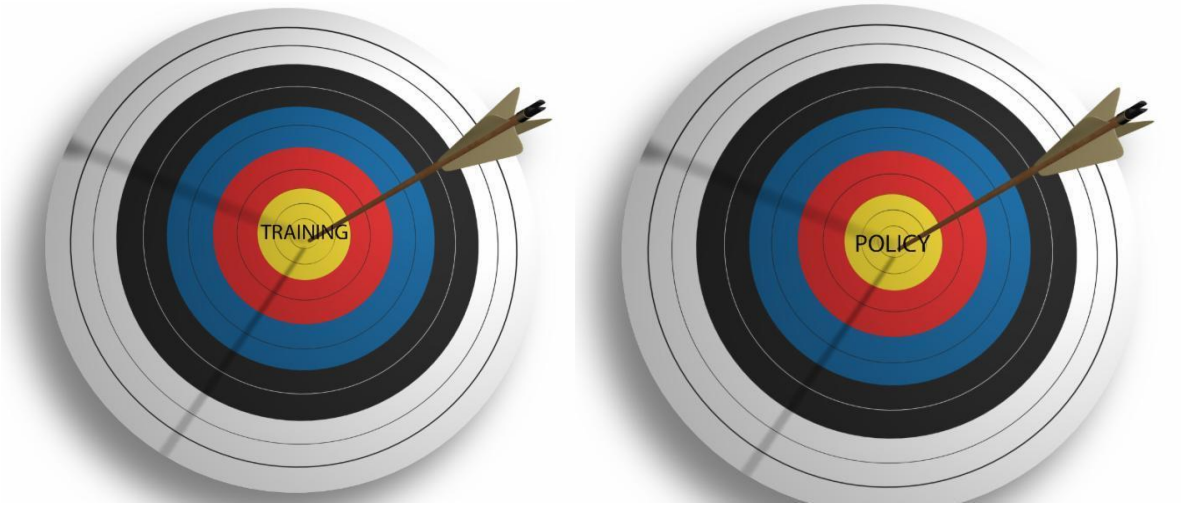
The Need To Reevaluate Social Media Risk Exposure

By Social Media Attorney Mark Fiedelholtz



Root Problems

Root Problem #1: In recent rulings, the U.S. Supreme Court classifies social media as a "high liability" platform that can permanently destroy a person's reputation worldwide. This new classification dramatically elevates the 1983 federal standards and common law negligence standards for developing employee social media liability training programs and policies. Governments are either unaware or refuse to shift their perspective of social media as a public relations issue that only impacts communication professionals, to viewing social media as a "high liability" risk issue that impacts every employee.

Root Problem #2: Refusing to treat social media as a "high liability" risk issue has caused devastating financial and public trust losses for large and small public and private employers. Incorrect risk evaluations of social media manifest itself in employers substituting verbal warnings to employees for outside expert social media liability training. More specifically, employees don't have the basic skills to identify libelous and speech not protected under the First Amendment. Employees fill this knowledge vacuum with their own wrong determinations on what social media content is "Free Speech" under the First Amendment. This training gap has become "red meat" for plaintiff attorneys representing fired or disciplined employees for social media mistakes. They file Section 1983 inadequate training lawsuits in the public sector, and negligent training lawsuits in the private sector to force big dollar settlements and multi-dollar judgments. In addition to the inadequate training lawsuits, plaintiff attorneys are winning large libel, harassment, invasion of privacy, harassment, discrimination, and copyright infringement lawsuits.

Root Problem #3: Another fallout from failing to make the shift from recognizing social media as a "high liability" risk exposure, is the development of defective social media policies. Many public and private employers make the fatal mistake of placing "blind trust" on boilerplate social media policies produced by policy services that crank out policies on a multitude of legal topics, and policies from trade and accrediting associations. These boilerplate policies have two fatal flaws:

- Most of the boilerplate policies from policy services, associations, and other organizations are drafted by employment attorneys, not experienced social media attorney specialists. Viewing social media policies exclusively form an employment law perspective overlooks key mass media legal issues. In a lawsuit, these gaps are exploited by plaintiff attorneys. It's critical to have a social media attorney specialist with a strong mass media background to close policy gaps that often translate into large legal damages.

- Even if the social media policy is airtight, the policy fails in court without proof that it was enforced with specialized employee training on the new social media speech and privacy laws (i.e. libel, First Amendment, privacy, and copyright infringement). Since the U.S. Supreme Court has classified social media as a "high liability" risk topic, social media policies must be enforced with expert employee liability training. (See caselaw at the bottom of this white paper).

Frequently Asked Questions

Question: Why do organizations need to reevaluate their social media risk exposure?

Answer: Thirteen years ago, in the traditional public sector and private sector communications structure (Pre-Facebook and Twitter), only a Public Information Officer, government decision maker, or marketing professional had access to mass media communications. There was no need for mass media law training beyond the top decision makers, communications professionals, and marketing staff.

However, in the past thirteen years, technological developments in personal devices combined with an open access business model offered by social media platforms (Facebook, Twitter, Instagram, WhatsApp, Live Streaming) has shifted the power of mass media broadcasting from a few employees to every employee who desire to access social media platforms. This power shift has created a new pool of broadcasters that are in critical need core social media law training in the areas of defamation, First Amendment, copyright infringement, and invasion of privacy issues. Without this specialized training, there is heightened risk exposure for employees to make costly mistakes that translate into big dollar settlements, judgments, and a loss of the public trust.

Question: What makes social media risk exposure so different than other risk exposures?

- The biggest distinction is the severity and permanence of the harm. For instance, when a libelous post or tweet goes viral in *"real time"*, the consequences are catastrophic for all parties involved. The victim of the harmful message can suffer permanent reputational damage in front of millions of people; the comment becomes a permanent digital footprint that any future employer or third party can discover.

- Every employee has the broadcasting power to destroy a person's reputation worldwide.

- Attorneys and communication professionals can't monitor every "real time" post or tweet. This fact reinforces the need for all employees to receive expert social media liability training.

- There are no takebacks, social media comments become a permanent digital footprint on the Internet landscape.

- Employers are encouraging the use of social media to achieve more transparency and engagement with the citizens in the public sector, and potential customers in the private sector. They want employees to become brand ambassadors on both their workplace sponsored and private social media networks. But, asking employees to be brand ambassadors on social media is like asking someone to swim in the deep end of a pool without swimming lessons, Governments are leaving employees vulnerable to costly social media mistakes without specialized libel, First Amendment, privacy, and copyright training. This educational gap becomes more pronounced in times of national crisis when employees are more apt to offer their raw opinions and humor to vent their frustrations.

- Under 42 U.S.C 1983 and under common law tort law, employees making social media mistakes can be sued in their official capacity and individually. As plaintiff attorneys seek more revenue streams in high dollar social media cases, the risk exposure of employees and decision makers being sued personally for social media mistakes and defective policies increases. Also, plaintiff attorneys may sue employees personally to enhance their trial strategies (i.e. employees being sued personally now have different legal objectives than being a good soldier for the employer in a lawsuit, especially in a deposition or testimony on the stand).

- Underpinning social media content is the desire of the user to become popular and vent their emotions. Unfortunately, the raw power of emotions become kindling to ignite defamation, intentional infliction of emotional distress, and other tort lawsuits.

- Often many harmful social media messages are often intentionally targeted at specific classes of people that are federally protected by clearly established laws. In the public sector, this cancels out a person's "Qualified Immunity" defense in a lawsuit. In the private sector, intentional conduct is used to capture punitive damages.

- Juries are more inclined to find punitive damages in social media cases, because the employee intentionally weaponized a powerful social media platform to harm a person or group in front of millions; also, there is a permanency to the comments. Additionally, in proving a workplace hostile environment case, social media is good evidence because it's inherently severe and pervasive (you are reaching millions of people and the comments are permanent footprints on the digital landscape).

- The intentionality of most social media messages opens the door for insurance carriers to deny claims (i..e. intentional exception act). Even if the claims are covered, premiums will skyrocket which directly impacts the taxpayer.

Question: Why can't we have our own attorneys draft a social media policy or just replicate a model policy from a reputable policy service or association?

Being an attorney doesn't automatically qualify you as an expert in every legal subject. Courts don't recognize busy in-house attorneys as social media law experts that have the expertise to draft "high liability" social media policies or develop employee training programs. The United States Supreme Court and federal courts have developed a body of law stating that written policies in the public sector and private sector that concern" high liability" areas, must be developed by specialists in that area. Here are some important points on the need for specialized social media law training and policy development:

- Workplace policies, especially on "high liability" topics, must avoid vague language and be customized to reflect the "operational realities" of that organization.

- In-house attorneys are placing their blind trust in boilerplate policies drafted by associations and policy services, this is a flawed approach. Courts are rejecting boilerplate social media policies for vague policy language, especially regarding First Amendment issues. In-house attorneys must perform their due diligence by finding out if the person who wrote the social media policy was a social media law expert and not assume that the person was a social media attorney.

- The landmark case of Liverman v. City of Petersburg 844 F.3d 400 (2016), is emblematic of the risk in-house attorneys take in relying on model policies. In the Liverman case, a house attorney wasn't a social media law expert and formulated her social media policy based on information from a nationally respected association conference and other police agencies. The 4th U.S. Circuit Court of Appeals ruled that the attorney's policy language was unconstitutionally vague, especially with reference to "free speech" language in the social media policy. The city admitted municipal liability for placing two police officers on probation based on the defective policy and paid out a hefty settlement. Additionally, the Petersburg police chief was found to be personally liable for disciplining the officers based on a defective social media policy.

- Judges conclude it's unreasonable to assume a busy in-house attorney has the same skill level to write a social media policy as a 30-year media attorney specializing in social media law.

Question: How do we develop an effective social media liability training program?

The most effective social media liability program, you must make sure that you comply with the new federal standards. To help you comply with the new standards, my specialized social media liability training and policy development programs are based on the following:

- ✓ To build an effective social media liability training program, you must approach the problem through a different analytical lens. Social Media is about broadcasting and publishing that warrants solid mass media law solutions, not just traditional employment law verbal warnings.

- ✓ Yes, there is some crossover between media law and employment law(i.e. defamation, harassment, retaliation), but the powerful strategies I have developed are based on educating newly minted broadcasters and publishers on core mass media laws. For instance, in journalism school you would be required to take a few mass media law courses.

- ✓ There must be a clear understanding that social media is no longer exclusively a public relations issue. As stated before, the U.S. Supreme Court and federal courts recognize social media as a "high liability" legal topic. The credentials of your instructor and course content must reflect this new designation as a specialized area of the law. Also, non-lawyers must be very careful about teaching courses that involve social media legal issues; they could be exposed to unlicensed practice of law claims. All social media marketing courses should include an outside social media attorney training employee on the nuances of the new social media speech laws.

- ✓ To defeat 1983 inadequate training claims in the public sector, and negligent training claims in the private sector, the instructor must be a social media attorney who specializes in social media law. You must provide documented evidence that your trainer was an experienced social media law expert. Verbal warnings given by busy in-house attorneys or non-lawyers or lightly addressing serious liability issues, won't protect the organization in a lawsuit.

Conclusion

Based on 30, 000 seminar attendees and over 800 online course participants, I can say with certainty that public and private sector employees nationwide are unaware of basic social media liability issues. This gap is costing governments millions in settlements and judgements. If this training gap isn't properly closed with expert social media training and policy development, both small and large governmental entities will continue to suffer severe financial losses and loss of the public trust.

The biggest problem is the failure of governments to recognize that courts classify social media as "high liability" topic. Social Media is no longer a communication or marketing issue, it's a human resource issue that impacts every employee.

Being an attorney or attending a few seminars doesn't qualify you as a media law expert. I don't have the qualifications to write a real estate contract just because I'm an attorney. Like doctors, today's attorneys are specialists. If governments continue to rely on busy in-house attorneys to update employee social media training and policies, they stand to lose millions of dollars, the public trust, incur personal liability, and their careers will be destroyed.

I compare inadequate social media policy and training development to driving a NASCAR Race Car. A person may know how to drive a car, but not a NASCAR Race Car that accelerates from 0 to 60 in 3 seconds. Inevitably the driver will suffer a horrible crash.

SUMMARY OF LEGAL CASES

Social Media Policy Federal Standards: Liverman v. City of Petersburg 844 F.3d 400 (2016), Social Media and Smartphones Are High Risk Platforms: Packingham v. North Carolina 137 S. Ct. 1730 (2017), Riley v. California 134 S. Ct. 2473 (2014), Elonis v. U.S. 135 S. Ct. 2001 (2015), **Privacy Issues:** 1st,,4th Amendment of the U.S. Constitution, City of Ontario, California v. Quon 130 S. Ct. 2619 (2010), **Unprotected** Opinions: Milkovich v. Lorain Journal Company, 497 U.S. 1 (1990), **Obvious Need For Training Standards:** 42 U.S. 1983, Training Standards, City of Canton, Ohio v. Harris 489 U.S. 378 (1989), Monell v. Department of Social Services, 436 U.S. 658 (1978). **Qualified Immunity:** qualified immunity applies so long as the official conduct of the individual defendant "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), White v. Pauly, 137 S. Ct. 548, 551 (2017), Anderson v. Creighton, 483 U.S. 635, 640 (1987), Pearson v. Callahan, 555 U.S. 223 (2009). Cahoo v SAS Analytics Inc. 912 F.3d 887 (Cir. 2019). **Affirmative Defense For Harassment and Other High Liability Issues**: Faragher v. City of Boca Raton, 524 U.S. 775 (1998), Burlington Industries Inc. v. Ellerth, 524 U.S. 742(1998). State of Mind For Punitive Damages Kolstad v. American Dental Ass'n, 119 S. Ct. 218 (1999).