SOCIAL MEDIA POLICIES: THE IMPACT ON YOUR PRACTICE

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I recently had the pleasure of presenting a seminar on social media at the Dauphin County Bench Bar with my new partner, Jennifer Ellis, formerly of PBI and now with Freedman Consulting. My previous presentations on social media focused on the marketing and client service aspects, plus ethical implications of course. By adding Jennifer to the podium, we included significant information regarding both ethical pitfalls, as well as the importance of using this new medium as an information resource, and controlling clients' use as well, to more effectively represent clients in many areas of practice.

We had a lively group actively participating in this session. As a result, we were able to delve into some additional areas in greater depth. The implications for significant impact in two areas of management became clear quickly. These implications apply to both the firm and the client's organization as well. Let me get these on your radar screen, if you're not already thinking about it.

The first area impacted by social media is that of Records Management and Retention. Electronic records are discoverable. We understand that when it comes to email. And most of our firms have already developed some rudimentary policy to deal with what gets kept and what gets deleted. And no doubt most of you have advised your clients to do the same. You know enough to make sure that clients are advised to immediately halt normal document destruction policies as soon as there is a possibility that a discovery request will be made. You wouldn't want your client to be charged with spoliation.

With the rapid rise in the use of social media both professionally and personally, the challenges become huge to preserve possible evidence. From text messages on individual cell phones, to videos on YouTube, to pictures and comments on Facebook, there is a whole new level of information which becomes difficult to access, let alone preserve.

Both the firm and its clients need to be savvy about their data and who has access to what. Most people never even modify security settings to make their personal information safer. The practice of "friending" people indiscriminately can provide access to otherwise relatively private information to people who are

certainly not a friend. Jennifer cited at least one opinion where a lawyer was prohibited from having a third party "friend" a defendant just to gain access to their Facebook information.

When asked about how to properly preserve data, Jennifer ran through various options. For example, she suggested that the firm immediately take possession of cell phones long enough to copy and preserve text messages. She suggested screen shots of web pages. And so forth.

All of this suggests that your records management policy, and those of your clients, probably need an update to account for the myriad of additional information stored on so many varying platforms. Your clients need some greater understanding of the implications of how they will respond to preservation demands and manage retention of so many varying platforms.

Of course, all of this flows into the second area impacted, which is the firm's computer use policy, as well as the policies employed by your clients. We know that, for example, a well-written policy will contain prohibitions about downloading pornographic images from the web. When employers first started providing internet access, the downloading of naughty images resulted in some sexual harassment suits, which in turn raised consciousness and eventually led to a proactive policy that better protected firms and clients. Likewise, most well-written policies prohibit bootlegging software, eliminate expectations of privacy, and allow an employer to review virtually anything for reasonable business purposes.

Social media use has started to impact these policies as well. Some policies prohibit employees from setting up private Facebook pages which reference or link to the employer without approval. There is a great risk for inadvertently crossing the ethical line when using social media. Risks include the unauthorized practice of law in jurisdictions where not licensed, the inadvertent establishment of an attorney-client relationship, failing to understand what might be viewed as advertising and therefore subject to minimum retention guidelines, and so forth.

All of this means that a firm must be very proactive on its own behalf in both better educating lawyers and staff as to the possible risks they take, as well as being very deliberate and clear in the firm's computer use policy as to what can and cannot be done. In fact, given how things have evolved, the policy itself should probably be renamed to a "technology use" instead of computer use policy.

The firm should be sure to include things which are prohibited and specifically mention that they would be considered outside of the scope of

employment. Use of a cell phone or texting while driving is a perfect example of an activity which should be included as prohibited and outside the scope of employment. That helps to eliminate vicarious liability for the firm from the unwise or illegal actions of employees.

Right now, we are experiencing a sea change in communications, mostly attributable to social media. Ethical guidance will lag behind something which is evolving so quickly, so you will have to think fast on your feet on behalf of your firm and your clients. So there is both risk and opportunity right now. At least it's now on your radar screen if it wasn't before.

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