

Social Media Deletion in Crisis Communication: Litigation Issues Concerning Deleted Social Media Content

Cayce Myers, Ph.D., LL.M., J.D., APR
Assistant Professor
Virginia Tech
181 Turner Street NW
113 Shanks Hall (Mail Code 0311)
Blacksburg, Virginia 24061
mcmyers@vt.edu

Introduction

Social media is increasingly an important source of evidence, especially if the underlying issue involves online behavior. However, in public relations practice the management of a client's online reputation is an important part of reputation maintenance or restoration. Corporations and individuals alike delete potentially embarrassing or inaccurate online information in order to preserve their carefully crafted reputation. In fact, in the past three years there have been well-known examples of social media content being removed: Steve Harvey's apology tweet for the Miss Universe debacle in 2015, McDonald's 2017 tweet criticizing President Trump, and Dove's 2017 Facebook promotion that was criticized for racial insensitivity. However, while deleting social media content is standard practice by many users, the surrounding circumstances of the deletion can lead to legal consequences.

Because social media is increasingly evidence in litigation, it is important for PR practitioners to know how deleting content can affect them, their clients, and the underlying litigation. Lawyers have increasingly been frustrated by rules that dictate how to preserve social media for trial. Recent cases have resulted in legal sanctions for attorneys who advise clients to manage the overall reputation reflected in social media accounts. However, deletion of social media content goes beyond a frustration for lawyers and clients because it affects PR practitioners. Deletion of online content, legally termed spoliation of evidence, can result in sanctions for the organization and its PR practitioner. This is particularly important because social media deletion typically occurs when unapproved, embarrassing, or controversial content is posted. This removal of content regularly occurs during an organizational crisis, which frequently coincides with litigation.

These new realities of litigation have direct implications for online reputation management. Given that laws against social media deletion contradict a routine reputation management strategy of PR practitioners, it is important for practitioners to know the legal consequences for their actions. This legal trend may even prompt organizations to become overly cautious about social media management, which prevents PR practitioners from using their unique skillset to maintain an organization's reputation. By knowing the parameters of these laws, PR practitioners can develop best practices and defend their professional choices while working within the law when managing social media. Recent state laws specifically address the deletion of online content that has evidentiary value. Because PR practice utilizes social media deletion as a strategy for

online reputation maintenance there is a tension between PR practice and the law. This paper examines the legal issues surrounding the deletion of social media content, and concludes with practical suggestions for PR practitioners.

Methodology

Current practices in online reputation management support the idea that while engagement with publics may be important the real concern is over what messages are out there for the public to see. Because of that deletion of social media content posted by users or third parties has become a commonplace practice for organizations. Deletion of problematic content, rather than engagement, seems to have some benefits. First, it does not require the user to interact with the negative post. Second, it disallows other users from engaging in the post. Perhaps most appealing, it allows the user to craft the dialogue it wants the public to see, and by limiting access to negative or unflattering commentary the social media owner creates (the illusion) of total control.

However, deletion of social media content seems to run afoul of ethical norms and practices of public relations. It also creates issues surrounding organizational trust, transparency, and engagement with publics. Despite this deleting social media content is a regular practice used by organizations and individuals alike to manage content. Recently, however, this issue has triggered legal implications for organizations or individuals facing a crisis. These implications are important to understand as courts now view social media posts as important evidence. Given this new reality this study seeks to answer the following research question: What are the legal implications for deleting social media content during litigation? From this initial research question this study also seeks to answer several sub-questions:

- What type of legal sanctions (if any) do parties receive for deleting social media content?
- Under what circumstances is social media content deleted during litigation?
- Are there circumstances where social media deletion may be legally justified?
- What implications do laws on social media deletion have for PR practitioners?

To answer these research questions this study legally analyzed federal and state civil cases involving social media deletion. These cases ranged in courts from trial courts to state supreme court decisions. Because social media deletion is frequently an issue that arises during the discovery process some of the cases included in this study are trial court orders and other unreported court orders. Looking at these types of cases allows this study to examine social media deletion at the most granular level in order to fully understand the issues, rationales, and implications for deletion.

Legal analysis is a form of qualitative textual analysis of legal text. It involves looking at patterns, themes, and rationales given by judges for their decisions. Because U.S. law operates in a common law tradition legal analysis requires the researcher to look at prior decisions and orders in order to fully understand the nuances and specificity of courts' decisions. From this analysis of court decisions larger patterns of court decisions, and trends among courts in handling these types of issues.

Implications for public relations practitioners

The questions about social media spoliation and deletion present an interesting intersection between reputation management and legal consequences of content preservation. To date there is no case that discusses public relations practitioners' roles in deletion of online content, and no case current involves a deletion of comments by a

non-party or non-attorney. However, it is easy to imagine how this area of law could apply to public relations. A public relations practitioner heavily involved in social media maintenance for a client could utilize strategic deletion of negative or outlandish comments in order to preserve the reputation of a client. It is also easy to imagine a scenario where an organization faces a crisis in which their social media accounts fill up with hate-filled accusations that ultimately clutter the message that the organization wants to convey. Strategic deletion of those comments could also be warranted. Perhaps most plausible is an organization facing a crisis in which information has to be delivered, and a social media message is sent out only to be corrected later. Perhaps it is good PR to delete the earlier, more inaccurate message and replace it with a more accurate and up-to-date message.

Of course, these are not the only scenarios where public relations deletion of content could occur, but they are situations that have happened. Equally important to social media content is what to do with the older content that is being removed. As previous cases across the U.S. have shown social media deletion can present a host of problems, even when litigation is just on the horizon and is not a reality yet. Because of this PR practitioners need to keep four things in mind when examining deletion.

Think before you delete. This may seem like an obvious suggestion, but deletion as an instinct needs to be tempered with a cost-benefit analysis. While it is true that deletion prior to a lawsuit is not viewed as purposeful as deletion during one it is important to remember that the rules of evidence do not view discoverable items from the lens of admissibility. Instead discovery laws look at potential evidence through the lens of relevance. If a social media user or manager is looking at content it is wise to consider what content may be more important than others. Deletion is an active practice, so it is going to be difficult for a user to claim that he or she deleted content accidentally. Moreover, deletion of relevant social media content seems to end up with an adverse inference instruction at trial. While the impact of such an instruction can only be evaluated on a case-by-case basis it is important to avoid this type of situation, if possible.

Know the risks and benefits of your privacy settings. This is a piece of advice that is more appropriate for individuals than for large organizations who use social media in a much more open way. However, privacy settings are important, especially if you are inviting others to comment on a social media page. While openness in social media engagement is important there is an inherent benefit in limiting those who can comment and see posts. These limitations can both make an account more manageable in terms of interaction, but also in terms of content control.

If you delete content have a way to store that content elsewhere. This is perhaps the big take-away from the social media spoliation cases. In all of the cases that have been analyzed in this study all of them could have been avoided if the content was stored elsewhere. This may require social media content managers to take screen shots or work with IT professionals to make sure there is a backup in content. For those posting content that is later updated and removed it is essential to store the previous content even if litigation is not immanent. Having the ability to know what you have said is almost as important as what you are saying now.

Do not automatically assume that negative content needs to be deleted. This piece of advice brings the conversation back to public relations reputation management. The

literature suggests that reputation is inextricably linked to historical action and past behavior. If transparency and engagement are hallmarks of good reputation then it serves to reason that engagement, rather than deletion, should be the first option for social media management. However, like all theories there are limitations to application. Sometimes content has to be removed for various reasons, but when faced with the decision of deletion or engagement, engagement should win.

Conclusions

This study focuses on an emerging area of law that will continue to grow as technology and use changes and expands. There are obvious areas that need further inquiry. Perhaps foremost among these is the implication of social media deletion in a non-U.S. context. As the law shows the discovery approach and spoliation standards for social media was an import (though misinterpreted) from Canada. Other jurisdictions outside the U.S. have different approaches to discoverable material. Equally important is that other non-U.S. jurisdictions have different views toward privacy, and the laws that affect privacy, on social media and other area, sometimes radically differ from those in the United States.

What is known is that social media spoliation is something that is being addressed by U.S. courts at all levels. It seems that lawyers now more than ever are in the business in reputation management, and the contours of what they advise their clients are affected by laws and professional guidelines. PR practitioners are similarly situated to lawyers in that their advice for clients' online reputations are affected by the same legal standards. While PR practitioners cannot be disbarred as attorneys can be, they can be complicit in the unwitting destruction of evidence. Knowing the law is important in the digital age, especially when so much social media work is done by individual users at a moments notice on portable devices. However, the bottom line is that like any communication, social media deletion and preservation is a deliberative act that requires the knowledge and expertise of the law and public relations.