Blue Cross Blue Shield and Social Media: Legal Liability & Risk Management

Scott W. Pink and Jennifer J. Baumann

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* This webinar is offered for informational purposes only. The content should not be construed as legal advice on any matter and is not intended to create an attorney-client relationship.
Scott W. Pink
Scott concentrates in advising technology, media and entertainment companies on intellectual property protection and litigation, advertising and promotional issues, gift cards, sweepstakes and loyalty programs, trademark protection, commercial and technology transactions, e-commerce and Internet law, and privacy and security issues.

Jennifer J. Baumann
Jennifer concentrates her practice in the areas of licensing, information technology, intellectual property, e-commerce, outsourcing and issues with respect to social media. She has extensive experience drafting and negotiating a range of agreements including licenses, master services agreements for research and development, distribution, software, trademark, copyright, patent, digital content, media, co-promotion, co-branding and merchandising.
Social media – what are we talking about?

- No single or uniform definition of what it means.
- Our definition: online or web-based technologies, tools and platforms that allow for the creation and exchange of user-generated content in a social setting.
  - Includes:
    - Social networking sites such as Facebook, LinkedIn, MySpace and Twitter
    - Blogging sites, including blogs on commercial news and other sites
    - Wikis
    - Video content sharing sites such as YouTube and Flickr
    - Social news sites such as Digg or Reddit
Benefits and risks of using social media as a company

- Must weigh the benefits media vs. the risks, but hard to avoid the reality of the widespread use of social media!

Benefits:
- staying relevant
- immediacy and real-time nature of medium
- size of potential audience for marketing and advertising (e.g., 400 million Facebook users)
- ability to use cutting technologies to get message across
- enhanced consumer interaction and feedback

Risks:
- Lack of control over message
- Blurring of professional/personal use
- Legal risks and liability
- Administrative and other costs in managing use
Social Media is already being used in health care industry.
Use of social media by a company and employees

- Company should understand legal risks/obligations and prepare policy accordingly.
- Assessment of legal risks – same issues/new medium.
  - Compliance with third-party social media terms and conditions
  - Intellectual property protection and infringement
  - Advertising and promotions
  - Privacy and confidentiality issues
  - Litigation and discovery
  - Employment law
  - Public company issues / SEC rules and regulations
  - Sector-specific issues and trends
Complying with social media site terms and conditions

- Two types of terms and conditions:
  - Users
  - Advertisers

- User terms:
  - Grant of rights in user IP
  - Users are responsible for their own activities and content on the sites
  - Terms define certain prohibited conduct (e.g. defamatory conduct)
  - Users must act in accordance with the applicable laws when utilizing the sites
  - Violations of laws that occur on a brand owner’s Site pages may result in termination of the site accounts or potential civil or criminal liability
  - Facebook and MySpace terms each include an indemnification provision in favor of Facebook and MySpace
Add terms to your pages or tweets

- If you are offering a product, service or promotion through social media, you may need to have your own terms.

- Add terms to Facebook page:
  - disclaimer of endorsement, sponsorship, etc. of content posted
  - rules about what may and may not be posted by third parties

Example:


- Recommendation: consider tweeting offer, with hyperlink to details, disclosures, official rules, etc.
Coca-Cola Facebook Fan Page

Blue Cross Blue Shield and Social Media: Legal Liability & Risk Management
Coca-Cola Facebook Fan Page

House Rules

This is your Fan Page and we encourage you to leave comments, photos, videos, and links here. However, we will review all comments and will remove any that are inappropriate or offensive. We will leave what you share that relates to the subjects covered on this Page. Please understand that comments posted to this Page do not represent the opinions of The Coca-Cola Company.

Terms of Use
Remove unwanted messages from your own page
Intellectual property issues

- Protecting your intellectual property
- Licenses to social media sites – reading the fine print
- Avoiding or mitigating infringement risks
Social media enables the rapid and vast publication and distribution of material.

Primary concerns are loss of copyright, trademark and trade secret protections.

Copyright – risks of vast publication of protected content
  - Invoke DMCA takedown policies to request removal of unauthorized use of copyrighted content on third party sites
  - Must be careful not to be too aggressive – risk of countersuits
Intellectual property issues – protecting your trademarks

- Problem involves third party use of your trademarks in social media URLs.
- Facebook allows one to personalize a Facebook URL by selecting a unique user name.
- Twitter allows each person to create a unique “handle.”
- Problem of name squatting – unauthorized third party registers and uses another’s name or brand as a social network site user name and on that account posts content, gains traffic, etc.
- Example – Tony LaRussa sues over a fake Twitter page.
Taking action against name squatting.

Both Facebook and Twitter have policies and procedures for complaints.

Facebook: you can report an abusive username by selecting the "Report this Person" link located on the bottom left side of that person's profile.

Twitter: report trademark violations or impersonations to Twitter's Terms of Service group by submitting a web request from the Support home page (if you have account). If no account, send trademark violations to terms@twitter.com and impersonation complaints to impersonation@twitter.com.
Facebook

- Broad license
- Transferable and sub-licensable
- Worldwide

Termination when content or account is deleted EXCEPT license continues with respect to any content that has been copied to any third-party site pages.
Twitter

- Broad license similar to Facebook, but disclaimer of interest in user IP: “This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what’s yours is yours – you own your content.”

- Review Twitter rules for prohibited practices.
Avoiding intellectual property infringement

- Primary risk is from user-generated contents which you have not reviewed.
- Take advantage of laws that are designed to protect website operators:
  - DMCA protection (17 U.S.C. §512) for copyright infringement
  - CDA immunity (47 U.S.C. §230) for other types of liability
- Determine scope of content you are going to permit to be uploaded.
- Be careful in the way you structure solicitations of content to avoid losing immunities.
Advertising issues and social media

JCPenney

Become a fan!
there are so many reasons to join ...

- get to know designers, like Charlotte Ronson
- check out style advice & get trend tips
- watch videos, see photos & more
- connect with other JCP fans
- find out new ways to save
Advertising issues – general

- Compliance with terms and conditions of social media sites
- Compliance with FTC testimonial guidelines
- Liability risks:
  - Primary risk is from third-party content that advertiser has not reviewed or vetted internally
  - Two kinds of liability to consider
    - Tort liability for illegal content – e.g., claims for defamation, false advertising, invasion of privacy, etc.
    - Intellectual property infringement claims
Advertising issues – Facebook advertising guidelines

Facebook

  - Outlines policies and practices for conducting advertising through Facebook
  - Lists prohibited content for advertising
  - Provides direction on references to Facebook
  - Cannot advertise mature content (including alcohol) without ensuring that such information is only able to reach the appropriate age audience

  - Primarily directed to sweepstakes and contests
  - Must have Facebook approval if doing contest or sweepstakes unless using the Facebook Platform or publicizing a contest or sweepstakes administered completely off Facebook.
  - Cannot be directed to children (minimum age is 18)
  - Need to follow rules on administration of promotion
  - Must disclaim Facebook as sponsor at entry page and in rules
  - Cannot condition entry in the promotion upon a user providing content on Facebook, such as making a post on a profile or Page, status comment or photo upload
  - Can use a third-party application to condition entry to the promotion upon a user providing content. For example, you may administer a photo contest whereby a user uploads a photo through a third-party application to enter the contest
Twitter

- No specific rules or restrictions on user advertising.
- However, Twitter recently amended rules to provide that they can place advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others.
Advertising issues – sweepstakes

- Need to make sure you comply with state sweepstakes laws.
- Geographical restrictions potentially more challenging with offerings though these sites.
- Need to be careful to ensure that you have sufficient disclosures on social networking sites when advertising sweepstakes (e.g., “no purchase or payment necessary language”).
- Contests involving user-generated content involve potential third-party liability claims discussed above.
- Need to be careful about “consideration” issues – which could turn sweepstakes into illegal lottery.
Advertising issues – defamation

- False advertising and defamation risks.
- Question is whether CDA immunity will apply.
- New potential liability for consumer-generated testimonials online and responsibility to advise and monitor such testimonials.
Advertising issues – defamation

- Social networking is a powerful medium of communication.
- Negative comments on social networking sites can have viral effect.
- Recent case: landlord sued tenant for posting on Twitter that landlord had “moldy apartments.”
- Landlord seeking $50,000 for damage to reputation.
- Question is when and whether to sue.
Advertising issues – immunity under Communications Decency Act

- Recognizes Internet is fundamentally different from traditional media.
- Whether immunity applies will depend on degree to which advertiser participated in the content generated by the users.
  - Is defendant a provider of an interactive computer service (one service, multiple users)?
  - Is the offending content provided by another information content provider?
  - Do plaintiff’s claims seek to treat defendant as a publisher or speaker of the third party’s content?
- No Section 230 immunity if you are “responsible in whole or in part for the creation or development of information provided through the Internet or any other interactive computer service.”
Advertising issues – immunity under Communications Decency Act


- Consumers post reviews of retail buying experiences on defendant’s website.
- Plaintiff sues for defamation, unfair competition, false advertising, etc. based on negative reviews of buying experiences.
- Held: defendant entitled to Section 230 immunity.
- No facts alleged to support cursory allegation that defendant was responsible for creating or developing offending content.
Advertising issues – immunity under Communications Decency Act

*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)*

- Site enables users to search for listings matching certain criteria (e.g., “will only live with white males”).
- Claim was that site violated California fair housing law by discriminating on the basis of sex, sexual orientation, etc.
- Held: no CDA immunity.
  - Site provided the search mechanisms and online questionnaires that elicited illegal content, i.e., content that would indicate a preference for a roommate which could potentially violate the Fair Housing Act.
  - The filtering mechanism by which users could search available listings made Roommates.com an “information content provider.” The fact that Roommates.com excluded certain information from a user’s search results and email notifications added a “layer of information” to the content by the site’s users.

- Takeaways:
  - Don’t ask site visitors to answer questions which might elicit unlawful responses.
  - Don’t categorize, channel and/or limit the distribution of online postings such that the client becomes a publisher.
- Decision may be in conflict with 7th Circuit decision regarding Craigslist (*Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist*, 519 F.3d 666 (7th Cir. 2008)).
Doctor’s Associates v. QIP Holders, 82 U.S.P.Q.2d 1603 (D.Ct. 2007)

- Allegations:
  - Quizno’s held contest in which user submitted videos comparing Quizno’s to Subway products
  - 115 videos submitted and reviewed by Quizno’s and winners posted
  - Subway sues Quizno’s for user-created advertisements posted on meatnomeat.com as being false and misleading under Lanham Act.
  - Court denied motion to dismiss under CDA, claiming facts were needed to determine whether Quizno’s is service or content provider.
New FTC Testimonial Guidelines

- Revised to cover consumer-generated online content, such as consumer blogs, network marketing and buzz marketing.

- Consumer or expert comments or statements online can constitute endorsements subject to these guidelines and create potential liability for company if false or misleading.

- Two requirements must be met:
  - Statement must be an “endorsement”: consumer must be likely to believe that the statement reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser.
  - Statement must be “sponsored”: the speaker’s statement must be considered “sponsored” by the advertiser of the product in question such that it can be considered an advertising message.
New FTC Testimonial Guidelines

- When is a blog sponsored?
  - Employee comments will likely be attributed to employer
  - Third-party comments will depend on degree of coordination between endorser and sponsor
  - Not an endorsement: consumer that buys product with his own money and posts comment online
  - Endorsement: consumer is part of a networking marketing program under which she periodically reviews products and receives a free product about which she writes a review

- If blog is deemed sponsored, then blogger must disclose material connections with sponsor.

- FTC claims sponsors have certain duties:
  - Advise endorsers of obligations to make truthful and substantiated statements and to disclose material connections and monitor compliance with these requirements
What is the significance of the application of the FTC guidelines?

- Online endorsements must meet the following requirements:
  - Endorsement must always reflect the honest opinions, findings, beliefs or experience of the endorser
  - Endorsement may not contain any representations which would be deceptive
  - Representations in endorsement must be supported by adequate substantiation
  - Endorser’s experience must be representative of what consumers will generally achieve with the product or service
  - If not representative, you must disclose what consumers will generally achieve
Emerging responses to the FTC Guidelines

- Twitter Disclaimers:
  - Consider risk of adding disclaimers to right side or left side of Twitter page
  - Industry is considering adding hashtags like #ftcdisclaimer or #sponsoredtweet as shorthand for full disclaimers

- Social media monitoring: third-party tools that search Internet for mentions of company.
HIPAA is primary concern in use of social media by the health care industry.

Need to implement practices and procedures to avoid unauthorized disclosure of “protected health information”.

Could be violation even if patient not identified by name if there is a reasonable basis to believe person could be identified.

Biggest risk is inadvertent disclosure of PHI – e.g. nurses “friending” each other through Facebook to provide shift change updates.
Need to decide if benefits outweigh the risks and whether risks can be managed.

Need to implement strict policies and procedures.

Employees must be advised, educated and trained.

Do you allow patients to participate?
Privacy concerns – e-mail

- Application of Can-Spam Act to messages sent via social networking sites.
    - CAN-SPAM applies to emails sent from one MySpace user to another, over the MySpace network
    - CAN-SPAM applies to instant messages
  - Facebook recently awarded $873 million against spammer.
Collection of data through social network sites requires consideration of various privacy issues:

- Compliance with requirements of social media site
- Compliance with your own privacy policy
- Compliance with state and federal privacy laws
  - HIPAA – Personal health information
  - Children’s Online Privacy Protection Act (COPPA)
  - New Maine law extending COPPA-like protections to 13-18 year olds

Consider adding social media features to company-owned websites to avoid these issues – and to collect and use important consumer data.
Litigation and discovery

- **Scope of discovery**
  - Company-owned blogs
  - Company-provided mobile devices
  - Third-party sites – obtaining discovery from Google, Yahoo, Facebook, Twitter
    - Uncertainty as to whether courts will find that individuals have a reasonable expectation of privacy in information they share via social networks
    - Courts outside US have ordered disclosure of Facebook profile even though set to “private”
    - Social media sites allow users to make information “public” or “private”

- Use of social media as evidence in cases
  - Impeachment
  - Establishing alibis
HR trend is to review information available online to make hiring decisions, but…

- Protected classes under federal law include:
  - Race, religion, ethnicity, age, sex

- Protected classes in some jurisdictions or in certain circumstances:
  - Family status
  - Sexual orientation

- Also consider:
  - Federal Disabilities Act (Disabilities)
  - Federal Vietnam Era Veterans Readjustment Assistance Act (Veterans)
  - Federal Genetic Information Nondiscrimination Act (Genetic Pre-Disposition Information)
Employment law – other considerations

- **Firing**
  - National Labor Relations Act/union agreements

- **Sexual harassment using social media**
  - Should your boss be your friend on Facebook?

- **Recruiting**
  - Good news for job applicants: employers are starting to review online sources to find the best talent
Employment law – recommendations

- Conservative approach: do not review any social media sites during the hiring process.

- Managed risk approach:
  - Consider reviewing only professional sites like LinkedIn
  - Consider reviewing only a small or downselected pool of applicants rather than every application received
  - Be sure to document the online check process and consistently apply that approach
  - Maintain documentation (or screenshots) of all on-line information reviewed
Special note: recommendations on sites like LinkedIn
Regulation FD — “Material Non-Public Information”
- Requires broad public disclosure
- Requires “full and fair disclosure of information”

The following information may be material:
- Earnings information
- Mergers, acquisitions, tender offers joint ventures or changes in assets
- New products or discoveries
- Developments regarding customers or suppliers (e.g., the acquisition or loss of a contract)
- Changes in control or in management
- Change in auditors or auditor notification that the issuer may no longer rely on an auditor’s audit reports
- Events regarding the issuer’s securities (e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities)
- Bankruptcies or receiverships
According to the guidance on websites, the following should be considered to determine whether information is made *public*:

- Is the corporate website a “recognized channel of distribution”?
- Is a posting made in a manner so as to make it “available to the securities marketplace in general”?
- Has sufficient time passed to allow investors and the market to react to the posted information?
Public company/SEC recommendations

- Conservative approach: do not allow use of social media due to risks of SEC regulations.

- Managed risk approach:
  - Maintain pre-approval process for disclosure and discussion of material non-public information
  - Use social media as another channel of distribution of information, but not in place of traditional release channels like press releases
  - Include links back to website that contains complete forward looking statement disclaimer
  - Review SEC guidance on use of websites!
    - Consider how many people are following you on Twitter
    - Consider how many people are fans on Facebook
**Sector focus**

- FDA/pharmaceutical
  - DDMAC Regulations/FDA took comments on November 12 – 13
  - Concerns over “adverse event” reporting
  - Concerns over direct-to-consumer advertising
  - Case to watch: *Allergan, Inc. v. FDA* (Oct. 1, 2009 U.S. D.C.)

- Health care
  - Additional HIPAA privacy concerns
Financial institutions

- FINRA released guidance on social media sites
  - Recording requirements makes using social media difficult
  - Interactive electronic forums v. static content
  - Monitoring
Sector trends

Franchising
- Vicarious liability issues
  - Franchisors
  - Employees of franchisors / company owned stores
  - Franchisees
  - Employees of franchisees
- Regulations for selling of franchises
- Regulatory advertising review

Real estate
- Ethics – National Association of Realtor Guidelines
- State licensure rules
- Fair housing laws
- RESPA laws
Developing a social media policy

- Understand the business strategy.
- Consider third-party sites vs. company-sponsored sites.
- Audit existing corporate policies.
- Develop policy for business related use of social media and guidelines for employee personal use of social media.
- Create suitable training and enforcement.
- Remain flexible!
Social media policy – understand the business strategy

- Discuss use of social media with key departments:
  - Marketing
  - Public relations / communications
  - Customer service
  - Human resources
  - Investor relations
  - Other: franchisees, insurance agents, real estate agents, independent sales force, outsourced vendors
Social media policy – marketing

- **Marketing**: social media has been primarily driven by marketing as a new form of communications with customers

- **Case study**: @ford
Social media policy –
public relations / communications

- Public relations / communications: social media may be used as additional channel to disseminate press releases

- Case study: @intel
Social media policy – customer relations

- Customer relations: social media may be used to make customers happy.
- Case study: @comcastcares
Social media policy – human resources

- Human resources: social media may be used for alumni networks, job postings, recruiting, etc.
- Case study: IBM’s Facebook Page

This is exclusively for nerdy people who work or have worked at International Business Machines (IBM).
Social media policy – investor relations and others

- **Investor relations:** companies may use social media to communicate with investors (shareholders for public companies and senior management for private companies).

- **Contractor sales force:** independent sales force may use social media to stay in contact with customers.

- **Real estate, Insurance or other agents:** building entire businesses using Facebook, Twitter, LinkedIn and other sites.
Social media policy – audit

- Review existing corporate policies and agreements – many of the same issues, just a new medium!
- Policies to consider reviewing
  - Employment handbook
  - IT policy
  - Website terms of use and privacy policies
  - Trademark and IP policy
  - Corporate/financial disclosure policies
  - Ethics guidelines/codes of conduct
  - Marketing materials approval procedures
- Agreements
  - Third-party/vendor agreements
Social media policy – initial considerations

- Policy vs. guidelines or business use of social media v. personal use of social media
- Blurring of promotional/business use vs. personal use
A social media policy should contain the following:

- A statement of purpose (i.e., the company supports the use of social media, but wishes to limit risk to the company and the employees)

- References to any other important policies or procedures including description of any prohibited content (i.e., confidential information of company, IP policy)

- Descriptions of any content that should be subject to pre-approval (i.e., financial disclosures)

- List of appropriate disclaimers

- Relevant contact in legal or other department for questions

- Impact for failure to follow policy
Social media policy – guidelines for employee personal use

- Guidelines: emerging online etiquette or “netiquette”
  - Be honest: do not impersonate others
  - Be truthful: do not make false statements
  - Be positive: if you have nothing nice to say, do not say it
  - Remember the Golden Rule: do unto others as you would have them do unto you
  - Would you say this to your mother?
  - Trust your instincts

…and many more…
Training

- Recommend general training for all employees on personal use of social media
- Specialized training for senior management, investor relations, communications or anyone who will be using social media on behalf of the company or who mentions the company in social media

Enforcement

- Consider monitoring for enforcement
- Consider reporting mechanism for violations of policy
- Be flexible
  - Remember that social media continues to change and evolve
  - Any policy and guidelines will change too
  - Remind employees or those subject to the policy to check back for policy and guidelines updates
Questions

- Webinar participants may ask questions via the chat feature on your screen.
- If we are unable to respond to your question during the presentation, someone will follow-up with you via email as soon as possible following the program.
Interesting Links:

FTC Guidelines on Endorsements and Testimonials  
http://www.ftc.gov/opa/2009/10/endortest.shtm

FDA Public Hearing on Social Media  
http://www.fda.gov/AboutFDA/CentersOffices/CDER/ucm184250.htm

SEC Guidance on Use of Company Websites  

Fair Housing Laws – www.hud.gov  
http://www.hud.gov/offices/fheo/FHLaws/yourrights.cfm

FINRA Social Media Guidelines  

Social Media Policies  
http://www.socialgovernance.com

Pharma Twitter Dashboard  
http://www.ignitelabs.com/pharmatwitter/

Social Media Monitoring Sites  
http://www.radian6.com/
Upcoming Social Media Webinar

- E-Discovery Implications of Social Networking Sites
  Tuesday, April 20, 2010
  1:00 pm EDT
  Kathy Owen
  DLA Piper LLP (US)

As more and more companies begin to embrace social media as a new way to promote and build business, it is important they also understand the e-Discovery implications of this new phenomenon. For instance, what are the key e-Discovery considerations related to social media websites? How is the information preserved? What techniques must be implemented to properly harvest data? What may or may not be discoverable? How can your institution be affected?

- For more information, please contact Carol Sue Sorber
  carol.sorber@dlapiper.com or 202.799.4462
Contact:

Scott W. Pink
(916) 930.3271
@ScottWPink

Jennifer Baumann
(312) 368.3916
@jbaumann72

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