



Tuesday, October 26
11:00am-12:30pm

611 - Web 2.0 – Ethical Do's and Don'ts for In-house Counsel

Laura D'Amato

Director (Partner)

Goulston & Storrs, P.C.

Bernard Gaffaney

Senior Corporate Counsel

Cisco Consumer Products

William E. Hornsby, Jr., Esq.

Staff Counsel

American Bar Association

Margaret Raymond-Flood, Esq.

Partner

Norris, McLaughlin & Marcus

Faculty Biographies

Laura D'Amato

Laura D'Amato is a director in the litigation and employment groups at Goulston & Storrs, P.C. Her practice focuses on a variety of complex litigation matters, including probate and fiduciary litigation, employment disputes, professional malpractice claims, and various contractual and real property related matters.

She is on the board of directors of hopeFound and the Community Legal Services and Counseling Center.

Ms. D'Amato graduated from Boston College Law School.

Bernard Gaffaney

Bernard A. Gaffaney is senior corporate counsel at Cisco Consumer Products LLC (Cisco), and works out of Cisco's campus in Irvine, California. His responsibilities include supporting within the Americas Cisco's sales group, marketing & promotions group, manufacturing group, as well as its customer advocacy group.

Prior to joining Cisco, Mr. Gaffaney worked as senior corporate counsel at Pioneer Electronics (USA) Inc. (Pioneer), in its offices in Long Beach, California. While at Pioneer, he managed its commercial and class action litigation and supported Pioneer's mobile entertainment group with respect to product planning, manufacturing, sales & marketing, and customer support issues. Before working for Pioneer, Mr. Gaffaney was an attorney at Morrison & Foerster in its (then-existing) Orange County office.

Mr. Gaffaney is the immediate past president of ACC's Southern California chapter (ACC's most decorated chapter) and continues to serve on that chapter's board of directors.

Mr. Gaffaney received a BA from UCLA and a JD from UC Hastings College of the Law.

William E. Hornsby, Jr., Esq.

William E. Hornsby, Jr. is counsel in the American Bar Association's Division for Legal Services, where he staffs the Standing Committee on the delivery of legal services. Since joining the ABA staff, he has provided support to the Standing Committee on Professionalism, the Commission on Responsibility in Client Development, the Committee on Research on the Future of the Law, and the ABA Presidential Commission on Access to Lawyers.

Mr. Hornsby has written several articles on technology and legal ethics for publications such as the National Law Journal, the Georgetown Journal of Legal Ethics and the ABA Law Practice Management magazine. His most recent law review article is entitled Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development, and appears in the Arizona State Law Review. He is a frequent speaker at bar association conferences and has participated in programs at universities including Fordham, Arizona State the University of Maryland and the University of Utah. He is a chair of the Illinois Attorney Registration and Disciplinary Commission Hearing Panel and an adjunct faculty member of the John Marshall Law School, where he teaches the first law school course on the professional responsibility of a technology-based law practice, in the LL.M. program in Information Technology and Privacy Law. He was inducted as a fellow into the College of Law Practice Management.

Mr. Hornsby has a BA from the University of Illinois, an MA from Southern Illinois University and a JD from DePaul University College of Law.

Margaret Raymond-Flood, Esq.

Margaret Raymond-Flood, a member of Norris McLaughlin & Marcus, P.A., devotes her practice to general litigation with an emphasis on complex commercial matters on both the state and federal levels. In particular, she has experience in the defense of environmental, products liability, professional liability and insurance claims and also has unique experience handling cy pres matters. Ms. Raymond-Flood is co-chair of the firm's Response to Electronic Discovery and Information ("REDI") Group, an interdisciplinary team that helps clients with the identification, preservation, collection, review, and production of massive amounts of electronically stored information required by new federal and state court rules.

Ms. Raymond-Flood serves on the board of trustees of the Hunterdon County YMCA. She is a member of the New Jersey Defense Association, Somerset County Bar Association, and Hunterdon County Chamber of Commerce. She is also a member of the Meritas Litigation Section Steering Committee, which serves hundreds of members from all over the United States and the world. Ms. Raymond-Flood served as a coach of the Bridgewater-Raritan High School Mock Trial Team for five years.

She earned her BA, magna cum laude, from Seton Hall University, and her JD from Seton Hall University School of Law. After graduating law school, she served as Law Clerk to the Honorable Neil H. Shuster, presiding judge of the Mercer County Civil Division in the Superior Court of New Jersey.

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**Web 2.0 –Do's and Don'ts
 for In-house Counsel regarding
 the Use of Social Media at a Company**

Bernard Gaffaney
 Senior Counsel
 Cisco Consumer Products LLC

October 26, 2010

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What is Social Media?

- Revolutionary change in the way that people discover, read and share information/content.
- Shift from one-to-many (think of broadcasts) to many-to-many (community dialogues).
- Technology has made this possible (Internet + highly accessible and scalable publishing technologies).
- Includes networks, communities, wikis, blogs, vlogs, message boards, bookmarks, etc.

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facebook | e | LinkedIn | twitter™

yelp | digg

You Tube | myspace.com a place for friends | WIKIPEDIA The Free Encyclopedia

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Some Attributes of Social Media

- Truly global reach
- Limited to no-cost to access
- No special skills needed to use
- Instantly available & viral
- Content can be altered (BUT impossible to retract)

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Social Media is Here to Stay

- More than **2/3** of the global Internet population visits social media sites
- Facebook = 500 million users
- Twitter = 100 million users
- LinkedIn = 75 million users
- MySpace = 66 million users
- Wikipedia = 13 million users (3.4M articles)
- And at the **workplace**, employers and employees are posting and viewing at social media sites.

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Potential Benefits of Social Media at the Workplace

For employees:

- Allows employees to have voice, connect with others and be productive (e.g., employee freedom and morale)
- Improves communication, information and connectedness w/i company

For company:

- Reaches customers through alternative avenues of communications
- Provides up-to-date information for customers
- Creates new marketing opportunities, increases branding and improves public relations
- Improves communication & information within company
- Drives innovation within company

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Social Media = Increased Revenue



“Companies deeply engaged in social media grew revenues by 18% over last year...companies that were least engaged dropped 6% on average.”

Charlene Li, Founder, Alltimeter Group
 July 2009 Report "ENGAGEMENTdb"

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Potential Risks with Social Media at Workplace

Generalized risk to company is that --

- ✓ Company will lose control over information,
- ✓ Released information will be virally disseminated
- ✓ As a result, company will be exposed to liability (lawsuits, fines, investigations, damage to goodwill, etc.)

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Potential Risks with Social Media at Workplace

Some specific risks to company --

- ✓ Unauthorized disclosure of confidential information and trade secrets
- ✓ Copyright and trademark infringement
- ✓ Harassment
- ✓ Defamation
- ✓ Malicious software
- ✓ Gov't investigation (e.g., FTC on product endorsements)
- ✓ Claims relating to hiring/firing of employees

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1. Integrate with Existing Company Policies

- Electronic Usage Policy
- Code of Conduct Policy
- Information Security Policy
- Document Retention Policy

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2. Guiding Rules for Employees

- Employees should ask themselves how posting would look if it showed up on the front page of the **Wall Street Journal**.
- Employees should **avoid** statements that would **harm company's reputation** and should **report misconduct to company directly**.
- Employee should be **factual, honest and respectful**.
- Employee should **add value** with **worthwhile information**.
- Employees should **take responsibility** for what they post, and **correct errors promptly** when they become known.
- Employee should choose appropriate **privacy settings** for social media sites.
- Employees should be aware of **applicable laws**, including privacy, confidentiality, IP, defamation, advertising, SEC (if applicable), etc.

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3. Company Assets: Personal Use & Privacy Expectations

- Policy should clarify whether company permits any **personal use of company assets**, including use of email, Internet, and social media sites.
- Policy should clarify that employees have **no expectation of privacy** w/r/t their use of **company assets** (computers, networks, smartphones, phones, etc.).
 --Courts may ignore this statement or engage in balancing

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4. Reach of Policy: Personal Time & Monitoring

- Policy should clarify that it applies to **all social networking**, whether the employee is on or off the job.
 - Line is blurring between what is on-duty and off-duty due to ubiquity of technology and online access.
 - For **official, sanctioned postings on behalf of company**, policy should clarify an **approval process** for content.
- Policy should state whether company **monitors** its employees' electronic usage. Policy should **reserve the right to monitor**, if company does not monitor.

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5. Use of Company Name/Marks & Transparency

- Policy should describe **if and how** an employee may use the **company's name and marks** in postings.
- Policy should require employees to **always identify themselves as employees of the company while discussing company business and related industry topics** on social media sites.
- **No aliases and no anonymous postings.**

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6. Disclaimer regarding Viewpoints

- Policy should require that employee include a **disclaimer** with all postings/communications that the **views expressed at those of the employee only and do not reflect the views of the company or others.**
- Policy should clarify that **employee may not commit company to any action** unless specifically authorized by company to do so.

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7. Prohibit Disclosure of Confidential Information & Infringement of IP

- Policy should clearly **prohibit** employees from **sharing proprietary/confidential information** when using social media, including trade secrets, customer information, business plans, non-public financial information/performance, alliances, etc.
 --Employees should not comment on rumors either.
- Company should have **confidentiality agreement** with employees.
- Policy should clearly **prohibit** employees from **infringing IP (either company's IP or a third party's IP)**. Risk areas include copyrights, trademarks, music, videos, photographs, etc.
- *Note:* Company **hosting social media** (or using social media sites) will have publishing liability BUT safe harbors exist.

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8. Prohibit Harassment, Defamation & Other Inappropriate Content

- Policy should make it clear to employees that company has **liability exposure** when an employee uses social media to **harass** co-workers or to make **discriminatory** statements or direct **sexual innuendo** at co-workers.
- Policy should explain to employees that company has **liability exposure for defamation** when an employee uses **social media through company assets** to disseminate rumors, gossip and offensive false statements about others (or when an employee – in the **scope of his/her duties** – uses social media to do the same).
 --2008 defamation suit against Cisco alleging Cisco atty defamed plaintiffs when he accused them of fraud in his anonymous blog

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9. Hiring/Firing Practices

- A company obtaining information **through social media sites** about an applicant's/employee's race, religion, national origin, sexual orientation, etc., could have **liability exposure** due to accusation that company made a hiring/firing decision based on a protected status --
 - Title VII of Civil Rights Act, American with Disabilities Act, Age Discrimination Act, labor acts, whistleblower and anti-retaliation statutes, off-duty conduct statutes, and related state/local laws
 - **User policies** of social media sites (e.g., commercial purposes, pretexting)
 - **Negligent hiring claims** (failing to conduct usual background search)
- Policy should state (and practice should be) that **irrelevant personal information** gained from Internet search will **ignored**.

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10. Providing References for Employees

- Especially for companies with operations in California and other plaintiff-friendly states, Policy should **prohibit** employees from providing an **employment reference/recommendation regarding any current or former employee** on a social media site such as LinkedIn or M-H Connected.
 - Negligent referral liability
 - Failure to warn liability
 - Allegation that any termination was not performance-related
 - Personal reference (unrelated to employment) may be okay

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11. Regulatory & Tort Law: FTC Endorsement Guidelines

- Policy should remind employees that if a person **posts** on a social media site **AND receives cash/in-kind payment** to review a product or service, such person ("endorser") **must disclose in his/her posting any relationship** with the provider of the product/service or face fines (up to \$11,000 per incident).
- Company could be liable** for endorser's failure to disclose relationship, even if company has no control over what endorser says.
- Company could also be liable** for endorser's **false or misleading statements** about the company's products/services, even if company has no control over what endorser says.
- An employee's salary would trigger "endorser" status; however, a company policy might save company from liability in some cases.

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11. Regulatory & Tort Law (cont.): Other Risks

- Policy should advise employees of **other regulatory and tort risk areas** associated with social media (as applicable):
 - Antitrust** issues relating to communications with competitors and postings about pricing, market allocation, etc. (federal and state laws)
 - False and misleading advertising** (federal and state laws)
 - Sweepstakes/promotions** - not only state laws but also rules of social media sites
 - SEC regulations
 - International** laws

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12. Protection against Malicious Software

- Policy should describe what **requirements**, if any, are imposed on employees **downloading and/or accessing social media site software on company assets**, as a way to limit company exposure to malware (e.g., viruses, worms, trojan horses, spyware, dishonest adware, crimeware, rootkits, etc.).

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13. Training, Acknowledgement & Questions

- Company should effectively **train employees** about policy on a periodic basis.
- Company should require each employee to **acknowledge receipt** of policy.
- Policy should identify **who an employee can consult for guidance and questions** regarding the policy.
- Policy should explain **consequences of violating** the policy.

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CONCLUSION

- Social media is part of the **mainstream** now and brings with it new and exciting **opportunities** for companies.
- There are, however, many **potential risks** associated with the use of social media by company employees.
- A **strategic plan** should be developed by a company before actively engaging in social media, including the adoption of a comprehensive **social media policy**.

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**Client Development –
 What lawyers need to know about the lawyers
 they hire**

ACC Program 611:
 Web 2.0 – Ethics do's and don'ts
 Will Hornsby, American Bar Assoc

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The Rules are the Rules

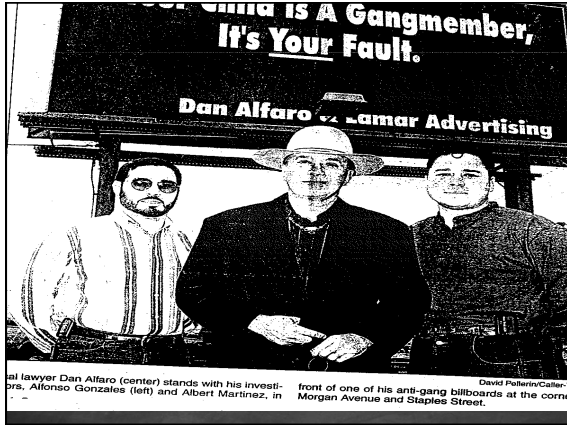
- State ethics opinions come to the same conclusion that the rules apply to advertising on the Internet
- In re Canter – applying the rules to the alpha spammer

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Limits on the state rules

- Commercial Speech
- Judging content over intent
- Texans Against Censorship v. State Bar of Texas
- Application to Web 2.0
- The challenge of automated blog-response programs







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Conditional Disclaimer – More Noise

- You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll-free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer. SC RPC 7.3(d)(2)(a)

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Disclosures – The music

- Please understand that no information you email to us before establishing a lawyer-client relationship will prevent us from representing a different client in the same matter. You understand that the information may be used in the representation of another client.
- See ABA MR 1.18, Comment 5, on duties to prospective clients

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Rules that limit the information you want

- Rule 7.1(b) – a communication is misleading if it creates unjustified expectations about the outcome of the matter.
- Rule 1.6 – As applied to past representations
 - Majority view – A lawyer may not reveal information relating to the representation
 - Minority view – A lawyer may not reveal secrets and confidences
 - As applied to Web 2.0

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**Web 2.0 – Ethical Do's and Don'ts
When Using Social Media in the
Context of Litigation**

Laura D'Amato, Goulston & Storrs, P.C.
October 26, 2010

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Popular Uses of Social Media in Litigation

- Obtain information about parties and witnesses.
- Collect evidence.
- Research potential jurors.
- Comment on recent cases/decisions.

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Potential Ethical Issues

- Lack of transparency as to a person's identity.
- Improper communications with represented or unrepresented parties.
- Improper communications with members of the judiciary.
- Comments about active cases.

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DO'S AND DON'TS

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Be clear about your identity and role in a matter or transaction.

- **ABA Model Rule 8.4(a)** prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.
- In March 2009 the Philadelphia Bar Association Professional Guidance Committee issued an advisory opinion finding that Rule 8.4(a) would be violated if an attorney hired a third party to become a Facebook "friend" of a potential non-party witness so that the attorney could obtain information about the witness for use at trial.

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Don't communicate with represented parties.

- **ABA Model Rule 4.2** provides that "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 lawyers has the consent of the other lawyer or is authorized by law to do so or by a court order."
- Be careful not to unwittingly communicate with a represented party by "friending" them or adding them to your Twitter network.

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Be upfront about your role when communicating with unrepresented parties.

- **ABA Model Rule 4.3** requires a lawyer who is dealing with a person who is not represented by counsel to be clear about his/her role, in particular that the lawyer is not disinterested. If the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer must take reasonable efforts to correct the misunderstanding.
- In addition, a lawyer may 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 lawyer's client.

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Refrain from ex parte communications with members of the judiciary.

- **ABA Model Rule 3.5** prohibits a lawyer from engaging in ex parte communications with a judge during a proceeding.
- The Florida Judicial Ethics Advisory Committee has advised that judges and lawyers should not "friend" each other on Facebook.

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Don't comment on any matters that you or your company are involved in.

- **ABA Model Rule 3.6** prohibits a lawyer from commenting on any investigation or litigation in which the lawyer is or has been involved and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter except in certain limited situations.
- Also be careful not to take a position in a blog that may be inconsistent with a position you (or your outside counsel) are taking in a pending matter.

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Don't make negative comments about the judiciary or other members of the bar.

- **ABA Model Rule 8.2** prohibits a lawyer from making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- Although not specifically prohibited by Rule 8.2, be careful not to make negative comments about other lawyers or jurors.

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**WEB 2.0 – ETHICAL DO'S AND DON'TS:
 THE ETHICAL DIMENSIONS OF E-
 DISCOVERY**

Margaret Raymond-Flood,
 Norris, McLaughlin & Marcus, P.A.

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What does ESI mean to you?

- Documentary and other evidence has been lost before, but the presence of electronically stored information ("ESI") heightens the risks:
 - Greater volume of evidence to manage
 - Need to deal with inadvertent and planned destruction
 - New formats and storage locations
 - Social Media Network sites???

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Early Cases

- Zubulake v. UBS Warburg
 - Adverse inference instruction for failure to preserve electronic evidence contributes to \$29.3 million initial jury award
- Coleman Holdings, Inc. v. Morgan Stanley Co.
 - Adverse inference instruction for failure to preserve and produce electronic evidence leads to \$2.58 billion damage award (*Reversed*)
- U.S. v. Philip Morris USA Inc.
 - \$2.75 million sanction for spoliation of electronic documents

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- Qualcom v. Broadcom
 - During last day of trial, QC witness revealed existence of unproduced records (200,000 pages)
 - Court found misconduct and concealment against QC and six of its retained attorneys
 - QC and its attorneys ordered to pay defendant's litigation costs (millions)
 - Upon QC's assertion of blame upon its attorneys, court vacated its initial order denying self defense exception to the attorney-client privilege and granted attorneys right to defend themselves

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Ethical Dimensions...

Model Rule 3.2: Attorneys cannot obstruct or slow the discovery process

Model Rule 1.6: Uphold Attorney-Client Privilege

Model Rule 3.4: Fairness to Opposing Party and Counsel

Model Rule 1.3: Reasonable Diligence and Promptness

Model Rule 4.1: Truthfulness in Statements to Others

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Use of Social Media in Litigation

- How does it apply in the context of litigation?
- Will the courts consider it as part of the discovery obligations?
- Will the courts grant access to postings on social networking sites in response to discovery demands?
- Will the courts require parties to search social media sites/links for relevant information?

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TEKsystems, Inc. v. Hammernick et al., United States District Court for the District of Minnesota, Case No. 0:10-cv-00819.

Complaint alleges that former employee violated her non-compete and non-solicitation agreement by communicating through Linked In professional network

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How to comply with ethical obligations when dealing with ESI and social media

Establish processes to properly:

- IDENTIFY
- LOCATE
- PRESERVE
- RETRIEVE
- PRODUCE

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IDENTIFY and LOCATE

- Determine locations and custodians with relevant information
- Consider offices in other geographic locations
- Involve IT department and attorneys immediately
- Consider usage and application of social media
 - Facebook, Twitter, LinkedIn

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Crispin v. Audigier, 2010 WL 2293238 (C.D. Cal. 2010)

Court quashes portions of subpoena requesting "private messaging" of Facebook and MySpace pages and remands for further development of the record on the wall postings and comments

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PRESERVE

- Notify employees of obligations to preserve ESI
- Suspend automated document destruction, where appropriate
- Institute litigation hold
- Monitor employee preservation efforts
- Preservation obligation attaches once "triggers" surface:
 - statutory - Sarbanes, HIPAA, SEC, EU, state, etc.
 - notice of a lawsuit
 - litigation that is "*reasonably anticipated*"

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RETRIEVE and PRODUCE

- Involve IT Department and/or outside vendors promptly
- Formulate a cost-effective strategy for reviewing and managing ESI
- Consider Attorney-Client Privilege Issues

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Model Rule 1.6: Uphold Attorney-Client Privilege

- R. 26(b)(5)(b) – allows for “claw back” provision
- Must balance needs of parties to have access to all relevant information with practical difficulties of dealing with volume of ESI
- Cost of privilege review
- Dangers of failing to review for privilege prior to production

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Do's

- Review data retention policy
- Review company policy regarding use of social media sites
- Conduct due diligence when identifying, locating, preserving and retrieving data
- Create and maintain good data preservation procedures
- Prepare “litigation hold” policies
- Formulate cost-effective strategy for reviewing and managing ESI
- Must make these efforts a “high priority”

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Don'ts

- Do NOT ignore data retention policies
- Do NOT fail to enforce social media policies
- Do NOT create systems that will create undue burdens as part of routine data management operations
- Do NOT intentionally fail to ask the right questions
- Do NOT be afraid to ask for help from IT or other outside vendors
- Do NOT wait until you are in crisis mode

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Questions & Answers

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THANK YOU.



Extras from ACC

We are providing you with an index of all our InfoPAKs, Leading Practices Profiles, QuickCounsels and Top Tens, by substantive areas. We have also indexed for you those resources that are applicable to Canada and Europe.

Click on the link to index above or visit <http://www.acc.com/annualmeetingextras>.

The resources listed are just the tip of the iceberg! We have many more, including ACC Docket articles, sample forms and policies, and webcasts at <http://www.acc.com/LegalResources>.