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## Agreements With Sources Must Be Kept

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*media•insights is published periodically by OneBeacon Professional Partners to address the broad scope of exposures faced by our agents' and brokers' clients, as media-related companies scramble to meet the public's appetite for information, news and entertainment in an increasingly litigious society. Underestimating the complexity in adhering to confidentiality agreements can lead to costly repercussions, both monetary and reputational. This issue of media•insights offers thoughts regarding smart practices and important coverages for mitigating one's risk exposure.*

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Promises made to sources or subjects by journalists must be kept. If a source indicates that his or her comments are "off the record" or "on background", then the comment or information should not be attributed to that particular individual. Similarly, if the source states that he or she will only come forward on the basis of confidentiality, that confidentiality must be maintained by the news media even against the threat of subpoena or of law enforcement. Other types of agreements made by journalists include agreements

to interview confidential sources on television with the promise to protect the identity of the interviewee. If the identity of the subject is not properly protected by digitizing the face or altering the voice, then that person may be able to sue for breach of contract. A failure to maintain the confidentiality of a source can also give rise to legal liability for breach of oral agreement, as well as damaging the credibility of the news organization.

Great care needs to be taken so as to avoid ambiguous situations in which a source may believe that he or she has confidentiality while the reporter does not believe that such a promise has been made. Reporters should make references to the specific conduct that they will undertake and what they will avoid, rather than making promises or statements as to what will happen, since these facts are often outside of their control. For example, a statement that "we will conceal your identity by digitizing your face" is appropriate, while the statement "no one will recognize you" might not be. To prove consent for interviews, television reporters can easily videotape the promise being made and any other conditions of the interview. A print reporter can use a tape recorder to memorialize any promises. This information, if preserved, will be invaluable in the event of any subsequent dispute.

If circumstances arise that make it difficult to keep a promise, this should be discussed with the source before the promise is broken. Discussions with sources may lead to changes in the source's position such that the promise of confidentiality can be modified or

entirely abrogated. If necessary, the reporter should be prepared to defend any such decision to breach confidentiality in public and in court.

Confidential sources should only be used only when absolutely necessary and as a last resort and only for a news report of substantial public interest. The best sources, of course, are public records, public officials speaking on the record and in an official capacity or other credible individuals willing to go on the record as to certain statements or information. Reporters should understand the quality and quantity of information they are being provided and whether or not it is critical to a particular story prior to making any sorts of promises to sources. In certain circumstances, such promises cannot be justified. Promises should not be made unless the reporter is reasonably confident that they can be kept. Once made, the journalist should ensure that his or her news organization takes all appropriate measures to effectuate any promises that have been made. In most cases, knowledge of promises can be limited on a need to know basis; editors, producers, legal counsel, photographers and other reporters may all need to be consulted in this regard. Statements to others in the organization should be minimized since any statements concerning the source's identity made to those outside the organization may waive the privilege of confidentiality. Increased and unnecessary discussion internally may increase the probability that such remarks are repeated to others outside the organization and possibly waived.

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Finally, it is of utmost importance that media liability policies provide coverage for claims arising from breach of agreements with sources. Most media insurance policies expressly provide that breach of confidentiality is a covered peril, no matter whether the promise was written or oral, express or implied, and however such a claim might be denominated. Such policies should also specifically provide coverage for allegations from a disgruntled story subject that he or she was not portrayed in a particular manner or light. Often times claims arise from a story subject, who participates in an interview only because he or she believes that the story is going to be flattering, but who subsequently threatens litigation when it is later learned that the story is not as they believed it would be described. In addition, it is important that in-house counsel for the insurer understand that confidentiality agreements must be protected even when divulging such confidentiality may often appear to be expedient or in the best interest of the media entity. The policy's conditions should specifically state that an insured does not breach the insured's standard duty to cooperate clause by maintaining the confidentiality of a source. Informed brokers and insureds will wisely only consider policies with these coverages.

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