



## Webinar Follow Up

Webinar	Best Practices for Using Social Media in Insurance
Date	16 January 2013
Presenter(s)	Fred Karlinsky and Rich Fidei Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb

Thank you for attending the ACORD Knowledge Center webinar. As mentioned during the event, questions that could not be answered during the webinar would be addressed separately. Below are questions along with answers from our presenter.

*Notice: These responses are intended for general purposes only and should not be relied upon as specific legal or regulatory advice. Many factors can affect the ultimate resolution of the questions presented, such as the specific laws of the jurisdictions involved and all of the facts and circumstances at issue. As with all questions, you should seek a thorough review of the issues from competent legal or regulatory counsel.*

Question	Response
If we have a "get a quote" tab on our FB (Facebook) page that takes consumer to our website do we need to disclose on our FB page that the quote is only valid for the states we are licensed in?	This would likely be deemed a solicitation of insurance since the company is identified, along with an invitation to get a quote. Thus, it would be best practice to disclose where the carrier or producer is licensed and limit the quote to those states so it is clear the licensee is not attempting to transact business in an unauthorized state.
Are there any companies that can help with records retention compliance? I've read about a couple, but are there any known for dealing with the insurance industry?	Our firm does provide clients with advice and recommendation and assist in the development of compliance protocols and social media policies.

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Question	Response
<p>If you post to stop by your booth at a tradeshow and say you are giving away an iPad is that something you can say?</p>	<p>Likely, you can say it, but there may be a need to include some limitations to assure compliance with applicable laws. Any communication made via social media intended to market a company, product or services, solicit business for an entity, or advertise an entity's products or services may be subject to solicitation or advertising regulations in the applicable states. This posting is indirect, but would identify the company and is likely intended to drive traffic to the company's booth to promote the company, its products and services. As such, it is a good rule to include certain disclosures, such as where an entity is licensed to conduct business and that the posting is not intended for any other jurisdiction. This is not an easy question since there could be a lot of nuances involved that may affect what needs to be done. On a different subject, general state laws often have limitations or prohibitions related to raffles or games of chance, if that is the method used for the iPad giveaway. We could provide a specific assessment, with more information, if you would like.</p>
<p>What about newsletters sent to agents- what are the regulations on these?</p>	<p>This will vary depending on the states involved and the information contained in the newsletters. Is it descriptive of the company, its products and services? Does it set forth sales information and sales incentive programs? Does it provide general information not intended to market the company or its products? Depending on the state(s) involved and the information in the newsletter, there could be issues involving solicitation, advertising and trade practice laws, to name a few.</p>
<p>In what means could a carrier have a producer keep track of advertising on social media? How do the carriers keep track of their posts, etc.?</p>	<p>Producer contracts should assure that a carrier's social media policy will be complied with and that the producer will establish and maintain protocols of compliance and record retention. A fundamental aspect of any policy has to include proper training, monitoring, supervision and enforcement.</p>

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<p>Would you mind talking more about reviews? Specifically, if a producer has a business page (not referring to personal page), what are current customer reviews viewed as from a legal perspective?</p>	<p>If they are arranged for, adopted, promoted, or prepared by the licensee, the licensee should assure they comply with all applicable laws. Reviews or testimonials relating to licensed entities will normally be treated no different than a testimonial printed in a brochure or used in a print advertisement. Generally, the regulation of testimonials requires the statement to be: (i) genuine; (ii) the opinion of the person making the statement; (iii) applicable to the product being promoted; and (iv) accurately reproduced. If the person providing the testimonial has a financial interest, including but not limited to being a shareholder or employee of the company, the financial interest must be disclosed in the advertisement. A compensated testimonial must be disclosed in the advertisement using language substantially similar to "Paid Endorsement." Keep in mind the actual standards will vary based on the circumstances involved and the applicable laws.</p> <p>The most difficult nuance when considering testimonials made via social media is the unsolicited testimonial. The interactive nature of social media often allows third parties, including satisfied customers, to post messages on a licensee's social media platform without the licensee's prior knowledge and without the licensee soliciting the testimonial. The law is still unclear in this area, but it is possible for this type of unsolicited testimonial to become the responsibility of the licensee from a regulatory compliance perspective. As an example, if the licensee distributes the unsolicited testimonial, then the licensee may become responsible for compliance with all laws applicable to testimonials. Liability is less clear if the licensee simply allows the unsolicited testimonial to remain on the licensee's social media platform. The resolution would likely involve a number of factors and will depend on the circumstances involved (such as, did an employee or affiliated party post it? Does the licensee promote them? Does the licensee weed out bad reviews and, in essence, select the reviews that remain?).</p>

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Question	Response
<p>For carriers that do not have captive agents, are we also held responsible for independent agents' social media content?</p>	<p>A carrier may be held responsible for the social media posts of independent producers if: (i) the carrier is involved in the development of the content posted by the producer; (ii) if the carrier reposts or distributes the post; or (iii) the applicable state laws impose this responsibility on the carrier because the agents are appointed by the carrier. Certain states may interpret their laws to make carriers accountable for select producer posts, especially those that relate to the carrier or its products and services. Those issues should be addressed in a social media policy, by contract and through an appropriate level of training, monitoring, and enforcement. As always, this is a state-by-state matter that would have to be evaluated under the specific circumstances involved.</p>
<p>In a social media policy, what can you say for personal and professional business page activity/comments if you have the freedom of speech rights? More on my question: Often we see companies suing former employers (sic) for personal comments or activity on Facebook. What can you say in your policy that protects you if you have the freedom of speech rights?</p>	<p>This is an interesting, but evolving, area of law and the answer to this question would greatly depend on which laws apply to the carrier, including any federal labor laws. As a general matter, a couple important dynamics have to be evaluated. Generally, a company can impose reasonable restrictions on an employee's postings that directly implicate the business interests of the company. For example, an employee should not be disclosing confidential or trade secret information on social media, and such matters may be prohibited without violating free speech rights. On the other hand, a carrier may be bound by labor laws that may prohibit a carrier from restricting, terminating or punishing an employee on certain subjects related to his/her employment, such as wages, hours and other terms and conditions of employment. This is because employees have rights under certain labor laws, such as to communicate with fellow employees about their mutual employment interests and such communication constitutes "concerted activity" which is protected by the NLRB. There could be other issues, such as retaliation claims for complaints dealing with harassment, discrimination or whistleblower claims. Any of these could result in wrongful discipline or termination claims. Of course, companies need to establish policies that specifically authorize and restrict those employees permitted to post on behalf of the company (such as on the company sponsored Facebook or Twitter pages). All of these issues can be addressed in a policy that accommodates personal employee rights, on one hand, and the interests of the company in protecting its business and brand.</p>

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Question	Response
<p>I've read several social media lawsuits and often the policy is dismissed because it is overly broad. How do you avoid this?</p>	<p>This is an extremely important issue and is really based on the "art" of drafting a social media policy. A policy that is too broad may be problematic if it does not provide specific direction and may be subject to claims of disparate or unsupported enforcement. Generally, companies should be as specific as they can on the standards and restrictions that apply. That said, it is important to also assure that the policy is "nimble" and general enough to apply to future developments in social media laws/regulations, IT advances, and company shifts and advancements in social media activities. Also, the policy should be periodically reviewed and updated to take into account developments in the laws, regulations and best practices applicable to social media postings. Lawsuits can never be prevented but liability can be mitigated with a policy that is specific to address a well-defined plan on social media activities and clear issues that can be anticipated, while accommodating the need for flexibility for unanticipated issues and future developments.</p>
<p>How can agents keep abreast of changes associated with these issues?</p>	<p>There is no central resource, but a few options include: (i) developments of the NAIC market regulation activities; (ii) market conduct and target examination reports issued by the Departments of Insurance; (iii) legislative and regulatory changes in the states; and (iv) contact Fred Karlinsky by email at <a href="mailto:fkarlinsky@cftlaw.com">fkarlinsky@cftlaw.com</a> or by telephone at (954) 332-1749 or Rich Fidei by email at <a href="mailto:rfidei@cftlaw.com">rfidei@cftlaw.com</a> or by telephone at (954) 332-1758.</p>

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