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[ Creating a policy with clear and precise guidelines in writing about Internet usage and e-mail correspondence is the best policy for protecting the company and the employee from issues related to a lack of judgment. ]

# The Digital World Dilemma:

## The **Internet**, Social Media,



Dan Sweetser

**Y**ou're an employer and you have an employee who is sending and receiving personal e-mails on company time. You can prove this not only because you've been monitoring her computer activity, but you've also been reading her e-mail correspondence even though she's been sending and receiving those e-mails using her personal e-mail account.

Disciplinary action or dismissal is the next step because clearly what she's doing is against company policy. You do have a policy about this kind of activity, don't you? If you don't you should.

But reading an employee's personal e-mails sent via her e-mail account is another matter. Why, you may be wondering. After all, it's your computer, you're paying the employee to do a job, and she's taking care of personal business on your dime. That ought to mean you're perfectly within your rights as an employer to monitor her computer activity right down to reading the contents of her e-mail correspondence even if she was using her personal e-mail account, right? Wrong.

### State Supreme Court Weighs In

A recent decision by the New Jersey Supreme Court ruled against an employer who retrieved and read e-mails between a former employer and her attorney using her personal e-mail account even though she was sending and receiving those e-mails on a company computer. It was a unanimous 7-0 ruling and is reportedly the first of its kind to reach the state Supreme Court.

Even though attorneys for the employer argued that the company's employee manual states that e-mail communications "are not to be considered private or personal to any individual employee," and that the employer reserved the right to "review, audit, intercept, access, and disclose all matters on the company's media systems and services at any time," personal privacy issues trumped the employee manual.

This ruling may only be the tip of the iceberg. As the Internet, e-mail communications, blogging, and social networking sites such as Facebook, MySpace, and Twitter become more pervasive, they'll continue to have a dramatic impact on the workplace both positive and negative.



Michael Mann



Lynette Young



# Personal Privacy & the Workplace

## A Clear Policy the Best Policy

Creating a policy with clear and precise guidelines in writing about Internet usage and e-mail correspondence is the best policy for protecting the company and the employee from issues related to a lack of judgment. Dan Sweetser, a partner in the law offices of Szaferman, Szaferman, Lakind, Blumstein and Blader, P.C. tells clients or anyone drafting an employee handbook or e-mail policy to inform employees that everything they do at work belongs to the company and is subject to monitoring without notice at any time.

"If you don't do that there could be an expectation of privacy with respect to that e-mail, which could possibly give [the employee] a claim to an invasion of privacy if the employer is looking at an employee's e-mail without giving them notice," says Sweetser.

Sending and receiving personal e-mails using the employee's company e-mail address is another story.

"The laws as I understand it with respect to e-mail is that your e-mail is considered the property of the company whether they are personal or company related," states Sweetser.

In the past, Sweetser has been contacted by employees who have been disciplined or sacked because they were doing something they shouldn't have been at work, such as surfing the Internet, visiting inappropriate websites or using company e-mail to send personal e-mails. Usually they want to know whether or not their employer has overstepped their bounds by initiating disciplinary action.

"Generally across the board I tell them, 'You don't have a claim because you're getting paid to do work, and you're not doing work and they caught you,'" says Sweetser.

## Blogs, Posts and Tweets

Blogs, Facebook posts, and Twitter 'tweets' create other issues. With social networking the rage and more people posting about the minutiae of their lives, it's inevitable that some of those posts or Tweets are work related, albeit positive or negative. Or employees may share information about the company or co-workers that the company doesn't want made public. Yes, one usually needs to be among the person's friends to view those posts or receive those tweets, but once you post something online, there's no guarantee of privacy and there's a chance that those comments may eventually get back to one's employer or co-workers. And no matter how loud one shouts about invasion of privacy, free speech, or whatever, if the employer doesn't like it, they can fire the employee for those posts and the employee can't do a thing about it.

"Most employees in our country are employed at will and they can be fired for any reason, including going on Facebook and telling the world that their company stinks or their boss is a jerk," explains Sweetser.

While the potential for abuse is there, it may not be that big of an issue from a legal perspective, the state Supreme Court ruling withstanding.

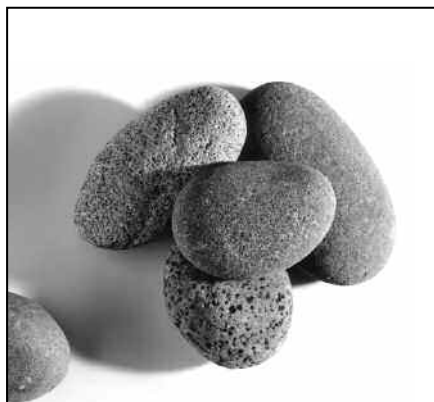
"It raises some interesting legal issues, but I don't think it comes up very often," opines Sweetser. "When it does come up, there's two things I tell the respective parties: If it's an employee, I say, 'Don't do anything at work or on a work-related piece of equipment with or without a policy unless you understand it can be reviewed and they have the right to look at anything you send and you can be dealt with based on that communication.'"

"You should never say anything in an e-mail you wouldn't say over a loud-speaker at work," adds Michael Mann, managing partner of the Princeton office of Pepper Hamilton LLP. "Every e-mail you send, you have to assume someone can or is reading it."

The same goes for inappropriate e-mails that people send about co-workers. "If you're not prepared to post that in the lunchroom, you shouldn't say it," says Mann. "And don't assume your employer isn't monitoring your Internet usage. It's an easy way to get fired today."

Of course he recommends employers inform employees about company policy regarding these matters.

"That completely removes any possible argument that they have any expectation of privacy and that all your equipment they use in the course of their employment should only be for the purpose of their job, and they're on notice that anything they do or say on any of that equipment is subject to monitoring or review by the company. With those two absolutes, it makes it very easy



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## Beware of the Blogs

Blogging is another form of digital communications with the potential to create issues.

"Employees are out there with the banner of the company holding themselves up as experts in a field and giving advice to people through blogs and basically creating exposure for the company for incorrect advice about products and services that is now in writing," says Michael Mann an attorney with Pepper Hamilton LLP.

Mann says creative attorneys will always find a way to implicate the company for the employee's behavior on company time. "Just like you're out driving and using your Blackberry during company time and get into an accident, they always go after the company," he says.

Mann's advice to employees interested in writing a blog is to clear it with their employer first. Similarly, Mann recommends that employers inform employees that they need approval before writing and posting a blog and that the company must approve the content of the blog. Of course, that advice refers to company-related blogs, not personal blogs on non-work related issues or topics. A sticky point, however, is when an employee does a blog on company time or associates themselves with the company in any way, for example, John Smith, loan officer with XYZ bank.

"That's how they sign them and now they've implicated the company," says Mann. "The proper way to do a blog is to have certain disclaimers that what you see on this blog is advice and not done on behalf of the company, or I'm not selling you something where we've agreed to a price or terms."

Lynette Young, founder of Purple Stripe Productions LLC, recommends a written agreement between the employees and company that outlines roles and responsibilities, including topics and issues that are and are not permitted to be covered in a public forum such as blogging or social networking, as well as a process to get information not covered accepted and approved.

"I have seen companies put employees online on Twitter, Facebook, and blogging with no guidelines for the employee, and when something comes up that the company is not happy about, the employee gets reprimanded. Employees cannot possibly know what the intentions of the company's communication needs are without guidelines."

for everybody to understand from the get go what they should do in order to protect themselves."

What else should a company be thinking about when creating a policy? In Mann's opinion they should be tailored to the company's particular business, products, and sales force. He also suggests employers continue to educate themselves about any new legal decisions regarding blogging, social networking, and other forms of electronic communications.

### Stay on top of the Rules

"The rules are constantly being reshaped," says Mann. "Trying to keep up with this is very difficult and creating good general policies by anticipating what's available now and what likely could be available is a good way to start.

Lynette Young, founder of Purple Stripe Productions LLC, social technology marketing & strategists, believes that guidelines for social networking on behalf of the company are a logical extension of traditional guidelines when it comes to speaking publicly on behalf of the company.

"Just as not every employee is allowed to go to the press and speak on corporate issues, not every employee should have an open line of communication to the outside world to speak on company issues," she says.

Training sessions to help guide employees on how to acceptably represent themselves in public can be helpful. "While over 75 percent of people that use the Internet are active on some form of social networking site they are used to communicating

## Social Networking for Beginners

More companies are using social networking for marketing their company, products, and/or services. Lynette Young of Purple Stripe Productions LLC offers guidelines for getting started.

"The best way to start with social media/marketing is to come up with goals of what you would like to accomplish," says Young. "Are you interested in getting your company's name more brand recognition? Attracting high-caliber employees? Looking to increase sales leads? Without clear and defined goals, no effort in social media will ever be successful."

After that, she recommends listening to what's happening on these platforms. Listen for conversations about your company, but think and listen laterally about other ideas and concepts within your industry as well as keep an ear out for competitors.

"Nothing is worse than showing up at a cocktail party and immediately breaking into a circle of people having a conversation and starting to sell and pitch to them, without having any concept of what's already going on," states Young. "By jumping right into 'the conversation' online this is essentially what you'd be doing."

from a personal point of view, not a professional/corporate," says Young.

A lot also depends on the corporate culture, the type of business, and the levels of comfort employees have with technology.

"At a minimum, if an employee is asked to represent the company online, a separate identity for that person should be maintained (don't use their personal accounts) where some level of management has control over accounts and passwords," says Young. "If the employee leaves for any reason, the work in the corporate accounts stays with the company."

Social networking can be a positive experience, yet because it's still a new medium, many companies are rightfully concerned although Young tends to alleviate many of those.

"Most concerns are rooted in the idea that an employee will say or do something to put the company into legal trouble," she says. "I have not personally seen a case yet where an employee has used the platform and accounts of their employer to put themselves out of a job or their company into intentional hot water. Proprietary company information is usually leaked anonymously, not under a known account, but this still seems to be an issue for feeding fears in a company."

So what does she tell clients to alleviate those concerns?

"The first thing I ask is if *they* would be willing to publish information to the public regarding *their* company that would put their career at risk? The answer is always 'no' and that is the case for their employees as well. By having a level of control over the actual accounts used online, the company also has a way to manage the message leaving the company as well." ■

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