The Management and Legal Quagmire of Social Media

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The contrast in history

- Social media—a whirlwind career
  - Facebook—only 7 years old, believe it or not
  - Twitter—less than 6
  - Blogs—about 10

- The law—an ancient concept and process
  - Anglo–American common law dates to the Middle Ages
  - Most American legal process dates back to before the mid-20th century.
The evolution of social media

- Social media evolves very rapidly:
  - New concepts evolve in a period of months
  - New products appear regularly
  - Boundaries are pushed constantly
  - Improved data technologies permit ever more sophisticated data collection and vastly more data storage
The evolution of law

- Law changes very slowly
  - Partially by intent—processes were intended to be cumbersome so as to limit the power of government
  - Partially a function of the limitations of legal processes themselves:
    - Court cases that take years to resolve
    - Lines of cases that take decades to resolve
    - Legislative processes that require several years to push through major bills
    - Regulatory processes that require several years to push through regulations
Result

- A serious mismatch between the evolution of social media and the ability of the law to deal with them
- Social media simply evolve too quickly for legal processes to ever completely catch up to them
- Courts and legislators are constantly addressing outdated problems or applying outdated solutions to current problems
The current state

- A hodgepodge of:
  - Outdated statutes
  - fact-specific case decisions and regulatory pronouncements
  - Legal processes intended for other more manageable technologies applied to social media with mixed results
  - A large legal vacuum
The Practical Issue

- Social media is increasingly being used in the workplace
- For pleasure:
  - Employee networking, social groups, etc.
- For business:
  - As a collaboration tool
The Stored Communications Act, 18 USC Ch. 121 (1986)

- Unauthorized access to stored communications is illegal
- Unauthorized disclosure of a stored communication by a service provider is prohibited
- Disclosure to government entities except as specifically provided for is prohibited
- Businesses or employers that provide social media networks may be “service providers”
Questions

- Can we manage these privacy rights?
- How?
- What about the Patriot Act and the NSA?
Public Records Laws

- Social media sites managed by public agencies are public records under most public records laws
  - Retention problematic-tools are not yet in place to easily retain a full record
  - Some subjects are subject to open meetings laws and so can’t go on Facebook
Questions

- Should a public entity even have a social media site?
- How do you control usage?
- How do you retain the “public records” on it?
Regulated Industries

- Many industries impose limitations or retention requirements on communications between the regulated persons and clients or the public
  - Lawyers
  - Financial services
- Others – work-related social media postings may be regulated more generally
  - Pharma
Questions

- Should you even allow social media sites in the workplace?
- Should you allow work/product discussions and threads?
Employment law

● A very touchy area—people can and do say all sorts of things
  – About their own employer
  – About working conditions
  – About wages
  – About union activities

● Some of this is protected, some is not
  – Both employees and employers need to be clear about what is protected and what isn’t
Employee speech

What’s protected?

- “Concerted action”—discussions in which employees talk about work conditions or speak out on work conditions with the intent to approach the employer about them
- “Section 7 rights”—discussions concerning union committee or organizing
- How do you know if the discussion is a section 7 discussion or concerted action?
  - The NLRB will tell you afterward
Employee speech

- What’s not protected?
  - General bitching and complaining
  - Speech to 3rd parties, including your Congressman
  - False or defamatory statements only if “maliciously false”
  - How do you know if it’s maliciously false?
    - The NLRB will tell you afterwards
Questions

- Do you even want to go there?
- Do you want to monitor employee postings on sites owned by others, e.g., Facebook?
Intellectual property

- A Facebook or LinkedIn page or twitter account is now important commercial property

- Who owns it?
  - Personal to the employee, probably created by the employee, but:
    - Used for business
    - Accessed on company time
Questions

- Who owns it?
- How do you begin to control this?
Privacy

- U. S.—Virtually no legal controls on collection and usage of data except for minors
  - Privacy is controlled by the usage policies of the service provider, and these generally give them very, very broad rights
Issues in the EU

- E.U. privacy law is very different from the U.S.
- Data subjects, including social media users, can demand a full copy of their file on CD
- There are much more stringent controls on data use
- Countries, and even provinces, may strictly control particular aspects of social media usage
The right to be forgotten

- E.U. law based on French law - le droit à l’oubli - or the “right of oblivion”
- Content about a person must be deleted on demand
- Three possible applications:
  - Content I post
  - Content I posted that is re-posted by others
  - Content about me that is posted by others
Questions

- You’re a multinational – what do you do?
Discovery

- Standard doctrine—everything you have that may be potentially relevant to a lawsuit is discoverable.
- No surprise—social media postings are discoverable too.
- The surprise—people don’t seem to know this.
- The result—some people, including lawyers, have found themselves in a very bad spot because they thought that social media were different from everything else.
Questions

- How do you manage this – retention, disposition, spoliation?
- How do you find things during discovery?
Questions

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