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Social Networking Policies and Legal Implications

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Speakers

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CAVEAT EMPTOR!

- Changing area of law
- Developing quite quickly and differently across different jurisdictions
- Anything cited herein should be verified for currency and accuracy for your area o'the world

Where Are We Now?

A Quick Survey by Show of Hands

- How many of you use Facebook?
- How many of you have blogs?
- How many have a social networking policy at your firm?
- How many have completely blocked some or all social networking sites?
- How many have pending lawsuits around social networking issues? (just kidding)

Does this "have legs?"

- More than 60% of Twitter users have stopped using the service within a month of joining.
 - <http://www.theaustralian.news.com.au/business/story/0,,25406742-36418,00.html>
 - http://blog.nielsen.com/nielsenwire/online_mobile/update-return-of-the-twitter-quitters/
 - Current stats: 15-20 million users (1300% growth in 6 months)
- Other sites like Facebook and MySpace have retention rates in the 50-70% range
 - Facebook = 225 million users
 - LinkedIn = 45 million
- If all the Facebook users were a country, it would be the _____ largest country in the world.

A Brief Pause . . .

- What's so different about social networking versus face-to-face social/professional interactions?
- Is the concern warranted?
 - The broader audience of an online presence – your firm's reputation
 - Exposure to legal liability for employer behavior (harassing, offensive or defamatory material)
 - Breaches of proprietary information (consciously or inadvertent)
- Don't forget – it can have legitimate business uses

NOT Performance Policy

- Don't confuse a social media policy with HR policies regarding performance issues and how people spend their time
- Policy should treat employees and partners like the adult professionals they are.

Policy Spectrum

- Live in denial
- Ban access to social network sites (for technical reasons? HR performance reasons?)
- Tolerate (with or without defined parameters)
- Embrace social networking (e.g., for marketing efforts)
 - Training for employees on best practices
 - Official firm pages on social networks
 - Designate "official" bloggers/contributors

Firm Culture Is A Factor

- Do you have a command-and-control firm culture? Do you have an open, transparent culture?
- Your policy will inevitably reflect your culture.
- No matter how buttoned down your culture, understand that it is hard to control social computing.

A Quick Discussion of Generational Differences

- Perceptions of privacy
- What's "appropriate?"
- What are the boundaries between "public" and "personal" personas? In the internet age, do they even exist?

Great Moments In Policy Making - #1

- HELENA, Mont. - A flood of criticism has prompted a Montana city to drop its request that government job applicants turn over their user names and passwords to Internet social networking and Web groups. The city of Bozeman abruptly suspended the practice Friday, saying it "appears to have exceeded that which is acceptable to our community."
- Since KBZK-TV of Bozeman reported on the policy Wednesday, Web forums have been abuzz over the issue. The American Civil Liberties Union of Montana immediately questioned the legality of the policy.

http://www.msnbc.msn.com/id/31446037/ns/technology_and_science-security/

Players in Developing a Policy

- **Social Media Policy Team**
 - Human Resources
 - Marketing
 - IT
 - Attorney Bloggers
- **Doesn't stop with policy development**
 - Identifying best practices
 - Providing training
 - What level of support for the attorneys (blogging, wikis) from IT?
 - Monitoring and reporting
 - Google Analytics

How Many Policies Do You Need?

- Perhaps a broad "online responsibility" policy that encompasses:
 - Social Networks (LinkedIn, FaceBook, MySpace, etc.)
 - Blogging
 - Wikis
 - Email
- Separate policies for attorneys/staff?

Impact on Existing Policies

- Important to review existing policies to dovetail and update – some likely candidates:
 - Public Relations
 - Code of Ethics
 - Privacy
 - Copyright
 - Confidentiality
 - Internet Usage
 - Software
 - Email

What Is the Scope of your Policy?

- Activities on the internet or also social computing behind the firewall?
 - Web 2.0 (Facebook, Twitter, etc.)
 - Enterprise 2.0 (Yammer, internal blogs, etc.)
- Does the policy cover social computing using firm equipment only?
- During office hours or after hours?
- Work-related interchanges and/or personal interchanges?
- Planned marketing efforts?

Policies are not Procedures

- We often see lengthy "policies" that include detailed step-by-step instructions
 - E.g., Email Policies with detailed email signature appearance and "how to file in DMS" instructions
- Instructions = procedures . . . be clear about this distinction.
- Policies that are short and clearly written are most likely to be read and followed

Clear Boundaries Between Individuals and Firm?

- Is a disclaimer necessary or helpful? What should it cover? Formation of attorney-client relationship?
- Professional Ethics and Responsibility requirements should be reflected in the policy (e.g., advertising)
- When should firm affiliations be explicitly disclosed? Alternatively, can they ever be completely hidden?
- What are the confidentiality expectations?
- What are the consequences for the employee/partner of non-compliance?

Great Moments In Policy Making - #2

- **Problem:** Kids constantly texting and talking on cells in class
- **Solution:** St. Ansgar passed a motion authorizing the expenditure of up to \$5,000 for a cell-phone jamming system that would turn off the communications capabilities of the phones. (Games and other applications stored on the handsets would still work, however.)
- **NEW Problem:** It's illegal to jam cell phone signals, as the FCC has deemed such practices a risk to the general safety of the population, since calls couldn't go out or be received in case of emergency.
- **Outcome:** Policy idea scrapped
- <http://tech.yahoo.com/blogs/null/146847>

Let's Get Legal

- Are there regulatory obligations? (FINRA, SEC, etc.)
 - <http://www.compliancebuilding.com/2009/06/26/twitter-and-compliance/>
- At-will employment impact
 - Recent federal court cases, litigants used information on LinkedIn to support their case.
 - Who is allowed to give "recommendations?"

But . . . But . . . FREE SPEECH!

- The First Amendment does not apply in situations involving private employees (it does, however, for government employees).
- Some states have laws protecting "off-duty" conduct.
- National Labor Relations Act safeguards discussion of wages, hours and/or other terms of employment.
- Whistleblower protection (such as Sarbanes-Oxley and Pennsylvania Whistleblower Law)

Cautions to Employers in Mining Social Data

- Just because it's on the internet doesn't make it a free-for-all in discovering what your employees are doing
 - Information discovered via social networks could tip into the same cautions and constraints that govern the interview process (sexual preference, pregnancy status, etc.)
 - Employers who violate the TOS of these sites or perceived ethical standards are not looked upon favorably by courts (e.g., creating false personas in order to gain access to employees' Facebook or MySpace accounts)

Lawyer Ethics Is Another Developing Area of Social Media

- *Twitter Discussion: Can a lawyer in City A go to Facebook and change the regional network that she lists on her personal Facebook account from City A where she lives and works as an attorney to City B in order to investigate a witness or opposing party who lives in City B?*
- The Philadelphia Bar Association issued an opinion this March disciplining an attorney for getting a 3rd party to “friend” a witness on Facebook on the lawyer’s behalf.

Great Moments in Policymaking #3

- No more games in our image – people will waste time
- What happened?
- People began downloading indiscriminately from multiple websites, including virus-laden sites
- Incredible burden on IT to clean infected computers

Technical and Resource Considerations

- Is it just limited bandwidth?
 - What is the technical impact of social networking?
 - Non-work related social networking and internet use
 - Streaming video/audio
 - Does the policy address this in a reasonable (and not outdated) fashion?
- What is the impact of policy on your IT and/or HR Dept.?
 - Policy should not place undue "policing" duties that may prove resource drains on these departments

Monitor Your Brand

- Social Media Audits/Monitors
 - Google Alerts, Trackur, Cymfony
 - Who will monitor/report?
- How will you manage internal problems?
 - "Ghost" Twitterers - that is, someone who impersonates a real person or company -- by the handle "hklaw" and "hklawtwits" have been bashing the international law firm of Holland and Knight (whose web address is hklaw.com)."
- How will you address defamatory material by outside parties?
 - Real Estate company sues Twitterer over following tweet:
 - *@[redacted] - You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay.*
 - Tweeter had 20 followers. Lawsuit has made tweet known to millions.
- "Cyberscrubbing" is a growing industry

Departing Employees

- Social network review when employees leave the firm?
- Ensure or encourage updates that remove firm connection to individual?
 - This does not remove historical (previously web-indexed) ties the individual may have to the firm.
 - Should their subsequent actions prove less than desirable, the internet will likely still reveal their previous connections.

Successful Launch of a Policy

- Education is a key element – help your employees:
 - understand the risks to themselves and the firm
 - use the tools safely and more effectively
- If every employee is a "brand ambassador," they should be trained to use this medium to represent the firm well.
- Consistency and Culture
- Docket for annual review for by Social Media Team:
 - Technology changes
 - Cultural changes
 - Marketing strategy changes

Read more about it . . .

Sample Policies

- Enterprise: List of 40 Social Media Staff Guidelines
 - <http://laurelpapworth.com/enterprise-list-of-40-social-media-staff-guidelines/>
- Social Media Policy Examples (including Harvard Law School; Gartner; U.S. Navy; U.S. Air Force; Intel; IBM; Cisco and more)
 - <http://123socialmedia.com/2009/01/23/social-media-policy-examples/>

Read more about it . . .

Policy Development

- CIO Magazine – "Twitter Tips: How to Write a Twitter Policy for Your Employees"
<http://www.cio.com/article/print/499049>
 - Note: Disagree with their Point 2 – Identify Twitter Accounts (demonstrates the wide range of opinion on appropriate policies and the undeveloped employment law around this topic).
- Protecting Employers From New Media
 - http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202432991714&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20NewsWire&cn=NW_20090813&kw=Protecting%20Employers%20From%20New%20Media&hbxlogin=1

Read more about it . . .

Etiquette

- New social etiquette: Please ask permission to tweet or tag?
 - <http://trueslant.com/KashmirHill/2009/08/10/new-social-etiquette-for-twitter-age/>

Read more about it . . .

Lawyer Ethics

- The Philadelphia Bar Association Professional Guidance Committee - Opinion 2009-02 (March 2009)
 - http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf
- When lawyers spy through Facebook: the ethics of “regional network” changes
 - <http://lawyerist.com/lawyer-ethics-spy-facebook/>

Read more about it . . .

Social Networking in Legal

- The Role of Social Networking in Law
- <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202432624155&src=EMC-Email&et=editorial&bu=LTN&pt=Law%20Technology%20News&cn=20090730&kw=The%20Role%20of%20Social%20Networking%20in%20Law>

Read more about it . . .

Privacy and Generations

- "How 10 digits will end privacy as we know it" – Ari Juels, CNET News 8/17/09
 - http://news.cnet.com/8301-1009_3-10310446-83.html?part=rss&subj=news&tag=2547-1_3-0-20
- It's SO over: cool cyberkids abandon social networking sites
 - <http://www.guardian.co.uk/media/2009/aug/06/young-abandon-social-networking-sites>