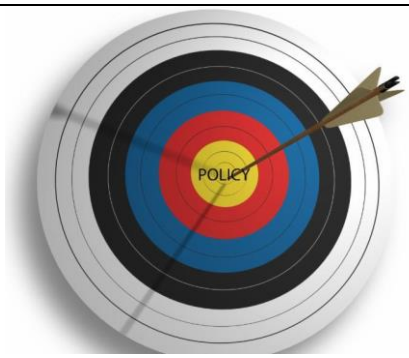
The Need To Reevaluate Social Media Risk Exposure

By Social Media Attorney Mark Fiedelholtz



Frequently Asked Questions

Question: Why do loss control professionals need to reevaluate their social media risk exposure?

Answer: In the traditional public sector communications structure thirteen years ago (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 desired to access social media platforms. This power shift has created a critical need for all employees to receive core social media law training in the areas of defamation, copyright infringement, privacy issues, First Amendment issues, and other mass media liabilities. Without this specialized training, there is heightened risk exposure for employees which translates into big dollar settlements and judgments.

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

Here are the big differences that make social media risk exposure unique:

- Employers are encouraging employees to use powerful social media mediums that can permanently destroy a person's reputation worldwide. They are encouraging employees to become brand ambassadors or enhance citizen engagement without in-depth social media liability training. Many governments are focusing on social media marketing without having a social media law expert train employee on the hidden liabilities in the social media speech laws. Courts find this oversight negligent conduct and ripe for a 1983 inadequate training lawsuit.

- 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.

- Under 42 U.S.C, 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 heighten. Also, plaintiff attorneys may sue employees personally to enhance their trial strategies (i.e. the employee now has personal objectives that may conflict with the employer's objectives, especially in a deposition or testimony on the stand).

- Most harmful social media messages are powered by strong emotions that act as a primer for defamation, intentional infliction of emotional distress, and other torts.

- Social Media messages are often intentionally targeted at specific classes of people that are federally protected by clearly established laws which diffuse an argument of "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).*

- 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: How have the courts and Congress weighed in on this paradigm shift.

Dating back to the 1980s and 1990s, there was significant legislation passed to recognize the growing power of mass media platforms. For instance, Congress passed the Computer Fraud and Abuse Act of 1986, Electronic Communications Privacy Act of 1986, and the Health Insurance Portability And Accountability Act of 1996 and other computer hacking and cyberbullying laws.

As for our courts, the U.S. Supreme Court now classifies social media and smartphones as "high liability" legal topics. This new legal standard compels all employers to reassess their present approach to social media employee training and policy development. *See 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), City of Ontario, California v. Quon 130 S. Ct. 2619 (2010), Liverman v. City of Petersburg 844 F.3d 400 (2016), Social Media and Smartphones Are High Risk Platforms*.

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?

Simply put, busy in-house attorneys aren't social media law experts and professional trainers. The United States Supreme Court and federal courts have developed a body of law stating that written policies in the public sector, especially concerning "high liability" areas, must be enforced with specifically targeted employee training. The instructor who is an expert in that area; general warnings will not suffice under 42 U.S.C. 1983. See **Need For More In-Depth Training Is Obvious**: *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).* ***Training Requirements To Capture An*** **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). 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. Liverman v. City of Petersburg 844 F.3d 400 (2016), City of Ontario, California v. Quon 130 S. Ct. 2619 (2010)

- In-house attorneys are placing their trust in boilerplate policies drafted by reputable associations and policy services. Did the in-house attorney perform their due diligence by discovering who wrote the social media policy or did he or she just assume since it was a reputable organization, the policy was credible. This distinction will be amplified in a lawsuit.

- In a lawsuit, in-house attorneys are finding out their model policies have big gaps; this is especially true with reference to the First Amendment policy language.

- The landmark case of Liverman v. City of Petersburg, is emblematic of the risk in tasking busy in-house attorneys to become overnight social media law experts and write social media policies. In fact, they aren't social media law experts. In a desperation to write a social media policy that is legally sound, in-house attorneys unknowingly seek incorrect outside information from reputable conferences and model policies. In the Liverman case this is exactly what happened. The in-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 the "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. The city paid out a hefty settlement.

- 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.

- In a lawsuit, governments are realizing they had false sense of security trusting model policies just because they come from a reputable organization. These policies don't hold up in court and leave governments vulnerable in a lawsuit to pay out big dollar settlements and judgments.

Question: How do we develop an effective training program?

To compensate for the historical shift from a heavily regulated mass media access paradigm to a wide-open mass media access paradigm, there must be a dramatic shift in your analytical perspective. My specialized social media liability training and policy development is 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 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 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, the instructor must be a media attorney who specializes in social media law, not just a busy in-house attorney In a 1983 inadequate training lawsuit or tort claim, you must provide documented evidence that your training reflected the proper risk exposure. More specifically, to sustain judicial review your training must reflect the fact that all employees have the social media access and power to permanently destroy a person's reputation worldwide. 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 employees nationwide are unaware of even basic social media liability issues. This gap is costing governments millions in settlements and judgements. If this training gap isn't properly address with expert social media training and policy development, both small and large governmental entities will suffer severe financial loses, especially the small governments existing on a shoe-string budget.

The biggest problem is the failure of governments to recognize that courts classify social media as "high liability" topic. Social Media no longer impacts just the communications or marketing professionals, they impact the constitutional rights of every employee in the workplace, and the third parties that receive their messages. Social Media platforms and digital media are being used by most employees to accomplish critical internal or external critical governmental operations. Also, social media, texts, and other digital media greatly impact the dissemination and archiving of public records.

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 real estate contracts 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 careers will be destroyed.

I compare inadequate social media policy and training to driving a NASCAR Race Car. A persona may know how to drive a car, but not a NASCAR Race Car that accelerates from 0 to 60 in 3 seconds. Inevitably the drive will suffer a horrible crash. Applying this analogy to an employee who didn't receive expert social media liability training, inevitably both the employee's career and personal finances 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).