

 [Click to Print](#) or Select 'Print' in your browser menu to print this document.

Page printed from: [New Jersey Law Journal](#)

INTERNET LAW

Legal Issues Surrounding Social Media: A Transactional Attorney's Perspective

Jeremy S. Piccini and Richard G. Lyons, New Jersey Law Journal

January 22, 2015

In today's ever-changing business world, transactional attorneys are tasked with spotting issues faster and more efficiently than a first-year law student during a final exam. This task is complicated by the ever-changing world of social media. In its most simple definition, social media is a set of online or web-based technologies, tools and platforms, which allow the creation and exchange of user-generated content in a social setting. Examples of major social media sites include Facebook, LinkedIn and Twitter.

In a transactional practice, social media presents several challenges. Among those challenges are: (1) a lack of guidance due to an undeveloped body of law; (2) a lack of complete understanding of social media as a whole; and (3) failure by many lawyers and business-client counterparts to clearly and thoroughly address social-media issues in transactions. Social media is viral in nature, whereby one minuscule misstep can grow into a devastating and newsworthy event very quickly if not managed and controlled properly. The focus of this article is to briefly inform the reader on the applicability of social media within the area of transactional law.

Despite the over-arching business and legal risks of social media, the authors recognize the outweighing and revenue-driving benefits that social media can add to a successful business model for both public and private entities. Social media, unlike other forms of advertising and communication, is immediate and cost-effective. Most importantly, social media maintains the relevancy of a company among younger generations and can be narrowly tailored to prospective customers that share a common interest. In today's world, a company is hindering its revenue potential by not maintaining business in the virtual world.

Today's consumer is more informed and educated than ever. The catalyst behind this education is the seemingly endless amount of information and data available via the Internet and social media. Those businesses that do not adapt can be classified as "virtual ghosts." For instance, a common scenario applicable to everyday life: You are making slight modifications to improve your home. You are seeking a product that is made and installed by a company close to your home. Prior to the purchase of the product, you want to read reviews about the product (a social media application), you want to review the website of the

manufacturer, view photos of their work, review any applicable licenses/accreditations, ultimately to determine if this company is the right fit for your home and budget. Successful businesses know that the consumer must have access to an immense amount of information prior to committing to a particular business, service or product. As a result, businesses are exposing themselves to potential liabilities which were inconceivable 25 years ago.

For instance, in the above scenario, if you represent the manufacturer or installer of the product, you must be mindful of the representations being made on the company's website. Under the New Jersey Consumer Fraud Act (N.J.S.A. 56:8-1), consumers (defined as any person or business that purchases products for their own use) are granted a great deal of protection from persons who sell products. Specifically, the act prohibits:

the act, use or employment by any person of any unconsciously commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment suppression, or omission of any material fact, with intent that others rely upon such concealment, suppression or omission, in connection with a sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

N.J.S.A. 56:8-2. As such, lawyers must take a more active role by informing their clients about possible violations due to content contained on their websites and through their social media. It is possible that a company could post "false promises" on the company Facebook page which lead to possible violations of New Jersey law.

Rather than simply rejecting the idea of social media, lawyers, including outside counsel and in-house attorneys alike, will benefit from understanding the applications of social media in their client's business processes so that they may proactively facilitate the business goals while simultaneously mitigating risk.

While legal issues may arise in a variety of industry sectors as a result of social media, health-care and financial industries particularly may have a greater need for legal advice due to strict compliance, regulatory and privacy concerns. Consider the following scenario: an employee of a public company creates a post on their Facebook page containing information about a newly developed product being tested, along with a picture of that product. Ask yourself, does this breach Security and Exchange Commission rules by disclosing material information not in accordance with protocol? Now consider an employee of a doctor's office posting a picture of all the paperwork on their desk that day. Does that post include patient identifiers? Has the user just bypassed all of your company's HIPAA guidelines by posting protected health information publicly for all to see? Or, for example, your visit to the dentist's office results in your automatically being "checked-in" on the office Facebook page; is that a HIPAA or other privacy breach?

The current focus surrounding social media in the legal field is reactionary in nature. Typically, social media concerns arise through litigation matters. Most notably, social media has become an effective yet problematic tool in discovery, particularly in privacy versus commercial use and employment matters. However, the focus is rarely on proactive transactional strategies such as ownership of Facebook contacts (akin to customer lists), goodwill of a LinkedIn page, valuation methods for social media branding, due diligence

regarding social media assets, or transactional documents and provisions that would benefit from assessing risks pertaining to social media early on in a transaction.

Social media clauses should be considered early on in a wide range of commercial agreements and transactions. Such agreements that would benefit from addressing social media concerns include but are not limited to: contractual relationships (i.e., employment contracts), vendor or services agreements, business acquisition and divestiture documents, franchise matters and license agreements. Drafters will benefit from paying special attention to the impact that social media may have in some of their typical "boilerplate" provisions (although the authors do not believe that anything in our transactional world is "boilerplate" or should be considered as such). Most notably, social media impacts provisions relating to confidentiality, intellectual property and inventions, noncompete/restrictive covenants, morals clauses and nonwaiver provisions.

In addition to revisiting your contract provisions, there are a number of risks which lawyers should be mindful of when working on transactions that may involve elements of social media, including:

- Public company information disclosure issues;
- Privacy and confidentiality;
- Industry and sector specific risks (HIPAA, FCRA, FINRA, FTC);
- IP issues and infringement;
- Advertising and promotion issues;
- Record management and retention;
- Acceptable use;
- Lack of control; and
- Personal/professional use.

General counsel and in-house attorneys in particular have the ability to mitigate risks posed by social media by discussing the use of social media with key departments within their organization. Attorneys are encouraged to embrace this new media by learning the landscape and utilizing such knowledge to the benefit of their clients. Attorneys should focus on four major proactive approaches to counsel clients in this new subsector:

Understand: Business strategies, vendors, customers, third-party websites, terms of use, company-specific terms or disclaimers, and company policies and codes of conduct.

Discuss: Developing risk-mitigation strategies and implementation.

Monitor: Third-party companies/tools.

Crisis-Management: Elevation procedures.

Focusing on the strategic needs of a business client, the goals of a transaction and the inherent risks of social media, counsel can help guide a client through a matter or a transaction by anticipating potential exposures as well as by assessing, mitigating or shifting risks to a level that is acceptable to the client. Risk is inherent in every business. Many firms like ours place an emphasis on the proactive mitigation of risk in an ever-evolving technological world because we, as lawyers, must learn to understand and remain at the forefront of client-specific risks in an effort to become true partners with our business clients. In order to do that, we must understand the implications of social media on our client's business models.n

Next Week...

Products Liability

Copyright 2015. ALM Media Properties, LLC. All rights reserved.