

Morgan Lewis

together

Ethical Aspects of Social Media

June 12, 2012

Sarah E. Bouchard
Doreen S. Davis
Brady L. Green
Barbara Murphy Melby
Havilah L. Gebhart

www.morganlewis.com

Agenda

- Welcome
- Maintaining Attorney-Client Privilege in the Age of Social Media
 - Attorney-Client Privilege Overview
 - Social Media and Its Effects on Privilege
 - Best Practices for Preserving Privilege
- Recent Developments Concerning Social Media and Employment Law Considerations
- Social Media and Employee Benefits
- Social Media Sites as a Marketing Tool
- Conclusion

© Morgan, Lewis & Bockius LLP

2

Morgan Lewis

Social Media

- Social Networking Sites (Facebook, Myspace, Pinterest)
- Business Networking Sites (LinkedIn)
- Online Media (YouTube, Hulu, Spotify)
- Personal Blogs
- Employer-Sponsored Blogs



© Morgan, Lewis & Bockius LLP

3

Morgan Lewis

Social Media Statistics

- **An average of 3.2 billion** Likes and Comments generated by Facebook users per day during the first quarter of 2012. (Source: Facebook)
- **901 million** monthly active Facebook users at the end of March 2012 (Source: Facebook)
- **175 million** tweets sent per day (Source: Infographic Labs)
- **Over 3 billion hours** of video are watched each month on YouTube (Source: YouTube)
- **465+ million** Twitter accounts (Source: Infographic Labs)
- **100 million people** take a social action on YouTube (likes, shares, comments, etc) every week (Source: YouTube)
- **50%** of U.S. CMOs at Fortune 1,000 companies said they launched a corporate blog because "it's the cost of doing business today" (Source: eMarketer)

© Morgan, Lewis & Bockius LLP

4

Morgan Lewis

Maintaining Attorney-Client Privilege in the Age of Social Media

Attorney-Client Privilege: The Basics

- Provides “absolute” protection to most confidential communications between a client and an attorney made within the scope of legal representation.
 - Client possesses the privilege.
 - Confidentiality is key.
 - Subject to voluntary and involuntary waivers.
- For corporations, whoever controls the corporation controls the privilege.
 - Individuals seeking legal advice must be doing so on behalf of the corporation.

Attorney-Client Privilege: Pennsylvania Law

- In Pennsylvania, this privilege is codified under 42 Pa. C.S. § 5928:

“In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.”

- Privilege is a “two-way street” - *Gillard v. AIG Ins. Co.*, 609 Pa. 65 (2011)

Pennsylvania Supreme Court has held that Section 5928 protects attorney-to-client as well as client-to-attorney communications.

Attorney-Client Privilege: Waivers

- Voluntary Waiver – Disclosure to any third parties who are not agents of the attorney or client
- Involuntary Waiver – Unintentional disclosure to opposing counsel or third parties
 - In Pennsylvania, involuntary disclosures are reviewed under a five-factor test that consider: (1) the reasonableness of precautions taken to prevent inadvertent disclosures; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) the measures taken to rectify the disclosures; and (5) whether justice would favor relieving the party of its errors.

See *Carbis Walker, LLP v. Barth and King, LLC*, 930 A.2d 573, 583 (Pa. Super. 2007).

Attorney-Client Privilege: Waivers (cont'd)

- Waivers cannot be used as both a “sword” and a “shield.”
 - Parties cannot selectively waive privilege for certain communications favorable to their case.
- Federal Rule of Evidence 502 provides that a party’s intentional disclosure of a privileged communication waives the privilege for all communications regarding the same subject matter.
 - Determining the subject matter of a waiver is a fact-intensive inquiry.
 - No bright-line test is used.

What is Considered Social Media?

- “Social media” encompasses online resources such as blogs, chat rooms, forums, and networking sites that enable users to share opinions, experiences, and information.
- Examples include Facebook, LinkedIn, Twitter, Google+, and YouTube.
- Generally all social media outlets have these characteristics:
 - Users not only receive content but also participate in content creation.
 - Users can build connections and create a community.
 - Users can interact with one another.

How Does Social Media Usage Affect Privilege?

- Any information posted on social media outlets is never completely private.
 - “Those [social media] pages are the equivalent of leaving open the doors and windows to a home, and then wondering why all the neighbors knew what was happening inside.”
Daniel J. Siegel, Social Media Opens a New Can of Legal Worms, The Philadelphia Lawyer, Winter 2012, at 42.
- Posting information on a website can also be considered disclosure to an unrelated third party— a voluntary waiver of privilege.
 - Many websites such as Facebook explicitly mention in their privacy settings that all content posted can be subject to third-party review.

Lenz v. Universal Music Corp., No. 5:07-cv-03783 (N.D. Cal. 2010)

- After filing a lawsuit against Universal Music Corp., plaintiff discussed the conversations she had with her counsel through a variety of social media outlets such as a blog, gmail chats, and email.
- Plaintiff also released comments about her case to a reporter for a gossip website.
- Court held that the plaintiff voluntarily waived attorney-client privilege by disclosing confidential material to multiple third parties.
 - Communication involving the plaintiff's motivation for filing the lawsuit and her counsel's litigation strategy became fair game as a result of the waiver.

Kintera, Inc. v. Convio, Inc., 219 F.R.D. 503-(S.D. Cal. 2003)

- Plaintiff makes statements regarding trial preparation on its own website to appease investors.
- Court holds that by making such disclosures, the plaintiff waived work-product privilege that would have otherwise protected the documents at issue.
 - Work-product privilege is susceptible to the same waivers as attorney-client privilege.
 - By posting information on work product on a public forum, the plaintiff voluntarily forfeited confidentiality and waived privilege.

Continental Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761 (D. Md. 2008)

- Plaintiffs were insurance companies filing a claim against Under Armour.
- One plaintiff inadvertently disclosed attorney-client-privileged information on its own website.
- Court applied the five-factor involuntary waiver test to determine that plaintiff waived privilege rights by inadvertently posting privileged information on its own website.
 - Court found waiver because plaintiff failed to take precautions against such mistakes, there were multiple postings, and the postings were left on the website for several months.

McMillen v. Hummingbird Speedway, Inc., No. 113-2010 (Pa.C.P. Jefferson 2010)

- Plaintiff files a personal injury claim.
- After viewing the public portion of plaintiff's Facebook profile and discovering comments related to the lawsuit, defendant files a Motion to Compel Discovery to search plaintiff's Facebook account.
- Court holds that nothing posted on "Facebook, MySpace, and their ilk" can be considered confidential.
 - Stating that the privacy agreements for both Facebook and MySpace put users on notice that their posts are not confidential.

Best Practices to Preserve Privilege

- Deactivate social media profiles.
 - The best way to mitigate the risk of waiving privilege through social media usage is abstinence.
 - Not necessarily realistic
 - Deactivation of a profile does not completely delete the electronic record, but it eliminates the risk that a client will post something that jeopardizes privilege after legal representation has commenced.

Best Practices to Preserve Privilege (cont'd)

- Educate personnel on how using social media can lead to a waiver of privileged information.
 - Personnel should not post anything on a social media outlet that is remotely relevant to their case.
 - Privacy settings will not be enough to preserve confidentiality.
- Having a social media policy to govern employees is important.
 - Might help address the precautions issue in the context of involuntary waiver

Ethical Considerations

- Pennsylvania Rule of Professional Conduct 3.3 requires attorneys to act with candor toward a tribunal.
- Social media evidence is no different than other forms of evidence.
 - Attorneys cannot tell a client to delete or alter truthful information posted on a social media outlet.
- Once it has been generated, you are stuck with it

Practical Advice

- Stay informed
 - The best defense against waiving privilege is to know the clients' social media habits and inform them of the risks involved.
 - Be up-to-date on the latest social media trends.
- When in doubt, follow the usual rules.
 - Despite the countless number of social media outlets, the general principle for maintaining attorney-client privilege is the same: disclosure of confidential information to an unrelated third party will result in a voluntary waiver of privilege.

Practical Advice

Ultimately, social media represents another increase in the volume of communication and therefore another opportunity for disclosure.

Recent Developments Concerning Social Media and Employment Law Considerations

Recent Developments

- **Federal Law**
 - The Social Networking Online Protection Act was introduced in the House of Representatives in April. The Act would prohibit employers from requiring job applicants or employees to submit their usernames and passwords for social networking sites.
- **Maryland**
 - The first state to pass legislation banning employers from requesting passwords to social media sites from employees and job applicants. (Md. Senate Bill 433 and House Bill 964.)
 - Effective October 1, 2012.
- **Others States**
 - Other state legislatures, including California, New York, Washington and Illinois, have introduced similar bills prohibiting employers from requiring current or prospective employees to provide passwords for social networking sites.

Newsworthy Risks

- Whole Foods – CEO's anonymous blogging promoting his company and criticizing competitors, including Wild Oats Markets prior to hostile takeover, led to unfair competition claims/lawsuit following FTC/SEC investigation.
- International Air Carrier "Queen of the Sky" – Flight attendant fired for posting revealing photographs in company uniform on her blog. She sued for sex discrimination claiming men not similarly punished.
- International Software Company – Employee posted news of a free software upgrade that Microsoft planned to offer select customers before Microsoft officially announced the promotion.
- Domino's, Burger King, KFC – Employees posted video/photographs harming company image.

Defamation

- An employer may be liable for defamatory statements made by an employee if the employee had the apparent authority to speak on its behalf.
- Therefore, it is important that a company take steps to ensure that employees are not speaking or purporting to speak on its behalf, and take prompt action against employees once it learns of any wrongful conduct.

Hiring Risks

- In addition to the social networking sites, some employers use search engines and other Internet sites such as PeopleFinders.com, Local.Live.com, Zillow.com, Feedster.com, Technorati.com (to search for blogs), and Opensecrets.org and Fundrace.org (to search for campaign donations). La Jean Humphries, *The Impact of Social Networking Tools and Guidelines to Use Them*, LLRX.COM, Jan. 15, 2007, <http://www.llrx.com/features/goodgoogle.htm>.
- According to the National Association of Colleges and Employers (NACE), more than half of all employers use some kind of online screening technology, including social networking sites such as Facebook and MySpace. *Id.*
- Lawful background checks? Invasion of privacy? Lawful off-duty conduct?

Common Law Invasion of Privacy

- Invasion of privacy consists of four different theories: ***intrusion upon seclusion***, publicizing private facts, false light, and appropriation of name or likeness.

Privacy and the Stored Communications Act

- Federal Stored Communications Act (SCA):
 - Penalizes anyone who:
 - “intentionally accesses without authorization a facility through which an electronic communication service is provided; or
 - intentionally **exceeds an authorization to access that facility ...**”
 - Contains additional restrictions on Internet service providers

Privacy and the Stored Communications Act (cont'd)

- May prohibit employers from accessing and monitoring employees' online activities without proper authorization.
- Prevents employers from using coercive means to access employees' private social media.

Be Careful about Accessing an Employee Website that Prohibits Management Access:

Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 880 (9th Cir. 2002)

- Pilot maintained password-protected website that only specific employees on an eligible list could visit. Eligible employees voluntarily gave access to management representative who logged on to the site as an eligible employee. Plaintiff sued his employer under the SCA for unauthorized access to his website.
 - The SCA “allows a person to authorize a third party’s access to an electronic communication if the person is 1) a ‘user’ of the ‘service’ and 2) the communication is ‘of or intended for that user.’”
 - The court held that the eligible employees had never actually accessed the site and, therefore, were not “users” under the SCA and could not provide third-party authorization to management.

Cannot Coerce Employee to Provide Password to Social Networking Site:

Pietrylo v. Hillstone Rest. Group d/b/a Houston's,
No. 06-5754 (D.N.J., jury verdict, June 26, 2009)

- Two New Jersey waiters were fired after their managers took offense at comments that the waiters posted on a password-protected MySpace account for restaurant staffers.
- A third employee gave managers her password to access the account, but claimed she was coerced into doing so.
- Jury found that:
 - Managers had violated the SCA and the New Jersey Wiretapping and Electronic Surveillance Act by intentionally accessing the MySpace page without authorization.
 - Punitive damages should be awarded.
- Defendant was also liable for plaintiffs’ attorneys’ fees, which are recoverable under the SCA.

More Risks to the Employer: Discrimination, Harassment, and Retaliation

- Title VII, Section 1981, and state/local discrimination/harassment laws
- Potential liability risks for employers:
 - the employer’s sponsorship of the content/blog comments, and
 - ratification by inaction to prevent or eliminate inappropriate content once on notice.

Risks to the Employer: Discrimination, Harassment, and Retaliation (cont’d)

- Potential employer liability for harassment via blog
 - Employer who knew or should have known of employee’s use of blog to harass other employees could face liability.
 - *Blakey v. Cont’l Airlines, Inc.*, 164 N.J. 38, 751 A.2d 538 (2000): Company has a duty to take effective measures to stop employee harassment of a co-worker when it knows or should know harassment is taking place in the workplace or work-related settings; N.J. Supreme Court remanded case to determine whether “Crew Member Forum” electronic bulletin board was sufficiently connected with workplace to allow liability.

Risks to the Employer: Discrimination, Harassment, and Retaliation (cont'd)

- Employer viewing applicant's personal information on blog/social networking site may trigger protections of antidiscrimination laws.
 - Sites may contain information regarding age, race, national origin, disabilities, sexual orientation, and other protected categories.
 - Difficult for employer to prove it did not view and rely on the personal information if there is a later lawsuit in the absence of a policy prohibiting use of these sites for hiring.
 - Even if not unlawful, employer may be making employment decisions based on inaccurate information.

Adverse Action Based on Blog May Violate State Lifestyle Discrimination Laws

- Twenty-one states and the District of Columbia protect smokers or consumers of lawful products from termination based solely on such activities.
- California, Colorado, New York, and North Dakota protect *any and all lawful activities*.
 - But a California appellate court has held that there is no lawful right to free speech protection from private employer action, only government action. *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72 (2004) (employee properly discharged because of membership in a private investment group).

Source: National Conference of State Legislators, *Employee Off-Duty Conduct*, available at <http://www.ncsl.org/default.aspx?tabid=13369>.

Risks to the Employer: Termination Claims

- Employee terminated for complaining in blog that manager spends most of the day on personal phone calls.
 - Not likely protected conduct.
- Employee terminated for complaining in blog that manager discriminates against female workers.
 - May trigger antidiscrimination/antiretaliation statutes.

Risks to the Employer: Harm to Company Image

- Employee reveals details in blog about personal life that harm company image.
- Employee reveals corporate information that harms company image.

Risks to the Employer: Copyright and Fair Use

- *L.A. Times v. Free Republic*, 2000 WL 565200 (C.D. Cal. 2000).
- Defendant's "bulletin board" website allowed members to post news articles to which they added commentary. Members posted the entire text of articles, including those from plaintiff's website.
- Court held that defendant's verbatim copying and posting of news articles onto its website was an attempt to exploit the market for viewing plaintiff's articles online, and such action was not protected by the fair-use doctrine.
- Potentially a concern with employer-sponsored blogs or electronic bulletin boards.

What Employers Can Do to Limit Risk

- Review Internet/email policy and blogging/social media/social networking policy.
- Implement a blogging/social networking policy.
- Implement a policy on whether recruiters, HR, and hiring managers can access social networking sites on job applicants (and, if so, with what restrictions).
- Prohibit accessing of private password-protected social networking sites without proper authorization.
- Consider Google alerts to track who is discussing the company and what they are saying.
- Ensure security of company-sponsored blog.

Internet/Email and Social Media Policy

- Inform employees that they have no reasonable expectation of privacy when using any technology supplied by the company.
- State that employer may and will record or monitor activities at its discretion.
- Obtain signed acknowledgments.

Blogging/Social Networking Policy

- Define “blogging” and “social networking.”
- Prohibit the disclosure of trade secrets and other confidential information.
- Time spent blogging or on social networking sites should not interfere with job duties.
- Address the use of company logos.
- Whether/when permissible to discuss company’s competitors, clients, and vendors.
- Prohibit any action that could be seen as harassing.
- Post and enforce the policy and punish violators.

Blogging/Social Networking Policy (cont'd)

- Employees blog at their own risk and are personally responsible for content.
- Require a disclaimer: “The views expressed in this blog are my personal views and they do not necessarily represent the views or opinions of my employer.”
- Provide employees with information on who to contact if they have any questions regarding the propriety of any material *before* they post the material to a social media site.

Make Appropriate Employment Decisions

- Ensure employment decisions are based only on appropriate criteria.
- Verify information obtained from the Internet before basing employment decisions on it.
- Do not ask a third party to “friend” an applicant to investigate background (privacy, ethical issues).

Social Media and Employee Benefits

Social Media and Employee Benefits: Examples

- **IKEA**
 - Twitter
 - Open enrollment
- **Pearson**
 - “Neo” – an internal social networking platform
 - Wellness initiative
 - *Participation exceeded goals by 35%.*
- **Sprint**
 - Provider-based social networking platform
 - Wellness initiative
 - *Over 12 weeks employees lost more than 40,000 lbs.*

Social Media and Employee Benefits: Considerations

- Advantages
 - Effective
 - Interactive
 - Broader audience
- Disadvantages
 - Integrates with—does not replace—current employee benefits communications
 - Privacy concerns

Social Media Sites as a Marketing Tool: Key Terms of the Site Contracts

Overview

- It's all the rage – Using trendy social media outlets for marketing purposes ... and hoping it goes viral
- This one has more than 18 million hits

<http://www.youtube.com/watch?v=4zJWA3Vo6TU>

Overview

- Social media potential is expanding – enhancing a company's ability to connect and communicate
 - For marketing
 - For customer service

What the Surveys Are Reporting

Industry Report © 2012 Social Media Examiner

- **Marketers still place high value on social media:** A significant 83% of marketers indicate that social media is important for their businesses.
- **Video marketing holds the top spot for future plans:** A significant 76% of marketers plan on increasing their use of YouTube and video marketing, making them the top areas marketers will invest in for 2012.
- **Top three benefits of social media marketing:** The number-one benefit of social media marketing is generating more business exposure (reported 85% of marketers), followed by increasing traffic (69%) and providing marketplace insight (65%).
- **Top five social media networks/tools for marketers:** Facebook, Twitter, LinkedIn, blogs, and YouTube were the top five social media tools used by marketers, in that order.
- **Social media outsourcing underutilized:** Only 30% of businesses are outsourcing some portion of their social media marketing, a slight increase from 28% in 2011.

© Morgan, Lewis & Bockius LLP

49

Morgan Lewis

What the Surveys Are Reporting

thinkJar and Sword Ciboodle Report

- Customer service is among the areas most likely to benefit from active use of Facebook, Twitter and other platforms. According to the study, 60% of companies in the U.S. and the UK are using social media in part to improve their customer service.
- Sixty percent of companies polled are using both Facebook and Twitter to answer questions from customers and address feedback. Eighty-five percent of companies use at least one of the two channels.
- Larger companies that field a substantial number of queries from customers have found that social media can help alleviate the strain of call centers or other parts of the businesses dedicated to customer service. Forty percent of these companies said that they have been using **social media marketing** as part of customer service for at least two years, while 53 percent said they have implemented it in the last two years.

(<http://www.brafton.com/news/60-percent-of-businesses-say-social-media-marketing-improves-customer-service>)

© Morgan, Lewis & Bockius LLP

50

Morgan Lewis

Understanding When You Click

- Most Sites Use Click to Accept Agreements
- Links to Links to Links ...
- Many of the Sites Have Similar Terms

Key Terms

- License to User Content
 - Control the content
 - Control unauthorized use by employees
 - *Are you protected?*
 - *A bad example*

An Example – Twitter Terms

5. Your Rights

- You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).
 - Tip This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same.
- You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.
 - Tip Twitter has an evolving set of [rules](#) for how ecosystem partners can interact with your Content. These rules exist to enable an open ecosystem with your rights in mind. But what's yours is yours – you own your Content (and your photos are part of that Content).
- Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.
- We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt that Content to any requirements or limitations of any networks, devices, services or media.
- You are responsible for your use of the Services, for any Content you provide, and for any consequences thereof, including the use of your Content by other users and our third party partners. You understand that your Content may be syndicated, broadcast, distributed, or published by our partners and if you do not have the right to submit Content for such use, it may subject you to liability. Twitter will not be responsible or liable for any use of your Content by Twitter in accordance with these Terms. You represent and warrant that you have all the rights, power and authority necessary to grant the rights granted herein to any Content that you submit.

(<http://twitter.com/tos>)

© Morgan, Lewis & Bockius LLP

53

Morgan Lewis

LinkedIn

• Contributions to LinkedIn

By submitting ideas, suggestions, documents, and/or proposals ("Contributions") to LinkedIn through its suggestion or feedback webpages, you acknowledge and agree that: (a) your Contributions do not contain confidential or proprietary information; (b) LinkedIn is not under any obligation of confidentiality, express or implied, with respect to the Contributions; (c) LinkedIn shall be entitled to use or disclose (or choose not to use or disclose) such Contributions for any purpose, in any way, in any media worldwide; (d) LinkedIn may have something similar to the Contributions already under consideration or in development; (e) you irrevocably assign to LinkedIn all rights to your Contributions; and (f) you are not entitled to any compensation or reimbursement of any kind from LinkedIn under any circumstances.

(http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag)

© Morgan, Lewis & Bockius LLP

54

Morgan Lewis

Other Terms

- Unilateral Right to Change
 - Can you terminate?
 - Can you require removal of content?
- Responsibility Re: Content
 - It is all you
- Publishing and Promotion Rules
- Developer Terms
 - Links and Use in Other Apps

You Shalt Not ...

- Understand What You Can and Cannot Do ...

(Twitter) You may not do any of the following while accessing or using the Services: (i) access, tamper with, or use non-public areas of the Services, Twitter's computer systems, or the technical delivery systems of Twitter's providers; (ii) probe, scan, or test the vulnerability of any system or network or breach or circumvent any security or authentication measures; (iii) access or search or attempt to access or search the Services by any means (automated or otherwise) other than through our currently available, published interfaces that are provided by Twitter (and only pursuant to those terms and conditions), unless you have been specifically allowed to do so in a separate agreement with Twitter (NOTE: crawling the Services is permissible if done in accordance with the provisions of the robots.txt file, however, scraping the Services without the prior consent of Twitter is expressly prohibited); (iv) forge any TCP/IP packet header or any part of the header information in any email or posting, or in any way use the Services to send altered, deceptive or false source-identifying information; or (v) interfere with, or disrupt, (or attempt to do so), the access of any user, host or network, including, without limitation, sending a virus, overloading, flooding, spamming, mail-bombing the Services, or by scripting the creation of Content in such a manner as to interfere with or create an undue burden on the Services.

<http://twitter.com/tos>

The All Important Guidelines

- Limit Use to a Specified Group (Authorized Representatives)
 - Prohibit other use
- Update Your Social Media Policies
 - Right to identify self as employee but no other use
 - No unauthorized posting that can be perceived as endorsed by the company
- Educate Authorized Users Re: Terms of Use
 - Guidelines for using social media
- Monitor Usage

Ad Agencies

- Many companies are “outsourcing” the job to third parties ...
- Ad agency guidelines

Ad Agencies – Sample Terms

- When utilizing Social Media on Company's behalf in an approved campaign, our business partners must remain cognizant that they are representing Company in such posts and content, and must use appropriate and professional language in all uses of Social Media. Company-sponsored messaging through Social Media or other electronic media must be focused on topics related to Company business or products, and should not be used for any non-business purpose.
- All statements made by our business partners on behalf of Company must be truthful, not misleading, and adequately substantiated (i.e., our business partners must have a reasonable basis for claims used in Social Media or other promotional materials prior to making such claims). Note that claims concerning products or services that affect consumer health or safety require a relatively high level of substantiation as compared with other goods or services. Scientific and/or technical claims concerning the utility, efficacy, or safety of Company's products must be based on competent and reliable scientific evidence.
- To the extent not apparent based on context, making clear in any post, conversation, or other exchange of ideas and information about Company or Company products that the business partners has been engaged by Company to make such statements or participate in such dialogue.

© Morgan, Lewis & Bockius LLP

59

Morgan Lewis

Ad Agencies – Sample Terms

Our business partners understand that their actions and activities involving the use of Social Media on behalf of Company also may be subject to certain specific requirements focused on protecting consumers, including, without limitation, the following:

- Adherence to established standards concerning the use of endorsements and testimonials in advertising, including, for example, the FTC's Concerning the Use of Endorsements and Testimonials in Advertising in the U.S., requiring, for example, that
 - endorsements reflect the honest opinions, findings, beliefs, or experiences of the endorser, and may not convey any express or implied representation that would be deceptive if made directly by the Business partner or Company;
 - endorsements are representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use;
 - quotes from endorsements or testimonials are not altered if such alteration or quote would not fairly reflect the substance of the original endorsement;
 - endorsements are based on bona fide use of the product, both at the time when the endorsement was given, and during the time when the endorsement or testimonial is used in the advertisement or promotional piece;
 - professional or celebrity endorsers are clearly identified as such, unless the consumers are likely to realize the individuals are not expressing their own views; and
 - material connections to the endorser are fully transparent and disclosed when such a relationship is not otherwise apparent from the context of the communication that contains the endorsement.
- Compliance with all applicable legal requirements and standards when use of Social Media or other electronic media may involve the collection of personal, individualized, or individually identifiable consumer information (including health-related and financial data) and/or incorporates elements of behavioral advertising, wherein the business partner tracks, measures, stores, or otherwise processes data about the online activities of consumers.
- Compliance with the requirements of relevant laws and standards intended to protect the privacy of children (including, for example, in the U.S., the Children's Online Privacy Protection Act ("COPPA") in their uses of Social Media.

© Morgan, Lewis & Bockius LLP

60

Morgan Lewis

Things Are Changing

- Develop a strategy
- Monitor terms and conditions
- Leverage the value but act prudently

Questions?

Presenters



Sarah E. Bouchard
Philadelphia, PA
215.963.5077
sbouchard@morganlewis.com



Barbara Murphy Melby
Philadelphia, PA
215.963.5053
bmelby@morganlewis.com



Doreen S. Davis
Philadelphia, PA
215.963.5376
dsdavis@morganlewis.com



Havilah L. Gebhart
Washington, DC
202.739.5774
hgebhart@morganlewis.com



Brady L. Green
Philadelphia, PA
215.963.5079
bgreen@morganlewis.com