Tweets and Twitters and Blogs: Managing Risk and Liability in the Age of Social Media

Presented by

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Overview

- **Introduction – Log On**
- **Monitoring employee's electronic communications.**
- **An employers duty to monitor employee internet Activity?**
- **Monitoring employee social media activity**
- **How to effectively navigate the ever evolving risks posed by Social Media in the workplace.**
- **Logoff**

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Social Media By The Numbers

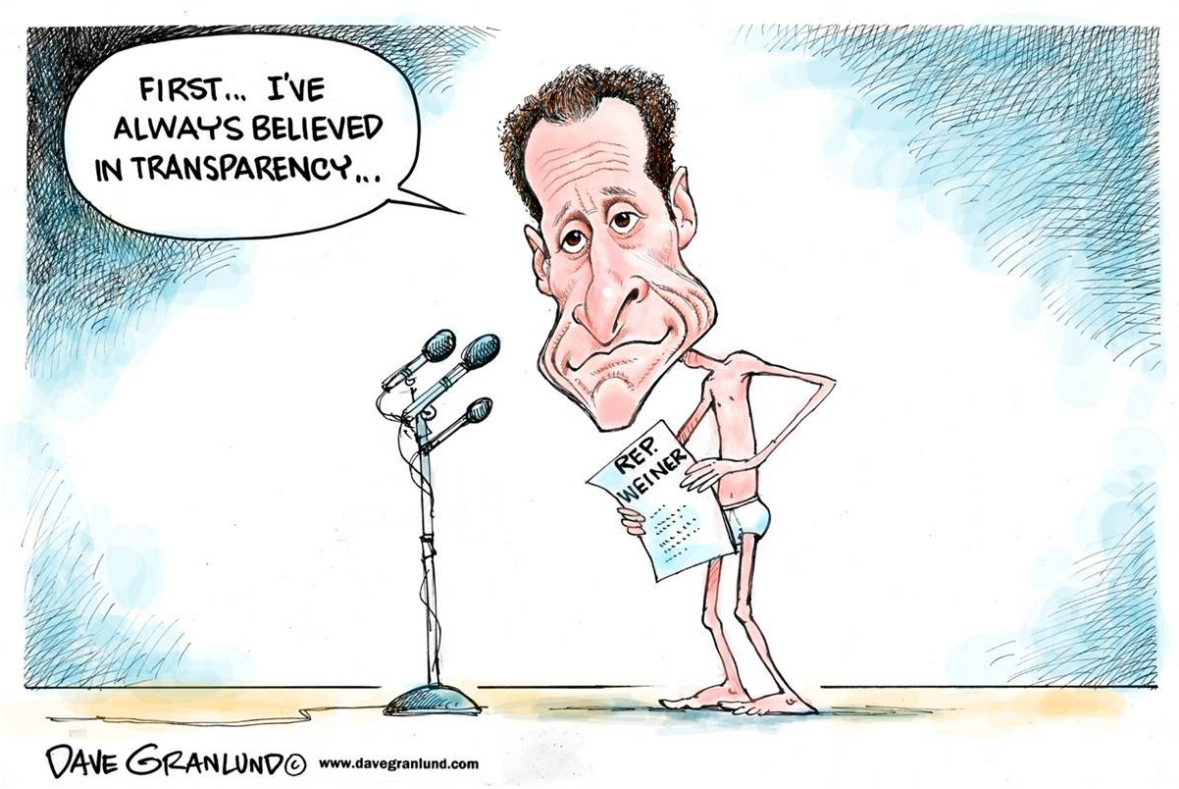
- **Facebook**
  - **Approximately 800 million active users worldwide.**
  - **Available in 70 different languages.**
  - **Approximately 250 million photos are uploaded per day.**
- **Twitter**
  - **Approximately 100 million active users worldwide.**
  - **Approximately 230 million "tweets" are sent per day.**
  - **Approximately 82 percent of the U.S. House of Representatives have twitter accounts.**
- **MySpace**
  - **Approximately 50 million active users worldwide.**

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Be Careful Out There



Can’t Make This Stuff Up



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We Also Want To Avoid This .....



Signs of the social networking times.

Social Media in the Workplace

- **There are many** legal **issues that need to be explored from** privacy **and** protection **to** liability.

- **Does your organization's internet policy resolve or create legal problems?**

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Social Media & Liability

The most typical areas of concern:

- **employment practices liability**
- **personal injury liability**
- **advertising injury liability**

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Legal Liability

- **Various theories of liability:**
  - **Third party statements**
  - **Defamation and false light**
  - **Violation of right to privacy**
  - **Violation of right of free speech**
  - **Violation of statutory rights**
  - **Invasion of Privacy**
  - **Harassment and Bullying**

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Recent Case Decisions

- **Case law related to internet use and social media is in its infancy.**
- **Few cases establish concrete precedent.**
- **Cases can be a useful guide for tailoring an organization's policies to limit liability risks.**

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Monitoring Employee Internet and Social Media Activities

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Recent Case Decisions

- **City of Ontario v. Quon, 130 S.Ct. 2619 (2010)**
  - **The Ontario, California Police Department issued pagers to its officers.**
  - **The officers were allotted a certain number of text characters per month and were told that they had to pay for any overages.**
  - **The officers used the pagers in the course and scope of their employment – but were also allowed to use them for personal use.**

Quon Continued

- **The Ontario Police Chief initiated an investigation to determine if the character limit was too low.**
- **During the course of said investigation, the police department obtained transcripts of the text messages.**
- **The Department discovered that the majority of Quon's messages were not work related, including some sexually explicit messages.**
- **Many of Quon's personal messages were sent during work hours.**

Quon Continued

- **Ontario Police Department "Computer Policy"**
  - **"The city reserves the right to monitor and log all network activity including email and internet use, with or without notice. Users should have no reasonable expectation of privacy or confidentiality when using these resources."**
  - **After the above policy was instituted, the city sent a memo informing officers that messages sent from company issued pagers would be treated like emails and therefore, subject to review.**

Quon Continued

- **After the police department discovered Quon's text messages were largely personal and some sexually explicit, he was disciplined for violating Department rules.**
- **Quon filed lawsuit against Police Department alleging violation of his 4th amendment right to privacy and against the wireless communications provider for violation of the Stored Communications Act ("SCA").**

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TEST

- **Did Quon have a reasonable expectation of privacy with respect to the text messages?**
- **Did the Department's search violate Quon's right to privacy?**
- **Was the Department's search justified?**

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Courts Decision

- **Court assumed "arguendo" that Quon had a reasonable expectation of privacy – but did not specifically address the matter.**
- **The search was justified by legitimate business reasons and it was not excessively intrusive in light of that justification.**
- **The search was "reasonable and normal" in the private-employer context.**
- **The Supreme Court reversed the Ninth Circuit's finding that Quon's rights had been violated.**

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What Does the Quon Decision Mean?

- **Any usage and/or monitoring policy related to technology should include: clear and conspicuous language that all data and electronic communications are subject to inspection and monitoring with or without notice.**
  - **Organizations should ALWAYS have EVERY employee sign something stating that they received and reviewed the policy.**
  - **Organizations should spell out what will be monitored (i.e. email, internet usage, cell phone communications, pager communications … etc.)**

Lessons From the Quon Court

- **Typical Organization Policy?**



Recent Decisions

- **Pietrylo v. Hillstone Restaurant Group, 2009 WL 3128429 (D.N.J.)**
  - **An employee of Houston's Restaurant created a Myspace chat group called "Spec-Tator."**
  - **The chat group allowed current and former employees to post comments and discuss their experiences at Houston's.**
  - **The group was only accessible to invited members who then would create a username and password.**

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Houston's Continued

- **After learning about the chat group, managers at Houston's gained access by asking an employee and member of the group for her username and password. She reluctantly provided it.**
- **Houston's management accessed the site using the employees username and password and two employees were terminated as a result.**

Houston's Continued

- **The former employees filed a lawsuit against Houston's alleging violation of the Stored Communications Act ("SCA") and various state statutes.**
- **After a jury trial, the former employees were awarded compensatory and punitive damages.**
- **The jury found that Houston's management violated the SCA by accessing the site without authorization.**
- **The jury also found that the employees' right to privacy was not violated despite the website being password protected.**
- **The employer appealed, arguing that there was no evidence upon which the jury could conclude it violated the SCA.**

Questions

- **Did the appellate court agree with the trial court?**
- **Did Houston's management have permission to access the site because they were authorized by a member of the group?**

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Courts Decision

- **The court upheld the jury verdict because there was sufficient evidence that Houston's management knowingly, intentionally, or purposefully accessed the chat group without authorization.**
- **Houston's management did not have permission to access the group because there was evidence that they obtained the username and password that allowed access through coercion.**

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Lesson's From The Houston's Decision

- **Employers who seek to research their employees on the internet should only access websites, chat groups, etc. that can be viewed by the general public.**
  - **Put another way: DO NOT HACK INTO YOUR EMPLOYEES' ACCOUNTS AND/OR CHAT GROUPS AND DO NOT OBTAIN ACCESS THROUGH DISHONEST METHODS.**



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The Stored Communications Act (18 U.S.C.A. Section 2701)

- **Can result in civil and/or criminal liability for:**
  - **Intentionally accessing a facility through which an electronic communication service is provided AND**
  - **Obtaining access to a wire or electronic communication while it is in electronic storage in such a system OR**
  - **Intentionally exceeding an authorization to access a facility for which electronic communications are provided**
- **Punishable by up to 10 year's imprisonment.**
- **SCA is not violated if access is granted by person providing the communication service or a user of the same.**

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Recent Decisions

- **Nolan v. CN8, 2010 WL 3749466 (D. Mass. 2010)**
  - **Television newscaster sent emails through his work email account urging NATAS members not to present Bill O'Reilly with an award.**
  - **Newscasters employer (Station CN8) warned him not to use his work email account for this purpose and newscaster began using his personal account.**
  - **Newscaster continued his protest of Mr. O'Reilly receiving the award at a banquet dinner.**
  - **Newscaster was fired for his actions.**

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Nolan Continued

- **Newscaster filed suit against employer alleging violation of his right to free speech.**
- **Court granted employers motion for summary judgment.**
- **Court held that the employer did not interfere with employees constitutional rights because his action interfered with a legitimate business interest (i.e. employer (Station CN8) may wish to work with Mr. O'Reilly and/or Fox).**

Moral of the Story

- **Always have a legitimate business interest in mind when formulating internet/social media policy.**

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Attorney Client Privilege



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Email Monitoring and Attorney Client Privilege (Personal Email Account)

- **Stengart v. Loving Care Agency Inc., 201 N.J. 300, 990 A.2d 650 (2010)**
  - **Employee used her company issued laptop to exchange emails with her attorney, through her personal, password protected web-based (Yahoo) email account.**
  - **Employee filed an employment discrimination lawsuit against the employer.**
  - **In anticipation of discovery, employer hired a computer forensic expert to recover all files stored on the laptop including emails, which uncovered the emails between the employee and her attorney.**
  - **Employers counsel then used the emails between the employee and attorney during litigation. Employers attorney disclosed the emails but maintained he had a right to use them during litigation.**

Email Monitoring and Attorney Client Privilege (Personal Email Account)

- **The court held:**
  - **Employee could reasonably expect that email communication with her lawyer through her personal account would remain private, and that sending and receiving them via company laptop did not eliminate the attorney client privilege.**
  - **Court noted that the expectation of privacy in emails with the employees lawyer does NOT mean that employers cannot monitor or regulate the use of workplace computers, specifically stating that companies can adopt lawful policies relating to computer use to protect its assets, reputation and productivity of the business.**

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Email Monitoring and Attorney Client Privilege (Work Email Account)

- **Holmes v. Petrovich Development, 191 Cal. App. 4th 1047, 119 Cal. Rptr. 3d 878 (2011).**
  - **Employee filed a lawsuit against her employer alleging sexual harassment and wrongful termination, among other things.**
  - **Prior to the employee leaving her job, she sent multiple emails from her work email account to her attorney regarding the alleged workplace violations.**
  - **Employer's counsel used the employee's emails at trial.**
  - **Employer was successful at trial and the employee appealed, arguing that the emails were protected by the attorney client privilege.**

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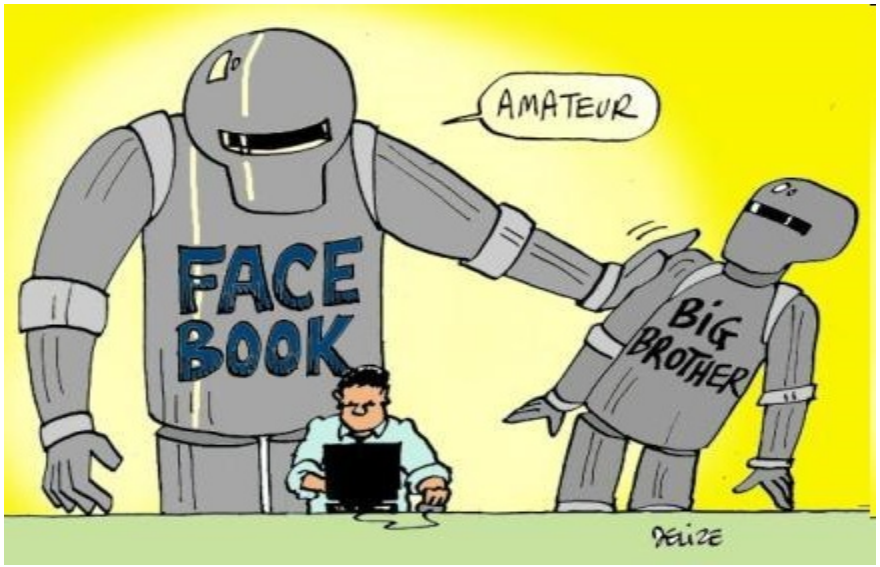
The Employer's Computer Policy

- **Work computers were only to be used for company business and employees were prohibited from using them to send or receive personal e-mail.**
- **Warned employees that the company would monitor the computers for compliance with the policy and could inspect all files and messages at anytime.**
- **Employees who used the company computer to create or maintain personal information or messages had no right of privacy with respect to that information or message.**

Email Monitoring and Attorney Client Privilege (Work Email Account)

- **The court held:**
  - **The employee waived the attorney client privilege, because the emails were not private pursuant to the employer's computer policy (i.e. company would monitor).**
  - **The court likened the employees email use to consulting her lawyer in the employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion would be overheard by the employer.**
  - **The court did not address whether its decision would have been different if the employee was using a personal, password protected web-based account such a Gmail or Yahoo, instead of her work email account.**

Duty To Monitor Employees Internet and Email Activities?



Duty to Monitor Employee Internet and Email Activities?

- **Jane Doe v. XYC Corporation, 382 N.J. Super. 122, 887 A.2d 1156 (2005)**
  - **Employee was accessing pornography, including child pornography on his work computer.**
  - **Employer was aware that employee was accessing internet pornography based on a limited investigation.**
  - **Employer informed employee to stop viewing internet pornography.**
  - **Employee was later arrested on child pornography charges.**

Duty Continued

- **Mother of a victim brought suit against the employer alleging negligence for allowing their employee to access and send child pornography via the work computer.**
- **The Trial Court dismissed the case on summary judgment, holding that the employer was under no duty to monitor the private communications of its employees.**
- **The Superior Court reversed the lower courts decision and remanded the case.**

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The Courts Decision

- **An employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate and take prompt and effective action to stop the activity.**
- **No privacy interest of the employee stands in the way of this duty of the employer.**
- **The Court also held that the employee did NOT have an expectation of privacy in light of companies email policy which provided that emails were subject to review and an internet policy limiting internet use to sites of a business nature.**

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Duty to Monitor Employee Internet and Email Activities?

- **Blakey v. Continental Airlines, Inc., 164 N.J. 38, 751, A. 2d 538 (2000)**
- **Continental employee brought action against male co-workers, alleging that they published defamatory statements on employer's electronic bulletin board.**
- **Employee also alleged that the employer was liable for hostile work environment arising from allegedly defamatory statements.**

Blakey Continued

- **The Blakey Court held:**
  - **Employers DO NOT have a duty to monitor the private communications of their employees.**
  - **Employers DO HAVE A DUTY to take effective measures to stop co-employee harassment when the employer knows or should know that such harassment is taking place in work related settings.**

Duty Continued

- **Amira-Jabbar v. Travel Services Inc., 726 F. Supp 2d 77 (D. Puerto Rico 2010)**
  - **Jabbar and several other employees attended a company approved golf outing. After the outing, one of the employees posted photos from the event on her Facebook page, including photos of Jabbar.**
  - **Under the photos is a section which allows people to post comments. Jabbar made the following comment regarding photos of herself: "remind me that taking pictures in the shade is really a dis-service to my wonderful chocolate skin." In response to Ms. Jabbar's comment, another employee said: "that is why you always have to smile."**

Duty Continued

- **Some months later at a work holiday party, the employees personalized candy canes to put on the company's Christmas tree, which lead to an anonymous employee painting Jabbar's candy cane black.**

- **The employee complained to management and subsequently resigned. The following day TSI began its investigation of the Facebook and candy cane incidents. After the investigation, TSI reviewed its harassment policy with all employees and blocked access to Facebook on all work computers.**

- **Employee filed suit against employer alleging that she was discriminated and retaliated against based on her race.**

The Courts Decision

- **The court affirmed the lower courts grant of summary judgment – finding that the alleged incidents were isolated and did not interfere with the employees work performance.**
- **The court also held that liability could not be imputed on TSI unless it knew or should have known of the harassment and failed to take prompt and appropriate action.**

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The Prudent Policy

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Key Question

- **Q: When does the employer duty to monitor arise?**
  - **A:**

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Key Question

- **Q: When does an employer know or should have known?**
  - **A:**

- **Q: What constitutes notice?**
  - **A:**

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Key Question

- **Q: Where do you draw the line?**
  - **A:**

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"Oh, You Girls"

- **Brynes v. Johnson Community College, 2011 WL 166715 (D. Kan.)**
  - **Nursing students photographed themselves examining a placenta specimen and the organ itself.**
  - **The student obtained permission from the Community College representative to photograph the organ on the condition that no identifying marks were present on the photo.**
  - **The students informed their professor that they planned to post the photos on Facebook and she responded: "Oh, you girls."**

Be Careful What You Say!!!

- **The students posted the photos on Facebook and were subsequently expelled from the school.**
- **The court granted a preliminary injunction and enjoined the college from dismissing the nursing students.**
- **The court held that the professor gave the students permission to post the photos by saying, "Oh, you girls" and not objecting to them posting the photos.**
- **The court further held that neither the college's code of conduct or any other code related to the college regulated student photography in the classroom and there was no policy prohibiting the transmittal of photos to others, including through social media.**

Another School Test

- **Yoder v. University of Louisville, 2009 WL 2406235 (W.D. Ky.)**
- **Background:**
  - **Nursing student was assigned to follow an obstetric patient through her pregnancy.**
  - **Student posted numerous blogs on her MySpace page detailing the process.**
  - **The blog did not contain any identifying information.**
  - **Student was dismissed from the school for violating the schools honor code.**
  - **Student filed suit alleging violation of her First Amendment rights.**

Another School Test

- **The Schools Honor Code:**
  - **As a representative of the School of Nursing, I pledge to adhere to the highest standards of honesty, integrity, accountability, confidentiality, and professionalism, in all my written work, spoken words, actions and interactions with patients, families, peers and faculty. I will work to safeguard the health and welfare of clients who have placed their trust in me and will advocate for the client's best interest.**

My Blog, Your Blog, We All Blog

- **A Sample of the Students Blog Entries (NSFW)**
- **“Pregnant woman are beautiful”**
  - **No. Hell-No.**
  - **Beautiful pregnant women are beautiful, or more like, only slightly distorted with the belly (as was the case with my “mom”). Otherwise, pregnancy makes an ok-looking woman ugly, and an ugly woman f***ing horrifying.**
- **“Children are such joy”**
  - **Someone referred to having kids as like being pecked to death by chickens. I’ll say that it’s more like being ripped apart by rabid monkeys.**
  - **At last my girl gave one big push, and immediately came out a wrinkly bluish creature, all Picasso-like and weird, ugly as hell, covered in god knows what, screeching and waving its tentacles in the air.**

Quiz

- **Did the students Blog violate the schools honor code?**

- **Note: The Sixth Circuit Court of Appeals reversed the district courts decision and remanded the case, because the district court decided the case on contractual interpretation grounds not constitutional grounds. 2011 WL 1345051 (6th Cir. 2011)**
- **Note 2.0: Yoder (nursing student with strong opinions) was reinstated and received her degree from the program. 2011 WL 5434279 (W.D.Ky. Nov 09, 2011)**

Answer

- **The court found that the students blog posts did not violate the schools honor code.**
- **The court reasoned that, the professional provision of the honor code was not violated because the posts were not made in a professional context.**
- **The court noted that if the school wished to have the professionalism affirmation to apply to every act or all conduct everywhere at all times in all contexts, IT MUST explicitly state it.**

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Policy, Policy, Policy

- **AGAIN – An effective policy tailored to fit the employer's situation is the most important aspect of avoiding liability.**

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Bonus Liability Question

- **Could the school be sued by the mother whose placenta was the FB subject? (Hint: Yes – this is America!).**
- **What should the school do to reduce liability exposure?**

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Coming to a Courtroom Near You



Protests Then and Now

- **Key Issues:**
  - **Freedom of speech (First Amendment).**
  - **Protection from unreasonable search and seizure (Fourth Amendment).**
  - **A students right to privacy.**
  - **A schools' right to discipline students and maintain order.**
  - **A schools' right to avoid disruptions.**

4th and 1st Amendments v. United States Schools Right to Prevent Disruption (1969)

- **Tinker v. Des Moines Independent Community School District et al., 393 U.S. 503, 89 S.Ct. 733 (1969).**
  - **A group of students were suspended for wearing black armbands to protest the Vietnam war.**
  - **Court held that the students' speech was protected because it did not, materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and did not interfere with the rights of others.**
  - **The court noted: "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate."**

A Modern Day Protest (2012)

- **A 12-year-old middle school student made a Facebook posting that said she “hated” the school monitor, because “she was mean” to her.**
- **The principal discovered the post and confronted her with a screenshot of the same. She was given detention.**
- **She did not learn and proceeded to post the following message: “I want to know who the f%$# told on me.”**

Modern Day Protest Cont.

- **She was called into the principal's office again and subsequently suspended.**
- **After the suspension, the parent of another student complained that she was "talking about sex" with her child.**
- **She was then taken from her class by a school counselor and into a room with several school officials and a deputy sheriff.**

Modern Day Protest Cont.

- **The school officials allegedly forced the girl to surrender her Facebook password and performed a search of her Facebook account.**
- **The student filed a lawsuit against the school district alleging that her constitutional rights were violated.**
- **The school district said that it "acted to prevent disruption." Sound familiar (*See* Tinker case)?**

Questions Raised by Modern Day Protest/Ask the Judges

- **According to the Tinker case, did the school district violate the girl's constitutional rights?**
- **What is the proper balance between a student's right to privacy and free speech v. the schools right to prevent "disruptions."**
- **Is there a difference between students criticizing teachers while at Starbucks and posting the same criticism on Facebook.**
  - **Is a Facebook post more likely to cause "disruption."**
- **Will there ever be a "bright line" rule defining what constitutes a disruption?**

Keys to Managing Social Media Risks

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Keys to Managing Social Media Risks

- **If your organization hasn't already, it should develop and immediately implement a firm wide social media usage policy.**
- **<u>This policy should become part of the orientation packet for all new employees</u>.**
- **It's the organization's responsibility to educate employees about what's expected of them.**
- **A well-drafted policy is the best way to ensure that your expectations are met while at the same time informing employees about the level of privacy to expect.**

Keys to Managing Social Media Risks

- **All employees need to be held responsible for what they post.**
- **They should be expected to comply with the organization's policies of professional conduct.**
- **They should further be expected to apply the same care and diligence, when engaging in social networking, as they do when engaging in other correspondence and communications with clients and contacts.**

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Keys to Managing Social Media Risks

- **Think twice before "sounding off" when posting a comment. If you wouldn't say it to someone's face in person then don't post it online in text.**
- **Under no circumstances should employees make statements that attack, threaten or demean another person. Employees should not make disparaging comments about the organization, co-workers, clients, vendors or competitors.**

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Keys to Managing Social Media Risks

- **Employees should not post pictures of firm events or of the interior of the organization's offices.**
- **They should not share any information about clients, co-workers or affiliates online nor should they identify these individuals by name.**
- **Eliminate expectation of privacy.**

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Hopefully Today Will Prevent Similar Policies …….



Sorry, but it's gotta go. Management says it could be used to access Facebook.

Social Media is Everywhere



"Huh. So Iran just friended us on Facebook ... Like, do I accept?"

Can’t Make This Stuff Up



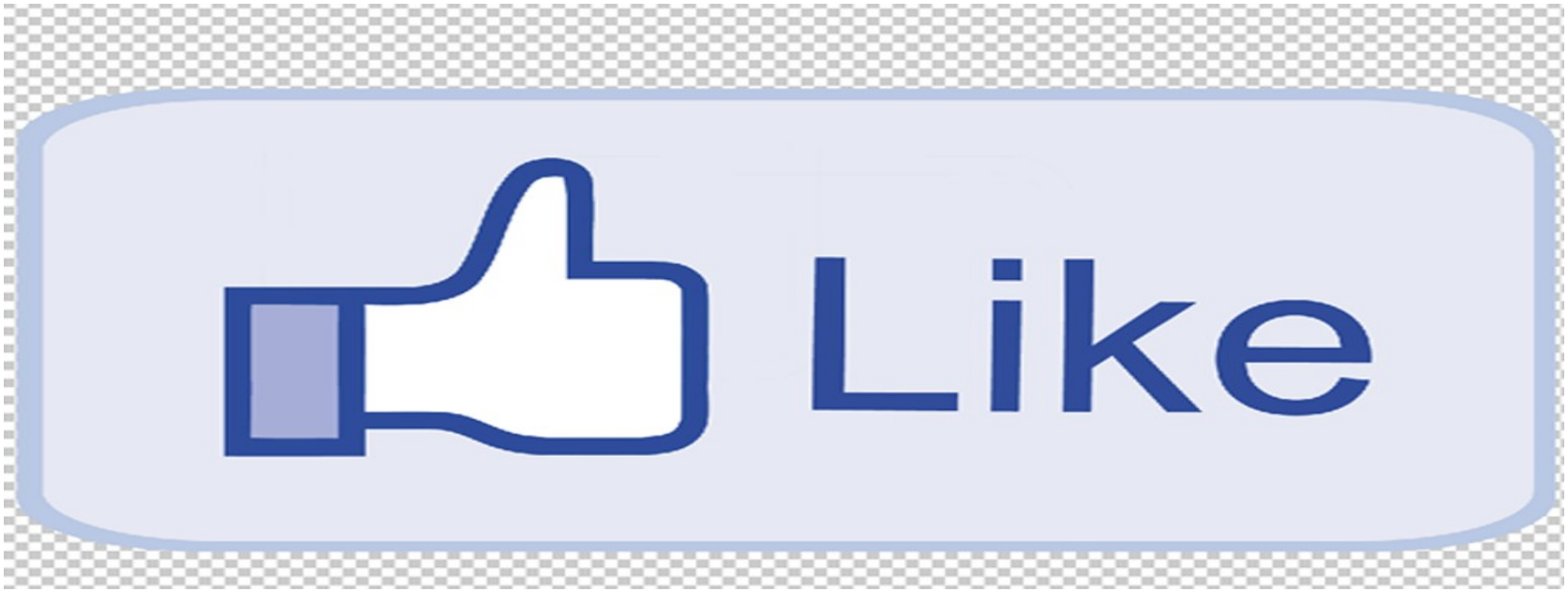
In Conclusion

- **Don't Drink and Facebook:**
  - **The social Media Sobriety Test**
  - **Launched by Webroot, a web security company, in November 2010**
  - **Downloadable program which attempts to block you from your Social media sites while intoxicated.**
    - **Doesn't work on mobile devices! ☹**
- **May have prevented the following debacle.**

Fired On Facebook



Tweets and Twitters and Blogs: Managing Risk and Liability in the Age of Social Media



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