

Developing a Social Media Policy

J. David Duffy, Esq.¹

THOMPSON COBURN LLP

The Problem

It's late Friday afternoon and you just hung up the phone with your client XYZ Corp whose General Counsel has heard all about Twitter[®], Facebook[®] and LinkedIn[®]. She doesn't use them herself, but she recently learned that certain employees have been using them to post disparaging things about some competitors' products. She also knows that these employees haven't been identifying themselves or their affiliation with the company in their posts. She wants your advice. Specifically, she wants your help drafting a social media policy to address these issues in the future. What will you do?

What is a social media policy?

A social media policy is a set of guidelines and directives setting forth a company's philosophy regarding acceptable usage of social media platforms. It is typically platform neutral; it applies to all employees and it incorporates other policies such as the employee code of conduct, the internet usage policy, the anti-harassment policy, the intellectual property policy and confidentiality and trade secret policies to name a few.

How prevalent are they?

If you consider that Facebook[®] first debuted in 2005, then the proliferation of corporate social media policies during the past several years has been rapid. But a recent survey of 34,000 companies worldwide conducted by Manpower[®] employer services, found that the actual number of companies with a policy is still quite small. In their survey, only 20% had a policy addressing social media usage.² While the number of companies implementing social media policies will no doubt continue to grow, XYZ Corp's request for assistance drafting a social media policy would apply to many companies today.

Elements of the policy

A. Corporate Philosophy

Social media policies are truly unique. Unlike other corporate policies prohibiting specific conduct, corporate social media policies focus upon the company's philosophy regarding these tools and in some larger sense the company's relationship with emerging technologies and its consumers. The spectrum with which companies either embrace and encourage their employees to use social media on the one hand, or discourage and outright forbid their usage on the other hand is vast. These policies truly reflect the corporate culture and for company-related activities, the corporate identity of the implementing institutions. Not surprisingly, technology companies such as IBM, Sun Microsystems, Dell, Cisco and Microsoft have open policies that encourage

employees to freely engage with social media in an appropriate way. For instance, Dell's Online Communication Policy begins with the following statement:

Dell recognizes that online communication tools such as weblogs ("blogs") and other online channels (chat rooms, etc.) increasingly serve as channels for direct interaction with customers, the media and other Dell stakeholders. The company's commitment to being direct supports open communications by employees and other Dell representatives, providing such communications are transparent, ethical and accurate.³

By contrast to these open policies that encourage employee interaction, companies like J. Crew, ESPN, law firms and FINRA have restricted certain types of employee interaction.⁴ For example, the sports network ESPN is an active participant in all social media platforms, but it has prohibited its employees from having "personal websites and blogs that contain sports content."⁵ This message is clear. The company wants to control whatever sports-related content is released from ESPN or associated with ESPN and it wants to control the talent that can post sports-related content. So, rank-and-file employees are not allowed to maintain their own sports content.

These are examples of how a company's philosophy towards social media drives the development of its social media policy. Therefore, to answer XYZ Corp's request, you will need to first sit down with the client to get an understanding of how the company uses social media to determine what the corporate philosophy towards social media is or should be. Through this process, the company may attain a complete understanding of how it uses social media and it's employees are using social media. This may cause the company to realize that it really doesn't have social media at all.

B. Content Control

Most aspects of the social media policy relate to content control. Much like companies struggled in the past decade with the proliferation of e-mail and the necessity to educate employees about e-mail content, social media is in exponential expansion of this same problem. If employees spoke or speak loosely in e-mail, social media is that much worse. In fact, by today's standard, e-mail has become the preferred platform for formal business communications while social media is rapidly becoming a platform for everything else. The colloquial nature of social media postings and the ready availability to use any media format makes social media a much more challenging problem. Couple the nature of communication with the ease with which employees can tweet on Twitter[®] or post to Facebook[®] from their mobile devices, clear policies regarding appropriate content are key. Finally, unlike e-mail, social media posts can be broadcast to a virtually worldwide audience thereby resulting in the possibility of even greater reputational damage or injury than e-mail is generally capable of producing.

Thus, given the nature of social media the need to provide guidance regarding content control is a primary purpose for the social media policy. Elements of the policy should include:

- The "refrigerator rule" – simply put, if the author wouldn't want to read what he/she has posted on the office refrigerator or on his/her parent's refrigerator,

then it's not appropriate for posting on social media. Additionally, employees should be reminded that what you say in social media can't be taken back. Or, put another way, you should never assume that anything you post won't be read today, tomorrow and as long as that website remains operable.

- Be respectful and honest – while it should be obvious, employees engaging in social media should recognize that even if their content is entirely personal, what they say can indirectly affect the company. If their content is viewed as company-related, then the adherence to basic virtues is even more critical. This, of course, includes demonstrating respect for all races, genders, religions and cultures.

This section from Coca-Cola's social media policy provides an excellent example.⁶

3. **Be mindful that you are representing the Company.** As a Company representative, it is important that your posts convey the same positive, optimistic spirit that the Company instills in all of its communications. Be respectful of all individuals, races, religions and cultures; how you conduct yourself in the online social media space not only reflects on you – it is a direct reflection on the Company.

- Disclose corporate affiliations – the social media policy should require employees who are commenting on the business of the company or anything that could be related to the business of the company to disclose their corporate affiliation.
- Use appropriate disclaimers – if an employee is permitted to comment about work-related matters without the express approval of the company, then the employee should use appropriate disclaimers to state that the individual's opinions are not those of the company. For example, a disclaimer such as “the views expressed on this blog are mine alone and do not represent the views of my employer (XYZ Corp) or any other person.”
- Educate employees on the appropriate use of the company name in their online interactions. Again, on the issue of philosophy, it is important for the company to decide whether it will permit its employees to associate themselves with the company at all in their online interactions. In particular, the company should identify who its spokespeople are for particular types of social media interactions. For instance, if the company is criticized by a customer in social media, does the company want any employee to respond? Or would the company prefer that the employee notify the company of a problematic posting and let the company take it from there?
- Expressly incorporate by reference corporate codes of conduct and other employee-related policies. For example, Cisco's Internet Postings Policy states:⁷

Your Internet postings should not violate any other applicable policy of Cisco, including those set forth in the Employee Resource Guide and the Code of Business Conduct.

- Prohibit misuse of intellectual property. While the company likely has an intellectual property policy, it is critical that the social media policy remind

employees not to claim ownership in other people's work, use copyrights, trademarks, publicity rights or other protected intellectual property without appropriate permissions and licenses. In particular, employees should be reminded that the company's own intellectual property such as the corporate logo or other branding may not be used in social media without express permission.

- Remind employees about improper disclosure of confidential information, private information and trade secrets. Employees should be instructed that social media is no place to discuss any confidential or proprietary information belonging to the company. Examples as innocuous as a Facebook® posting that says "I just finished an all-nighter closing a major deal for the company and now I'm ready for bed" could have extremely unintended consequences if the subject matter of that deal became publicly available. Additionally, statutes like HIPPA or the FTC Red Flag Rule place privacy limitations over customer and patient data. Employees must be reminded that disclosure of confidences can subject the company to liability and the employee will be subject to severe discipline for any violations.

C. Other Considerations

- Advise employees about Internet monitoring. The Internet usage policy, if one exists, likely provides information about employee privacy while using company resources to access the Internet. Both the Internet usage policy and the social media policy should inform employees about how the company monitors the Internet and social media activities so no employee will be surprised if that monitoring yields inappropriate and actionable employee content that results in some form of discipline.
- Advise employees that they are also important Internet monitors. The best Internet monitoring the company has at its disposal is its own employees' use of the Internet and their willingness to identify and report things that would be of interest to the company. The social media policy should advise employees that they should be active viewers of content and should never be afraid to advise the company of anything that they encounter that will be of interest. Regardless of whether they find a negative comment about a company product or service on Twitter® or Yelp® or whether they just find information that has business value, they should be encouraged and educated about how to bring that information forward.
- Remind employees that their jobs still matter. A recent survey conducted by Robert Half® found that 54% of the companies it surveyed completely block access to social media sites at work.⁸ These policies are probably more often enacted to address performance concerns rather than to control content, but the point is well taken. Social media usage that is not work-related can invariably lead to lost productivity. Coca Cola's policy astutely addresses this concern:⁹

8. **Be responsible to your work.** The Company understands that associates engage in online social media activities at work for legitimate purposes and that these activities may be helpful for Company affairs. However, the Company encourages all associates to exercise sound judgment and common sense to prevent online social media sites from becoming a distraction at work.

D. Training

As you develop your social media policy for XYZ Corp, you should realize that developing a written policy is only the first step towards having an effective social media policy. Continuous training and education regarding the policy's content and the content of any related policies are critical towards ensuring the written policy's success and they are an important part of the company's total solution to avoid litigation due to the ill-informed actions of its employees.

The Solution

XYZ Corp made the right decision. Rather than choosing to ignore a troubling employee social media post, it contacted you. XYZ Corp's employees, like nearly every other employee today, accesses the internet and engages in some form of social media consumption. These habits potentially expose the company to unforeseen liability. Developing social media policies and guidelines are the appropriate first step towards mitigating against these unknown risks.

Useful Third-Party Resources

- Online Social Media Policy Database (contains 123 policies), <http://socialmediagovernance.com/policies.php>
- Sharon Lauby, "Should Your Company Have a Social Media Policy?" <http://mashable.com/2009/04/27/social-media-policy/>
- Russell Herder, "Social Media Embracing the Opportunities, Averting the Risks." August 2009.

¹ J. David Duffy is a Partner in Thompson Coburn LLP's Chicago Office. He is a member of the Commercial Litigation and E-Discovery practice groups and is experienced in technology-related litigation. He is a frequent speaker on issues involving technology, e-discovery and social media.

² "Employer Perspectives on Social Networking: Global Key Findings." Manpower, January 2010.

³ <http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&-section=019>.

⁴ "J. Crew's Internal Blogging Policy Document", May 21, 2009, http://www.mediabistro.com/prnewser/social_networks/jcrews_internal_blogging_policy_document_116867.asp; <http://www.finra.org/Industry/Issues/Advertising/p006118>; http://www.bakerdstreamingvid.com/publications/Baker_Daniels_Social-Media-Policy.pdf

⁵ "ESPN Tells Lambs, 'Don't Tweet, Unless You Tweet for ESPN'," August 4, 2009, <http://www.fangsbites.com/2009/08/espn-tells-lambs-dont-tweet-unless-you.html>; "ESPN Limits Social Networking", New York Times, August 4, 2009, <http://www.nytimes.com/2009/08/05/sports/05espn.html>.

⁶ <http://www.viralblog.com/wp-content/uploads/2010/01/TCCC-Online-Social-Media-Principles-12-2009.pdf>

⁷ http://blogs.cisco.com/news/comments/ciscos_internet_postings_policy

⁸ “Whistle – But Don’t Tweet – While You Work, October 6, 2009,
<http://rht.mediaroom.com/index.php?s=131&item=790>

⁹ <http://www.viralblog.com/wp-content/uploads/2010/01/TCCC-Online-Social-Media-Principles-12-2009.pdf>