

**MANAGING SOCIAL MEDIA:
AN EMPLOYMENT LAWYER'S PERSPECTIVE**

MAY 2010

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INTRODUCTION

I. SOCIAL MEDIA

A. In General

In the second quarter of 2006, the typical U.S. mobile subscriber made and received an average of 216 phone calls and 79 text messages per month. The Nielsen Company, *In U.S. SMS Tops Mobile Phone Calling*, Sept. 22, 2008, http://blog.nielsen.com/nielsenwire/online_mobile/in-us-text-messaging-tops-mobile-phone-calling. By the second quarter of 2007, the typical U.S. mobile subscriber made and received 228 phone calls and 172 text messages per month. *Id.* By the second quarter of 2008, the average was 204 phone calls and 357 text messages per month. *Id.* In short, users are now text messaging more than they are calling. *See id.*

The dominance of text messaging over calling is even more apparent among users age 13 to 17. During the second quarter of 2008, users in this age bracket sent and received an average of 1,742 text messages per month, compared to an average of 231 phone calls per month. *Id.* By the third quarter of 2009, the average number of text messages sent by this soon-to-be-employed generation had ballooned to 3,146 per month. Roger Etner, *Under-aged Texting: Usage and Actual Cost*, Jan. 27, 2010, http://blog.nielsen.com/nielsen/online_mobile/under-aged-texting-usage-and-actual-cost. Indeed, even users under the age of 12 were sending and receiving an average of 1,146 text messages per month as of the third quarter of 2009. *Id.*

This incredible surge in text messaging has translated into a staggering 4.1 billion text messages being sent each day in the U.S. during the first half of 2009, up from the already impressive 2.1 billion text messages per day in the first half of 2008. Press Release, CTIA, CTIA—The Wireless Association® Announces Semi-Annual Wireless Industry Survey Results (Oct. 7, 2009), <http://www.ctia.org/media/press/body.cfm/prid/1870>. And the fact that text messaging has spread so rapidly among younger users suggests the overall volume of texting will continue to increase in the coming years as those users age.

Social media—broadly understood for purposes of this paper to include blogs, wikis, microblogs, message boards, chat rooms, electronic newsletters, social networking sites, and other online sites and services that permit users to share information with others—has not penetrated daily life to the same extent texting has. For example, a recent study by the Participatory Marketing Network (PMN) and Pace University’s Lubin School of Business’s IDM Lab of 200 PMN panel members and consumers between the ages of 18 and 24 found that only 22 percent of those studied were using Twitter. Press Release, Participatory Marketing Network, Gen Y’s Are Not Yet Taking Flight on Twitter (Jun. 1, 2009), <http://thepmn.org/pressreleases/060109>.

Moreover, although 99 percent of respondents indicated having an active profile on at least one social media website, a subsequent PMN study of 203 PMN panel members and consumers between the ages of 18 and 24 found that respondents were far more likely to abandon social media sites than texting. Press Release, Participatory Marketing Network, Gen Y Would Abandon Social Networking before E-mail or Texting (Oct. 20, 2009), <http://thepmn.org/pressreleases.html>. In fact, e-mail, text messaging, TV, and talking on the

phone all ranked as more important to respondents than visiting social networks or social networking sites. *Id.*

Nevertheless, it is clear that the use of social media is on the rise. For example, on March 7, 2010, more than 13% of Academy Award viewers were simultaneously active on the web, a significant increase from the 2009 Academy Awards, when 25.6% of the population tuned in, but only 8.7% of viewers watched and surfed simultaneously. The Nielsen Company, *Facebook, Google and Yahoo are Top Sites While Watching Big TV Events*, Mar. 16, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/facebook-google-and-yahoo-are-top-sites-while-watching-big-tv-events. Similarly, on February 7, 2010, 14.5% of Super Bowl viewers surfed during the big game, up from 2009, when only 12.8% of viewers surfed during the game. *Id.*

A preliminary analysis of Nielsen's single-source measurement of Internet and TV, in Convergence Panel, and select National People Meter homes revealed that Facebook was the top destination of Academy Award surfers (39.5%), with Google coming in second (35.1%). *Id.* Those visiting Facebook during the awards also logged the longest average time online during the Awards, at 15.7 minutes, with MySpace coming in second at 9.8 minutes on average. The results were similar for Super Bowl XLIV, where 36 percent of multi-media users visited Google.com and 34 percent visited Facebook.com. *Id.* Facebook was still number one in terms of total average time at 18.6 minutes, while YouTube took second place with 16.7 minutes on average and MySpace fell to third with 14.5 minutes on average. *Id; see also*, The Nielsen Company, *14% Multi-Tasked and Got Social on the Web During Super Bowl*, Feb. 12, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/14-multi-tasked-and-got-social-on-the-web-during-super-bowl.

Multi-media event experience is not, of course, limited to awards ceremonies and sporting events. In the wake of the devastating earthquake in Haiti on January 12, 2010, the Twitter account for the Red Cross gained approximately 10,000 followers over the course of a few days. The Nielsen Company, *Social Media and Mobile Texting a Major Source of Info and Aid for Earthquake in Haiti*, Jan. 15, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/social-media-and-mobile-texting-a-major-source-of-info-and-aid-for-earthquake-in-haiti. Prior to the earthquake, the Red Cross had been adding 50 to 100 followers per day. *Id.*

Although there are other players globally—most notably Friendster in Asia, Orkut in Brazil, and V Kontakte.ru in Russia—it is clear that Facebook has overtaken MySpace and is (for the moment) the undisputed leader in the U.S. social networking space. LeeAnn Prescott, *Social Networking by the Numbers: Facebook is eating up MySpace, 2nd tier networks led by Tagged*, Feb. 10, 2010, <http://www.research-write.com/2010/02/social-networking-by-the-numbers.html>. In December 2009, Facebook had 111.9 million unique visitors, up from 54.5 million unique visitors in December 2008. Andrew Lipsman, *2009: Another Strong Year for Facebook*, Jan. 21, 2010, http://blog.comscore.com/2010/01/strong_year_for_facebook.html. Likewise, total page views and total time spent online at Facebook more than doubled during 2009. *Id.* Likewise, so-called “frequency metrics” for Facebook, such as average minutes per usage day (up 6 percent) and average usage days per visitors (up 37 percent), showed significant gains in 2009. *Id.* In fact, it is estimated that Facebook now accounts for approximately seven percent of all time spent online in the U.S. *Id.*

According to Facebook's own statistics, it presently has 400 million active users. Facebook, <http://www.facebook.com/press/info.php?statistics> (last visited May 3, 2010). To put that number in perspective, if Facebook users were considered Facebook "citizens," Facebook would be the third most populous country on the planet. See Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (last visited May 3, 2010).

B. By Employees

Not surprisingly, the overall surge in Facebook's popularity has translated into a surge in Facebook usage at work. On April 15, 2010, managed security company Network Box announced the results of its analysis of 13 billion URLs used by businesses during the first quarter of 2010. Press Release, Network Box, Network traffic increases to Facebook and YouTube (Apr. 15, 2010), <http://www.network-box.com/node/533>. According to the survey, more business internet traffic goes to Facebook than to any other internet site, with 6.8 percent of all business internet traffic going to the social networking site, an increase of one percent since the last quarter of 2009. *Id.* The same analysis revealed that YouTube takes up more business bandwidth than any other site, with ten percent of all corporate bandwidth being consumed by users watching clips, an increase of two percent since the last quarter of 2009. *Id.*

These findings are consistent with the October 26, 2009, analysis by Morse, an IT services and technology company, of a recent survey of 1,460 office workers in the United Kingdom. Press Release, Morse, Twitter and Social networks cost UK businesses (Oct. 26, 2009), http://www.morse.com/press_20.htm 4/. According to Morse, 57 percent of workers reported using social networking sites during the working day for personal use. *Id.* The survey further found such employees report spending an average of 40 minutes during working hours on social networking sites each week. *Id.* Interestingly, respondents estimated that their co-workers spent an average of 59 minutes *per day* on social networking sites. *Id.*

Morse estimated the cost of the productivity lost to social networking sites to be £1.38 billion (approximately \$2.12 billion). *Id.* Of course, assigning a monetary value to the productivity supposedly lost to social networking sites is a difficult task at best. Even if the data regarding employee time on social networking sites is accurate, ongoing research by Dr. Larry Rosen suggests members of what he calls the Net Generation (those born after 1980) are more adept at multi-tasking than their older counterparts. Larry Rosen, *Generation 'Text': FB Me*, Feb. 11, 2010, <http://www.cnn.com/2010/OPINION/02/08/rosen.texting.communication.teens/?hpt=C2>; see also <http://www.csudh.edu/psych/RosenResearch.htm>. It is at least possible that a truly adept social network user is capable of both performing his or her job in a productive manner and keeping tabs on his or her various social networking sites. Moreover, absent a study comparing the average time spent doodling, daydreaming, and pursuing other unproductive distractions by social networking site users on the one hand and non-users on the other, it may be quite difficult to determine the extent to which social networking sites (as opposed to any other form of daily distraction) actually contribute to lost productivity.

That said, it seems intuitively obvious that engaging in non-work-related online activity is, at a minimum, distracting. It is not particularly surprising, for example, that twenty-three states, the District of Columbia, and Guam have all banned text messaging while driving, while another

eight states have banned text messaging by novice drivers and one state has restricted school bus drivers from texting while driving. Governors Highway Safety Association, http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html, (last visited April 24, 2010).

A simple Google search reveals ample anecdotal evidence that texting while working may impact performance and is, if nothing else, often perceived as unprofessional or even rude. *See, e.g.*, Stephen Viscusi, *Prediction: Katie Couric's Report on Texting Will Save More Lives Than Her Campaign On Colon Cancer. And Guess What? It Will Save Your Job As Well!*, Aug. 26, 2009, http://www.huffingtonpost.com/stephen-viscusi/prediction-katie-courics_b_270060.html; Kristi Gustafson, *Bad Employee? Texting and on the Phone While Working*, Dec. 11, 2008, <http://blog.timesunion.com/kristi/4188/texting-while-working/>; Posting of Frame Lady, The Picture Framers Grumble, <http://www.thegrumble.com/showthread.php?t=46664> (Mar. 17, 2010); Posting of Robby to Bankers' Threads, <http://www.bankersonline.com/forum/> (Human Resources Forum, Question about employee "texting" at her desk) (Mar. 23, 2010, 12:37 EST); Posting of Pattie Hunt Sinacole to Job Doc, Instant Messaging and Texting At Work, http://www.boston.com/jobs/news/jobdoc/2009/08/instant_messaging_and_texting.html (Aug. 17, 2009, 08:23 EST).

Whatever the reality, it seems apparent that the genie is now well outside of the bottle. Even if an employer was somehow able to effectively ban all social media usage via company networks and systems (a monumental task), it would be virtually impossible for an employer to stop employees from using mobile, Internet-capable devices to access social media. In October 2009, CTIA, the international association for the wireless telecommunications industry, announced that more than 246 million data-capable devices were in the hands of consumers. According to CTIA, more than 40 million of these devices are Smartphones or wireless-enabled PDAs. Press Release, CTIA, CTIA–The Wireless Association® Announces Semi-Annual Wireless Industry Survey Results (Oct. 7, 2009), <http://www.ctia.org/media/press/body.cfm/prid/1870>.

C. By Employers

For their part, employers have realized that the online pursuits of employees and potential candidates are shot through with rich veins of interesting information. The highly publicized case involving the sexual text messages of an Ontario, California, SWAT police sergeant provides just one example of the type of insight an employee's text messages may provide. *See Quon v. City of Ontario, et al.*, 529 F.3d 892 (9th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3619 (Dec. 14, 2009) (No. 08-1332). Other examples include TEKsystems's use of LinkedIn connections to prove up violations of contractual employee non-solicitation provisions by former employees, the Kansas City Chiefs' decision to suspend Larry Johnson for two weeks for belittling his head coach and using a gay slur on Twitter, and a Canadian insurance company's decision to cut off sick-leave benefits for an allegedly depressed employee who posted pictures of herself romping on the beach and living it up at Chippendale's. *See TEKsystems, Inc., v. Hammernik et al.*, No. 10-CV-00819 (D. Minn. Mar. 16, 2010); Associated Press, *Johnson suspended until Nov. 9*, Oct. 29, 2009, <http://sports.espn.go.com/nfl/news/story?id=4603752>; *Depressed woman loses benefits over Facebook photos*, Nov. 21, 2009, <http://www.cbc.ca/canada/montreal/story/2009/11/19/quebec-facebook-sick-leave-benefits.html>.

Indeed, it appears employers' recruiting functions have begun to *institutionalize* the use of online social media to evaluate applicants. A June 2009 survey of 2,667 non-government hiring managers and human resource professionals found that forty-five percent of employers use social networking sites to research job candidates, up from 22 percent the year before. Press Release, CareerBuilder.com, Forty-five Percent of Employers Use Social Networking Sites to Research Job Candidates (Aug. 19, 2009), <http://www.careerbuilder.com/share/aboutus/pressreleases.aspx>. According to the survey, another 11 percent of employers plan to start using social networking sites for screening. *Id.*

Bozeman City, Montana, for example, requires all applicants to submit a complete list of user names and passwords for "any Internet-based chat rooms, social clubs or forums, to include, but not limited to: Facebook, Google, Yahoo, YouTube.com, MySpace, etc." Declan McCullagh, *Want a job? Give Bozeman your Facebook, Google passwords*, Jun. 18, 2009, http://news.cnet.com/8301-13578_3-10268282-38.html. Similarly, the Florida Bar of Examiners voted last year to begin reviewing applicants' social media usage and online social presence, although it stopped short of requiring applicants to disclose user names and passwords. Martha Neil, *Florida Bar to Surf Social Websites for Adverse Applicant Info*, Aug. 31, 2009, http://www.abajournal.com/news/article/fla_bar_overseers_to_surf_social_sites_for_adverse_applicant_info.

Among those employers who reported using social media sites and online search engines to evaluate candidates for employment, 29 percent reported using Facebook, 26 percent reported using LinkedIn, and 21 percent reported using MySpace. Press Release, CareerBuilder.com, Forty-five Percent of Employers Use Social Networking Sites to Research Job Candidates (Aug. 19, 2009), <http://www.careerbuilder.com/share/aboutus/pressreleases.aspx>. In addition, 11 percent reported searching blogs, and seven percent reporting following candidates on Twitter. *Id.* The industries most likely to screen job candidates via social networking sites or online search engines were Information Technology (63 percent) and Professional & Business Services (53 percent). *Id.*

The CareerBuilder.com survey further revealed that employers often act on what they find online. Thirty-five percent of employers responding reported finding content on social networking sites that caused them not to hire a candidate. *Id.* The top examples of disqualifying content cited were:

- Provocative or inappropriate photographs or information (53 percent);
- Content regarding the candidate's drinking or drug use (44 percent);
- Candidate bad-mouthed a previous employer, co-worker, or client (35 percent);
- Candidate showed poor communication skills (29 percent);
- Candidate made discriminatory comments (26 percent);
- Candidate lied about qualifications (24 percent); and

- Candidate shared confidential information from previous employer (20 percent).

Id.

In a testament to the differing attitudes toward texting and its role in a business setting, 14 percent of employers reported disregarding a candidate because the candidate sent a message using an emoticon (*e.g.*, a smiley face), while 16 percent reported dismissing a candidate for using text language (*e.g.*, "GR8") in an e-mail or job application.

On the other end of the spectrum, it seems savvy social media candidates may be able to use online content to enhance their prospects for landing a job. According to the CareerBuilder.com survey, 18 percent of employers reported finding content on social networking sites that actually caused them to hire the candidate. *Id.* The top examples cited were:

- Profile provided a good feel for the candidate's personality and fit (50 percent);
- Profile supported candidate's professional qualifications (39 percent);
- Candidate was creative (38 percent);
- Candidate showed solid communication skills (35 percent);
- Candidate was well-rounded (33 percent);
- Other people posted good references about the candidate (19 percent); and
- Candidate received awards and accolades (15 percent).

Id.

II. Employer Policies

A. Not Yet Prevalent

Notwithstanding the growing popularity and use of texting, social networking sites, and the information associated with same by both employers and employees alike, a 2009 report by Manpower, Inc., found that only 20% of employers worldwide have a "formal policy regarding employee use of social networking sites." Manpower Inc., *Employer Perspectives on Social Networking Survey*, 2009. Companies in the Americas led with 29% of employers having such a policy, while only 25% of employers in Asia and only 11% of employers in EMEA had such policies. *Id.*

The Manpower findings for U.S. companies were in line with the results of a 2009 survey of 586 businesses by the American Management Association and the ePolicy Institute, which found that only 30 percent of U.S. companies have a policy addressing personal-blog usage during working hours and only six percent have policies regarding personal tweeting on company time. Laura Mohammad, *Socially aware: What to consider when crafting employee rules for social media*, Jan. 8, 2010, <http://memphis.bizjournals.com/triad/stories/2010/01/11/smallb3.html>.

Similarly, a recent Cisco study based on interviews with 105 participants representing 97 organizations in 20 countries found that only one in seven of the participating companies noted a formal process associated with adopting consumer-based social networking tools for business purposes. Press Release, Cisco, Global Study Reveals Proliferation of Consumer-Based Social Networking Throughout the Enterprise and a Growing Need for Governance and IT Involvement (Jan. 15, 2010), http://newsroom.cisco.com/dlls/2010/prod_011310.html. Likewise, only one in five participants identified any policies in place concerning the use of consumer-based social networking technologies in the enterprise. *Id.* The Cisco study further found that the unstructured nature of social networking is causing companies to struggle with policy creation and adoption, because copying an established governance process from other, more structured areas often does not work for social networking. *Id.* In particular, businesses are having difficulty striking the right balance between the social and personal nature of these tools while maintaining some degree of corporate oversight. *Id.*

Evgeny Kaganer, Ph.D., lead researcher and assistant professor, IESE Business School, explained the findings as follows:

The research findings spotlight an underestimation of the power and influence of social networks on businesses, and the transformation that companies need to make, not only to protect themselves, but also to encourage and benefit from the collaboration these social networks and tools afford them. Ignoring the increased usage and influence of social networking and Web 2.0 tools leaves organizations at the risk of misuse, potentially leading to the disclosure of information and misrepresentation of the company.

Id.

Indeed, among the 250 IT managers surveyed by Network Box, the most frequently cited security concern was “employees using applications on social networks” while at work, with 43 percent saying this was a major concern. Press Release, Network Box, Network traffic increases to Facebook and YouTube (Apr. 15, 2010), <http://www.network-box.com/node/533>. In response to a separate question, 36 percent of respondents indicated they were concerned about malware passed via networks such as LinkedIn or Twitter and employees trusting (and clicking on) links sent by contacts within their social networks. *Id.*

This concern appears to be well placed. Roughly a third of the UK office workers surveyed in connection with the Morse study indicated they had seen sensitive information posted on social network sites, while more than 76 percent noted that their employers had not given them any specific guidelines regarding the use of Twitter. Press Release, Morse, Twitter and Social networks cost UK businesses (Oct. 26, 2009), http://www.morse.com/press_20.htm 4/. Similarly, a 2009 America Management Association and ePolicy Institute survey found:

- 14% of employees admit to e-mailing confidential or proprietary information about a firm, its people, products and services to outside parties;
- 14% admit to sending third parties potentially embarrassing and confidential company e-mails that are intended strictly for internal readers;

- 89% of users admit to using the office system to send jokes, gossip, rumors or disparaging remarks to outsiders; and
- 9% have used company e-mail to transmit sexual, romantic or pornographic text or images.

Laura Petrecca, *More employers use tech to track workers*, Mar. 17, 2010, http://www.usatoday.com/money/workplace/2010-03-17-workplaceprivacy15_CV_N.htm.

Moreover, given the continuing integration of social media into daily life, particularly among younger users, employers who fail to take a thoughtful approach to social networking sites may be hindering their ability to attract the next generation of talent. As Hugh Murphy, Business Manager of e-Channels for 3M U.K. and Ireland and a respondent in the Cisco study, explained,

Businesses need to embrace social media not only to remain competitive, but also to continue to attract top talent. The next generation of leaders will be exceptionally savvy with these tools, so 3M is using social media externally to help us with recruiting. Several of the graduates we hired this year specifically told us that they hadn't considered 3M before they saw our employer profile on social media.

Id.

B. Legal Issues

In addition to productivity, security, and recruiting concerns, the use of social media presents unique employment-related legal issues. An April 21, 2010, Westlaw search of all federal decisions for the preceding three years found 86 cases mentioning "Facebook," 175 cases mentioning "MySpace," and 464 cases mentioning "text message" (or a truncation of same). The issues addressed in these cases are varied to say the least, and many have no specific implication for employers or employees as employers or employees. *See, e.g., Parker v. Jekyll & Hyde Entertainment Holdings, LLC*, 2010 WL 532960 (S.D.N.Y. 2010) (approving an enhancement award for named representatives of a class based in part on the named plaintiff's creation of a Facebook page to identify and locate other class members); *Quigley v. Karkus*, 2009 WL 1383280, *1 (E.D. Pa. 2009) (holding that Facebook "friendship" was not evidence of a group relationship of the type targeted by Section 13 of the Securities Exchange Act); *U.S. v. Fumo*, 2009 WL 1688482 (E.D. Pa. 2009) (finding no juror misconduct based on juror's Facebook postings of status during trial and subsequent media attention of the Facebook postings).

A subset of these decisions, however, has very specific implications for employers and employees as employers and employees. These decisions provide a rough guide to the types of issues a well-drafted social networking media policy should address.

1. Hostile Work Environment

Ten years ago, the New Jersey Supreme Court squarely addressed the question of whether alleged harassment that occurs on an electronic bulletin board is capable of supporting a hostile environment claim:

The case appears to have proceeded on the thesis that there could be no liability if the harassment by co-employees did not take place within the workplace setting at a place under the physical control of the employer. Although the electronic bulletin board may not have a physical location within a terminal, hangar or aircraft, it may nonetheless have been so closely related to the workplace environment and beneficial to Continental that a continuation of harassment on the forum should be regarded as part of the workplace. As applied to this hostile environment workplace claim, we find that if the employer had noticed that co-employees were engaged on such a work-related forum in a pattern of retaliatory harassment directed at a co-employee, the employer would have a duty to remedy that harassment.

Blakey v. Continental Airlines, Inc., 751 A.2d 538, 542 (N.J. 2000).

In *Blakey*, Tammy Blakey complained of sexual harassment and a hostile working environment based on conduct and comments directed at her by male co-employees. *Blakey*, 751 A.2d at 543. Specifically, Blakey complained to Continental's management concerning pornographic photographs and vulgar gender-based comments directed at her that appeared in her plane's cockpit and other work areas. *Id.* Dissatisfied with Continental's response, Blakey sued Continental for its failure to remedy the hostile work environment. *Id.*

While the federal litigation was pending, Blakey's fellow pilots published a series of electronic messages to an on-line computer bulletin board called the Crew Members Forum (the "Forum"). *Id.* at 544. The Forum was accessible to all Continental pilots and crew member personnel through CompuServe, an Internet service provider with whom Continental had a contract. *Id.* The Forum was distinct from the Crew Management System ("CMS"), which contained information on flights, crew member schedules, pay, and pilot pairings. *Id.*

Although Continental required pilots and crew to access the CMS to learn their flight schedules and assignments, pilots and crew were not required to access the Forum. *Id.* Moreover, whereas Continental personnel were able to access the CMS via terminals located in crew locations throughout the Continental network, through a voice response system, and via Internet service provided by CompuServe, access to the Forum was available only through CompuServe. *Id.* at 544-45. Finally, at the time of the offending posts, only 250 Continental employees nationwide had access to the Forum, and Continental management was not permitted to post messages or reply to any messages on the Forum. *Id.* at 545. Put simply, the Forum was an electronic bulletin board, where employees could post messages for each other if they chose to do so. *Id.* at 545. *Id.*

The *Blakey* court ultimately held the allegedly harassing postings in the Forum *might or might not* support a claim for alleged workplace harassment, depending on whether Continental derived

a “substantial workplace benefit” from the bulletin board and whether the bulletin board was “sufficiently integrated” with the workplace so as to impose on Continental an obligation to respond to allegedly harassing posts on the bulletin board. *Id.* (remanding for a determination of same). In short, the court held that online postings would *not* support a claim of workplace harassment, if those postings could not be fairly considered part of the workplace. *See id.*

Since the *Blakey* decision, the issue of online harassment has continued to make its way into the court system. For example, in *Goring v. Board of Supervisors of LSU*, Professor Darlene Goring pointed to allegedly derogatory statements by a student on her Facebook page as evidence of a racially hostile working environment and pointed to the school’s alleged failure to ensure that the postings were removed as evidence that the school failed to take prompt remedial action. *See, e.g., Goring v. Board of Sup’rs of LSU*, 2010 WL 1533286, *1 (M.D. La. 2010). The court did not question whether the student’s postings could support a hostile work environment claim but instead simply granted summary judgment in favor of LSU, because there was no evidence that the postings were motivated by the professor’s race. *Id.* at *8.

Similarly, in *Wolfe v. Fayetteville, AK School Dist.*, a student (“WW”) brought various claims based on alleged violence and bullying at school. *Wolfe v. Fayetteville, AK School Dist.*, 600 F. Supp. 2d 1011, 1015-18 (W.D. Ark. 2009). The student brought additional claims based on the school’s alleged failure to take corrective action and alleged retaliation against the student for complaining. *Id.* In response to the school’s motion to dismiss, the student pointed to the following allegations to support the student’s claims, which were sufficient to defeat the motion:

- On December 3, 2006, Woodland students formed the “Everyone Hates [WW]” group on the website “Facebook.” In its “Group Info,” the group stated “[WW is] a little bitch. and [sic] a homosexual that NO ONE LIKES.” Comments by group members were threatening and generally anti-homosexual in nature. After WW’s mother reported the group to Byron Zeagler, the school’s Vice Principal, he asked, “Well, is he a homosexual?”
- On March 8, 2007, a fellow student posted to the Facebook group entitled “I Love Watching Fights at School” that he was going to have someone beat up WW. The next morning, WW’s mother reported the posting, to which Zeagler responded that “students said things all the time.” That afternoon, a fellow student punched WW in the face.
- On March 25, 2007, students, in consultation with Zeagler, a teacher, and the District’s public relations department, started a Facebook group, “The Whole Story,” on which harassing and threatening posts were made. Within weeks, the group was shut down by Facebook.

Id. at 1017-18.

As employers and employees consider how best to manage employee use of non-work-related social media, the New Jersey Supreme Court’s thoughtful analysis of the fundamental question of whether online conduct—or any other conduct outside the workplace—may form the basis of a work-related harassment claim should not be overlooked. Indeed, neither plaintiff nor

defendant should assume that online conduct that occurs outside of work is actionable, particularly when the online conduct is personal in nature and not directly connected to the employer's workplace. See *Blakey*, 751 A.2d at 542 (remanding the harassment claim based on online postings for determination of whether the employer enjoyed a "substantial workplace benefit" as a result of the online message system such that the message system had become "sufficiently integrated" into the workplace); compare *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (finding off-duty sexual assault of airline employee by co-worker could support a claim of sexual harassment where the assault occurred during an out-of-town lay-over occasioned by the employer's flight schedule in hotel rooms provided by the employer) with *Anderson v. Adam's Mark Hotels and Resorts*, 211 F.3d 1277, 2000 WL 390107 (10th Cir. April 18, 2000) (unpublished) (finding off-duty sexual assault of hotel employee by co-worker could not support a claim of sexual harassment where the events leading to the assault were not work-related and the employer had no notice that a sexual assault was going to be committed in one of its rooms by an off-duty employee) and *Jones v. Haliburton*, 583 F.3d 228, 240-42 (5th Cir. 2009) (holding that employee's claims stemming out of sexual assault by co-worker in employer-provided housing in Baghdad were not "related to [her] employment" and were not premised on a personal injury "arising in the workplace" for purposes of an arbitration agreement, because the assault took place after hours and took place after a social gathering some distance from where the employee worked); cf. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'").

2. Knowledge

The possibility that online conduct might give rise to a claim of workplace harassment raises at least two questions with respect to employer knowledge of the alleged online harassment: (1) does an employer have an obligation to monitor online activity to ensure there is no harassment; and (2) at what point may it be said an employer knew or should have known of allegedly harassing online conduct?

a. The Duty to Monitor

In *Blakey*, the New Jersey Supreme Court specifically held that Continental did *not* have an obligation to monitor the posts on the Forum. *Id.* at 551-52. In reaching this conclusion, the court considered the fact that employees did have to use the Forum for work, a limited number of employees had access to the Forum, and it was not entirely clear that the Forum could be fairly considered part of the workplace. *Id.* at 554-45. Moreover, the court noted that obligating Continental to monitor the Forum would implicate "grave" privacy concerns. *Id.* at 551.

Nevertheless, the New Jersey Supreme Court concluded its discussion of the issue with some practical (and free) advice to employers:

To repeat, employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace

and in settings that are related to the workplace. Besides, it may well be in an employer's economic best interests to adopt a proactive stance when it comes to dealing with co-employee harassment. The best defense may be a good offense against sexual harassment. "[W]e have afforded a form of a safe haven for employers who promulgate and support an active, anti-harassment policy." Effective remedial steps reflecting a lack of tolerance for harassment will be "relevant to an employer's affirmative defense that its actions absolve it from all liability." Surely an anti-harassment policy directed at any form of co-employee harassment would bolster that defense.

Id. at 552 (internal quotations and citations omitted).

b. Actual and Constructive Knowledge

Under existing law, an employer may be charged with knowledge of allegedly harassing conduct, if an official with authority to correct the problem is made aware of the problem. *See, e.g., Sharp v. City of Houston*, 164 F.3d 923, (5th Cir. 1999) ("A title VII employer has actual knowledge of harassment that is known to 'higher management' or to someone who has the power to take action to remedy the problem.") (footnote and citations omitted). Moreover, at some point, online workplace harassment may become so pervasive as to permit a jury to infer that the employer was either on notice of the conduct or should have been. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (an employee may demonstrate constructive knowledge by "showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.") (citation omitted); *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758 (1998) ("An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct but failed to stop it.").

The nature of social media permits for at least one other permutation of the knowledge question: at what point does an employer have knowledge of online conduct by virtue of a manager's "presence" in the online social group, chat room, message board, or tweet stream in which the conduct takes place? Notably, the New Jersey Supreme Court in *Blakey* took pains to point out that Continental managers did not have access to the Forum and was thus able to avoid answering this question. *See id.* at 545.

This issue was raised to some degree in *Wolfe v. Fayetteville, AK School Dist.*, when the school moved to dismiss the student's Section 1983 claim, because the student had failed to allege the school was aware of the complained of conduct. *Wolfe*, 600 F. Supp. 2d at 1021. The court denied the motion to dismiss, finding the allegation regarding the school's involvement in the creation of the Facebook group "The Whole Story," among other things, effectively alleged that senior officials had knowledge of the conduct complained of by the student. *Id.*

Although there is an obvious difference between an allegation sufficient to defeat a motion to dismiss and evidence sufficient to defeat a motion for summary judgment, employers should think carefully about training their managers on the potential consequences of membership in social media groups and on the importance of escalating potentially harassing online conduct of which they become aware as a result of their use of social media. Indeed, it is worth noting that the *Wolfe* court found the allegation that Zeagler was involved in the student Facebook group

that made threats against WW, among other things, was a sufficient allegation of specific retaliatory conduct on the part of Zeagler to support the student's First Amendment retaliation claim. *Id.*

3. Pretext

a. Inconsistent Assessment

A manager's prior, positive comments about an employee's performance may be asserted as evidence of pretext, if the manager terminates the employee for alleged poor performance shortly thereafter. *See, e.g., Brown v. M & M/Mars*, 883 F.2d 505, 510 (7th Cir. 1989) (jury could infer supervisor did not sincerely believe employee had poor performance, given high marks supervisor gave employee in draft review just a month or two before the termination). With this in mind, employers should consider specifically reminding their managers that the company's policy on recommendations (which typically prohibits managers from providing recommendations) extends to online activities, including LinkedIn "recommendation" requests from employees.

If a manager does provide positive feedback for an employee via social media, "official" performance reviews and metrics may nevertheless be sufficient to defeat an isolated online recommendation. *Cf. Senske v. Sybase, Inc.*, 588 F.3d 501, 507-09 (7th Cir. 2009) (finding that sales employee's over-attainment of his revenue quota in one year was an obvious anomaly and did not undermine company's stated reason for termination); *Quigley Corp. v. Karkus*, 2009 WL 1383280, *5 (E.D. Pa. 2009) (citation omitted) (discounting significance of evidence that some shareholders were Facebook friends, noting that "'friendships' on Facebook may be as fleeting as the flick of a delete button.").

b. Inconsistent Enforcement

Potential pretext challenges also underscore the need for a coherent approach to social media management, particularly in terms of what is permitted and what is not permitted and how consistently the policy on same is enforced.

In *Jackson v. Planco*, the employer had a policy banning employees from visiting "inappropriate" websites. *Jackson v. Planco*, 660 F. Supp. 2d 562, 571 (E.D. Pa. 2009). Although the policy did not provide specific guidance on what the employer considered "inappropriate," the employer used an Internet filter that prohibited employees from visiting certain sites, which included Facebook. *Id.* at 571-72. The filter was not completely reliable, however, and periodically went down, such that employees were able to visit banned sites. *See id.* at 572.

On one such occasion, Christie Vasquez, a supervisor, saw Tony Jackson, one of her employees, visiting a gun-related website. *Id.* This was shortly after the Virginia Tech shootings that claimed 33 lives, and Vasquez became concerned that Jackson might be a safety threat. *Id.* at 572-573, fn. 15. Following an investigation, which revealed that Jackson had visited various gun websites and at least one knife website, the employer terminated based on Jackson's violation of company policy regarding "inappropriate" sites and the company's determination that he might be a threat to others. *Id.* at 575.

Jackson claimed his termination was actually based on his heart condition, which he asserted as a disability, and in retaliation for his FMLA leave and his prior complaints of discrimination. *Id.* at 565. In an attempt to demonstrate the employer's stated reason for his termination was pretextual, Jackson noted that other employees, including Vasquez, had visited banned sites, namely Facebook, but were not terminated. *Id.* at 578. The court ultimately rejected the comparison, because there was no evidence that the other employees had visited sites with violent content. *Id.* Nevertheless, the Jackson case highlights the need to take a thoughtful approach to deciding which sites employees may and may not visit and the appropriate level of discipline for employees who visit prohibited sites.

4. Defamation

Unfavorable online postings frequently lead to claims of defamation. *See, e.g., Carter v. Incorporated Village of Ocean Beach*, 2010 WL 599388 (E.D.N.Y. 2010) (remanding state law defamation claims brought by former police officers that were based on sergeant's blog entries); *Collins v. Purdue University et al.*, --- F. Supp. 2d ----, 2010 WL 1250916, *14 (N.D. Ind. 2010) (holding the newspaper defendant's online comment blog qualified as an "interactive computer service" and that the newspaper was thus shielded from liability for online reader comments to one of the newspaper's article, because the newspaper did nothing to encourage, edit, or adopt those defamatory comments); *Blakey*, 751 A.2d at 542 (defamation claim based on derogatory comments by co-workers posted to electronic bulletin board); *Varian Medical Systems, Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (Cal. App. 6 Dist. 2003), *rev'd on other grounds*, 25 Cal. Rptr. 3d 298 (Cal. 2005) (defamation action based on allegedly defamatory blog posts about former employees).

Given the risk of personal liability, employees should resist the temptation to make derogatory comments regarding others. Likewise, given the risk of vicarious liability, employers should make it clear that company policy prohibits any employee from making defamatory statements online.¹ Employers should understand, however, that employer liability for defamation by an employee is determined by whether the statements were made in the course of scope of employment, not whether they were specifically authorized, at least under Texas law. *See, e.g., Hooper v. Pitney Bowes, Inc.*, 895 S.W.2d 773, 777 (Tex. App. – Texarkana 1995, writ denied) ("The employer is liable for the act of his employee, even if the specific act is unauthorized or contrary to express orders, so long as the act is done while the employee is acting within his general authority and for the benefit of the employer.").

Nevertheless, a policy that makes it clear that online statements by managers do not represent the views of the employer and are not part of the manager's duties should assist in arguing that the statement was not made in the course and scope of employment. *Cf. Rodriguez v. Sarabyn*, 129 F.3d 760, 771 (5th Cir. 1997) (holding that statements by agents were within the course and scope of employment under Texas law, because they were of the kind the agents were "authorized and expected to make" and "closely connected to the performance of their duties")

¹ Some employers may wish to prohibit any derogatory statement rather than simply those derogatory statements that are actually defamatory. Before doing so, the employer should make certain applicable state law does not prohibit the employer from taking action based on lawful off-duty conduct. *See infra* Section II.B.7. Likewise, public employers must ensure they do not run afoul of the protections afforded by the First Amendment. *See infra* Section II.B.8.

(citations omitted); *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573 (Tex. 2002) (manager’s defamatory statements were not within the course and scope because there was no evidence that making the statements would further the employer’s business or accomplish a purpose of the manager’s job). A well drafted social media policy should also prohibit employees from forwarding or endorsing defamatory statements made by others. See *In re Perry*, 423 B.R. 215, 241, 269-70 (Bkrtcy. S.D. Tex. 2010) (defendant “published” defamatory postings in a blog that the defendant did not write by telling others about the defamatory postings and forwarding an e-mail with a link to the defamatory postings).

5. Invasion of Privacy and the Infliction of Emotional Distress

a. By Posting

The online disclosure of truthful but sensitive personal information may support an invasion of privacy claim or an intentional or negligent infliction of emotional distress claim, even if it cannot support a defamation claim (because it is true).² See, e.g., *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34 (Minn. App. 2009).

In *Yath*, Navy Tek worked as a medical assistant for Fairview Clinics. *Id.* at 38. Tek saw Candace Yath, the wife of a friend, visiting a doctor at the clinic. *Id.* Curious, Tek reviewed Yath’s medical file and learned that Yath had a new sexual partner, had visited the clinic to be tested for a sexually-transmitted disease related to that new sexual partner, and had been diagnosed as having a sexually-transmitted disease. *Id.* Tek reported what she learned to Net Phat, who was related to both Tek and Yath as an in-law and worked at another Fairview location. *Id.* Phat, in turn, told her brother (Yath’s ex-husband). *Id.*

After word of all this reached Yath, Yath’s grandmother contacted Fairview and reported Tek’s conduct. *Id.* Fairview conducted an investigation and determined, based part on its review of Tek’s computer usage, that Tek had in fact accessed Yath’s file without a legitimate business reason. *Id.* at 39. Fairview also interviewed Phat, who denied knowing anything about Yath’s medical condition. *Id.* Fairview did not review Phat’s computer usage, because Phat did not have access to Yath’s files. *Id.* Based on its investigation, Fairview terminated Tek but did not terminate or discipline Phat. *Id.*

The day after Fairview terminated Tek, Yath’s grandmother informed Fairview that she believed either Tek or Phat had created a MySpace account under the fictitious name “Rotten Candy” that showed a picture of Yath, stated Yath had a sexually-transmitted disease, and stated that Yath had cheated on her husband. *Id.* Fairview attempted to investigate the allegation, but the MySpace page had been deleted before Fairview could view it. *Id.* Fairview noted, however, that MySpace was a blocked site and thus the page could not have been created at Fairview. *Id.*

Yath ultimately sued Fairview for invasion of privacy and the negligent infliction of emotional distress. *Id.* at 37-38. The trial court granted summary judgment in favor of Fairview, and the court of appeals affirmed. *Id.* at 38. With respect to Yath’s invasion of privacy claim, the court held that the creation of the MySpace page satisfied the “publicity” element but nevertheless

² Some states, such as Texas, do not recognize a claim for the negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993).

upheld the grant of summary judgment to Fairview, because there was no evidence Fairview was involved in the creation of the MySpace account. *Id.* at 45. To the contrary, the evidence established that Fairview had blocked the MySpace site such that the account could not have been created at Fairview. *Id.* The court affirmed summary judgment for Fairview on Yath's infliction of emotional distress claim, because Yath failed to present any evidence suggesting Fairview should have foreseen Tek's intentional misconduct, the standard for determining whether an employer is vicariously liable for an employee's intentional acts under Minnesota law. *Id.* at 47. Although Fairview ultimately prevailed, the litigation occasioned by Tek's misconduct underscores the practical value in periodically reminding employees of their confidentiality obligations.

b. By Reviewing

An employer may also face an invasion of privacy claim based on the employer's review of an employee's electronic activity. *See, e.g., Quon v. City of Ontario, et al.*, 529 F.3d 892 (9th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3619 (Dec. 14, 2009) (No. 08-1332) (sergeant's Section 1983 Fourth Amendment claim based on police department's review of text messages sent using a police department pager).

In *Quon*, the Ontario Police Department (the "OPD") distributed text-message capable pagers to its officers, including Sergeant Jeff Quon. *Id.* at 895. The OPD did not have an official policy on texting, but it did have a Computer Usage, Internet and E-mail Policy" (the "Policy") applicable to all employees. *Id.* at 896. The Policy stated, "The use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." *Id.* The Policy further provided:

C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

D. Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

Id.

In addition, in 2000, before the City acquired the pagers in 2006, Quon signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that he had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." *Id.* Among other things, the Employee Acknowledgment stated that "[t]he City of Ontario

reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice,” and that “[u]sers should have no expectation of privacy or confidentiality when using these resources.” *Id.* In addition, Quon attended a meeting on April 18, 2002, during which Lieutenant Steve Duke, a Commander with the Ontario Police Department’s Administration Bureau, informed all present that the pager messages “were considered e-mail, and that those messages would fall under the City’s policy as public information and eligible for auditing.” Quon admitted that he “vaguely recalled attending” this meeting but testified that he did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City’s Policy. *Id.*

In holding Quon nevertheless had a reasonable expectation of privacy in text messages sent using the police-owned pager, the Ninth Circuit Court of Appeals looked past the plain language of the Policy, past the plain language of the Employee Acknowledgment, past the meeting at which Quon was told the pager was subject to audit, and past the fact that the pager messages were subject to public disclosure under the California Public Records Act, and focused on the following facts: (1) Quon was permitted to exceed the 25,000 character limitation established by the City’s service contract provided he paid the associated overage charges; (2) Lieutenant Duke had said he did not want to become involved in accounting and would not audit Quon’s pager use to determine whether it was business or personal, provided Quon paid the overages; and (3) the City had not audited any employee’s pager usage during the eight months between the distribution of the pagers and its audit of Quon’s pager. *Id.* at 907.

The Ninth Circuit’s holding is presently on review before the Supreme Court. Although *Quon* involves a public employer, the Supreme Court’s analysis of the reasonableness of Quon’s expectation of privacy will almost certainly be seen as persuasive authority for purposes of determining whether an employee of a private employer has a reasonable expectation for purposes of a common law invasion of privacy claim. Indeed, if the Supreme Court adopts the Ninth Circuit’s reasoning, the obvious lesson for all employers who wish to preserve their ability to manage their IT resources as they see fit will be to monitor and audit employee usage of all IT systems regularly and to take action against any employee who makes personal use of those systems. *See id.* at 907.

Separate and apart from the questions *Quon* raises about an employer’s ability to destroy expectations of privacy through explicit policy statements, a recent decision under the Stored Communications Act has raised new questions about an employer’s ability to require an employee to divulge information related to his or her online activities. *See Pietrylo v. Hillstone Restaurant Group*, slip op., 2009 WL 3128420 (D.N.J. 2009) (denying motion for new trial after jury found managers’ access of employee Facebook group violated the Stored Communications Act); *Pietrylo v. Hillstone Restaurant Group*, slip op., 2008 WL 6085437 (D.N.J. 2008).

Brian Pietrylo (“Pietrylo”) and Doreen Marino (“Marino”) were employed by Hillstone Restaurant Group as servers at the Houston’s restaurant in Hackensack, New Jersey. *Pietrylo*, 2008 WL 6085437 at *1. Pietrylo created a group on MySpace called the “Spec-Tator.” *Id.* In his initial post, Pietrylo stated the purpose of the group was to “vent about any BS we deal with out [sic] work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation. ... Let the s* *t talking begin.” *Id.*

Pietrylo used Houston's trademarked logo as the icon for the group, which appeared on the MySpace profiles of those who were invited into the group and accepted the invitation. *Id.* Pietrylo invited past and present employees of Houston's to join the group. *Id.* Once a member was invited to join the group and accepted the invitation, the member could access the Spec-Tator whenever they wished to read postings or add new postings. *Id.*

Among others, Pietrylo invited Karen St. Jean, a greeter at Houston's, to join the group. *Id.* St. Jean accepted the invitation and became an authorized member of the group. *Id.* One night, while dining at the home of TiJean Rodriguez, a Houston's manager, St. Jean accessed the group through her MySpace profile on Rodriguez's home computer and showed Rodriguez the Spec-Tator. *Id.* At some point thereafter, Robert Anton, a Houston's manager, asked St. Jean to provide the password to access the Spec-Tator, which she did. *Id.* St. Jean testified she was never explicitly threatened with any adverse employment action. *Id.* Nevertheless, St. Jean stated she gave her password to members of management because they were members of management and she thought she "would have gotten in some sort of trouble" if she did not. *Id.*

Anton used the password provided by St. Jean to access the Spec-Tator from St. Jean's MySpace page and printed copies of the contents of the Spec-Tator. *Id.* The postings included sexual remarks about Houston's management and customers, jokes about some of the specifications Houston's had established for customer service and quality, references to violence and illegal drug use, and a copy of a new wine test that was to be given to the employees. *Id.* at *2. Pietrylo testified these remarks were "just joking." *Id.* By contrast, members of Houston's management testified they found these postings to be "offensive." *Id.* Indeed, after Robert Marano, a regional supervisor of operations for Houston's, reviewed the postings, he terminated Pietrylo and Marino. *Id.* Marano testified he was concerned the content of the MySpace group would affect the operations of Houston's by contradicting Houston's four core values: professionalism, positive mental attitude, aim to please approach, and teamwork. *Id.*

Pietrylo and Marino sued Hillstone for violations of the federal Stored Communications Act, 18 U.S.C. §§ 2701-11, (the "SCA") and the identical provision of the New Jersey Act, N.J.S.A. 2A:156A-27. *Id.* at *3. Both statutes make it an offense to intentionally access stored communications without authorization or in excess of authorization. *Id.* Both statutes provide an exception to liability "with respect to conduct authorized ... by a user of that service with respect to a communication intended for that user." 18 U.S.C. § 2701(c)(2); accord N.J.S.A. 2A:156A-27c(2). Accordingly, the court turned its attention to whether St. Jean authorized the review of the postings to the Spec-Tator group by Houston's management. *Pietrylo*, 2008 WL 6085437 at *3-4.

St. Jean testified that if she did not give the password to the manager who asked for it, "I knew that something was going to happen. I didn't think that I was going to get fired, but I knew that I was going to get in trouble or something was going to happen if I didn't do it." *Id.* at *4. St. Jean also testified that no one told her she would be fired but that "[i]t wasn't an overwhelming feeling, but I knew. It sounds bad, but I didn't want to lose my job.... I didn't want to lose my job for not cooperating with them." *Id.* When asked if she was "following orders" in giving Houston's management her password, St. Jean stated, "I wasn't following orders. They asked me and I didn't know what else to do so I just gave it to them." *Id.* When asked if she felt pressured into giving her password, St. Jean explained "[n]o and yes," but later

explained that she believed Houston’s “would have kept on pressuring me and I’m not good under pressure.” *Id.* St. Jean acknowledged that she “pretty much thought after I gave him [Anton] the password all the managers were going to see it.” *Id.*

After summarizing this testimony, the court held St. Jean’s provision of her password to Anton would not constitute “authorization,” if it was given under “duress.” *Id.* at *4. The court then held that St. Jean’s testimony demonstrated that there was a fact issue as to whether her consent was given voluntarily or under “duress.” *Id.* The court further held that Pietrylo and Marino had a reasonable expectation of privacy in the group and denied Hillstone’s motion for summary judgment on that claim. *Id.*

After a jury found that Hillstone had in fact violated the SCA and its New Jersey counterpart, the court denied Hillstone’s motion for judgment as a matter of law, explaining that the jury could have concluded that St. Jean’s consent did not constitute an effective authorization under the SCA. *Pietrylo*, 2009 WL 3128420 at *2-3. Interestingly, the jury found Hillstone had not invaded any common law privacy interest of Pietrylo or Marino. *Id.* at *1.

Setting aside the entertaining fact pattern, the significance of the *Pietrylo* decision is the court’s holding that an at-will employee’s consent does not necessarily constitute “authorization” for purposes of the SCA, which appears to be at odds with cases recognizing, for example, that an at-will employee can consent to something as meaningful as a mandatory arbitration program merely by continuing to work after receiving notice of the program. *Compare id. with In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (citing *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227 (Tex.1986)).

From a practical standpoint, the *Pietrylo* court’s wholesale failure to provide any guidance whatsoever regarding when an employer may safely rely on a consent given by an at-will employee and when an employer must instead be concerned that the employee harbors some unstated, secret reservations about providing consent will later be held to have destroyed the consent’s effectiveness is troubling, to say the least. *See Pietrylo.*, 2008 WL 6085437 at *3-4 (finding a fact issue on whether consent was freely given, where employee voluntarily disclosed online group to one manager, was never threatened with adverse action for refusing to share her user id or password, and never expressed any concern over providing such information when asked).

In the face of decisions like *Quon* and *Pietrylo*, a well drafted social media policy should specifically address the issue of privacy expectations in social media, remind employees that the fact that the employer has not exercised its audit right in the past should not create any expectation that it will not do so in the future, and specifically disclaim the ability of any management official to contradict the explicit terms of the policy on such matters.

6. The National Labor Relations Act

It is only a matter of time before employees and unions begin using social media to organize and otherwise engage in protected discussions regarding the terms and conditions of employment. *Cf. Quigley v. Giblin*, 569 F.3d 449 (D.C. Cir. 2009) (affirming summary judgment in favor of union on claim by union members that union resolution requiring password protection on

campaign websites limited their ability to communicate with other union members by, among other things, effectively prohibiting candidates from having campaign pages on Facebook). Accordingly, a well drafted social media policy should reference a company's policy on the use of IT resources and reaffirm any restrictions on the use of such resources to solicit or distribute information on behalf of third party organizations. *Cf. Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1111 (2007), *enforcement granted in part and denied in part and remanded in part, Guard Publishing Co. v. N.L.R.B.*, 571 F.3d 53 (acknowledging permissibility of restriction on use of corporate IT resources to solicit or distribute materials on behalf of third party organizations).

Similarly, although a social media policy should explicitly remind employees that they may not disclose confidential information outside of the company, the policy should be mindful of the right of employees to discuss their own compensation and other terms and conditions of employment for the purposes of engaging in activities protected by section 7 of the National Labor Relations Act. *Cintas Corp. v. N.L.R.B.*, 482 F.3d 463, 467 (D.C. Cir. 2007) (enforcing Board order finding that an employer's confidentiality policy was unlawful, because employees could reasonably construe it as prohibiting protected section 7 conduct).

7. Lawful Off-Duty Conduct

A well drafted social media policy should also account for the fact that California, Colorado, New York, and North Dakota have enacted statutes limiting an employer's ability to terminate (and in some instances fail to hire or otherwise discriminate against) an employee based on lawful activity conducted outside of working hours and away from the employer's premises. *See* CAL. LAB. CODE §§ 96(k), 98.6(a); COL. STAT. 24-34-402.5; N.Y. LAB. CODE § 201-d(2)(c); N.D. CENT. CODE § 14-02/4-03. Likewise, the policy should be mindful of the fact that Illinois, Minnesota, Montana, Nevada, North Carolina, and Wisconsin have enacted statutes limiting an employer's ability to discipline or terminate (and in most instances fail to hire or otherwise discriminate against) an employee based on the employee's use of lawful products after hours and off site. *See* 820 ILCS 55/5; MINN. STAT. ANN. § 181.938; MONT. CODE ANN. §§ 39-2-313, 314; NEV. REV. STAT. ANN. § 613.333; N.C. GEN. STAT. § 95-28.2; WIS. STAT. ANN. § 111.35. Accordingly, broad statements in a social media policy purporting to extend the employer's other policies to online conduct that occurs after hours and without any use of the employer's IT resources or other facilities should be prefaced with the ever popular "subject to applicable law" disclaimer.

8. First Amendment Retaliation (Public Employers)

A public employer's attempt to regulate a public employee's off-duty use of social media raises concerns under the First Amendment. It is well settled that a public employer (*i.e.*, a state or political subdivision of a state) "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006). And a public employee who is terminated (or otherwise discriminated against) in retaliation for exercising his or her rights under the First Amendment has a recognized cause of action for First Amendment retaliation. *Id.*; *see also Pickering v. Board of Education*, 391 U.S. 563 (1968).

A court entertaining a public employee's First Amendment retaliation claim must, however, determine whether the plaintiff expressed his views as a citizen, or as a public employee pursuant to his or her official duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). If the statement was made pursuant to the employee's official duties, the employee is not speaking as a citizen for First Amendment purposes, and the Constitution does not insulate the employee's communications from employer discipline. *Id.* By contrast, a public employee who makes public statements outside the course of performing his or her official duties retains some possibility of First Amendment protection, because that is the kind of activity engaged in by citizens who do not work for the government. *Id.* at 423.

Stated differently, if the employee is not speaking as a citizen on a matter of public concern, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. *Id.* at 418. This consideration reflects the importance of the relationship between the speaker's expressions and employment. *Id.* A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. *Id.* The Supreme Court elaborated on this issue in *Garcetti* as follows:

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

Id. at 418-19 (citations omitted); *see also Connick v. Myers*, 461 U.S. 138, 143 (1983) (“[G]overnment offices could not function if every employment decision became a constitutional matter.”).

Assuming the court determines the public employee was speaking as a citizen and not pursuant to his or her official duties, the employee must then demonstrate: (1) his or her speech was constitutionally protected, (2) he or she suffered an adverse employment decision, and (3) there is a causal connection between the speech and the adverse employment determination, such that it may be said that the speech was a motivating factor in the determination. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). If the employee produces evidence of these three elements, the public employer may nevertheless escape liability by demonstrating either: (1) it would have taken the same adverse action in the absence of the protected speech; or (2) the plaintiff's speech

was “likely to disrupt the government’s activities, and the likely disruption was sufficient to outweigh the First Amendment value of plaintiff’s speech.” *Mandell v. County of Suffolk*, 316 F.3d 368, 382-83 (2d Cir. 2003).

Not surprisingly, public employees’ use of social media has already joined other forms of expression (*e.g.*, writing a letter to the editor or speaking at a press conference) in forming the basis of a First Amendment retaliation claim. *See, e.g., Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn 2008); *Snyder v. Millersville University*, 2008 WL 5093140 (E.D.Pa. 2008) (unreported).

For example, in *Spanierman*, a non-tenured high school teacher was fired after he created several MySpace profiles. *Spanierman*, 576 F. Supp. 2d at 292. According to Mr. Spanierman, he originally began using MySpace, because students were asking him to look at their MySpace pages. *Id.* at 298. Mr. Spanierman explained that he used his MySpace account to communicate with students about homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions. *Id.* The teacher then created a MySpace account and created several different profiles. *Id.* One of his profiles was called “Mr. Spiderman,” which he maintained on MySpace from the summer of 2005 to the fall of 2005. *Id.*

Elizabeth Michaud, a guidance counselor at the high school at which Spanierman taught, testified that she received student complaints about Spanierman’s MySpace page, so she viewed it. *Id.* According to Michaud, the plaintiff’s profile page included “a picture of the Plaintiff when he was ten years younger, under which were pictures of [the plaintiff’s] students.” *Id.* In addition, according to Michaud, near the pictures of the students were pictures of naked men with what she considered “inappropriate comments” underneath them. *Id.* Michaud further testified she was disturbed by the conversations Spanierman was apparently conducting on his profile page. *Id.* Specifically, Michaud stated Spanierman’s conversations with the students were “very peer-to-peer like,” with students talking to him about what they did over the weekend at a party, or about their personal problems. *Id.* Michaud felt Spanierman’s profile page would be disruptive to students. *Id.*

After viewing Spanierman’s profile page, Michaud spoke with Spanierman about his online communications with students about things that were not related to school, and suggested that he use the school email system for the purpose of educational topics and homework. *Id.* Michaud also told Spanierman that some of the pictures on his profile page were inappropriate. *Id.* After Michaud spoke with Spanierman, Spanierman deactivated the offending “Mr. Spiderman” profile. *Id.* Shortly thereafter, however, Spanierman created a new MySpace profile named “Apollo68,” which was “nearly identical” to the offending “Mr. Spiderman” profile. *Id.* The high school suspended Spanierman while it conducted an investigation, at which point Spanierman promptly disabled the “Apollo68” profile. *Id.* at 298-99.

At the conclusion of the investigation, the school decided not to renew the plaintiff’s one-year employment contract for the next school year because the plaintiff had “exercised poor judgment as a teacher” in his use of the MySpace page. *Id.* at 299. Spanierman sued the school district under 42 U.S.C. § 1983, claiming the school had violated his First Amendment rights. *Id.*

The court determined that Spanierman’s communications on MySpace were not made pursuant to his responsibilities as a teacher and that *Garcetti* did not, as a result, preclude his First Amendment claim. *Id.* The court then turned to the question of whether Spanierman’s MySpace posts were on a matter of public concern. *Id.* The court noted that expressing dissatisfaction with working conditions is not, by itself, speech on matters of public concern. *Id.* at 309-10 (citing *Tiltti v. Weise*, 155 F.3d 596, 603 (2d Cir.1998); *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999)) (“[S]peech on a purely private matter, such as an employee’s dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern.”). In fact, after a careful review of the page’s content, the district court concluded that only one portion potentially constituted protected expression on a matter of public concern: a poem Spanierman had written that arguably protested the war in Iraq. *Id.* at 310. The district court determined, however, that there was no evidence of a causal nexus between Spanierman’s poem and his termination. *Id.* at 311. Instead, the court noted certain communications on Spanierman’s MySpace account that the school could have found disruptive to school business:

Byczko [a student]: “yo, hows it going sir? i figured i would leave a comment because i’m bored:)”

Plaintiff: “Things are going well for me. Sorry that you are bored. I’ll see you tomorrow. If you ever call me sir again, you will be serving a detention sooooo long that your great grandchildren will have to finish it out. LOL”

Byczko: “hey, i think thats a threat, u and me might have to fight!!! SIR!!! lol, see ya tomorrow!”

Plaintiff: “I would never threaten you. It’s a straight out promise. I’ll give you a choice you can serve detention until you’ve copied every page of every book in my room or you can stay from tomorrow until 11-22-3088”

Id. at 312.

Plaintiff: “Repko [the screen name for a student] and Ashley [another student] sittin in a tree. K I S S I N G. 1st comes love then comes marriage. HA HA HA HA HA HA HA HA!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! LOL”

repko [the student]: “dont be jealous cuase you cant get any lol:)”

the plaintiff: “What makes you think I want any? I’m not jealous. I just like to have fun and goof on you guys. If you don’t like it. Kiss my brass! LMAO”

Id.

Having found no evidence of a causal nexus between the potentially protected speech and the termination, and having found some evidence connecting the termination to unprotected speech, the court granted summary judgment for the school. *Id.* at 313. Although the school ultimately prevailed, the litigation its decision engendered underscores the need for public employers to be particularly mindful of the reach of their social media policies.

9. Due Process Claims (Public Employers)

a. Procedural Due Process

Public employees are also entitled to certain due process protections. Specifically, employees are entitled to procedural due process, if an employer's actions involve the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). When an employer's action—such as a termination—deprives an employee of such an interest, the employee is generally entitled to a pre-deprivation hearing. *Id.*; see also *Patterson v. City of Utica*, 370 F.3d 322, 329 (2d Cir. 2004) (“The Due Process Clause of the Fourteenth Amendment requires that, generally, a person must be afforded the opportunity for a hearing prior to being deprived of a constitutionally protected liberty or property interest.”).

Generally, in the employment context, a property interest arises only where the public employer is barred, whether by statute or contract, from terminating (or not renewing) the employment relationship without cause. *S & D Maint. Co., Inc. v. Goldin*, 844 F.2d 962, 967 (2d Cir. 1988). For example, in *Spanierman*, the court found Spanierman did not have a property right and thus was not entitled to due process, because the school could choose not to renew his employment agreement at will. *Spanierman*, 576 F. Supp. 2d at 302-03. Likewise, in *Ocean Beach*, the district court found that the plaintiffs did not have a property interest in their employment, because their employment was seasonal (and thus “temporary,” in the court's view) and because the plaintiffs did not meet the continuous employment test for protection under New York's civil service law. *Ocean Beach*, 2010 WL 599388 at *7.

Under the right circumstances, a public employee may also be able to make a due process claim in connection with the deprivation of a liberty interest. *Ocean Beach*, 2010 WL 599388 at *8. Generally, termination from employment or refusal to hire, by themselves, do not constitute the deprivation of a liberty interest. See, e.g., *Roth*, 408 U.S. at 577 (1972). Courts have held, however, that a plaintiff may establish a due process claim based upon a deprivation of a liberty interest, if the plaintiff is able to establish damage to his or her reputation, “coupled with the deprivation of a more tangible interest, such as government employment.” *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004). Such claims are commonly referred to as “stigma-plus” claims. *Ocean Beach*, 2010 WL 599388 at *8.

To prevail on a stigma-plus due process claim based upon termination from government employment, a public employee must establish (1) the defendant made stigmatizing statements about the employee, which impugned the employee's good name, reputation, honor, or integrity; (2) the alleged stigmatizing statements were publically disclosed, including being placed in the employee's personnel file; and (3) the statements were made concurrently with, or in close temporal relationship to, the employee's dismissal from government employment. *Segal v. City of New York*, 459 F.3d 207, 212-13 (2d Cir. 2006) (internal quotations and citations omitted); see also *Patterson*, 370 F.3d at 330. Under some circumstances, even a public employer's refusal to rehire an employee may implicate the employee's liberty interests. *Ocean Beach*, 2010 WL 599388 at *8 (citing *Donato v. Plainview-Old Bethpage Central School District*, 96 F.3d 623, 630 (2d Cir. 1996)).

Overall, the test of whether a public employer's action (such as termination or refusal to rehire) impacts an employee's liberty interest is whether the state employer's action "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment." *Roth*, 408 U.S. at 573. Ultimately, in *Ocean Beach*, the district court concluded the plaintiffs were afforded sufficient due process and did not, therefore, determine whether the plaintiffs actually suffered a deprivation of a liberty interest. *Ocean Beach*, 2010 WL 599388 at *9-10.

In light of the foregoing, a public employer should provide procedural due process to any public employee who has a property interest in his or her employment, before taking action against the employee based on his or her use of social media. To reduce the risk of arguable "stigma-plus" claims, public employers should consider taking special care to ensure that the specifics of the employee's social media use (which may be salacious) are not widely distributed or publicized.

b. Substantive Due Process

Substantive due process is distinct from procedural due process and represents an outer limit on the legitimacy of governmental action. *Spanierman*, 576 F. Supp. 2d at 303 (citing *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)). The Supreme Court has emphasized that "the touchstone of due process is protection of the individual against arbitrary action of government ... whether the fault lies in a denial of fundamental procedural fairness, ... or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal citations and quotation marks omitted).

Like a procedural due process claim, a substantive due process claim requires the plaintiff to first establish the existence of a "federally protectable property right," which requires a demonstration of a clear entitlement to a benefit under state law. *Spanierman*, 576 F. Supp. 2d at 303. Second, the plaintiff must demonstrate that "the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* (citing *Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) (internal quotation marks omitted); *Lewis*, 523 U.S. at 846-47. A plaintiff must show "not just that the action was literally arbitrary, but that it was arbitrary in the constitutional sense. Mere irrationality is not enough: only the most egregious official conduct, conduct that shocks the conscience, will subject the government to liability for a substantive due process violation based on executive action." *Id.* at 303-04 (citing *O'Connor v. Pierson*, 426 F.3d 187, 203 (2d Cir. 2005)).

In *Spanierman*, the court found the plaintiff did not have a claim for a substantive due process violation based on the school's decision not to renew his contract. *Id.* at 304. The court based this decision again on the conclusion that the plaintiff did not have a property interest in his at-will employment. *Id.* Further, the court found that the school's actions did not rise to the level of egregiousness required for a substantive due process claim. *Id.* For public employees who may actually have a property interest in their employment, public employers are well advised to ensure that their social media policies are not overly aggressive and that a public employee accused of violating same is afforded the proper degree of due process.

10. “Endorsement”

In addition to the standard fare of employment-related concerns, other, seemingly arcane legal concerns are implicated by the use of social media by employers and employees. Although a full discussion of these concerns is beyond the scope of this paper (which is explicitly focused on employment-related issues implicated by the use of social media), the revised Federal Trade Commission (“FTC”) Guides Concerning the Use of Endorsements and Testimonials in Advertising (the “Guides”) are worthy of mention.

Per the Guides, “When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.” 16 C.F.R. § 255.5. Failure to make this disclosure may result in liability. 16 C.F.R. § 255.1. Although the connection between the FTC Guide, employers, employees, and online social networking policies may not be immediately apparent, one of the examples provided in the Guides leaves little doubt that the FTC has blogging employees on its mind:

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer’s product. Knowledge of this poster’s employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

16 C.F.R. § 255.5.

In light of the Guide, a social media policy should specifically require employees to identify themselves as employees of the company when speaking about the company or its products. In addition, to ensure the other potential issues associated with social media use by employees are properly addressed (*e.g.*, copyright infringement, trade disparagement, deceptive trade practices, insider trading, *etc.*), specialists from multiple fields should be provided the opportunity to put their “stamp” on the policy.

C. A Sample

A sample social media policy has been attached as Appendix A. It should be noted that this is a sample only and assumes a private, publicly-traded employer. An actual social media policy should be developed by the employer, in conjunction with its legal counsel and subject matter experts, taking into consideration the specific benefits and risks the use of social media may present to that employer.

It should further be noted that the sample policy assumes the Company has a robust and properly drafted IT Resources, Software Licensing, and Appropriate Workplace Behavior policies, as well as strict rules surrounding media relations management and the protection of confidential information. In addition, it should be noted that the sample policy makes certain significant

decisions, like permitting managers to be friends with employees, that employers should consider carefully in light of their specific circumstances before adopting. Likewise, it should be noted that the sample policy makes certain risk trade-offs, like affirming the right of employees to disclose their own compensation information (to guard against section 7 claims under the NLRA) and giving employees the choice about whether to report negative information they uncover about the company (to guard against section 8(a)(1) surveillance claims under the NLRA and hours worked claims under the FLSA), which may not be strictly necessary and should be examined carefully before being adopted.

Perhaps most importantly, it should be noted again that this sample policy is written by an employment lawyer with an emphasis on the potential employment issues associated with employee and manager use of social media, as opposed to the myriad of other issues associated with general social media etiquette, the use of social media as a marketing tool, or the use of social media for online business collaboration. Although the sample policy contains elements relevant to these other areas of concern, they are in no way the focus of this particular sample and should not be viewed as a substitute for consultation with an appropriate specialist. Indeed, even the employment-related provisions should not be viewed as a substitute for consultation with an employment specialist familiar with the specific circumstances of the employer, its employees, and their respective use of social media.

Finally, whether or not an employer adopts a specific policy, employers should consider customized training for their managers, recruiters, leave managers, and investigators regarding the proper use of online media in managing employees, selecting candidates, managing absences, and investigating potential workplace misconduct. For example, while the sample policy makes frequent use of the “subject to applicable law” disclaimer, it is important for recruiters to understand the limits of what they may and may not consider when evaluating a candidate’s social media content, particularly in those states that prohibit consideration of lawful off-duty conduct when making a hiring decision. Stated differently, ensuring the employer’s social media policy is properly applied given the employer’s specific circumstances and specific uses of social media is every bit as important as ensuring that the social media policy is properly drafted.

III. Ethical Issues for Attorneys

There are unique ethical issues surrounding a lawyer’s use of social media to conduct discovery in connection with a dispute. This portion of the paper provides an overview of a lawyer’s obligations under the Model Rules of Professional Conduct (the “Model Rules”)—and the Texas Disciplinary Rules of Professional Conduct (the “Texas Rules”), which largely adopt the Model Rules—with respect to social media-based discovery.

A. Use of Social Media in Formal Discovery

Parties have begun to see social media as a potential source of discovery in litigation. As far back as 2005, Starbucks was seeking social media-related discovery in connection with its defense of a Fair Labor Standards Act collective action. *Pendlebury v. Starbucks Coffee Co.*, 2005 WL 2105024 (S.D. Fla. 2005). More specifically, Starbucks sought discovery of any “internet handles” used by any of the plaintiffs in making any posting about Starbucks. *Id.* at *3. Starbucks argued such information would lead to the discovery of internet postings it believed

the plaintiffs had made regarding the number of hours they worked and the nature of their duties. *Id.* The court denied the request until such time as Starbucks has established that the plaintiffs had made such postings. *Id.*

More recently, a Pennsylvania federal court addressed the discoverability of the identities of anonymous social media participants. *McVicker v. King*, 2010 WL 786275 (W.D. Pa. March 3, 2010). In *McVicker*, William McVicker sued the Borough of Jefferson Hills (the “Borough”) and certain Borough Council members, claiming that the defendants unlawfully terminated his employment with the Borough in violation of Title VII, the Age Discrimination in Employment Act, the First Amendment, the Fourteenth Amendment's Equal Protection Clause, and the Pennsylvania Human Relations Act. *Id.* at *1.

The *McVicker* court described the time frame regarding when the Borough Council first learned that McVicker had filed an EEOC claim as “critical” to Plaintiff's claims of retaliation and discrimination due to political affiliation. *Id.* According to McVicker, the four individual council member defendants all provided deposition testimony that the termination of his employment was not discussed until on or about September 8, 2008. *Id.* McVicker contended that this testimony was contradicted by the deposition testimony of other members of Council who were not named as individual defendants. *Id.*

McVicker then sought production of records from Trib Total Media, Inc., owner of the “YourSouthhills.com” website, that would identify a number of anonymous bloggers who posted information on YourSouthhills.com during the period of May 1, 2008, to June 8, 2008. *Id.* According to McVicker, these posts were in “very close proximity to the time when the Plaintiff reasonably believes that Defendants were about to take an adverse employment action against him.” *Id.* The posts reflected an ongoing discussion of the activities of the government of Jefferson Hills Borough. *Id.*

Trib Total Media objected to the subpoena and asserted the First Amendment rights of its anonymous posters. *Id.* at *1-2. The court denied McVicker’s attempt to compel the discovery, finding that Trib Total Media had standing to assert First Amendment rights on behalf of its users, that the terms of service of the blog created an expectation of privacy, that the information was not directly related to the claims of the case, and that the plaintiff had not demonstrated the information required for impeachment could not be obtained from another source. *Id.* at *4-6.

As the popularity of social media continues to rise, it appears inevitable that discovery will increasingly involve investigation of internet postings. Investigation of internet postings on social media and their authors is particularly on the rise in defamation cases, as plaintiffs are increasingly using third-party subpoenas to seek the identity of anonymous bloggers who post allegedly defamatory statements. *See, e.g., Krinsky v. Doe6*, 159 Cal.App.4th 1154, 1168-73 (2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex.App.—Texarkana 2007); *Klehr Harrison Harvey Branzburg & Eilers, LLP v. JPA Development, Inc.*, 2006 WL 37020, * (Pa. Com. Pl. 2006) (collecting cases).

B. Use of Social Media in Informal Discovery

Litigators have also realized that of social media may be used for such informal discovery purposes as monitoring an opposing party's social media sites for useful tidbits of information, monitoring juror's posts to establish potential bias, searching social media connections for potential witnesses to support a case, or searching social media connections to identify potential defendants to a claim. See, e.g., *Parker v. Jekyll & Hyde Entertainment Holdings, LLC*, 2010 WL 532960 (S.D.N.Y. 2010) (approving an enhancement award for named representatives of a class based in part on the named plaintiff's creation of a Facebook page to identify and locate other class members); *U.S. v. Fumo*, 2009 WL 1688482 (E.D. Pa. 2009) (finding no juror misconduct based on juror's Facebook postings of status during trial and subsequent media attention of the Facebook postings); *Healix Infusion Therapy, Inc. v. Helix Health LLC*, 2008 WL 1883546 (S.D. Tex. April 25, 2008) (slip copy) (same); *Pitbull Productions, Inc. v. Universal Netmedia, Inc.*, 2008 WL 1700196, *6 (S.D.N.Y. April 4, 2008) (slip copy) (same); *Goupil v. Cattell*, 2007 WL 1041117 (D.N.H. 2007) (slip copy) (defendant moving to set aside criminal conviction after discovering that the jury foreman had been composing a blog before, during, and after the trial that included the foreman's negative impression of criminal defendants); *Mark Hanby Ministries, Inc. v. Lubet*, 2007 WL 1004169, *6-8 (E.D. Tenn. 2007) (slip copy) (analyzing whether blog postings, among other things, provided sufficient basis for exercise of jurisdiction); cf. *Lorraine v. Markel American Ins. Co.*, 2007 WL 1300739, *39-55 (D. Md. 2007) (analyzing a variety of hearsay exceptions as they relate to blogs and other electronically stored utterances); *X17, Inc. v. Lavandeira*, 2007 WL 790061, *4 (C.D. Cal. 2007) (not reported in F.Supp.2d) (excluding as hearsay blog entries identifying defendant as the source of allegedly infringing photographs); *Cingular Wireless, LLC v. Hispanic Solutions, Inc.*, 2006 WL 3490802, *1 (N.D. Ga. 2006.) (slip copy) (plaintiff relying on "certain 'blog' chat" to support allegations that defendant made unsolicited phone calls to the mobile phones of plaintiff's customers); *McCabe v. Basham*, 450 F.Supp.2d 916, 924 (N.D. Iowa 2006) (in suit alleging nationwide conspiracy to suppress dissent, plaintiffs moving court to consider an anonymous blog entry from someone claiming the President shot him the bird at a rally in Pennsylvania).

For example, in *Quigley v. Karkus*, the plaintiff, a publicly traded company, sued a group of investors who collectively owned more than 10 percent of the shares of Quigley for alleged violations of the Securities and Exchange Act of 1934. *Quigley v. Karkus*, 2009 WL 1383280, *1 (E.D. Pa. 2009). Quigley and the investors were engaged in a proxy contest over election of the board of directors. Quigley alleged the investors were attempting to obtain control of the company by means of materially false statements in proxy materials. *Id.* Among other things, Quigley alleged the investors failed to disclose that another investor, Mr. Ligums, was part of their "group" (as defined by the Securities and Exchange Act) that intended to solicit proxies for the unseating of the incumbent Quigley board. *Id.* at *3.

Quigley contended that Ligums' extensive personal and professional connections with many of the investors led to the conclusion that he agreed to act in concert with the investors to solicit proxies and vote shares for control of the company. *Id.* Quigley based this claim, in part, on evidence that Ligums had extensive personal and professional connections with other members of the investor group, including that Mr. Ligums was Facebook "friends" with one of the investors and one or more of that investors' children. *Id.* at *5.

The court flatly rejected any argument that Mr. Ligums' Facebook activity deemed him a member of the "group" for purposes of the Securities and Exchange Act:

For purposes of this litigation, the Court assigns no significance to the Facebook "friends" reference. Facebook reportedly has more than 200 million active users, and the average user has 120 "friends" on the site. The fastest growing demographic is those [users] 35 years old and older. Facebook Pressroom, <http://www.facebook.com/press/info.php?statistics> (May 13, 2009). Regardless of what Facebook's apparent popularity or usefulness may say about the nature of 21st century communications and relationships, the site's designers' selections of icons or labels offer no substance to this dispute. Indeed, the Court notes that electronically connected "friends" are not among the litany of relationships targeted by the Exchange Act or the regulations issued pursuant to the statute. Indeed, "friendships" on Facebook may be as fleeting as the flick of a delete button.

Id. at *5, fn. 3.

In another case, TEKsystems—a company that recruits, employs, and provides the services of technical service personnel, industrial personnel, and office personnel—recently used LinkedIn connections to allege violations of contractual employee non-solicitation provisions by its former employees. *TEKsystems, Inc., v. Hammernik et al.*, No. 10-CV-00819 (D. Minn. Mar. 16, 2010). TEKsystems sued several of its former recruiters, including defendant Hammernick, for violations of employment agreements with TEKsystems, which included covenants not to compete, not to solicit, and not to divulge confidential information. In its complaint, TEKsystems alleged Hammernick solicited TEKsystems' contract employees and clients on behalf of her new employer. In support of its complaint, TEKsystems alleged that "Hammernick has communicated with at least 20 of TEKsystems' Contract Employees using such electronic networking systems as "LinkedIn." *Id.* at 10. TEKsystems further alleged that in such communications, Hammernick asked one employee if he was "still looking for opportunities." *Id.* She then stated that she "would love to have [you] come visit my new office and hear about some of the stuff we are working on." *Id.* TEKsystems attached the alleged communication to its complaint. *Id.*

It is in this context that questions under Rules 4.2 and 4.3 of the Model Rules and Rules 4.02 and 4.03 of the Texas Rules arise. In particular, the use of social media in this fashion raises the issues of whether using social media to informally gather information about a party constitutes a "communication" for purposes of the Model Rules and Texas Rules and, if so, whether that communication runs afoul of the rules for communicating with a represented or unrepresented party.

C. The Texas Disciplinary Rules of Professional Conduct

According to the American Bar Association, 47 states have rules of professional conduct relating to lawyers that follow the format of the Model Rules. American Bar Association, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited May 10, 2010). In addition, 39 states have generally adopted the comments to the Model Rules. American Bar Association,

<http://www.abanet.org/cpr/pic/comments.pdf> (last visited May 10, 2010). Analysis under the Model Rules can thus serve as a useful guideline in addressing questions of lawyers' ethical responsibilities.

1. Ethical Limits on Communications

The Model Rules and Texas Rules include two rules that generally govern communications by lawyers with persons other than their clients or potential clients. The first, Model Rule 4.2 and Texas Rule 4.02, addresses communication with persons who are represented by counsel, such as adverse parties in litigation:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL R. OF PROF. CONDUCT 4.2; *see also*, TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(a) (“In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”)

The second, Model Rule 4.3 and Texas Rule 4.03, addresses communication with persons who are not represented by counsel:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

MODEL R. OF PROF. CONDUCT 4.3; *see also*, TEX. DISCIPLINARY R. PROF. CONDUCT 4.03 (“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”).

Moreover, courts have confirmed that the rules regarding professional conduct of attorneys apply to online activity. *See, e.g., United States f. Khan*, 538 F. Supp. 2d 929, 935-36 (E.D.N.Y. July 19, 2007) (cautioning an attorney to review the postings on his website in light of New York's Disciplinary Rules and to “comport himself in a manner that adheres to these rules”). In addition, the court observed that, given the nature of the Internet, the attorney's online postings also may be subject to the codes of professional conduct of other states. *Id.*

a. Whether Online Posting Constitutes a “Communication”

Use of social media by a lawyer for informal discovery could take several forms. A lawyer may make use of an opposing party’s social media site for the purpose of gathering information about the party or the subject matter at hand by passively reviewing the party’s social media content. Alternatively, the lawyer could take a more active role by posting content on a social media site, initiating an original post, or posting a response to another post. These posts might be on the lawyer’s social media site or someone else’s social media site.

i. Passive Review

Model Rule 4.2 and Texas Rule 4.02 states that a lawyer shall not “communicate” about the subject of his or her representation with a person the lawyer knows to be represented. Although there is no law on the subject (yet), a passive review of a party’s social media site seems to be less like a “communication,” because there is no direct interaction between the individual who posted the information and the lawyer reviewing it. This use of a social media seems to be more comparable to a review of an unprivileged document voluntarily produced by the party.

ii. Affirmative Posting

By contrast, an attorney who affirmatively and independently posts content on a social media site connected to a represented party in an attempt to gather information relevant to the subject matter of the party’s representation may be in serious risk of violating Model Rule 4.2 and Texas Rule 4.02. Among other things, it is important to consider whether the affirmative post by the attorney is an original post or a response to pre-existing post. It is also important to consider whether the post by the attorney is on the attorney’s social media site or on someone else’s social media site.

In contrast to a passive review of postings, an attorney who initiates an original post seeking to elicit a response from a represented party appears to fall squarely within the Rules’ prohibition against communicating with a represented party about the subject matter of representation without the consent of opposing counsel. While there is no law on this subject (yet), the initiation of an original post by an attorney appears to be a “communication” with the represented party. See David Hricik, *The Ethics of Blogging, Blawging, Chatting, List-Serving and Just Kabitzing in Public Places*, p. 11-13 (2006), <http://ssrn.com/abstract=917180> (discussing whether communication occurring on a blog is covered by Model Rules 4.2 and 4.3).

Consider the following hypothetical. A plaintiff’s lawyer posts to a social media site related to a company-defendant in search of current employees of the company-defendant who might be able to corroborate the plaintiff’s version of events—thereby circumventing the company’s lawyers. This active, affirmative act of posting in a forum known to be frequented by representatives of the employer-defendant (including managerial representatives) is likely to run afoul of Model Rule 4.2 and Texas Rule 4.02 because (1) a lawyer, (2) is initiating communication with persons who may be representatives of the company, (3) requesting information about the subject matter of his representation, (4) with knowledge that the company is represented in the matter; and (5) without the permission of opposing counsel. See MODEL R. OF PROF. CONDUCT 4.2; TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(a).

If passive review appears to fall outside the scope of Model Rule 4.2 and Texas Rule 4.02 and an original posting appears to fall within the scope of Model Rule 4.2 and Texas Rule 4.02, the question remains of whether a responsive posting triggers these Rules. Comment 3 to Rule 4.2 of the Model Rules states,

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

MODEL R. OF PROF. CONDUCT 4.2, cmt. 3.

According to Comment 3, Model Rule 4.2 governs all communications with represented parties, whether initiated by the lawyer or not. Stated differently, according to the comment, Model Rule 4.2 applies any time the lawyer knows the party is represented by counsel. *Id.*

Notwithstanding Comment 3 to Model Rule 4.2, some jurisdictions draw a distinction between a communication initiated by an attorney and a communication initiated by a represented party. For example, although the Texas Rules are modeled after the Model Rules, the Texas rules do not include a comment similar to Comment 3 of the Model Rules. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 4.02, cmts. In this connection, it is noteworthy that the Fifth Circuit Court of Appeals held that a communication initiated by a represented criminal defendant to counsel for a co-defendant did not violate the Texas Rules, because the represented criminal defendant initiated the communication. *In re Medrano*, 956 F.2d 101, 103-05 (5th Cir. 1992); *cf.* TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(b) (allowing a party to initiate direct communication with an opposing party, even if the opposing party is represented, provided the attorney is not the one orchestrating the communication).

In jurisdictions such as Texas, an attorney posting a *response* to a represented-party's post may be able to argue the communication was not prohibited by the applicable disciplinary rules, because the "conversation" was initiated by the represented party. *Compare In re Medrano*, 956 F.2d 101, 103-05 (5th Cir. 1992) (no violation of Texas Disciplinary Rule of Professional Conduct 4.02 where represented party initiated contact with attorney) *and* TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(b) (allowing a party to initiate direct communication with an opposing party, even if the opposing party is represented, provided the attorney is not the one orchestrating the communication). Obviously, this argument will have greater force if the post by the represented party was on the lawyer's social media site, such that there is little doubt that the represented party knew that he or she was initiating a conversation with the attorney.

By contrast, if the attorney is responding to the represented party's post on his or her own social media site or on a third-party social media site, the argument loses considerable force, because the individual may not have intended to "initiate" a conversation with counsel for his or her opponent. This is particularly true, if the attorney does not clearly disclose his or her identity in his or her responsive post. *Compare* MODEL R. OF PROF. CONDUCT 4.2, cmt. 1 ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and

the uncounselled disclosure of information relating to the representation.”) and TEX. DISCIPLINARY R. PROF. CONDUCT 4.02, cmt. 1 (“Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel.”).

b. Whether the Lawyer “Knows” the Party Is Represented

Even if an attorney’s post constitutes a “communication,” there may yet be a question about whether the lawyer knew the party was represented. See MODEL R. OF PROF. CONDUCT 4.2 (only prohibiting communication with a person known to be represented); see also, TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(a) (same). Consider the question of a corporate-defendant:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

MODEL R. OF PROF. CONDUCT 4.2, cmt. 7.

The comment to the Texas Rule, although somewhat differently worded, is largely the same. TEX. DISCIPLINARY R. PROF. CONDUCT 4.02, cmt. 4 (“In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved.”). Nevertheless, this comment has been the subject of widely varying interpretations. See David Hricik, *The Ethics of Blogging, Blawging, Chatting, List-Serving and Just Kabitzing in Public Places*, p. 4-6 (2006), <http://ssrn.com/abstract=917180>. It should also be noted that, where a state’s rule and the Model Rule differ, a federal court may attempt to apply a “national” ethics standard by analyzing the issue under both the applicable state rule and the Model Rule in an attempt to harmonize the two. See *id.* at p. 6.

Given the inherently indeterminate scope of a corporate party, an attorney-poster must be careful to ensure that his or her post does not solicit responses from an employee of the corporate party who “supervises, directs or regularly consults with the organization’s lawyer concerning the matter” or “has authority to obligate the organization with respect to the matter” or “whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” Without such safeguards, the attorney runs the risk of violating Model Rule 4.2, if any such person responds to the post. This is particularly true with respect to the Model Rule, which does not draw a distinction between communications initiated by the attorney and communications initiated by the represented party. MODEL R. OF PROF. CONDUCT 4.2, cmt. 3. It should be noted, however, that neither the Model Rule nor the Texas Rule requires the

consent of the organization for communications with former employees of the organization. MODEL R. OF PROF. CONDUCT 4.2, cmt. 7; TEX. DISCIPLINARY R. PROF. CONDUCT 4.02, cmt. 4.

Even if the attorney-poster is careful to ensure that no one who constitutes a corporate “party” under the Rules responds, the attorney-poster is still required to follow certain procedures in communicating with unrepresented parties. More specifically, Texas Rule 4.3 requires that the attorney (1) not state or imply that he is disinterested in the matter; (2) make reasonable efforts to correct any misunderstanding by the person about the lawyer’s role in the matter; and (3) refrain from giving legal advice if he knows the person’s interests are in conflict with the interests of his client. MODEL R. OF PROF. CONDUCT 4.3; TEX. DISCIPLINARY R. PROF. CONDUCT 4.03; *see also*, MODEL R. OF PROF. CONDUCT 4.3, cmt. 1 (“In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”); *cf.* MODEL R. OF PROF. CONDUCT 1.13(f) (“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”).

2. Advising Within the Law

Both the Model Rules and the Texas Rules prohibit an attorney from counseling a client to engage in, or assist a client in engaging in, conduct that the lawyer knows is criminal or fraudulent. MODEL R. OF PROF. CONDUCT 1.2(d); TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c). These same rules, however, permit an attorney to discuss the legal consequences of any proposed course of conduct with a client and to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. MODEL R. OF PROF. CONDUCT 1.2(d); TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c). The comment to the model rule explains the interplay between these two provisions as follows:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

MODEL R. OF PROF. CONDUCT 1.2(d), cmt. 9; *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c), cmt. 7 (“There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”).

With questionable decisions like *Quon* and *Pietrylo* on the books (for at least the moment), it is especially important for attorneys to understand this distinction. If, for example, an employer informs its counsel that an employee has provided a password to access a MySpace group created by other employees that the employer wishes to review, that counsel needs to understand

whether he or she is permitted to advise the employer to access the group using the password. With this concern in mind, comment 10 to Texas Rule 1.02(c) is particularly instructive: “The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.” TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c), cmt. 10.

IV. Conclusion

The genie is out of the bottle, and attorneys representing employees, employers, and unions would be well advised to familiarize themselves with social media to ensure they are aware of the myriad ways in which its potential uses and misuses may affect their clients. As more and more information regarding individuals and institutions becomes more and more available, the legal management, protection, and use of that information becomes more and more important. Attorneys should also remember that even in situations where the formal rules of civil procedure do not apply, the applicable rules of ethics do.

This paper is not intended as legal advice.

APPENDIX A:

Sample Social Media Policy

Introduction

This policy is designed to provide guidance for employees who use social media, which should be broadly understood for purposes of this policy to include blogs, wikis, microblogs, message boards, chat rooms, electronic newsletters, social networking sites, and other sites and services that permit users to share information with others. As of the most recent revision date of this policy, Facebook, MySpace, LinkedIn, Twitter, YouTube, Flickr, and Gchat are all examples of social media. This is not an exhaustive list, of course, and is likely to change over time.

Basic Principle

Employees should at all times be aware of the effect their actions may have on their images, as well as the Company's image. Although this policy provides specific guidelines for social media use, one simple rule of thumb is to avoid any use of social media that would be embarrassing if it became known to others at work or in the larger business community.

Social Media During Work Hours

Working time is for working, and the use of social media during working time is not permitted. The occasional use of social media during non-working time is permitted, provided it does not create a disruption, does not interfere with business, and complies with the Company's policies, including the Company's IT Resources and Appropriate Workplace Behavior policies. To be clear, any use of social media that occurs during work hours or on Company premises, or involves any Company IT resource, must comply with all Company policies.

Social Media After Hours

The Company respects the rights of its employees, and what employees do on their own time is not usually of any concern to the Company. That said, employees should consider whether their online conduct would cause others to see them in a different light if it became known at work or in the larger business community. Employees should be particularly mindful of any after-hours online activity that would violate the Company's Code of Conduct or a Company policy if engaged in at work. Subject to applicable law, the Company may consider any online conduct of which it becomes aware, even if that conduct was engaged in after hours, in deciding whether to discipline, terminate, or take any action against an employee.

Guidelines

These guidelines represent a starting point, not a stopping point, for educating employees about the work-related issues that may be implicated by the use of social media. In all instances, employees are expected to use good judgment and to consider the effect of their social media use on others and the way in which others perceive them.

1. Stay Legal

Employees are responsible for ensuring that their use of social media complies with all applicable laws. Employees should note that what law applies is often a complicated question when online activity is involved, given the dispersed geographic nature of the Internet and its users. If an employee is in doubt about the legality of his or her conduct, the employee should find out whether what he or she is doing is legal before proceeding.

2. Remain Respectful

Employees should be respectful in their use of social media and avoid inflammatory or childish exchanges. Employees should assume others will become aware of their online activity and think carefully about whether that online activity creates an accurate impression of who they are. Moreover, in accordance with general Company policy, employees are not permitted to post, publish, or otherwise distribute defamatory information regarding any other person, including any of the Company's competitors. Rather than engaging in an unproductive war of words, if an employee comes across negative information regarding the Company, the employee may forward it to the Director of Media Relations, who will deal with it accordingly.

3. Know What You Are Talking About

Employees are encouraged to know what they are talking about when talking online (and off-line, for that matter). Before getting into a disagreement with someone, an employee should consider whether the employee has his or her own facts straight. Although this is simply a piece of friendly advice with respect to online activity unrelated to the Company, it is a mandate when it comes to online activity that is related to the Company or its business. An employee may not under any circumstance communicate information related to the Company or its business that is inaccurate or misleading.

4. Be You

Employees are encouraged to speak in the first person online. In addition, if an employee's use of social media is related to or involves the Company or its business, or if an employee is making statements or representations related to the Company or its business online or elsewhere, the employee must use his or her own name, identify his or her association with the Company, and make it clear that the employee is speaking for him or herself, not the Company. Employees may not attempt to appear disinterested when speaking about the Company or its business. In fact, as a general rule, if an employee has a vested interest in something the employee is discussing, the employee should point that interest out.

5. Do Not Speak for the Company

In accordance with the Company's Media Relations policy, no employee may speak on behalf of the Company, unless specifically authorized to do so by the Company's Media Relations Department. Likewise, employees should understand that a statement by someone affiliated with the Company does not necessarily reflect the view of the Company and should be viewed as a personal statement only, unless the statement has been specifically authorized by the Company's

Media Relations Department. Managers, for example, are neither required nor authorized to speak on behalf of the company online by mere virtue of their status as managers.

Please also note that no one may use any Company logo or trademark, unless specifically authorized to do so by the Media Relations Department. If an employee sees online use of the Company's logo or trademark that the employee believes may not be authorized, the employee may notify the Director of Media Relations.

Finally, if an employee receives a media or press contact or inquiry related to the Company, the employee should not respond but should instead immediately forward it to the Director of Media Relations. Remember: the Company takes its image seriously.

6. Maintain Confidentiality

An employee's confidentiality obligations extend to the employee's online activities. Accordingly, employees should be familiar with the terms of the Company's policies on Confidential Information and Insider Trading, as well as the terms of the employee's confidentiality agreements with the Company. Generally speaking, an employee should not disclose to any third party any information related to the Company or its people, products, services, clients, partners, suppliers, or other business interests unless that information is already public knowledge. (An employee may, of course, discuss his or her own compensation and similar information regarding the employee's own terms of employment but should do so in a respectful fashion.) Even if the information is public, an employee should avoid discussing the Company's clients, suppliers, and partners without their permission. If an employee is in doubt about whether he or she may disclose particular information, the employee should contact the Legal Department.

7. Respect Privacy

Employees should respect the privacy of others both online and offline. Employees should not disclose the employment status, marital status, sexual orientation, personal habits, medical conditions, or other personal details of others without permission, whether or not such information otherwise constitutes "confidential information" under the terms of the Company's policies or agreements. (Obviously, employees must not disclose information learned about an individual, such as a client, by virtue of employment with the Company.)

Likewise, employees may not post, publish, or otherwise disseminate any photograph, video, or other depiction of individuals connected with the Company, without the permission of the individuals depicted. In addition, if the photograph, video, or other depiction was created by or on behalf of the Company or reveals non-public information regarding the Company or its business, the employee must also obtain the written permission of Media Relations Department.

8. Honor Copyrights, Trademarks, and Intellectual Property

Employees must not make any use or reproduction of any copyright, trademark, or intellectual property belonging to any other person, except in accordance with applicable law. Employees should avoid quoting more than short excerpts from the works of others and should always give

the author proper credit through formal citation. The Company respects the copyrights, trademarks, and intellectual property of others and expects its employees to do the same.

9. Avoid Inappropriate Behavior

The Company prohibits all forms of inappropriate workplace behavior, including but not limited to unlawful discrimination and harassment. If the Company becomes aware of potentially discriminatory or harassing online conduct by an employee that bears any relation to the workplace, the Company will investigate such conduct in accordance with its standard policies. Subject to applicable law, an employee who is determined to have engaged in conduct in a violation of any Company policy may be subject to discipline, up to and including termination, even if such conduct was engaged in after-hours or off premises.

10. Use Good Judgment

Again, the foregoing guidelines provide a starting point, not a stopping point, for the proper use of social media. Employees are expected to maintain personal responsibility for their online activities and to use good judgment when using social media at all times. If an employee has any questions about his or her use of social media either during the work day or after-hours, the employee should contact Human Resources.

Social Media Use on Behalf of the Company

Any employee who is authorized to use social media as an official representative of the Company must use his or her real name and identify his or her position with the Company. All authorized social media use must comply with all Company policies and must be consistent with fostering a trusted, respected, and professional image for the Company. If an employee who has been authorized to use social media on behalf of the Company has any question regarding whether any particular use of social media is proper, the employee must discuss the use with Media Relations before proceeding.

References and Recommendations

Managers are neither permitted nor authorized to provide employment references or recommendations online or otherwise. Rather, all reference and recommendation requests must be directed to Human Resources.

Managers As Friends

The Company encourages positive working relationships between managers and employees and ultimately trusts the decision of whether to become online “friends” to the judgment of the manager and employee involved. That said, managers and employees should think very carefully before becoming “friends” online.

Employees, for example, should think carefully about whether they really want their managers to be aware of all of the information visible to their online “friends,” particularly given a manager’s obligation to inform the Company of any activity that violates this or any other policy. Similarly, managers should think carefully about whether they really want to become aware of

all the information an employee has decided to make available to his or her online friends. Again, a manager who becomes aware of conduct by an employee that violates this or any other policy must notify his or her manager or Human Resources.

Managers and employees should also consider whether the other will view a friend request as intrusive or something he or she “must” agree to. To be clear, an employee is not required to be online “friends” with his or her manager, and a manager is not required to be online “friends” with his or her reports.

Company Monitoring of Social Media

Consistent with the Company’s IT Resources policy, employees have no expectation of privacy with respect to any information created, viewed, distributed, received, uploaded, downloaded, accessed, or otherwise facilitated by any Company-owned or provided computer, network, email system, SMS, internet connection, or other IT resource (“IT Resources”), which includes any use of social media that involves any Company IT Resources. Similarly, employees should have no expectation of privacy whatsoever with respect to information that is generally available online.

The Company monitors and reserves the right to publish, disseminate, and make use of any content created, viewed, distributed, received, uploaded, downloaded, accessed, or otherwise involving any Company IT Resource. Any employee who makes use of any Company IT resource consents to such monitoring, publication, dissemination, and use by the Company.

No statement of any manager or other official may alter or limit the Company’s rights as described in this policy or in the Company’s IT Resources policy. Likewise, the fact that the Company may not have audited or reviewed an employee’s use of Company IT Resources in the past should not create any expectation that the company will not do so in the future.

Finally, the Company reserves the right to monitor online activity by any person regarding any topic, even if such activity does not involve the Company’s IT Resources, subject to applicable law.

Questions

If an employee has a question regarding this policy, the employee should contact Human Resources.

Violations

If an employee believes this policy has been violated, the employee should report the violation to his or her manager or Human Resources. Any violation of this policy may result in disciplinary action, up to and including termination. Nothing in this or any other policy alters the at-will nature of any employee’s employment.