

**TRANSPORTATION RESEARCH BOARD
SOCIAL MEDIA WEBINAR
Breakout 6: Legal Considerations
September 21, 2011**

Practical Considerations and Practice Pointers as to Social Media and Social Media Policies.

1. Social media is oral conversation and written conversation at the same time.
2. Social media is a powerful tool, and can be highly useful. It can spread the word, and is a means of engaging in a conversation with the public and the industry.
3. A Social Media Policy cannot be created in a vacuum. Other policies are implicated when a person uses social media and when an employer is drafting a Social Media Policy, including but not limited to:
 - the entity’s Personal Conduct Policy;
 - the entity’s Sexual Harassment Policy;
 - the entity’s Crisis Management Policy;
 - employee’s rights of free speech under the First Amendment and state law;
 - Open Meeting (“Sunshine”) laws;
 - Freedom Of Information/Open Records Act;
 - for attorneys, the Rules Of Professional Conduct.
4. Employers must realize that like entity-provided computers and entity-provided PDAs, social media will not be used exclusively for business purposes. Conversely, employees must realize that whenever they use the entity’s domain name—even during personal time away from the office – the entity is implicated, all actions are public, and that the employer can be expected to hold the employee accountable.
5. Online searches are a reality, and in many circumstances ubiquitous. Social media users must expect that whatever he/she posts will be seen and retrieved by “strangers.”

6. The common sense guidelines for a Social Media Policy and for Social Media users:
 - You are responsible for what you post.
 - Be professional.
 - Obey the law.
 - Be transparent. Always identify yourself. Do not plagiarize. Give appropriate attribution to other’s work. Provide links.
 - Remember that what you post will be public for a long time.
 - Don’t tell secrets (the secret sauce recipe); lawyers must preserve confidentiality and privilege.
 - Follow the New York Times rule before hitting “send”: would you (or your entity) be embarrassed if your post appeared on the front page of the New York Times?
 - Be aware of Metadata.
 - There is potential personal liability for content.
 - Make it clear whether you are speaking for yourself or for your employer.

7. A recent article pointed out additional considerations as to the entity’s social media sites:
 - is review by compliance personnel or legal counsel to be required before communication as to certain topics?
 - what limits will be placed on the topics to be addressed through the entity’s social media accounts?
 - will employees be permitted to refer to the entity or entity’s issues when using their personal social media accounts?
 - will employees’ personal accounts be monitored for compliance with the policies, and if so, how?
 - how will the entity’s document retention policy be applied to, or modified, because of the use of social media?

“From Friend Request to Discovery Request: Issues Raised By Business Use of Social Media”, Matthew A. Cordell and Barry P. Harris, IV, Lexology (Globe Business Publishing, March 15, 2011)

8. On October 27, 2010, the National Labor Relations Board (NLRB) issued an unfair labor practices charge which alleges that an employer illegally fired an employee for posting negative comments about the company on Facebook. The employee posted negative comments about a supervisor on her personal Facebook page from her home computer. Other workers made critical remarks in response to her post. Section 7 of the National Labor Relations Act (NLRA) protects an employee’s right to discuss wages and working conditions with other employees. The NLRB alleged that the employer violated the employee’s right to engage in concerted activity. The NLRB also asserted that the employer’s internet and blogging policies violated the NLRA by prohibiting employees from publicly depicting the company in any way without permission and from making disparaging remarks about the

company or supervisors. American Medical Response of Connecticut, NLRB Reg. 34, No. 34-CA-12576 (10-27-10).

A SAMPLE SOCIAL MEDIA POLICY

Guidelines

1. Remember that the Internet is not anonymous, nor does it forget.

Everything written on the Web can be traced back to its author one way or another and very easily. Information is backed up often and repeatedly, and posts in one forum are usually replicated in others through trackbacks and reposts or references.

2. There is no clear line between your work life and your personal life. Always be honest and respectful in both capacities.

With the ease of tracing authors back from their posts and the amount of information on-line, finding the actual identity of a poster from a few posts and a screen name is not impossible. This creates an avenue for outside parties to link your personal writings to those you've done in a professional capacity. Always write as if everyone knows you. Never write anything you wouldn't say out loud to all parties involved.

3. Avoid hazardous materials.

Do not post or link to any materials that are defamatory, harassing or indecent. Comply with the firm's Code Of Conduct, Personal Conduct Policy and Sexual Harassment Policy.

4. Don't promote other brands with the firm's brand.

Do not promote personal projects or endorse other brands, causes or opinions. Be sure to respect third party copyrights. If a personal opinion must be posted, clearly state to all readers this does not represent the opinion of the firm.

5. Keep confidentiality.

Do not post any confidential or proprietary information in regards to the firm or its clients. Do not reference clients, other firm lawyers, or suppliers without their approval.

6. Don't pad your own stats.

Do not create anonymous or pseudonym online profiles in order to pad link or page view stats. Also, do not comment on your own or another's posts in order to create a false sense of support.

7. Always trackback.

When reposting or referencing a post on one of the firm's online sites, provide a link to the original post or story.

8. Identify yourself.

When relevant, identify your affiliation with the firm and your area of concentration.

9. Do not pat yourself on the back.

Do not post self-laudatory statements regarding your work or the firm's.

10. Do not qualify your work.

Do not post statements regarding the quality of your work or the firm's.

11. Do not approve recommendations or testimonials.

Recommendations and testimonials violate the ethics rules under which the firm operates. Individuals with the firm do not need to discourage others from posting promotional materials about the firm; however, the firm cannot link to them or have them posted on the firm's sites.

12. Do not promote successes.

Don't report firm results or outcomes or use words like "successfully", "favorably", "won" or "prevailed" in describing the firm's representations. The promotion of successes is prohibited for law firms. It also violates the ethics rules under which the firm operates.

13. Do not return fire.

If a negative post or comment is found online about the firm or yourself, do not counter with another negative post. Instead, publicly offer to remedy the situation through positive action. Seek help from the firm's Ethics Officer in defusing these types of situations.

14. Do not offer or appear to offer legal advice.

Individuals with the firm should not give legal advice or otherwise form attorney-client relationships in using social media. Formation of these relationships must be done only through the firm's regular procedures to avoid conflicts and other ethical problems.

RESOURCES

New York State Bar Association Committee On Professional Ethics Opinion 843 (9-10-10): a lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Florida Judicial Advisory Committee (December 15, 2009): lawyers and judges should not "friend" on Facebook. If they have done so, they should "unfriend" immediately. Online "friendships" could give the impression that lawyers are in a special position to influence their judge "friends." *See also* South Carolina Advisory Committee On Standards of Judicial Conduct – a judge may be a member of Facebook and may friend law enforcement officers and employees as long as they do not discuss anything related to the judge's official position. "Judges cannot isolate themselves from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities." (October 2009).

"What to Tell Clients About Facebook and Other Social Media Sites," by David L. Raybin and Benjamin K. Raybin (Tennessee Bar Journal, March 2011).

Guidelines and Policies available online:

-IBM Social Computing Guidelines: <http://www.ibm.com/blogs/zz/en/guidelines.html>
(Accessed 7-14-11).

-Weblogs at Harvard Law School–Terms Of Use:
<http://blogs.law.harvard.edu/terms-of-use/> (Accessed 7-14-11).

-Oracle-Sun News-Sun Blogs: www.sun.com/aboutsun/media/blogs/policy.html
(Accessed 7-14-11).

ABA Model Rules Of Professional Conduct:

–Model Rule 1.6 Client Confidences & Confidentiality

–Model Rule 1.18 Prospective Clients

–Model Rule 3.6 Trial Publicity

–Model Rule 4.2 & 4.3 Persons Represented By Counsel

–Model Rule 7.2 Advertising

–Model Rule 8.4(f) Misconduct.

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