now seeing those regulations start to catch up with social media activity.

Ross Bruch:

Laura, this has been fascinating. How can our listeners get in touch with you?

Laura Giles:

Well, the easiest way is to find all of my contact information on the Ballard Spahr website, and please don't hesitate to reach out with any questions.

Jen Zegel:

Well, thank you very much. Thank you, Laura, for joining us today and for sharing your knowledge and expertise on legal and planning considerations for social media influencers. On behalf of Justin, Ross, and I, until next time, thank you for listening.