

# Sunrise Webinar Series

Labor and Employment

October 1, 2010

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(Materials included in the following outline are not intended to  
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# Social Networking

Steve Palazzolo



# Don't think you need one of these?!?

## **Israeli army nixes raid after Facebook leak**

03 Mar 2010 11:36:56 GMT

**Source: Reuters**

JERUSALEM, March 3 (Reuters) - The Israeli military called off a raid in Palestinian territory after a soldier posted details, including the time and place of the raid, on the social networking website Facebook, Israel's Army Radio reported on Wednesday.

The soldier -- since relieved of combat duty -- described in a status update how his unit planned a "clean-up" arrest raid in a West Bank area, the radio station said. Facebook friends then reported him to military authorities.

**The Israeli military spokesman's office had no immediate comment.**

(Writing by Allyn Fisher-Ilan; Editing by Louise Ireland)



# When did “friend” become a verb?

Wikipedia lists well over 100 “major active social networking sites.”



# When did “friend” become a verb?

According to Wiki:

Facebook has 500,000,000 registered users;

MySpace has 130,000,000 registered users;

Twitter has 75,000,000 registered users; and

In December of '07 (the last time anyone seems to have tried to count) Technorati was tracking 15.5 million active blogs and that does not even begin to scratch the surface.



# The Issues!

Pre-employment issues

Monitoring employees

The FTC Guidance



# Some Pre-employment Issues

Social Networking Sites as a recruiting tool may implicate:

- Civil Rights Laws
  - Elliott-Larsen
    - Sex (including pregnancy), Race, Religion, Color, National Origin, Age, Height, Weight, Marital Status
  - Title VII
    - Race, Color, Religion, National Origin, or Sex
  - ADEA
    - Age (over 40)
  - ADA
    - Disability
      - Don't forget associational claims



# Some Pre-employment Issues

Social Networking Sites as a recruiting tool may implicate:

- Civil Rights Laws
  - GINA
    - Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members (i.e. an individual's family medical history).





# Some Pre-employment Issues

The screenshot shows a Facebook profile for Steven Allen Palazzolo. The profile includes a profile picture, a cover photo, and a bio. The bio states: "Steven only shares some of his profile information with everyone. If you know Steven, send him a message or add him as a friend." The profile is divided into several sections: Information, Basic Information, Contact Information, Education and Work, and Pages. The Information section lists his relationship status as "Married to Lisa Palazzolo" and his children as "Daniel Spencer Palazzolo, Victoria Lynn, and Christopher Palazzolo". The Basic Information section lists his sex as "Male", current city as "Grand Rapids, MI", and relationship status as "Married to Lisa Palazzolo". The Contact Information section lists his website as "http://www.negotumlex.wnj.com". The Education and Work section lists his grad school as "Wayne State University", college as "Michigan State '82", high school as "Jenison High School '78", employer as "Warner Norcross & Judd LLP", position as "Attorney", and location as "Grand Rapids, MI". The Pages section lists "G.B. Russo & Son", "Mark Sala", and "Warner Norcross & Judd Sustainability Group". The right sidebar contains advertisements for "Life of Pi fan?", "Need New Windows?", and "Love Angels and Demons?".

facebook Search Home Profile Account

**Steven Allen Palazzolo** Add as Friend

Wall Info

Steven only shares some of his profile information with everyone. If you know Steven, send him a message or add him as a friend.

**Information**

Relationship Status:  
**Married to**  
Lisa Palazzolo

Children:  
Daniel Spencer Palazzolo  
Victoria Lynn  
Christopher Palazzolo

Current City:  
**Grand Rapids, MI**

Website:  
http://www.negotumlex.wnj.com

**Basic Information**

Sex: Male

Current City: Grand Rapids, MI

Children: Daniel Spencer Palazzolo  
Victoria Lynn  
Christopher Palazzolo

Relationship Status: Married to Lisa Palazzolo

**Contact Information**

Website: http://www.negotumlex.wnj.com

**Education and Work**

Grad School: Wayne State University  
JD

College: Michigan State '82

High School: Jenison High School '78

Employer: Warner Norcross & Judd LLP

Position: Attorney

Location: Grand Rapids, MI

**Pages** See All (16)

G.B. Russo & Son

Mark Sala

Warner Norcross & Judd Sustainability Group

Send Steven a Message

**Friends** 43 friends See All

Julie Palazzolo Bays

Angela Harcek

Cathy Crothers Romkema

William Healey

Tamara Lynne Poortvliet

Mikey VandenBera

Create an Ad

**Life of Pi fan?** ×

Yann Martel, the author of Life of Pi, has written a new book, Beatrice and Virgil. Pre-order and save extra 32% now, free ship \$25+

Like

**Need New Windows?** ×

You can afford them! 3 yrs no interest. Schedule an estimate with 1-800-Hansons for new windows today!

Like

**Love Angels and Demons?** ×

Chat (13)



# To protect your company

You may want to consider a written policy that prohibits your HR and Management employees from viewing the social networking sites of candidates.

OR . . .



# To protect your company

. . . you may want to consider a written policy for using social networking sites as a recruiting tool that:

- Requires candidate's permission before accessing sites;
- Discloses that any and all public sites and public areas of private sites may be viewed; and
- Explicitly states that non-job related criteria will not be considered when making hiring decisions.



# Use of Social Networking by employees

According to one survey “surfing the web” costs U.S. companies \$63 Billion Dollars per year.

77% of Facebook users use the site at work.

Of those who use Facebook at work, 87% say they have no clear business reason for doing so.

Users are on Facebook 2 hours a day.



# Monitoring your Employees

## Legal Implications:

### **THE MICHIGAN PENAL CODE (EXCERPT)** **Act 328 of 1931**

#### **750.539c Eavesdropping upon private conversation.**

Section 539c. Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both.

**History:** Add. 1966, Act 319, Eff. Mar. 10, 1967



# Monitoring your Employees

## **BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT**

**423.508 Gathering or keeping certain information prohibited; exceptions; information as part of personnel record.**

Sec. 8. (1) An employer shall not gather or keep a record of an employee's associations, political activities, publications, or communications of non-employment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records shall not apply to the activities that occur on the employer's premises or during the employee's working hours with that employer that interfere with the performance of the employee's duties or duties of other employees.

(2) A record which is kept by the employer as permitted under this section shall be part of the personnel record.



# Monitoring your Employees

Legal Implications:

Both the Electronic Communications Privacy Act of 1986 and the Stored Communications Act prohibit unauthorized access of electronic communications with 2 important exceptions:



# Monitoring your Employees

ECPA and SCA Exceptions;

1. Employer owned exception. When the employer is the service provider and is accessing its own systems.
2. Consent exception. Must get consent prior to accessing.





# Courts are construing these exceptions very narrowly

## **Pietrylo v. Hillstone**, 2009 WL 3128420 (D. New Jersey 2009)

Employees created MySpace. “This group is entirely private, and can only be joined by invitation.”

Employee provided password to a Manager. Manager terminated two employees for concerns that site would affect operations and violate company’s core values.

Terminated employees filed claims alleging:

- Violation of Federal Wiretap Act (18 USC §§ 2510-22);
- Violation of Stored Communications Act (18 USC §§ 2701-11); and
- Violation of parallel New Jersey State laws.

Jury returned a verdict finding for Plaintiffs under:

- Stored Communications Act



# Other legal considerations regarding monitoring

National Labor Relations Act:

29 USC § 157.

“Employees shall have the right to self organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

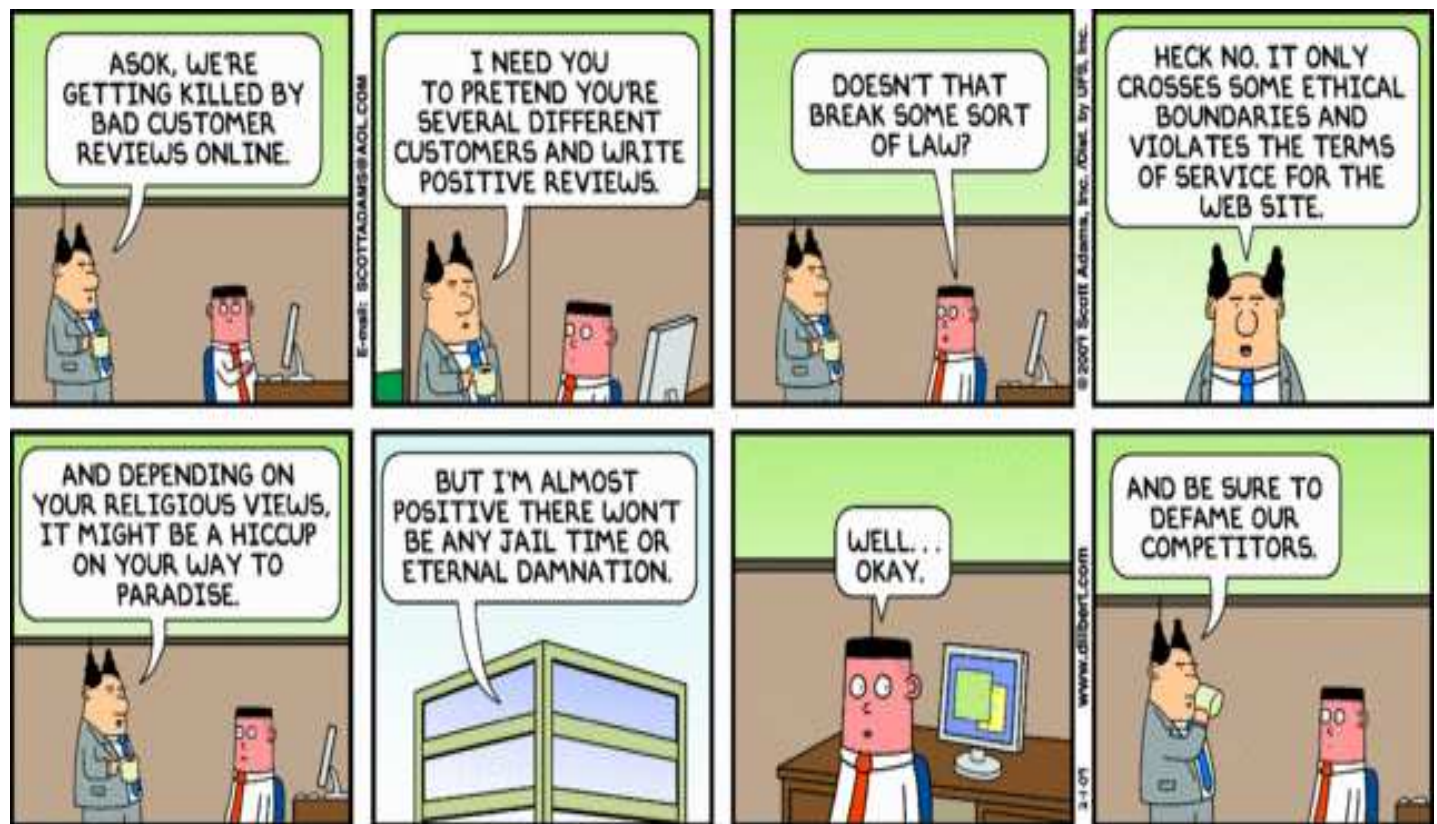


# Social Networking and Product Claims

The FTC recently issued guidelines dealing with Product Claims on Social Networking Sites.



# Social Networking and Product Claims



# Employees Like to Talk

When an Employee talks about the PRODUCTS or SERVICES of his Employer on a social media platform,

- Employees can become ***Endorsers***,
- Employers can become ***Advertisers***,
  - And, the Employer may be liable for any Federal Trade Commission (FTC) violation committed by their endorsing employee.



# Employers are then Liable...

When their employee-endorsers make ***deceptive, false*** or ***misleading*** statements or claims.

Cindy, an employee of Phil's Used Cars tweets:

- “My employer, Phil's Used Cars, gave me an employee discount on a great car! Like all cars sold by Phil, it will NEVER, EVER break down!”



# Employers are then Liable...

When their employee-endorsers fail to disclose a ***material connection*** such as:

- *Consideration* given to endorser (cash, free products, prizes, etc.), or any
- *Relationship* between endorser and advertiser (such as employment).

Paul, an employee of Heely Chiropractics posts on his Facebook page:

- “Heely Chiropractics gives the best adjustments in the entire state!”



# FTC Requires Formal Policies

Advertisers must ***educate*** their endorsers regarding their responsibilities AND

***Monitor*** their endorsers' communications, statements and claims.





# In the Employment Setting, This Means:

## Development of *Social Media Policies*

- Written
- Comprehensible
- Communicated
- Implemented
- Effective



# Social Media Policies Should Contain at a Minimum:

**Standards** of conduct for employees (the “Do’s and Don’ts”);

**Requirements** that employees disclose all material connections;

**Confirmation** of understanding from the employee;

**Notification** of the training and monitoring systems in place;

**Consequences** for violations of the policy.



# Things to Consider in Your Policy

How are you going to become involved in social networking?

- Is it a personal activity?
- Is it a work-related activity?



# Things to Consider in Your Policy

How do you define social networking?

- Is it Facebook and Twitter etc.?
- Is it blogging?
  - Company blogs?
  - Personal blogs?
- Is it commenting on other's stuff?
  - Blogs?
  - Websites?
- Or is it any interaction on the web that involves communication?



# Things to Consider in Your Policy

How far do you want to go?

- At work?
  - Do we prohibit all social networking?
  - Do we limit time spent?
    - Amount of time?
    - Breaks only?
    - Only as long as it does not interfere with your work?
  - What kind of disclaimers do we require?



# Things to Consider in Your Policy

How far do you want to go?

- At Home?
  - Do we prohibit all social networking using the company name?
  - What kinds of disclaimers do we require?
  - What happens when you find offensive material on a home-based site?
  - What about managers and supervisors?



# Other Things to Consider in Your Policy

Think about how this policy intersects with your other policies like:

- Your confidentiality policy
  - You will want explicit reference to use of confidential information, trademarks, service marks and other IP
- Your harassment and EEO policy
- Your current computer use policy
  - Do you add to this, or do you write an entirely new policy?
- The penalties for violating the policy



# More Ideas

Require disclosure from employees of all social media platforms used to discuss employer products or services in order to facilitate effective monitoring.

Educate internal corporate audiences regarding responsibilities: create a “**culture of compliance.**”

Proactively and periodically remind all employees of the policies in place.

Encourage proactive communication from employee-endorsers to demonstrate compliance.

Create a blanket policy prohibiting all types of word-of-mouth marketing (still requires monitoring and enforcement!).





# Steven A. Palazzolo



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