

# Smart Phones, Smart Policies: Social Media Risk Management for Brokers

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### WHERE TO BEGIN?

Social Media, New Media and Web 2.0

“Web 2.0” is a phrase that we have all repeatedly heard but may not fully understand as it relates to a real estate brokerage. To put it simply, “Web 2.0” is Internet software that enables Internet users to create their own content, allowing for interactivity and relationship building over the internet. Web 2.0 includes blogging, wikis, virtual communities and social networking sites. The social sites you’re probably the most familiar with are LinkedIn, Facebook, Twitter and YouTube. There are many more sites devoted to on-line relationship creation and curation and more sites are added each day. As a Broker, it is vital that you understand the role of the web in your brokerage and your role in managing your brokerage in the web.

So, Where to begin?

1. Conduct an on-line audit of your Brokerage.

If you “google” the name of your Brokerage, what appears? Use your preferred search engine to conduct a search of key terms regarding your brokerage, your name, the brokerage name, names of your agents, etc. Use the search results to guide you in determining your on-line presence.

2. Conduct an off-line audit of your Brokerage.

Ask your agents to provide you with information concerning their web presence. Do they have a business web-site? Are they actively using social media? What benefits and what drawbacks do they associate with social media?

3. Assemble your “A Team”

This team will be assisting you in creating or changing the social media policies and procedures manual for the Brokerage. The team should have members who actively use social media and embrace new media as well as members who refuse to adopt new technology and do not see value in social media.

4. What is the role of social media and the web in the Brokerage?

Is social media a tool to establish and strengthen relationships with previous, current and future clients? Will social media and the web play a greater role in the Brokerage and serve as a place of business in the same way as the bricks and mortar office?

5. Conduct an audit of potential risk.

There are many potential risks associated with the use of social media. This class will address several of those.

6 Start writing!

The policy for social media use should be written in a manner that all agents and staff can grasp and clearly understand what is expected of them. You should consult with legal counsel during this process to ensure that your policy is appropriately addressing any concerns you have.

## **WHO'S YOUR REGULATOR?**

The use of social media or new media by a Real Estate Brokerage is heavily regulated. The following is a list of just a few of the parties and laws regulating your usage.

National Labor Relations Act

Electronic Communications Privacy Act

Stored Communications Act

Communications Decency Act

Wireless Communications and Public Safety Act

The Copyright Right Act

The Digital Millennium Copyright Act

The Fair Housing Act

The Real Estate Settlement Procedures Act

The Sherman Anti-Trust Act

The Federal Trade Commission through the regulation of testimonials

The National Association of REALTORS® Code of Ethics

State Regulatory Body

State statutes regulating the relationship between the Broker and its clients and customers

The Terms of Use of each individual web-site used

Service agreement between MLS provider and the Brokerage

Franchise agreements

We can't forget the United States Constitution and the 1st and 4th Amendments as well as the important role of the policies adopted by the Broker and the Brokerage to self-regulate.

## **CLIENT CONFIDENTIALITY**

You and your agents owe a duty of confidentiality to your client. There are a myriad of ways that new technology simplifies violating that duty to we must be aware of.

1. Using the name of the client in an advertisement.

That Facebook post by the agent saying they're helping "Paris find a new pad in the 'Bu" is an advertisement and the client may not appreciate having the Facebook friends of their agent put on notice that she is moving to a new neighborhood.

2. Third Party Storage sites

There are many reasons why a brokerage keeps clients records. State law requires it, your accountant appreciates it (sometimes), you may want to harvest the files for information later and, potential litigation. There are many things to consider when choosing to store those records in an on-line third party storage site.

- a. Security: How easy is it for the security of the on-line provider to be hacked? Information in the records you keep can provide a criminal with all the information needed to cause financial harm to your client.
- b. Notice: If the security of your data is breached, when and how will you be notified by the service provider?

- c. Indemnification: If you suffer a financial loss due to litigation resulting from a security breach, will the on-line provider indemnify you?

Many states have adopted laws regulating how personal data is maintained, an agent should be aware of those requirements as well.

## **Brokerage Confidentiality**

The internal operations of the Brokerage are important and in some situations the Broker may want to take steps to insure that some operations remain private. A Broker may want to conduct a “trade secret audit” that is, the Broker may want to determine if any of their operations should be protected as a trade secret. A trade secret is something that is:

1. A secret;
2. Not generally known in the industry, and gives a competitive edge;
3. Cannot be reverse-engineered by a competitor except with significant investment of time, effort and expense;
4. Owner must take reasonable affirmative measures to safeguard the secret.

If the Broker determines that something within their operation should be protected as a trade secret, he or she needs to make it clear to agents that there is an expectation of confidentiality.

## **Hold Your Fire...**

At some point, your brokerage will be mentioned on the internet in a manner that you don't appreciate. This could be a negative review on a web-site, a mention in a social media posting or an entire web-site solely devoted to critiquing the performance of your brokerage and one of your agents. How you respond is important and you should have a policy in place that your agents are aware of that makes it clear:

1. Who has the authority to speak for the company,
2. How negative reviews, responses and comments are handled.

## **Getting Dooood**

Can a real estate agent have a “personal life” on-line that is distinct from their “professional life” on-line? When creating a policy concerning how an independent contractor agent or an employee are to represent the Brokerage on-line, the Broker needs to be aware of the National Labor Relations Board guidance concerning this issue. A Broker can't restrict employees from commenting through social media in a manner to try and create a healthier work environment. A Broker can take measures to protect their reputation on-line through policies.

## **Copyright Law**

What you don't know can hurt you...

Real Estate Professionals encounter countless situations involving copyright law each day. Unfortunately, not all Real Estate Professionals are aware of the role the U.S. Copyright Act and the Digital Millennium Copyright Act play in their practice.

The following are items that are copyrightable subject matter:

Literary Works,  
Musical Works,  
Dramatic Works,  
Pantomime and Choreograph,  
Pictorial, Graphic and Sculptural,  
Motion Picture and Audiovisual Works,  
Sound Recordings,  
Architectural Works.

Let's say a real estate agent wanted to create a virtual tour of a property and post that video on his website and also upload the video to YouTube and then post on Facebook a link to the video: there are many copyright issues to take into consideration.

1. Who is the "author" of the virtual tour? The author is the owner of the "bundle of copyrights" associated with the work.
2. Is the virtual tour truly a virtual tour or is it a set of pictures running as a slideshow? If the virtual tour is a set of pictures running as a slideshow, then each picture is a work subject to copyright protection and the author must be determined before the picture can be used. If the virtual tour is a video of a property then it's potentially an audiovisual work subject to protection. If the agent took the pictures or filmed the video then the agent is most likely the author and can use the pictures. However, if the agent has transferred his copyrights to another entity, such as his Broker or a multiple listing service, then the agent must have a license to create the virtual tour.
3. If the agent wishes to use music in the background of the virtual tour, that music is most likely subject to copyright protection as well and the agent must get a license to use that music.
4. When the agent uploads that virtual tour to YouTube, the terms of use for that site dictate the relationship between the agent and the site.

So, where to begin?

1. Always ask permission to use the work of another.
2. Read your MLS agreement to determine who is the owner of the copyright on pictures.
3. Read the terms of use of web-sites you are going to use to advertise listings.