Online Marketing – Social Media

Gary Kibel – gkibel@dglaw.com, @GaryKibel_law
Partner – Davis & Gilbert LLP

Drew Bordages – dbordages@specificmedia.com
Senior Vice President, General Counsel – Specific Media

Albert Raymond – albert.raymond@td.com, @al_raymond
Assistant Vice President, Privacy – TD Bank
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Gary Kibel
Partner – Davis & Gilbert LLP

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Sources of Law That Impact Social Media

- Federal Trade Commission

- Can-Spam Act of 2003

- Digital Millennium Copyright Act
  - 17 U.S.C. § 512

- Communications Decency Act
  - 47 U.S.C. § 230

- Children’s Online Privacy Protection Act

- Computer Fraud and Abuse Act
  - 18 U.S.C. § 1030

- Electronic Communications Privacy Act
  - 18 U.S.C. § 2510

- Copyright; Trademark; Rights of Publicity

- State Law
  - Baby FTC Acts; Spam laws;

- SROs and industry trade associations
  - NAD; CARU; IAB; AAAA; ANA; DAA; public policy organizations
Communications Decency Act

- “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”

- **Analogy**: The telephone company is not liable for transmitting defamatory messages if someone makes defamatory statements during a phone call

- Social media services, such as Twitter, are the 21st century telephone companies
Communications Decency Act

- *DiMeo v. Max* (PA- September 2007)

  - **Claim**: Negative comments posted about the owner of a PR firm to a blog

  - **Result**: Court held that blog operator is not liable under the CDA. “[§ 230 effectively] overrides the traditional treatment of publishers under statutory and common law.”
A co-worker who was also a Facebook friend took a screenshot of a negative post by a hospital worker and shared it with senior management. The worker was suspended because the post reflected a “deliberate disregard for patient safety”

Held that nonpublic Facebook posts are protected under the Stored Communications Act because employee configure privacy settings (friends only)

Employer not liable, however, since information was voluntarily provided to the employer
- An operator of an Internet website, online service, online application, or mobile application that is directed to minors or that has actual knowledge that a minor is using its service must
  
  • Permit a minor who is registered to use the service to remove content posted by the minor
  
  • Notify the minor of this right
  
  • Provide clear instructions on how to accomplish removal
  
  • Notify the minor that removal “does not ensure complete or comprehensive removal of the content or information”
State Password Laws

- Legislation enacted, pending or introduced in approximately 36 states
- Generally prohibit an employer from requiring or requesting a current or prospective employee from disclosing his or her username or password for a social media account, or even the existence of the account
- **Exceptions** – Company-issued devices; legal compliance
Fraley v. Facebook
(N.D. Cal., Aug. 17, 2012)

- Facebook allegedly used users’ names and likenesses in advertising to promote and sell products and services via the “Sponsored Stories” program

- The complaint, filed in March 2011, alleged:
  • Violation of the CA Right of Publicity Statute
  • Violation of CA’s unfair competition law
  • Unjust enrichment (a claim which was later dismissed)
- **Outcome:** On August 26, 2013, the U.S. District Court for the Northern District of CA approved a $20 million settlement. The approved settlement required:

  - Provide a mechanism allowing users to view their interactions and content that had been displayed in Sponsored Stories to date, institute controls allowing parents to prevent the use of minors’ names and likenesses in Sponsored Stories
  - Revisions to the terms of service to provide additional information and transparency as to when and how users’ names and profiles are re-published on the site
In December 2012, Instagram rolled out proposed privacy policy changes, including the following: “To help us deliver interesting paid or sponsored content or promotions, you agree that a business or other entity may pay us to display your user name, likeness, photos ... and/or actions you take, in connection with paid or sponsored content or promotions, without any compensation to you”

- Users concerned that their name, likeness, and photographs were to be used in connection with promotions without compensation. The additional statement appeared to grant Instagram broad rights to all user photographs, while affording users little legal recourse.

- The plaintiff brought claims based in breach of contract, violation of California's publicity rights statute, and unfair competition.
**Outcome:** Case dismissed on procedural grounds: the plaintiff did not adequately demonstrate ‘injury,’ since Instagram had notified its users of the changes well before they went into effect, and allowed users the opportunity to terminate their accounts.

- However, Instagram removed the disputed language from its privacy policy.
FTC Actions

- **Google** (3/20/2011) – Google Buzz

- **Twitter** (6/24/2010) – ID / password security

- **Facebook** (11/29/2011) – Social Media privacy disclosures

- **Spokeo** (6/12/2012) – Scraping social media data – violation of Fair Credit Reporting Act (FCRA)
FTC v. Path
(February 2013)

- Misleading user interface
- No meaningful choice
- Automatic collection of information from consumers’ mobile device address books (including approx. 3,000 children under age 13)
- Deceptive representations in violation of the FTC Act
- Consent Order
  - $800,000 civil penalty
  - Destroy data
  - 20 years of biennial assessments
Privacy Strategies to Minimize Risk of Social Media Usage

Albert Raymond
Assistant Vice President, Privacy – TD Bank
albert.raymond@td.com, @al_raymond
Disclaimer

Any and all opinions and statements are my own and do not represent my employer, TD Bank
What Is ‘Social Media’?

- FFIEC considers social media to include any form of “interactive online communication in which users can generate and share content through text, images, audio and/or video — including, but not limited to, micro-blogging sites; forums, blogs, customer review web sites and bulletin boards photo and video sites; sites that enable professional networking; virtual worlds and social games.”
In Other Words, These ...
Risks ...? What is the Biggest Risk of Social Media Use?

- Compliance risk?
- Vendor reliance risk?
- Security risk?
- Reputation risk?
- The biggest risk may be … doing nothing*
The Big Four Takeaways

- Communicate the rules and train the workforce on SM compliance, especially where employee’s social profiles are linked to your company.

- SM insists on a new perspective on governance, but may not require wholesale change; current governance frameworks principally apply. (but won’t forever!)

- Due to rapid changes in the space, flexibility is key to compliance.

- Stay the same course online as offline. Regulators’ enforcement has been sane, reasonable and understandable (so far) …
The Big Four Action Steps

1. Show visible and proactive support from senior leadership
2. Create and publish ‘The Rules’
3. Demonstrate how you monitor ‘The Rules’
4. Enforce ‘The Rules’
The Big Four Action Steps

1. The objectives of use of SM within and outside the company*
2. Creation, publication and awareness of a SM policy
3. Who can create allowable content?
4. How is content approved (if needed**)?
5. How do we enforce The Rules (software, hardware, fear)?
6. Awareness
Breaking it Down – What to consider

1. The objectives of use of SM within and outside the company*
2. Creation, publication and awareness of a SM policy
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4. How is content approved (if needed**)?
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6. Awareness
Objectives of Social Media

1. What are we trying to accomplish?
2. What do we expect to gain?
3. Who are we trying to reach?
4. How will activities be managed? If at all?
5. Looking for an ROI? *(Good luck with that, for now)*
Oversight of Social Media

1. Same standards from pre-electronic forms or communication apply – mirror what’s done in print and other traditional media*

2. Risk-based supervisory oversight required** for new operational risks of SM

3. Record Keeping / Archiving duties***
The Policy – The Bedrock of the Program

Decide first:
- Business use only?
- Personal use only?
- A bit of both? Neither?

Then consider:
- Nuances of your culture and organization
- What is your regulatory environment?
An effective policy should address (at least) three key content areas

- Employee rights and obligations
- Monitoring guidelines
- Engagement processes and roles
Policy Essentials – 30 Foot View

- List of approved SM activities
- Guidelines for usage
- What is ‘allowable content?’ details
- Applicable consumer protection laws
- Description of oversight and audit
- Employee training on Social tools & concepts (e.g. ‘static’ vs. ‘interactive’ content)
The Policy Variations

Social Media Guidelines

- **Ponder Before You Post**: On-line photos and comments live for a very long time and spread rapidly. Before you post, **think about the impact your post could have** on you, your colleagues and Company.

- **Practice Transparency**: If, in your personal posts, you want to speak about or refer to Company, you should disclose the fact that you are a Company employee. Please use a disclaimer, such as: “These opinions are entirely my own and do not represent Company’s position, strategies or opinions.”

- **Confidentiality and Privacy are Paramount**: As a trusted financial institution it is our responsibility to respect and protect the confidentiality and the privacy of our customers, employees and suppliers. To protect this trust, you may not disclose or use any restricted, confidential, internal or proprietary information about or belonging to Company (including for example, logos, internal documents or discussions), its employees, customers, suppliers or competitors.
The Policy Variations

Social Media Guidelines

- **Be a Good Online Citizen**: Be aware that you are responsible for any information you post on social media channels and may be held accountable for it by Company. Be respectful and refrain from posting any information that violates any laws or is discriminatory, defamatory, obscene, intimidating, hateful or harassing.

- **Be a Company “scout”**: Even if you are not an official online spokesperson for Company, you can still help build and protect our reputation.
The Policy Variations

Do’s and Don’ts for Company Employees Using Social Network Sites for Personal Reasons (i.e., NOT on Company’s Behalf)

- DO ensure that your postings on social network sites are consistent with all applicable Company policies, including Company’s Policy Against Sexual Harassment and Other Workplace Harassment and Company’s Policy Regarding Violence in the Workplace

- DO NOT represent or suggest that your postings on social network sites are approved, sponsored or authorized by Company or that you are speaking on Company’s behalf or on behalf of any Company client or business affiliate

- DO NOT advertise or sell Company products or services via social network sites. DO NOT otherwise promote Company products or services via social network sites, unless you disclose that you work for Company.
The Policy Variations

Do’s and Don’ts for Company Employees Using Social Network Sites for Personal Reasons (i.e., NOT on Company’s Behalf)

- **DO** feel free to express your personal opinions on social network sites. Nothing in the Company Social Networking Policy is intended to prohibit or discourage employees from discussing wages, hours, working conditions or other terms and conditions of employment

- **DO NOT** expect privacy with respect to any comments and/or discussions regarding Company, its business, products and services, or any related topics posted on all types of openly accessible Internet sites
Enforcing The Rules

While monitoring is not necessarily all-or-nothing, consider …

- How and in what manner will monitoring take place
- What’s the breadth and scope of content that will be monitored
- Who is tasked with the responsibility to monitor
- What are the costs associated with monitoring
- What privacy rights of employees are implicated; and
- Any less intrusive means to regulate compliance
Who Can *(Should!)* Use Social Media?

Criteria for participation in a Pilot

- Must provide a plan on how to use social media
- Training
- Attest to following the rules, and
- Must use SM once a week

Users wishing access and their managers must pass online course on Compliance issues

- What they can and can't do
- Escalation procedures
- Know the Rules
Note

1. Proposed Guidelines would not impose any new obligations on companies

2. Use of SM is compared to use of any new “process or product channel”

3. Risk Management program should reflect size and complexity of the firm’s SM policy
The proposed guidance identifies the following key components:

- **Governance Structure**: Clear roles for the board and senior management to set strategy and controls.

- **Policies and Procedures**: Could be separate for social media or incorporated into existing policies and procedures.

- **Due Diligence Process**: Selection and management of any third-party service providers.

- **Employee training**.

- **Oversight of Content**: Responsible for monitoring information posted by, or on behalf of, the bank at the social media sites.

- **Audit and Compliance Process**: Additional risks posed to legal compliance by the new activity.

- **Success Measurement**: Track effectiveness of the social media efforts and reporting on them back to the board and senior management. (ROI?)
Employee Use of Social Media – The Grey Area

- Rules and definitions of personal vs. business use vary by vertical or regulator

- Generally, consider prohibiting recommending specific product or link to recommendations unless management approves of content

- Unscripted or participation in chat rooms or online seminars may constitute ‘public appearances,’ (FINRA)

- A blog may also constitute an “Interactive electronic forum” and depending on type of posting, it may be considered an ‘advertisement’ (FINRA)

- Generally, posts by customers or third parties on your site is not considered to be communication with the public; Unless, the firm has involved itself in preparation/approval of the content
Employee Use of Social Media – The Grey Area

- Content of the communication is determinative, not the channel
- The productivity question … *time killer or employee boost?*
- Business communications through personal devices must be supervised, recorded and retained (BYOD nightmare)
- ‘Inadvertent’ SM activity may represent a ‘corporate disclosure’ per SEC – especially of top management (CFO: “*Board meeting. Good numbers = Happy Board.*”)
- State labor laws prohibiting employers from seeking employee/applicant passwords to social media accounts – 12 laws on the books now; more coming!
- Accepting friend requests from the Boss?
1. Employees use social media both in and out of the workplace and may believe they are entitled to, an expectation of privacy in their personal communications even in workplace.

2. Email and acceptable policies of yore generally apply to social media usage.

3. Case law trend in social media and privacy is that courts will not reflexively recognize or protect privacy interests of those who voluntarily engage in social media communications ...

   - Data is discoverable ... especially if it can refute / provide evidence of claims (e.g. personal injury)
Employee Privacy – The Delicate Balance

4. Most legal cases hinge on the wording in company policies: (Examples)
   1. “Company policy permits occasional personal use of internet and e-mail”; or
   2. “Company policy states employee should have no expectation of privacy, and employees are prohibited from using company property to send or receive personal email or use SM”
      a) “Company will monitor its computers for compliance with the policy and might inspect all files and messages … at any time”

5. Employees expect privacy and yet some regulation requires companies to supervise, record and maintain employee’s business communications (SEC) ?!?!
## Business Activities vs. Personal Activities: Business Activities

<table>
<thead>
<tr>
<th>ACTIVITY</th>
<th>EXAMPLE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Endorsing/recommending/&quot;liking&quot; (or equivalent) an investment, financial planning or trading strategy of Company or competitor.</td>
<td>“Liking” a specific public company or product page on Facebook. Regulations require that Registered Employees do not participate in these activities because they could be interpreted as endorsements.</td>
</tr>
<tr>
<td>2 Any endorsement/recommendation/&quot;like&quot; (or equivalent) of any product, service or seminar (including those of Company).</td>
<td>Tweeting an invitation to an upcoming Company branch event discussing retirement planning.</td>
</tr>
<tr>
<td>3 Accepting an endorsement of your skills or expertise.</td>
<td>Accepting an endorsement on Facebook of your skills.</td>
</tr>
<tr>
<td>4 Discussions with clients about their accounts. (Discussions can arise by an individual seeking information, advice, etc. through Social Media).</td>
<td>Responding to a client enquiry received through Facebook. This is considered a business activity regardless if the interaction is client specific or generic in nature.</td>
</tr>
<tr>
<td>5 Discussions with clients about any service or regulatory complaints. (Discussions can arise by individual seeking information, advice, etc. through Social Media.)</td>
<td>Continuing to communicate with the client/resolve the client’s complaint using Twitter.</td>
</tr>
<tr>
<td>6 Solicitation of (potential or existing) clients found through Social Media searches, references or through leads.</td>
<td>Using advanced search technologies available on Social Media sites such as LinkedIn to target high net worth clients with the intention to offer financial planning products/solutions.</td>
</tr>
<tr>
<td>7 Providing an HTML link to a Company or third-party site (or news article) to promote a product/service or to share an educational/informative content.</td>
<td>Sharing an interesting article published online on the Investment Executive website describing a tax-efficient investment strategy.</td>
</tr>
<tr>
<td>8 Re-Tweeting a Twitter post on any business-related topic.</td>
<td>Sharing an interesting article published online describing a tax-efficient investment strategy.</td>
</tr>
</tbody>
</table>
### Business Activities vs. Personal Activities: Personal Activities

<table>
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<tr>
<th>ACTIVITY</th>
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</thead>
<tbody>
<tr>
<td>1    Networking with family and friends.</td>
<td>Sharing photos of a family gathering on Facebook</td>
</tr>
<tr>
<td>2    Participation in Social Media site games, apps, virtual gifts, etc.</td>
<td>Playing Farmville on Facebook.</td>
</tr>
<tr>
<td>3    Joining an online community to discuss personal interests.</td>
<td>Joining Flixster to discuss your favorite movie or Last.fm to share music and radio stations with friends.</td>
</tr>
<tr>
<td>4    Reconnecting with former colleagues or classmates</td>
<td>Searching and connecting for contacts on LinkedIn for maintaining a network of contacts.</td>
</tr>
<tr>
<td>5    Organizing an event with friends</td>
<td>Creating and distributing invitations through Facebook for a class reunion or charity event.</td>
</tr>
<tr>
<td>6    Tweeting or re-tweeting on a non-business-related topic.</td>
<td>Commenting on a sporting event</td>
</tr>
</tbody>
</table>
Employee Privacy – The Basic Add-ons

Supplements to the basic Company policy
- State whether work-based or personal use of SM sites is permissible in workplace
- Describe under what circumstances, and when (e.g., unpaid breaks) SM sites may be used
- List acceptable and unacceptable use of SM sites
- Disclose if employee should have any expectation of privacy
- Be honest in the consequence of failure to follow the policy
NLRA (National Labor Relations Act)

NLRB’s general position is that

- Employers are permitted to regulate employee behavior, including speech on social media web sites

- Generally, policies regulating free speech are not *permissible* if they interfere with employees’ rights to organize labor unions

- Cannot interfere/restrict EE’s concerted activities

- *Applies to non-union shops as well*
An NLRA Disclaimer, For Your Consideration ...

- DO NOT share information on social network sites that is Company’s confidential or proprietary information, or the confidential or proprietary information of any Company client, customer or supplier (except where disclosure is authorized in advance by Company’s Legal Department or where disclosure is protected by the National Labor Relations Act, or other applicable laws, including disclosures related to wages, hours, working conditions or other terms and conditions of employment).
<table>
<thead>
<tr>
<th>TD Money Lounge – US</th>
<th>TD Bank announces 8-day-a-week banking (hey, we would if we could). Happy April Fool’s Day!</th>
</tr>
</thead>
</table>

**Topic**: For April Fool’s Day, we posted an announcement for 8-day-a-week banking. Customer Reaction: Mostly Positive – high number of likes and shares. Comments included some positive posts from fans sharing they love TD but it also included some sarcastic/junk posts and customer service complaints, which were taken offline by the SCS team.

**Quote**: Shakie Brooks-Parker “Lol... that was cute.”

**Metrics**:
- Likes: 313
- Comments: 21
- Shares: 29

How Are We Doing?

TD Bank Group Social Voice of the Customer
Friday, October 11th - Thursday, October 17th 2013

US:

Similar to top themes in Canada, TD’s community involvement and customer service were the main topics this week. Total volume decreased by ~19% to ~2667 mentions from ~3276 mentions last week.

TD’s involvement in the community made up ~1.0% of the total volume this week with conversations around participation in local TD Tree Days events in the US.

Customer service conversations made up ~1.2% of total volume down from ~2.2% last week. Negative mentions were at ~25% this week, down from ~45% last week, as some customer expectations were not met by TD employees. Positive mentions were up to ~50%, from ~25% last week, as customers mentioned they were impressed by our friendly staff.

Examples of what customers said on Twitter

Have you heard of the #TDScholarship? Tell a high school/CEGEP student about it today http://t.co/BxecFmYr6X cc: @TD_Canada

@TD_Canada u need to do a better with the way u treat existing customers. #20years as loyal customer is on me I guess. #justmyopinion

Huge thank you to the tellers at @TD_Canada going above & beyond to find & bring me my special request! Walked all the way to another store!
Our Customers inspire us every day.

We'd like to return the favor and make banking more convenient.

Visit us in person at one of our 1,300+ locations, or you can talk to a real person 24/7 by calling 1-888-751-9000.

Connect with us on Facebook at www.facebook.com/TDBank

Human to human.

@TDBank_US

TD Bank @TDBank_US

On average, how much time per week do you spend managing your finances?

JohnnyHockey @Lemeuss

Moved 3000 miles away, @TDBank_US is still my bank. No banks in CA can match them. New app allowing deposits is amazing!

@elonmusk
Following by Walt Mossberg and others

DEFCON @datcon_

Hacker News Network @ThissIsh...

Popular accounts · Find friends

Philadelphia Trends · Change

38,020 TWEETS 9,458 FOLLOWING 20,145 FOLLOWERS

Maine to Florida · bankhumanagain.com

7:58 PM - 12 Sep 13 - Details

Reply to @Lemeuss @TDBank_US

Anyone in the same boat as Alyssa? RT: @alyssawatson6 do u ever buy a pack of pens & then hate them & then take the free ones from somewhere else because they are better?
“Like” this photo if you’ve ever brought your dog into TD Bank.

“You mean TD Bank has dog treats, just for me?”

How often are you stopping by to see us?

Littlest Banker, Lilly, loves her weekly visits to TD Bank. To find a TD Branch near you click here: http://bit.ly/11xfexC
Hi Ga Zam, we'd like to reach out and speak to you for a better understanding of your account. Kindly send us a message to service@td.com (Attn: Social Media) with your contact information and the best time for us to connect. Please do not include any account information. Thank you. ^CB

September 13 at 4:17pm · Like
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Senior Vice President, General Counsel – Specific Media
dbordages@specificmedia.com
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