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Mayer, Brown reviews limits, potential for social media

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Marcia E. Goodman first learned about social media from her college-age children, but soon realized that new ways of online networking could also change business.

"We started to talk to our clients and realized that they were in all different stages of dealing with the employment, regulatory, IT and public relations implications of social media," said Goodman, a partner at Mayer, Brown LLP.

Goodman worked with several partners last summer to create "The Social Media Revolution: A Legal Handbook," an 86-page resource guide to social media. In addition to updating the guide and creating a global edition, they are also hosting Social Media Revolution: Business & Litigation Risks, a social media conference for clients at The Ritz-Carlton Chicago.

Legal and business professionals came together on Tuesday and Wednesday to discuss the impact of social media on such areas as business, privacy and the law.

Goodman called on her experience as an employment lawyer when she joined a panel on social media in the workplace.

"Employers have to worry about whether they might incur liability because an employee goes out and says something positive, but not quite provable about their product," she said. "They have to worry about employees going out there and sharing company secrets, they have to worry about whether employees are going out there and harassing people or expressing opinions that are controversial."

Goodman pointed to a recent National Labor Relations Board case involving an employee who claimed that she was fired because of Facebook postings she made about her supervisors. The case settled after the NLRB supported an employee's right to use social media to complain about treatment at work, she said.

"Most of us lawyers have thoughts about how far that goes or shouldn't go, but we don't know what the NLRB is prepared to do," she said. "The board is viewed as not a really forward-looking organization, so it's interesting that they would get in the social media limelight."

Partners Andrew S. Rosenman and Bronwyn F. Pollock teamed up for a panel discussion on how companies can develop effective social media policies.

Rosenman suggested that companies provide policies that guide the use of social media during all stages of employment.

"Before employment you have concerns about how you're going to use social media, if at all, in contemplating job applicants and investigating their background," he said. "There are a number of concerns over monitoring social media and what controls should be put in place during employment. Or, there are issues that can come up after employment with respect to supervisors making references on LinkedIn."

Employers should strive to be as specific as possible in social media policies, Pollock said. They should give examples of websites or other communications that trigger use of the policy.

"What's really interesting and different about this kind of a risk is that ... the generational differences as to people in management versus line employees, in terms of what they think ought to stay private, what is common sense, may be very different," she said.

Rosenman added that industries tend to approach social media in different ways. Financial services firms are often more conservative about employee use of social media, while sales organizations rely on employees to use online networking to promote their products.

Rosenman and Pollock agreed that companies need to not only develop, but also actively train their employees on social media policies.

Partner and banking regulatory lawyer Jeffrey P. Taft approached social media from a different angle, discussing its intersection with privacy laws.

He focused on regulatory developments, including a recent Department of Commerce report that questions whether more protections are needed in social media applications.

"One of the areas that people are concerned about are GPS-type services or people-tracking services like Foursquare, where people can be tracked voluntarily or involuntarily, and whether there is a need to regulate those areas," he said.

Taft also pointed to bipartisan legislative efforts by Sens. John McCain and John Kerry to create an "online privacy bill of rights." The bill faces a tough time in the House, where the Republican majority will likely view it as an additional burden imposed on industry, he said.

Taft recommended that legislators give industries a chance to create and enforce their own online privacy standards before imposing federal restrictions.

"In the U.S., financial services firms and others are bigger users of information as far as marketing," he said. "We tend to be a lot more innovative both in technology and also in our use of the information — that can be stifled or hindered by some not-well-thought-out legislation."

Lawyers must also join their clients in identifying the potential benefits and risks to getting involved in social media.

Partner Michael E. Lackey Jr. broached the ethical considerations for lawyers who use social media at the conference. He said that 80 to 90 percent of lawyers use LinkedIn or Facebook.

"The interesting part about this is that lawyers, when they are operating in the social media space, kind of forget that they're lawyers," he said. "It's this classic blurring that we're seeing going on between social media and the workplace."

Lawyers could get in trouble on LinkedIn by identifying their practice areas as "specialties" or by soliciting recommendations from colleagues or clients, Lackey said. They could also overstep boundaries on Facebook by sending friend requests to judges, or even to witnesses or parties in litigation, he said.

"When LinkedIn came on board, when lawyers signed on Facebook, they just sent out requests to people they knew or they filled out their information," Lackey said. "I don't think there was this cognizance that this is essentially a form of lawyer advertising."

Lackey recommended that lawyers continue to use social media, but that they become more educated on its risks.

"Social media is here to stay — there's no doubt about it," he said. "If you're not participating in this space, you're going to be left behind."

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