
Being Smart While Being Social

With the deadline for submitting this article looming ahead of me, I did what most members of my generation do when faced with limited time and significant work ahead of them, I went on-line. I checked out Instagram, read some stories on Snapchat and browsed Facebook. During my hour of “socialization” I learned that a friend of mine completed her first triathlon, a work acquaintance was singing the praises of a title company that had closed a very complicated deal she put together, and two people I follow were warning me not to open e-mails or accept new friend requests from them as they had been hacked. How appropriate that I would be writing an article on legal issues and risks arising from social media and technology when so many of those issues all exist in my social media feed.

Intellectual Property Infringement

My friend who completed her first triathlon proudly posted pictures of herself taken along the race course. In each picture the grimacing face of my friend is visible behind the watermarked logo of the official race photographer. These pictures are no different than the ones that show up daily in our social media feeds, school pictures of our children, wedding photos of our friends, and if you’re involved in real estate, lots of pictures of properties for sale. The internet has made it easier and faster to document every aspect of our lives and the lives of those around us, and to do so in beautiful (if slightly filtered) pictures. The risk that exists with sharing those pictures is that we may be infringing on the intellectual property rights of another. Virtually every original work that is ultimately fixed in a tangible medium of expression is eligible for copyright protection, and in most cases, copyright protection is instantaneous upon fixation. Everything from a novel to a text message can be subject to copyright protection. Copyright vests in the author many rights including: 1) Making and distributing copies, 2) Making derivative works, 3) Making public performances and display, 4) Licensing the use of the work by another. The pictures taken by the photographer at the triathlon were subject to copyright protection with the photographer owning the rights. When my friend posted the pictures on-line, she was making and distributing copies without having obtained the proper license and was infringing on the rights of the photographer. While the photographer had taken the step of watermarking the picture and including a copyright mark, he wasn’t required to; registration and marking of copyrighted materials is not required in the United States. Giving attribution to the author of the protected work does not relieve the person posting the material from liability for infringement, you may not be plagiarizing the work, but you are infringing on the copyright.

It is important that real estate brokerages and agents take steps to prevent intellectual property infringement in establishing their on-line presence. This means adopting policies and procedures addressing licensing materials obtained from a third party before posting them and clarifying who owns material created by an agent during their affiliation with a brokerage.

Endorsements, Testimonials and On-Line Reviews

“Yes! Best closing ever at @DriverTitleCo! I wouldn’t trust anybody else for this complicated deal! #awesomeservice #blessed”

My contact who took to Twitter to post how pleased she was with the service provided by a title company was providing what would most likely be viewed as a testimonial or endorsement. In fewer than 140 characters, you can get in quite a bit of trouble.

The Federal Trade Commission regulates the use of testimonials and endorsements in advertising. The FTC guidelines on the use of testimonials and endorsements states that: “Endorsements must be truthful and not misleading. If the advertiser doesn’t have proof that the endorser’s experience represents what consumers will achieve by using the product, the ad must clearly and conspicuously disclose the generally expected results in the depicted circumstances, and if there’s a connection between the endorser and the marketer of the product that would affect how people evaluate the endorsement, it should be disclosed.”

If we focus on the second portion “connection between the endorser and the marketer” we need to look at the relationship between my contact and the title company that she’s endorsing. If my contact owns part of the company, is related to an employee or received payment or a gift in exchange for her tweet, that connection could certainly change how most people would evaluate the endorsement. To disclose the relationship in such a limited space, the easiest approach is to add #ad or #sponsored to the tweet. We also must be aware of the potential for a RESPA violation if we are receiving “something of value” for the referral of a settlement service. If my friend was receiving payment for her positive tweets and those tweets included recommendations for use of the service and were read by her clients who are her followers, this could be a serious red flag for a potential violation.

“Groan...my fax machine just spit out a home inspection from Philip Driver. What kind of dinosaur still sends faxes? Reading this inspection, the old geezer must have his toupee on too tight and has limited the flow of blood to his brain”

We’ve all read a post or tweet like this and we all recognize that not all comments about a company found on-line are positive and not all reviews are glowing. How we respond to negative reviews and negative comments varies. Article 15 of the NAR Code of Ethics states: “REALTORS® shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses, or their business practices.” If the person who wrote the post is a REALTOR® and the comment is about a real estate professional, then the Code of Ethics can come into play when determining potential action. Many people are turning to the legal system and claims of libel and defamation in response to negative on-line comments. Defamation is a false statement that is published or spoken, about an identifiable person or entity that causes harm. A recent case out of New York involved a consumer frustrated with the service provided by a home improvement contractor. In Mr. Sandless v. Fanelli, Ms. Fanelli hired Mr. Sandless (Matt Gardiner) to refinish the floors in her living and dining room. Ms. Fanelli wasn’t pleased with the completed work or the corrective actions of the company after her complaints, and posted many on-line reviews on Yelp including the following:

“this guy mat the owner is a scam do not use him you will regret doing business with this company I’m going to court he is a scam customers please beware he will destroy your floors he is nothing by a liar he robs customers, and promises you everything if you want s### then go with him if you like nice work find another he is A SCAM LIAR BULL###ER”

Mr. Sandless filed a defamation suit against Ms. Fanelli and was awarded \$1,000 in damages. In his ruling the judge said that this post crossed the line from opinion to libel. “Terms such as ‘scam’ ‘con artist’ and ‘robs’ imply actions approaching criminal wrongdoing rather than someone who failed to live up to the terms of a contract.” A representative from Yelp who commented on the outcome of the case said “We frequently find that a better course of action, rather than suing your customers is publicly responding to a critical review in the same forum.”

Real estate brokerages need to identify in advance of any potential negative on-line comments who the spokesperson for the company will be in making any comments or responses. While your immediate response to reading a negative review may be anger, it’s important to take a step back before responding and remember that frequently the best response to a negative comment is a positive comment from a pleased client. If you find yourself in the position where you want to turn to social media to vent about a negative encounter with a peer, conduct a conscientious review of what you’ve written and ask yourself “What do I want to accomplish with this?” “What are the potential ramifications of this post?” and my favorite “Would my mother approve?”

Social Engineering and Phishing

“Heads up, my FB account was hacked. Ignore any pm’s from me”

“Another doppelganger FB account is out there- if we’re already friends, don’t accept a new friend request from what looks like me- if we’re not already friends, then why are you reading this?”

I think most of have seen a posting like this or experienced a situation where someone we’re already friends with on Facebook will appear to send us a new friend request. The concept of phishing is relatively simple; someone will “bait” us with a message, an e-mail or a friend request and we (the target or the fish) will take the bait and open an attachment that contains malware or provide information that can be used to harm us. Social engineering is the addition of manipulation of the target into taking action. In the case of one of my friends who posted that she had been hacked, I had received a message from her account earlier in the day where she told me that she was traveling overseas and had lost her passport and wallet and desperately needed me to save her and wire her money. Since I had waved to her in the carpool line that morning, I was fairly certain she didn’t need me to rescue her. However, not all of her friends who received that message would have seen her that morning and based on her social media activity and frequent overseas travel, her plea for help would not be so easily dismissed.

How to protect yourself? Pay attention to your passwords, this seems pretty basic and it is. Avoid the obvious “Password123” or your name and birthdate combination and don’t use the same password for multiple accounts. Install updates, this is also very basic but is often forgotten. Applications are

updated to repair flaws that hackers have found in the system, installing the update is how you fix the flaws and keep the application running smoothly and safely. Verify that your friend is actually sending you a request before acting on it and don't open attachments or click on links that you weren't expecting to receive.

IBM urges its employees to "Be Smart" in their social media usage and those words of guidance are very appropriate in their simplicity. Be Smart in what you post, Be Smart in what you share and Be Smart in how you interact with others.



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