



UNDER CONSTRUCTION

March 13, 2012

Construction and Social Media – Do You Have a Plan?

by Rick Erickson and Nicole Sornsin

At this year's Arizona State Bar Convention and at the Annual Convention hosted by Associated General Contractors of America, we will be focusing our presentations on social media and its growing impact on the construction industry.

Our clients are increasingly interested in better understanding the reality of social media and its inevitable intrusion upon customary solicitation and bidding, design review, construction management and project administration and delivery. As more construction projects go paperless, moreover, clients are wondering if the electronic and digital technology behind social media is going to dominate as the means of project communication or if social media will simply be relegated to personal networking between construction professionals. Many questions have also been raised about document and data retention policies for social media, especially when claims or litigation are anticipated.

Before connecting the concept of social media to the construction industry, it is important to understand what is really meant by and included as social media. According to Merriam-Webster, 2004 was the first known use of the term "social media," which includes all "forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other

content (as videos).^[1] Wikipedia posts that “[s]ocial media includes web-based and mobile technologies used to turn communication into interactive dialogue.”^[2]

Keeping these definitions in mind, the most familiar social media websites are Facebook, LinkedIn, Twitter, YouTube, or popular online journals well known as blogs. In 2011, Facebook boasted more than 750 million users, making its user population comparable to the third largest country in the world, while YouTube has become the second largest Internet search engine next to Google.^[3]

The overwhelming reach of social media is obvious, but many are still reluctant to use it beyond personal and business networking and marketing.^[4] The common definitions of social media include much more than private networking, instead broadly contemplating all means of sharing electronic information and mobile technology—private, professional or otherwise. For social media in business, “[r]eal-time’ is a new imperative,” forcing companies to reckon with information originating at the lowest level of business operations, on a moment’s notice, and with little or no ability to control the mass distribution of this information outside the company.^[5] Facebook’s founder explained this January, moreover, that he wants to transcend personal interaction to more significantly influence “our core institutions and industries” with social media.^[6]

The construction industry is certainly one of our core industries, and its leaders are already following suit by implementing comprehensive social media strategies. Among many construction blogs online today, some consultants run daily journals on any number of topics from regional trends in project funding to analyzing critical path delays.^[7] Architects and engineers are innovating social media to function as their communication platforms.^[8]

Public entities are posting bid procedures and announcements on their Facebook pages, using Twitter for design review and project updates and linking the public to YouTube for city council meetings including discussions about change orders and project appropriations.^[9] Project managers already recognize that social media is integral to Building Information Management (BIM), which presents a collaborative and virtual model of the project.^[10]

Some major U.S. cities are using Facebook, LinkedIn, Twitter and YouTube to inform constituents about construction project opportunities, traffic delays and bid protest hearings.^[11] Public and private owners alike should appreciate social media as an effective means of communicating to avoid negative public opinion when construction inevitably interferes with daily routines and commerce. For these project owners, using social media is a sophisticated

approach to public relations.

A contractor presently managing a major construction project in Arizona has followers on Twitter including many of the subcontractor representatives on the project, so he “tweets” throughout the day on topics ranging from safety issues to coordination of work. The use of social media on the project does not adversely affect productivity and is a welcome means of communicating with the overwhelming number of 20-something workers on the project. Text messaging is also how an entire generation of these workers prefers to communicate, both in their private time and while on the job. Acquiescing to their way of communicating is more practical than trying to stop or change it.

Social media, therefore, is already affecting the construction industry in many ways, but there has been very little discussion about legal dilemmas posed by using social media on construction projects. For example:

- Are tweets, texts and blogs all project records that owners, design professionals and contractors must preserve by law, and should this electronic media be covered under a cogent records retention policy?
- Can owners and contractors legally restrict workers from tweeting, texting or blogging about the project to avoid raising potential claims or other adverse consequences for owners, design professionals and contractors alike?

These are only a couple of the many questions that remain largely unanswered in our courts and other tribunals when it comes to social media. There is, after all, no body of law that specifically requires preservation of construction records arising from the use of social media on the project. Granted that, depending on the subject matter involved, social media may fall under a company’s document retention policy or regulatory statutes, the burden of preserving social media should be governed by a standard of reasonableness.^[12] The largest companies would have a pretty strong argument that it is virtually impossible – and therefore unreasonable – to require monitoring of employees’ personal smart phones, Twitter accounts, blog journals and Facebook pages to retain all information material to a construction project.

Furthermore, business leaders have been reluctant to risk being the first ones to face legal challenges because of their strict policies against social media in the workplace, even assuming that all social media can be monitored and that these policies can be realistically enforced.^[13] Some opponents have already challenged such restrictive social media policies on grounds that they impede or infringe upon constitutional rights of privacy and free speech.^[14] It remains to be seen how anyone on a construction project can control or retain social

media generated by private individuals working on the project.

On the other hand, text messaging about safety issues on the project would probably be of interest to an investigator from the Occupational Safety and Health Administration. An auditor may want any electronic data associated with payment administration on the project, including social media communications about changes in the original scope of work. The Equal Employment Opportunity Commission may find it highly material that a superintendent regularly tweeted about a worker's poor performance before he was terminated from the project. Finally, litigation over project delays may wind up focusing on a daily blog or Facebook postings that were critical of the general contractor's project manager for his failure to coordinate the work of the numerous subcontractors.

Social media issues like these are, indeed, becoming more prevalent in construction litigation, especially when discovery disputes arise over preservation of material records on the project.^[15] Dealing with these social media issues requires sound legal counsel because sanctions and consequences can be severe if social media is known to be material and can reasonably be preserved but is not. When claims or litigation are anticipated, for instance, parties have an affirmative obligation to preserve material records, and dismissal or significant monetary sanctions may be appropriate in cases where spoliation of evidence deprives an opposing party of a fair evaluation of all material evidence.^[16]

In addition, when written agreements require or necessitate the use of social media on construction projects, parties should consult their attorney and err on the side of having a plan to retain and account for material information to avoid potential legal consequences. Good records management is good project management, and good project management is good claims and litigation management. It is too risky to do nothing. Taking the time to come up with a plan can show that good faith efforts were taken to manage social media on the project.

In the meantime, the boundaries of social media are expanding rather than diminishing in their effect on the construction industry. The best approach to avoid legal dilemmas is to consider achievable objectives to keep social media in check while preserving privacy and maintaining accountability of all information material to the project. Despite the difficulties and even impossibilities with controlling social media generated on a construction project, the best plan is to put forth a reasonable and enforceable policy for everyone on the project to consider and honor. Doing so is the best way to protect the project records and prevent claims.

Notes:

^[1] See Merriam-Webster, *Social Media* (Feb. 2, 2012). [\[back\]](#)

^[2] See Wikipedia, *Social Media* (Feb. 2, 2012). [\[back\]](#)

^[3] Erik Qualman, *39 Social Media Statistics to Start 2012*, Socialnomics (Feb. 2, 2012). [\[back\]](#)

^[4] N. Clayton, *Business Joins the Party—SOCIAL MEDIA: Online networking is transforming the way businesses operate but few understand its true implications*, Wall St. J., May 4, 2011, at 1-2; see also M. Brown, *Why the Construction Sector Should Engage with Social Media—social media can help with communication and collaboration in the construction sector and benefit sustainability initiatives*, The Guardian, Feb. 16, 2012, at 1-2. [\[back\]](#)

^[5] N. Clayton, *supra* note 4; see also J. Sheridan, *To Tweet or Not to Tweet?*, Architectural Record (April 2010), at 1, (last visited Feb. 16, 2012). [\[back\]](#)

^[6] *Mark Zuckerberg's IPO Letter: Why Facebook Exists*, Reuters (Feb. 2, 2012). [\[back\]](#)

^[7] See, e.g., McGraw Hill Construction Community, (last accessed February 6, 2012). [\[back\]](#)

^[8] See E. Joyce, *Hashtag This: Social Media Risks and Rewards in Construction*, *Engineering News-Record* (Oct. 20, 2011). [\[back\]](#)

^[9] See States News Service, *Associated Builders and Contractors, Virtual Construction Project Maps Available Nationwide Through New Partnership of Associated Builders and Contractors and Business Social* (Oct. 11, 2011); Daily Record, *Freeholders on Facebook, Tweets on Transportation, Policy Discussions on YouTube* (Aug. 27, 2009). [\[back\]](#)

^[10] M. Brown, *supra* note 4, at 2. [\[back\]](#)

^[11] See *City of Baltimore Social Media Directory*, (last visited Feb. 13, 2012); *City of Las Vegas Connect With Us*, (last visited Feb. 13, 2012). [\[back\]](#)

^[12] See *Peter Kiewit Sons', Inc. v. Wall Street Equity Group, Inc.*, 2011 WL 5075720 *5 (D. Neb. 2011) (companies must follow a reasonable pre-litigation records retention policy and can periodically destroy records pursuant to this policy) (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988).) [\[back\]](#)

^[13] See N. Clayton, *supra* note 4, at 2. [\[back\]](#)

^[14] See NLRB Memorandum Om. 12-31, Report of the Acting General Counsel Concerning Social Media Cases (2012) and NLRB Memorandum Om. 11-74, Report of the Acting General Counsel Concerning Social Media Cases (2011) (chronicling cases on whether employer social media policies are overly broad and whether discharges of employees after they posted comments to Facebook were unlawful). *But see* Bill Malone, *Implement, Educate and Enforce Strict Social Media Usage Policies— in that Order*, akibia (Aug. 6, 2009), (discussing the importance of enforcing strict social media policies while educating employees on the consequences for violation and reasoning behind the policies); R. Sandomir, *ESPN Limits Social Networking*, N.Y. Times, Aug. 5, 2009, at B14 (discussing guidelines prohibiting on-air talent, reporters and writers from having sports-related blogs or websites and requiring a supervisor's approval first before discussing sports on any social networking sites). [\[back\]](#)

^[15] See *Skyline Roofing & Sheet Metal Co., Inc. v. Zilkowski Constr., Inc.*, 957 N.E.2d 176 (Ind. App. 2011) (superintendent's

blog comments on union participation were material in dispute brought by non-union contractor); *see also Cannata v. Wyndham Worldwide Corp.*, 2011 WL 5598306 (D.C. Nev. 2011) (discovery order compelling developer's compliance director to testify about management of corporate documents including social media). [\[back\]](#)

^[16] *See Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (Ariz. App. 1997) (in most states, courts impose a duty to preserve records known to be relevant in litigation, reasonably calculated to lead to the discovery of admissible evidence, reasonably likely to be requested during discovery, or subject to a pending discovery request) (citations omitted); *Robertet Flavors Inc., v. Tri-Form Construction Inc.*, 1 A.3d 658 (N.J. 2010) (defective window claims against construction manager were dismissed because the owner replaced the windows and deprived opposing experts an opportunity to conduct their own analysis first). [\[back\]](#)

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