

# TO POST or NO That is the Le

BY MARC R. JACOBS, ESQ.

**T**he Internet has revolutionized the way gymnastics clubs and organizations do business through the use of websites, Facebook, Twitter, Instagram, and other social media sites to communicate information, as well as market, network, promote and advertise. Social media continues to evolve as new sites emerge offering unique platforms to distribute and share information, enabling clubs and organizations to reach thousands of people instantly. Further, most social media accounts are free to set up and manage, making them a cost-effective tool.

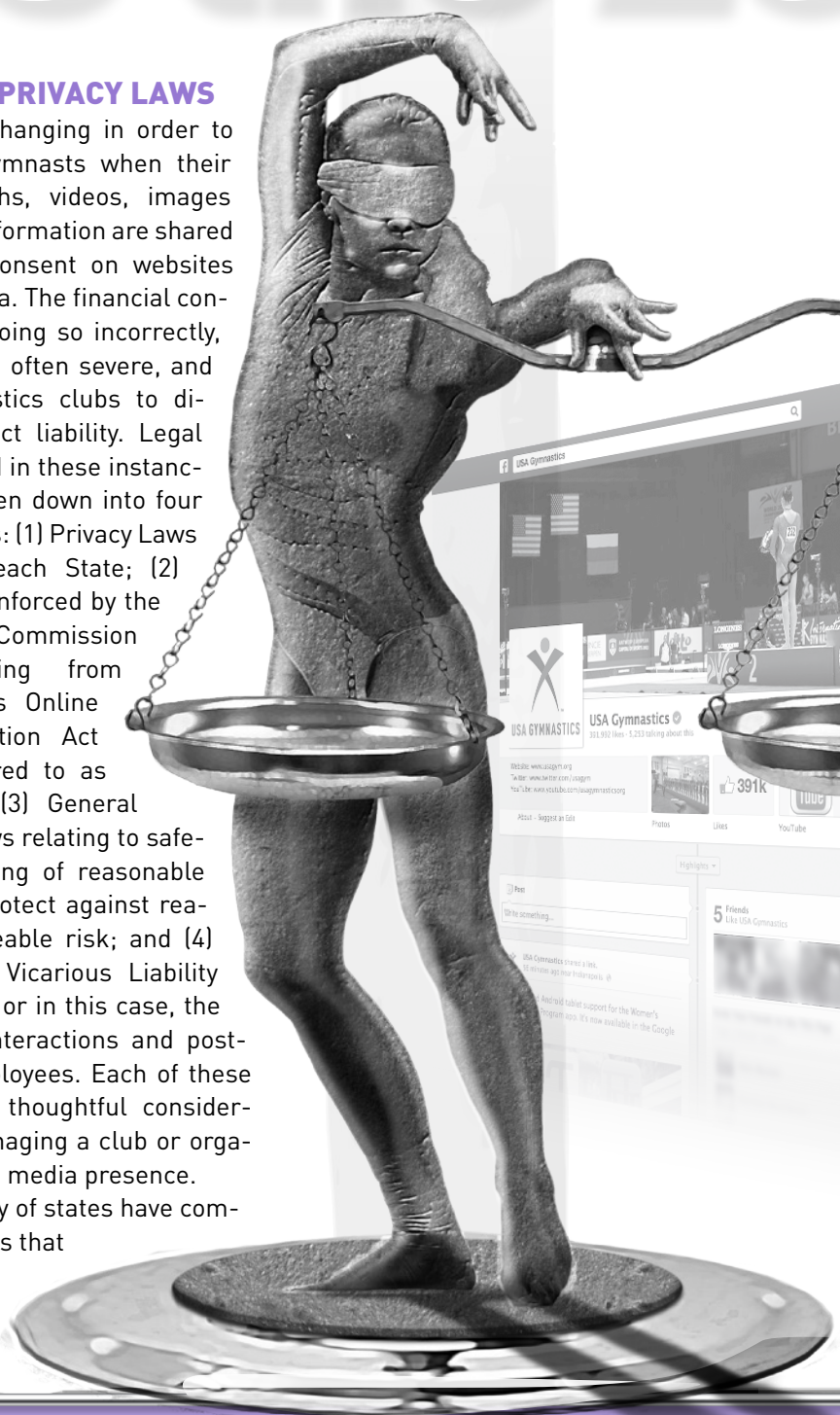
Like many advances in technology, social media invites the scrutiny and oversight of entirely new areas of law concerning child safety and privacy rights, which pose liability risks to gymnastics clubs and the children who participate in them. While some of the liability exposure risks stem from common sense, others are more subtle, requiring gymnastics clubs and organizations to strongly consider the implications before they post, tweet, upload, share, pin, re-pin, publish or promote, or even simply “like” someone else’s post.

To post or not to post? That is the legal question.

## INCREASED PRIVACY LAWS

**L**aws are changing in order to protect gymnasts when their photographs, videos, images and personal information are shared without their consent on websites and social media. The financial consequences of doing so incorrectly, or unsafely, are often severe, and expose gymnastics clubs to direct and indirect liability. Legal concerns raised in these instances can be broken down into four main categories: (1) Privacy Laws applicable in each State; (2) Federal Laws enforced by the Federal Trade Commission (FTC) stemming from “The Children’s Online Privacy Protection Act of 1998” referred to as the “COPPA”; (3) General Negligence Laws relating to safety and the taking of reasonable measures to protect against reasonably foreseeable risk; and (4) an Employer’s Vicarious Liability for the actions, or in this case, the social media interactions and postings by its Employees. Each of these areas requires thoughtful consideration when managing a club or organization’s social media presence.

The majority of states have complex privacy laws that make it unlawful and/or



# NOT to POST — Legal Question

illegal for anyone to photograph or videotape a child, or use their name or likeness, in connection with any commercial purpose without their parents' knowledge, permission or consent. These laws have been interpreted broadly to include websites and social media platforms where the services that a company provides are marketed, promoted, advertised, touted or sold.

Because gymnastics club websites and social media pages operate as an extension of their business, they are regulated by state privacy laws.

Violations of these state privacy laws can be as much as \$750 per violation, plus attorneys' fees. People are litigious—a trend that is exacerbated when disgruntled families leave or switch gyms, or are expelled for outstanding account balances. When an opportunistic class action attorney incorporates a minimum statutory damage penalty into a class action lawsuit, suddenly a gymnastics club could find itself facing a lawsuit on behalf of hundreds of alleged plaintiffs for un-consented use of a photo, name, video or likeness, multiplied by \$750 or more per Plaintiff, turning a \$750 problem into a *six or seven figure*

*damages claim* plus attorneys' fees.

The solution to this problem is simple: clubs and organizations should obtain consent forms from parents allowing the use of their children's photographs and other protected information in connection with marketing, advertising and promotional materials in print and online with club websites and social media. These consent forms should be included in the packet of documents that new families sign when registering or signing up for a class or team program. For team members, a consent form is best included in the team handbook. For existing members, it is always wise to have families sign updated team handbooks and/or forms on an annual basis. These are good methods for keeping up with legal requirements and incorporating new club policies.

## COPPA

After the U.S. federal government determined that more than 10 million children under the age of 13 were using the Internet in 1998, it enacted The Children's Online Privacy Protection Act ("COPPA"). Prior to COPPA, online services could be used to locate children, and lists of children's names and addresses could easily be purchased over the Internet. Faced with an obvious

growing concern, Congress enacted the COPPA to protect the privacy of children online, including their names and identifying information. The FTC is the governing body which regulates and enforces the COPPA.

COPPA regulates all persons or entities that operate websites or online services on the Internet for commercial purposes that involve the dissemination of children's personal information, name and address. Under the law, it is the responsibility of clubs' website and social media page owners because they *control* the content and thus are considered the "operators" of those sites and pages. Any personal information collected about children under age 13 is regulated under COPPA. The term "collect" is not clearly defined, but generally means to gather information from children or parents, who either enter the information online, *or other collection methods*, i.e., such as gathering and taking photographs and video.

Effective July 1, 2013, COPPA expanded its list of "personal information" to include as protected, *geolocational* information about a child, as well as photos, videos and audio files that contain a child's *image or voice*. Most people don't realize that their smart phones imbed precise GPS location information into photos

# TO POST or NOT to POST — That is the *Legal* Question

...Continued

taken by those devices. Because this expansion of “personal information” in 2013 has greatly increased COPPA’s scope, it is prudent for all gymnastics clubs to take appropriate precautions to comply with COPPA’s consent requirements. This is easily accomplished by making the required disclosures and obtaining parental

consent. Before collecting, using or disclosing personal information from or about a child, an “operator” must take into consideration available technology and make reasonable efforts to ensure a child’s parent receives notice of the operator’s information and disclosure practices (i.e., what is

being collected and how and where it is intended to be used) and consents to those practices.

Under COPPA, the penalties are as much as \$16,000 per violation plus attorney’ fees, subject to the discretion of the FTC. Civil actions may also be brought by the Attorney General of an individual state, and/or even by private attorneys and plaintiffs who bring suit under their state’s Private Attorney General Act (“PAGA”) statutes. These allow plaintiffs to bring a private action on behalf of the Attorney General (with approval from the Attorney General) or a “right to sue” type letter. These suits can become astronomical when incorporated into a class action lawsuit where damages multiply.

The important thing to remember is that compliance is easily achieved through the disclosure and consent process. Equally important, because COPPA is not intended to be punitive but to protect children, it incorporates a “safe harbor” provision that allows non-compliant “operators” to cure the problem and obtain approval from the FTC after notifying it of the remedial actions taken.

## GENERAL NEGLIGENCE

If a club is in compliance with the state and federal privacy laws, the club’s risk of exposure to the aforementioned statutory schemes is greatly reduced. Unfortunately, however, statutory compliance does not eliminate all liability risks of postings on a gymnastics club’s or organization’s websites and social media pages, nor does it eliminate real-world risk to children.

Continued on page 10...



# TO POST or NOT to POST — That is the *Legal* Question

...Continued

Consider the following scenario: Competitive Gym USA posts a photo of a smiling 9-year-old holding a winning medal on its Facebook page. The post reads: "Congratulations to Jane on taking 1<sup>st</sup> place in the all-around at this weekend's 2013 Spring Invitational." An unwanted third party sees that post and refers to a publicly available meet scores website looking for the Jane from Competitive

that 25 people have "Liked" the gym's post about Jane, including one person by the name of Suzy Doe. Clicking on Suzy Doe's name, the third party is referred to Suzy Doe's personal Facebook page where the third party can confirm that Suzy Doe is Jane's mother, and can see photographs of Jane, and many other items of publicly available information. This is because Suzy Doe's Facebook page reveals the city in which they live, Happyville, USA, where Suzy was born, where she went to high school and even to whom she is married — Steve Doe. Clicking on Suzy's husband, Steve Doe, this third party finds out just as much information about Steve. Finally, the third party performs a simple Internet search to find real estate records in Happyville, USA, locating the only house in Happyville, USA, that is owned by both Suzy and Steve Doe. Based on a seemingly innocuous posting, the unwanted third party now has Jane's home address information, and enough information to fabricate a rich back story, believable by a young, impressionable child, placing Jane in increased danger of a predator. And of course, the third party knows where Jane does gymnastics multiple days per week because the gymnastics club's name is known.

Protecting the privacy and safety of children is of paramount importance. Gymnastics clubs and organizations should implement appropriate guidelines for employees and staff and frequently monitor social media sites to ensure they are in compliance. Applying common sense and implementing content, privacy and safety policies with respect to

the content of postings, and who can see the postings, and balancing those with the reasonable precautions and safety measures that can and should be taken, is critical for protecting children and complying with the general negligence laws of clubs' respective states.

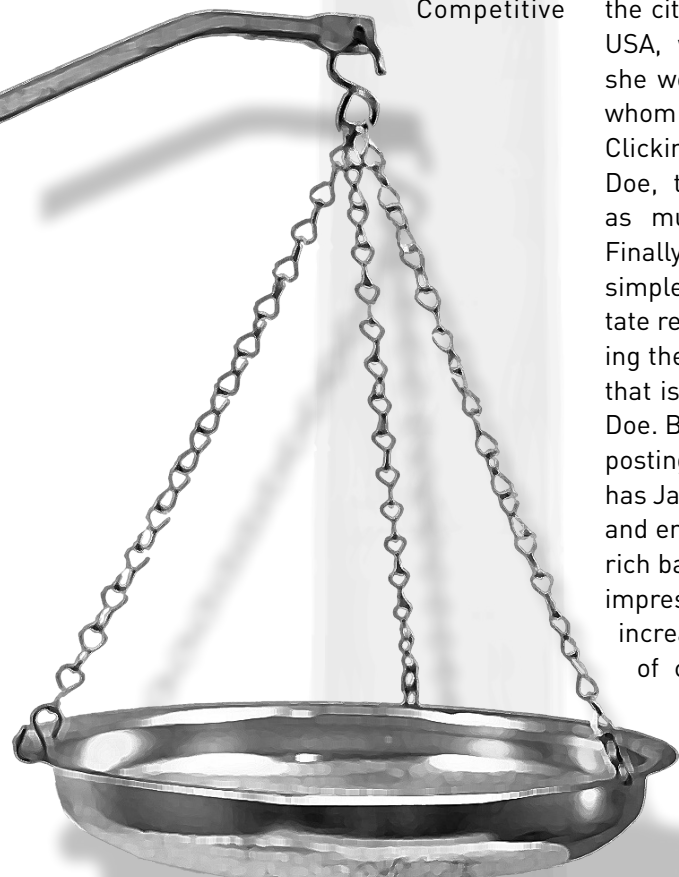
## VICARIOUS LIABILITY FOR EMPLOYERS

**W**hile parents may consent to the club's use of photos, videos and the like, that consent does not automatically flow to employees of the gym who may disseminate that information on their separate social media sites, unaffiliated with the club. This raises exposure to the club under a legal theory known as "vicarious liability," which is a form of strict, secondary liability arising under the common law doctrine of agency — respondeat superior — the responsibility of the superior for the acts of their subordinate. Employers are vicariously liable under the respondeat superior doctrine for negligent acts or omissions or violations by their employees in the course of employment (sometimes referred to as 'scope of employment').

The taking of photographs and video by coaches and employees of children while they are being paid and performing their duties, and the separate sharing of those photos or videos by those coaches or employees on third party social media sites, without the consent of the parents, could arguably lead to vicarious liability problems for the employer who is under a duty to control the employees' actions at work. While the parents

Continued on page 12...

Gym USA who took first place in the all-around at this weekend's 2013 Spring Invitational — and there is Jane's first and last name listed with all of the other gymnasts. Now, this third party has Jane's last name — Jane Doe. Referring back to the Facebook page, this third party sees



# TO POST or NOT to POST — That is the *Legal* Question


...Continued

may have consented to the gymnastics clubs' use of name, photographs and videos for the clubs' benefit, those consents do not extend to the employees who operate outside the scope of the consents obtained by the club, when they take photographs or video of gymnasts while they are working, and take those images outside of the workplace.

Websites and social media sites are the current gold standard in marketing, advertising, promotion and communication for businesses — gymnastics clubs cannot afford to abandon these cost-effective tools.

*For more information regarding athlete welfare, including sample policy templates for mobile and electronic communications and more, visit USA Gymnastics' Clubs Care Campaign website at [usagym.org/ClubsCare](http://usagym.org/ClubsCare).*

Being cognizant of the increased potential for liability and instituting best practices to comply with privacy laws should be fundamental when posting to websites and social media pages. Taking these steps can go a long way to both protect the welfare of gymnasts and guard against liability risks that could impact a gymnastics club's bottom line.

To post, or not to post? Do so only after first giving thoughtful consideration and implementing best practices. Then, feel free to hit **enter, post, tweet, send, share, pin, upload** and/or **publish** buttons. 

*Marc R. Jacobs is a partner at Michelman & Robinson, LLP, a national law firm with offices in Los Angeles, Orange County, San Francisco, Sacramento and New York. He is the parent of recreational and competitive gymnasts and represents gymnastics clubs throughout the U.S., assisting them with business opportunities as well as labor and employment and permitting issues. Jacobs is also a well known cartoonist and has been published in USA Gymnastics magazine and British Gymnastics magazine. He is headquartered in Los Angeles, California. For more information, please visit [www.mrllp.com](http://www.mrllp.com).*