Seminar Topic: This material provides an in-depth examination Court & Regulatory rulings regarding who owns work-related social media accounts and content and what employers can do to manage their employee & business' social media activities.

This material is intended to be a guide in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

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In addition to providing traditional labor & employment law services, he represents companies desiring to institute preventive & proactive HR functions. These functions include policies & procedures that help to efficiently & discreetly resolve issues in-house & prevent lawsuits & complaints; they also help to reduce costs & act as catalysts for increasing productivity & profits.

Charles has been the lead litigator, negotiator & representative for hundreds of labor & employment agreements, arbitrations, mediations & agency cases/complaints & investigations. Moreover, he's frequently the subject of business related TV, radio & print interviews.

Relative to civic & association involvement, Charles is on many boards of directors including the GOA Regional Business Association-2014 Chair; Latinos Progresando, Youth Outreach Services; Kelly Hall YMCA; Black & Latino Achievers of the YMCA's of Chicago; & the Small Business Advocacy Council; & in July he just finished up a 5-year run on the Chicago Bar Foundation's Young Professionals Board.

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Social Media @ the Workplace: Impact on Human Resources & Labor & Employment Law

A Management Side Attorney's Guide to the Workplace & Social Media Law

A review of court & regulatory rulings regarding who owns work-related social media accounts & content, & what employers can do to manage their employee & business' social media activities.

Defining Our Terms – Common Reference Points

What's "social media?"

- It's also called electronic media, e-media, social networking & online networking.
- It's simply e-communication. Still predominantly via internet.
- It doesn't matter whether it's done via email, texting, LinkedIn, Facebook, chat rooms, Skype or Google Talk.
- The terminology & methods change so quickly that terms that were popular a few years ago such as instant messaging, internet 2.0 & chat rooms are now obsolete. Remember AOL, MySpace or Ryze?
- Although the modes of communication & the lingo may change, the basic component of social media is communication via internet.
- These communications can be recorded or published.
- Some theorize that whether our communications are intentionally recorded or not, or whether they exist forever. Does this matter? Is someone eavesdropping or listening? (rhetorical question because we know the answer to both questions is yes.).
- What happens to social media if internet or some other product is no longer the in vogue method of communication?
- For our purposes, social media is just the name given to this mode of communication. It can & will change, but it seems that it will always be electronic & it will always exist.

Popular Social Media in 2015

- In my opinion, the most popular social media right now are:
  - Facebook
  - Instagram
  - Snapchat
  - Email & text/MMS/SMS messaging
  - LinkedIn
  - Go To Meeting, Skype & other video & audio chatting services
    Google & their multiple services (can't say it's YouTube or Plus since Google keeps changing names), but Google is the common interface
  - Twitter
  - Yelp
  - My Blog (charlesakrugel.com) & LinkedIn group (Charles Krugel's Labor & Employment Law & Human Resources Practices Group)
    - FYI: My only e-media affiliations are LinkedIn, my blog, Google+, my YouTube channel (Charles Krugel's YouTube Channel) & my media interviews

Issues We'll Cover

- Over the past decade, various workplace issues involving social media have increased & will continue to increase.
- The reality is that social media is part of workplace culture whether you like it or not & it's not going away.
- Based on the cases I've seen & read about here's what businesses are dealing with the most:
  - Negative statements from employees concerning their bosses, customers, co-workers, products or services sold, *compensation, benefits, work hours & rules*. I.e., content.
  - Blatantly inappropriate statements; e.g., lewdness, nudity, profanity, racism, sexism, other "isms." Also, bullying or harassing behavior, lying or exaggeration, & political or ideological statements. Again, this is content related.
  - Ownership issues. Who owns a company's social media account? Content? What constitutes ownership**?**

What Kind of Guidance Exists Concerning the Employer–Employee Relationship?

- Over the past few years, the National Labor Relations Board (NLRB) has inserted itself as a key arbiter of workplace social media issues (compensation, hours, and conditions of employment). We'll examine why.

- The EEOC, & similar civil rights agencies, are also policing business' online activities. Their focus has been in the background, credit & criminal history checking aspects of E-communications. However, unlike the NLRB their activities have been more research & advisory oriented & not nearly as punitive as the NLRB.
    - I'm guessing that this will change, & the EEOC will become more punitive; it makes sense politically & revenue-wise.
- NLRB regulates what employers & employees can or can't say about wages, hours & conditions of employment.
    - Isn't this practically everything?

- Courts have made some noteworthy rulings:
    1) company vs. employee ownership of a social media account
    2) a teacher's social media comments about her students. Surely, more are out there.

At Least 1 Federal Court Ruled on Who Owns A Business' Social Media Account

(This is Our Launch Point for Analysis)

- Eagle v. Edcomm—analyzes who owns a social media account—employer or employee? Facts of the case follow.

- Linda Eagle started Edcomm in 1987. Edcomm trains people to work in banks & finance. In 2008, she started a LinkedIn (LI) account with her profile (photo, bio, etc.) for marketing & development. You can look her up today on LI; she's still there; this is living history☺.

- Another company bought Edcomm in 2010. It kept the Edcomm name & kept Eagle on as an employee—for a while.

Eagle v. Edcomm Facts Continued

- Edcomm, via its new owners, encouraged employees to engage in LI for business. It had a general & unwritten e-media policy: When an employee left Edcomm, it would take control of the former employee's LI account**.**

- For whatever reason, in 2011, Eagle was fired by Edcomm. It immediately took control of her LI account & locked her out of it. At the same time, Edcomm changed *most* of the info. on that account to eliminate much of Eagle's personal info. Eagle's LI account was restored to her in stages, with full access regained in Oct. 2011 (she lost access for a few weeks).

- Due to the temporary loss of her LI account & alleged loss of business, Eagle sued Edomm in Pennsylvania federal court.

- She alleged 10 different legal theories (counts)—2 federal claims & 8 state claims.

Eagle vs. Edcomm—The Court's Decision
Federal Law Claims

- Computer Fraud & Abuse Act (CFAA) — federal law that permits civil action for "loss" or "damage" to a computer or related system (e.g., OS, data, hardware or something concrete).

- Permits recovery of concrete $ damages, including legal fees, revenues & related damages. But no recovery for future lost revenue or lost business.

- Eagle failed to provide any evidence of concrete losses or equipment damage as a result of losing her LI account. Consequently, her CFAA claim was dismissed prior to trial via summary judgment.

Eagle Decision—Lanham Act (Federal)

- Relates to unfair competition due to misleading or confusing consumers that Eagle's LI account was now Edcomm's official LI account.

- Eagle needed to prove that she had a valid interest in her LI account, she owned the account, & Edcomm's use of her LI account caused *confusion* among customers as to whom they were doing business with or whose account it was.

- Because Edcomm changed most of her identifying information (the key stuff) on the LI account there was no confusion or misrepresentation. So, Eagle's Lanham claim was dismissed via summary judgment.

- So, Eagle lost on both of her federal claims; no trial; summarily dismissed.

Eagle's State Law Claims Went to Trial

I.e., court didn't dismiss them prior to trial

- State claims:
    - Unauthorized use of name;
    - Invasion of privacy due to Edcomm taking her LI identity & account;
    - Edcomm stole her publicity;
    - Identity theft;
    - Stealing of clients/business;
    - Edcomm interfered with Eagle's relationship with LI & caused her damage;
    - Civil conspiracy by Edcomm & its directors;
    - Civil aiding & abetting.

- This is a "throw in everything including the kitchen sink" approach to litigation. Very costly. So, just going to trial is sort of a "moral" victory for her. But, was it a $$ victory?

How the Court Ruled on Eagle's State Claims

- Edcomm did not have a formal social media policy, though it informally encouraged employees to engage in social media. Obviously, a formal policy would have helped & a written policy even more so.
    - Does formal = written? (context/circumstances control)
- On the other hand even though Edcomm changed her LI page, Edcomm didn't pretend to be Eagle, & the LI page gave notice that she left Edcomm.

- Ultimately:
    - Edcomm was guilty of this because for a short period of time, it used Eagle's LI identity for its own purposes.
    - However, the time period was so short that Eagle was unable to prove any damages like lost business, credit problems, etc., therefore, she gets $0.

Eagle's Invasion of Privacy Claim

- Eagle needed to prove that Edcomm misappropriated her identity for its own gain.

- For a little while, anyone searching for Eagle on LI would be sent to Edcomm's profile.

- This was enough to prove the invasion claim.

- But, just like the name claim, Eagle couldn't prove any concrete damages like lost business, credit problems, etc.

- Again, she gets $0 & Edcomm catches a break**.**

Eagle's Misappropriation of Publicity Claim

- Eagle needed to prove that:
  - her name or likeness had $ value
  - that Edcomm took her name/likeness without permission
  - they used it for commercial advantage.

- The idea is that a person has exclusive entitlement to the commercial value of their name or likeness. This relates only to commercial value.

- Court ruled for Eagle on this. *By taking Eagle's LinkedIn account as its own, instead of creating a new account, Edcomm took Eagle's commercial identity*. Anyone searching for Eagle on LinkedIn would unwittingly be directed to Edcomm, thinking that it's Eagle.

- But did she get any $$ for this? Again, NO, because she was unable to prove any actual losses. Another break for Edcomm.

- I think that this is where a lot of employers could have problems. Consider the increasingly popular notion that every individual is a free agent. If that's true then can't have their own commercial identity?

- Employers need to careful about control & ownership because it could be easier for employees to prove real financial damage (e.g., being fired, retaliation, demotion, etc.)

Eagle's Identity Theft Claim

- Reminder: This is per PA law; other states might be different. This occurs when someone's identity is taken without prior consent & for an unlawful purpose.

- Court rules for Edcomm because: Eagle's name was in the public domain & her account/identity wasn't used for unlawful purposes. Keeping Eagle locked out of her LI account was sleazy but not illegal ID theft.

Eagle's Conversion Claim

- Eagle needed to prove that Edcomm deprived her of some right to tangible property or took her property as its own.
- PA court only applies this tort to tangible property. Some other states apply this to intangible property.
- A LI account, like any other software, domain name, or electronic transmission, is intangible property. So, Eagle loses on this claim.

Eagles Tortious Interference with Contract Claim

- Eagle claims that Edcomm interfered with her contract with LI & this caused $ harm to Eagle.
- Court says that because Eagle unable to prove $ damages caused by Edcomm, she loses.
- This was Eagle's big problem, she couldn't prove sufficient $ loss under any sort of legal theory. More on this soon.

Eagle's Civil Conspiracy Claim

- Conspiracy is 2 or more people acting together with malice; it's not just Edcomm as a sole business entity; it's Edcomm's individual officers/personnel.
- Eagle claimed that Edcom's people, via its officers, conspired to take her LI account.
- Eagle had to prove that this "taking" was intended to injure & she was in fact injured.
- Eagle couldn't prove any of this, so she lost.

Eagle's Civil Aiding & Abetting Claim

- Eagle claimed that Edcomm's executives individually aided in the taking of her LI account & online identity (as opposed to Edcomm as a single entity). Not the same as conspiracy.
- Difference between conspiracy & civil aiding & abetting is that individuals acting together, as a unit, vs. acting separately without a plan, etc.
- Eagle needed to prove that the individually named defendants knew that what they were doing was wrong or illegal, & that they would hurt Eagle.
- Here's why she lost: She couldn't provide any evidence as to a single named defendant who aided & abetted in the taking of her LI account & online identity.
    - The taking was something Edcomm did as a routine matter, with neither malice nor negligence in doing so

The "Meaty" Part – Damages (Acutal Losses & Punitives)

- Because Eagle succeeded on 3 of her state claims (unauthorized use of name; invasion of privacy by taking her identity; & misappropriation of publicity), she's entitled to monetary compensation for losses.
- Eagle needed to provide some credible evidence of actual lost business from Edcomm's actions. The evidentiary standard is that there was some "fair degree of probability" that she would make money or gain some advantage because of an alleged or impending transaction.
- She needed to provide some "reasonable" substantiation like reports, figures, communications, prospects, etc. Eagle failed to do this. She provided overall sales figures & oral testimony from her accountant. None of this equaled "reasonable certainty" of $ gain from her LI account or online identity.
- Punitive damages are awarded for "willful, wanton or reckless conduct." Although Edcomm broke the law, it didn't try to hurt Eagle. It only took something that it thought it owned as a result of buying out Eagle.
- SO, EVEN THOUGH EDCOMM BROKE THE LAW, EAGLE GOT BUPKIS (Unless you count her moral victories as something).

Edcomm Counterclaimed against Eagle
What the Heck, It's only $$$!

- Edcomm made 2 counterclaims against Eagle, concerning her LI account. The court's ruling is very instructive for employers.

- 1st counterclaim: Misappropriation. Edcomm alleged that Eagle took Edcomm's LI account as her own (this was after she got it back from Edcomm).

- Court holds against Edcomm. *It never had a written or express policy concerning LI. It encouraged individual employees to engage in LI, but it didn't do anything to regulate that involvement.*

- Also, LI's contract was originally between LI & Eagle, not between LI & Edcomm. In fact, Edcomm never had its own individual account, it just had the account started by Eagle.

Edcomm's 2nd Counterclaim: Unfair Competition

- Edcomm alleged that Eagle improperly took its content & connections (links, profiles, info.) & illegally used them to compete with Edcomm.
- Injury has to result from this alleged misconduct; i.e., the "misappropriation."
- Since misappropriation not proved, & Edcomm provided no independent evidence of injury of unfair competition, it loses.

Eagle v. Edcomm — Lessons Learned

- Remember, this is PA federal court, & except for the federal CFAA & Lanham Act allegations, PA state law applies. But . . .
    - As far as I know, this is the only ruling on company ownership of social media account & it's very current & coherent (never underestimate coherency).
- These are very well written & easy to read decisions. Kudos to Judge Buckwalter. Just wait until we get to the NLRB's decisions & advice—oy vay!
- In order for a company to claim ownership of an employee's social media account the company should do the following (in no particular order)

Companies Should

- Have a written or express (I.e., a commonly known even though not in necessarily writing) social media policy. This could also be a broad policy concerning all media communications (print, radio, etc.).
- A company should clearly delineate the "W's." Who, when, why, what – who speaks, when they speak, why they're the chosen ones & what they can say.
    - But as we'll soon discuss, the NLRB has stepped into the "who, when, why & what" issue. So, it's not a simple task to "clearly delineate" the W's.
- Consistently, review & monitor the policy for compliance & currency. As with any employment related policy, the longer it exists without review, compliance or enforcement, the less credible it is — so sayeth the courts, arbitrators, agencies, etc.
- Consistently monitor their social media presence. That is, don't just create accounts or encourage employees to engage, then let it slide. Stay involved. Monitor communications, update policy as needed, or if necessary, hire a 3rd party to do it. Show that you care & that this means something to you.
- If you want to prove ownership in court, then act/behave like an owner from inception onward.

Ehling v. Monmouth Hospital; Federal Stored Communications Act

- 8/20/13 U.S. Dist. Court of N.J. decision. 11-CV-03305.
- Ehling was a hospital nurse. On her Facebook page, she posted remarks very critical of paramedics. These remarks were sent by a co-worker to management, & Ehling was suspended & later fired. Suspension was due to her FB postings; firing due to many reasons.
- Ehling claimed firing violated federal Stored Communications Act (1986) by accessing her FB posts.
- SCA intended to protect private e-communications. Company liable for actual damages. However, no violation where access to the content was authorized by creator.
- Ehling regularly published on FB, & such content was provided to her bosses without coercion or protection. No violation of SCA.

Another Court Case: New York State Reinstates Teacher Who Made Obnoxious Remarks about Students

- In June 2010, teacher posted on Facebook that her students were "devil spawn," & that she wanted them to die of drowning. During the initial investigation of the postings, Rubino lied to employer & said not her content. She was fired. This is Rubino v. City of New York.
- In May, 2013, court ordered her re-hiring because she had a 15-year career with no prior disciplinary action. Also, this was an isolated incident, she was venting about her frustrations with her students, the comments were on her "private" FB page & deleted after 3 days, & prior to that, none of her students or their parents had seen the comments. Note: Her remarks became public after someone told her principal about them.
- However, that the NLRB has said that "venting" isn't protected, yet in this context court says it is protected. Again, more confusion in the rulings. This leads to our NLRB analysis.

Violation of Confidentiality Clause

- Snay vs. Gulliver Schools Inc.; 137 So.3d 1045 (2/26/14).
- Daughter brags on FB re dad's $80k settlement with employer for discrimination. Clear violation of confidentiality clause.
- "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."
- This Facebook comment went out to approximately 1200 of the daughter's Facebook friends, many of whom were either current or past Gulliver students.
- Court: Go back to trial court & figure out how much should be refunded.

Switching Gears: The NLRB & Content—What Can Be Said & By Whom…but first some context

- The National Labor Relations Board (NLRB) was created in 1935 per the National Labor Relations Act (NLRA).
- Its purpose is to promote democracy in the workplace & employees' right to collectively organize. Anything that relates to the wages, hours or conditions of employment is subject to the Act (practically anything).
- The last substantive change to the NLRA was in 1959. That's 5 years before the Civil Rights Act of 1964.
- Since 1964, there have been numerous federal, state & local workplace protection laws passed.
- Since 1964, labor union organizing has sharply declined in our private sector (around 7% of our private sector workforce; around 11% overall).
- The NLRA/NLRB is increasingly seen as an obsolete relic of a bygone "industrial age."
- Consequently, the NLRB is looking for ways to stay relevant & to avoid being shut down.
- The NLRB employs about 1,100 people nationwide (2013/14).
- The NLRA doesn't apply to managers/supervisors; it only applies to employees.

Is The NLRA/B the Maytag Repairmen of U.S. Labor Policy?
Is it Time to Retire the NLRA/B?

Or is the NLRB Entrepreneurial, Innovative & Adaptive?
Is it the Steve Jobs (Mobs) of Government?

- Recognizing that unions are in decline, around 2009, the NLRB began to apply the collective actions of the NLRA TO ALL WORKPLACE COMMUNICATIONS IN ALL INDUSTRIES REGARDLESS OF THEIR NON-UNION OR UNION STATUS.

- Through a series of cases & guidance, the Board has picked apart companies social media policies to ensure compliance with the Act. Some of those are handouts.

- Some of the companies & industries that have been hit with NLRB litigation over social media include Costco, Target & GM, small healthcare companies, individual schools, not-for-profit social services organizations, a dermatology clinic & a newspaper.

NLRB Guidance on Social Media

- Its 3rd published guidance was issued on 5/30/12. It's a long (24 pages) inconsistent slog through its views on social media policy & practices. The first 2 weren't any easier to understand either.

- Unfortunately, the NLRB's quasi-judicial opinions are equally inconsistent & difficult to apply to many workplace situations. Ironically, they've issued all of this guidance in order to help businesses understand their opinions in the larger workplace context.

- Their guidance & decisions contain lots of bureaucratic double talk & jargon.

- It appears that the NLRB has succeeded in staving off obsolescence by confusing & confounding anyone who tries to make sense of its opinions & guidance.

Specific Examples of the NLRB's guidance:

- It's okay for employers to require that their employees be honest & accurate, but requiring employees to be "**completely** accurate & **not** misleading" is illegal because so long as the posted info. isn't "**maliciously** false," then it's okay as protected activity. Huh? How do we prove malice? What if it's 52% inaccurate? Is that "completely inaccurate" then?

- Requiring employees to be fair, courteous or professional to others is fine, but prohibiting "disparaging or defamatory" comments is illegal. In other words, the NLRB is saying that making disparaging or defamatory comments about the company, using the company's equipment & bandwidth, is permissible so long as it's not "maliciously false." Still, it's okay if it's "defamatory" or "disparaging." It generally depends on context.

Specific Examples of the NLRB's guidance cont.:

- A company can't make a blanket prohibition for sharing "confidential" &" "personal" info. of others or the company. But, the company can prohibit the employees from sharing "Secret, Confidential or Attorney-Client Privileged Information" (so long as that posted info. doesn't relate to employees, then it's illegal to prohibit it).

    - For some reason, the NLRB emphasizes capitalization of "Secret, Confidential or Attorney-Client Privileged Information," but don't say why it's important.

- It's illegal for a company to require employees to "report any unusual or inappropriate social media activity." Also, it's illegal to say: "you are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers." These prohibitions are just plain insane.

NLRB Guidance on Social Media

- Finally, 1 big problem with NLRB guidance & opinions is that sometimes if the employer legitimately believes something (e.g., that the employee no longer wants to work there; that employee hates the employer or co-workers; or that employee committed serious act of misconduct), the NLRB may or may not accept that as a valid defense (i.e., mixed motive is illegal). With the NLRB it's all contextual. In the NLRB's opinion, it doesn't matter whether the employer acted in an objectively reasonable manner; it only matters if the employer acted in a way that the NLRB would have (think the EEOC's criminal background screening guidance).

    - Remember, to be concerted there needs to be "some evidence" of shared concerns about employment.

What Are Some of The NLRB Cases About?

- Tasker Healthcare, d/b/a Skinsmart Dermatology, 04-CA-094222, 5/8/13; 19 employee dermatology practice with no union.

- Employer's Facebook Group is open to employees & former employees, but is otherwise private.

- Employee rants & says that employer is "full of shit," they can "FIRE ME . . . . Make my day." Employee is fired & files NLRB complaint.

- Fortunately, the NLRB rules that **personal ranting, not related to collective issues, isn't "concerted activity."** So the firing is legal.

- Per the NLRB in Tasker: "Concerted activity includes circumstances where individual employees seek to 'initiate or to induce or to prepare for group action,' & where individual employees bring 'truly group complaints' to management's attention."

- At a small social service agency in Buffalo, NY, several case workers who dealt with domestic violence issues complained about their employer & another coworker's performance. They were fired for violating the company's anti-harassment & bullying policies.

- They filed an NLRB complaint. The Board said those firings were illegal because they engaged in "concerted activity" for improved work conditions & their NLRA rights. Hispanics United of Buffalo & Carlos Ortiz, 03-CA-027872, 12/14/12. Reinstate employees with back pay.

    - Concerted activity doesn't need to be expressly concerted; it can be inferred from circumstances.

- Essentially, an employer can't have a rule that explicitly or implicitly prevents employees from communicating with each other or a 3rd party, like the NLRB, about their employment (w, h, coe).

- Another view: The postings were call-to-action about a worker questioning co-workers' performance. The postings indicate that the employees are zealous & want to do well. Should they be fired, or even disciplined, for such candor & enthusiasm?

Costco vs. the NLRB

- Costco created a social media policy. Someone complained to the NLRB. The NLRB said that some of the policy was illegal & some of it was okay.

- Essentially, the Board said that any policy that prohibited employees talking amongst themselves or with a 3rd party (e.g., the NLRB) about wages, hours or conditions of employment is illegal.

- If the policy is intended to insure truthful communications, civility or protection of proprietary, trademarked or copyrighted info., then it's okay so long as it's narrowly written, i.e., not too broad—anyone know what this means?

- Many (not all) offensive, profane or unprofessional remarks, that are made in the context of discussing wages, hours or conditions of employment are legal. They can't be prohibited by policy. Which remarks? Only George Carlin's 7 FCC prohibited words?

    - Costco Wholesale & UFCW Local 731, 34-CA-012421, 9/7/12

Kroger v. Granger; NLRB, 07-CA-098566; 4/22/14

- This decision shows you just how out of touch with business & technology the NLRB is.
- An NLRB ALJ (administrative law judge), invalidated Kroger's attempts at protecting & managing its online content & reputation.
    - And, just to spice things up, the ALJ even rejected & accepted his own NLRB General Counsel's advice in the same decision.
- If you identify yourself as an associate of the Company and publish any work- related information online, you must use this disclaimer: "The postings on this site are my own and don't necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores."
- Do not comment on rumors, speculation or personnel matters.
- "It simply has not been demonstrated, is highly counterintuitive, and defies common sense that any Kroger employee discussions about Kroger 'work related information'—online or in the line at the post office—will be likely to be misconstrued as a statement of Kroger's."
- "As the General Counsel [of the NLRB] has recognized in related circumstances, the appropriate analogy for online communications is the water cooler at work . . . . Simply put, unless an employee is actively seeking to give the appearance of speaking on behalf of an employer—it is unlikely in the extreme that an employee's online communications and postings will be mistaken for an authorized communication of the employer." (P. 11, Ll. 5-10)
- In 2015, the whole concept of the "water cooler" being the workplace hangout is antiquated as it was in 1998 when that same concept was parodied as being out of date in the Seinfeld finale.

- It's ridiculous to compare one venue that serves only a few people at a time to social media which serves millions simultaneously.
- Oddly enough, in the same Kroger decision, the ALJ says that an opinion from the NLRB's own General Counsel is "without precedential value." P. 12, L. 30. This statement was in regard to requiring employees to disclaim their Kroger-related social media postings. Unfortunately, this bit of GC guidance would have helped Kroger out because it required that employees post a disclaimer on all social media postings related to Kroger & where the employee was identified as a Kroger employee. But according to that ALJ, that's illegal because it's too burdensome.
- I see this decision as an anomaly because its reasoning is bizarre & outdated; ironically, it's a very recent decisions on SM.
- Aren't businesses entitled to some sense of reassurance that it can protect their own content & reputation from the employees that they pay?

Other Cases to Be Aware Of

- Even lawyers make mistakes (no really!): Sometime in May/June 2013, a Cleveland, OH, criminal prosecutor was fired because he engaged in a Facebook chat with an accused killer's defense witnesses. He tried to persuade them to change their testimony by pretending to be an ex-girlfriend of the accused to make them jealous & irate at him.
    - Whether the prosecutor was morally right or wrong, his conduct created a huge ethical dilemma.
- The dates are fuzzy on this one, but sometime in 2009 or 10, 2 NJ lawyers had their paralegal Facebook friend a represented party in a case to get adverse info. on that party to undermine their claims. The 2 attorneys were CHARGED with ethics violations

Transition to Workplace Policies

- Now that we know what the courts & agencies have to say about what's illegal & not regarding social media @ work, what should employers do?
- The threshold question is: Should your client's company have a social media policy? In order to answer this question, consider the following factors:

Social Media & Workplace Policies

- How important is social media to the company? Does social media fit in with its growth plans? Is it important to employee or customer relations? If answer is "yes," then they probably need at least a barebones policy.

- How important is it to control company's message? Is it key to branding, marketing, etc.? If yes, then they probably need more than a barebones policy, but nothing too comprehensive.

- How important is controlling what employees say about their employer among themselves or to the public? If very important, then a comprehensive & carefully worded policy is needed.

- If social media isn't part of a company's development strategies, or employee relations, then it probably doesn't need a social media policy.

- However, if a company has an employee communications policy, & hasn't factored social media into that policy, then they should at consider whether or not to include it via reference or in some other way.

Sample Policy Language

(Don't copy this word-for-word, they're examples only)

- Savings Clauses: "Our social media policy will be administered in compliance with all applicable laws & regulations, like the NLRA."
    - Or, "our policy will not be interpreted or administered in any way that unlawfully prohibits your rights pursuant to any laws."
    - Be very careful of these types of clauses. Although they're useful & suggested, the NLRB has ruled that they won't save an otherwise defective policy or provision of a policy.
- Don't make derogatory comments that may damage the company's good will or public image before consumers & customers.
- Don't share information that we've taken aggressive actions to protect, such as attorney-client & privileged information, customer information, trade secrets & similar proprietary information. For guidance on what constitutes this type of information, speak to a supervisor or someone in communications. Show respect for copyright, trademark, fair use & other intellectual property laws.
- Don't let anyone deceive you into disclosing protected or confidential information. If you're asked to ignore communications policies or procedures, be suspicious & request advice.
- Use common sense & exercise sound judgment when communicating. Take personal responsibility for your communications. If you're not sure about posting something, then talk to a co-worker about it. Remember, even though what you post might be legal that doesn't mean it's smart to share it. Plus, if we or your co-workers see it, it stands to reason that future prospective employers will see it too.
    - Frankly, in light of the NLRB's prohibitions, I'm not sure why saying "use common sense & exercise sound judgment" is legal, whereas other types of prohibitions aren't.
- Any harassing, bullying, discriminating or retaliatory communications or conduct isn't permitted between co-workers or towards customers. When in doubt, talk to someone or review our policies.
- Don't impersonate someone. Don't post anything in the company's name, or in a manner that could reasonably be attributed to us, without first obtaining our authorization.
- Treat others as you'd like them to treat you-"Golden Rule."
- Indicate that the company may discipline or discharge for violating the policy.

If We Create A Policy,
What Do We Do With It?

- Integrate your social media policy with other e-media or tech policies. Having multiple stand-alone policies is inefficient.

- Management are leaders, so behave as leaders (effective leaders that is). Walk-the-walk & set the example for others.

- Decide who will manage & monitor your company's social media. Where it's posted, when, by whom, what, etc.

- Have a response or intervention plan in case a crisis occurs.

- Establish which topics are taboo to post about or discuss; e.g., lewd images, protected intellectual property, dishonest information, regulated info. (SEC, FDA, etc.)

- Be consistent in your application of the policy. Document when applied, how applied, to whom, why, etc.

- Incentivize compliance or exemplary use of e-media.

- Be respectful of others' privacy, especially those who aren't employees, or those who aren't engaged in social media. Recognize where the boundaries lie (easier said than done right?).

- Recognize difference between communications about the work lives of coworkers as opposed to something only affecting 1 person.

- Stay current on trends & innovations, including slang & security.

- Train everyone on it. Get buy in from all.

- Finally, & this is really important, be transparent. It strikes me that one of the key aspects of all e-media is transparency. It's scary & intimidating to "expose yourself," but this doesn't mean that you have to go "all the way."
    - Transparency can be as simple as explaining why your taking action "A" as opposed to actions "B" or "C."

Trends to Watch Out For

- Around 14 states have made asking for passwords & related information illegal, more states are considering this & it's arguably bad management.
    - AR, CA, CO, IL, DE, MI, MD, NM, NV, OR, TN, UT, VT, WA
    - 30-plus other states are considering such laws.
    - So don't ask job applicants or employees for access to *PERSONAL* social media accounts, passwords, information or devices that they've *actively* taken steps to protect.
- Language is less of a barrier to communicating across cultures; visuals are emphasized. Pictures, videos, photos, etc., are communicative not just art or for preservation.
- More professionals whose careers are dedicated only to social media. They manage content, ownership, accounts & whatever else is invented.
- Should we familiarize ourselves with any social media platform's licensing & user agreements? Not as important as behaving like an account owner. May be important in the absence of any other policies/practices. Do your due diligence on social media as you would any other transaction.
- Increasing scrutiny of control & ownership of bandwidth, equipment & content.