

camera
phone



instant
messaging



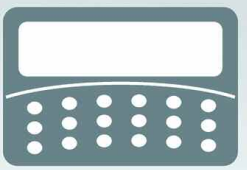
email



blog



personal
digital
assistant



MWC

South
Carolina
Bar

global
positioning
satellite





THE ELECTRONIC WORKPLACE

Blogs, Cybersmears and Similar Challenges

By William H. Floyd III and James T. Hedgepath

IM'd lately? If not, maybe you were too busy blogging. Or maybe you were taking pictures with your camera phone, using your new credit card sized GPS unit to locate the nearest Chinese restaurant, downloading music to your iPod or learning how to use your Blackberry PDA. With so many new hi-tech devices to choose from, how can you keep up with all of the rapidly changing technology? Of even greater significance to your practice, what impact do these relatively recent technological advances have on employees and employers, the security of proprietary information and individual privacy?

In less time than needed to read this article, someone could easily use a camera phone to copy confidential documents; a disgruntled employee could post trade secrets

on his Web log, "blog" for short; or an instant messaging conversation could result in a sexual harassment claim. Notice the theme? While mobile phones, camera phones, GPS units, personal digital assistants (PDAs), blogs, e-mail and many more electronic tools have become convenient time saving devices for attorneys and their clients, they also bring added risk. Although this risk can arise in almost all areas of practice, this article focuses on an area that most attorneys deal with in some way: the electronic workplace.

Camera phones and mobile phones

The days of lugging around the five pound "mobile" phone bag are long gone. Most individuals now have mobile phones that weigh just a few ounces. In 2005, more than half of the mobile phones pur-

chased in the United States were camera phones. Within a few years, according to industry estimates, all cell phones will have a camera, at least, and likely many additional electronic functions. Of all the new electronic devices on the market, camera phones probably pose the most risk to employers. They provide a user the opportunity to photograph almost anything or anyone at a moment's notice. Camera phones are portable, concealable and almost indistinguishable from a regular mobile phone.

Allowing camera phones in the workplace can lead to unintended consequences for the employer and its employees. For example, an employee, vendor or other visitor could use a camera phone to take pictures of employees or proprietary processes or information. This could lead to discrimination and harassment claims or disclosure of confidential information.

Text messaging is another byproduct of mobile phones. Without actually calling an individual, a mobile phone user can send a message, similar to e-mail, to another mobile phone user. Further, many mobile phones now allow users to attach text or image files to a text message. Thus, a mobile phone or camera phone user may be able to appropriate confidential information without even making or receiving an actual telephone call.

What steps might employers take to address the use of camera phones and mobile phones in the workplace? Some employers have banned mobile phones altogether. Others have installed jamming devices that disable cameras in certain areas. Others have adopted detailed written policies addressing the issue.

Attorneys advising employers about dealing with mobile phone and camera phone issues should analyze each situation on a case-by-case basis. For many employers, a complete ban of mobile phones is not feasible. However, at least a partial ban is appropriate in most situations. Camera phones should be banned in employer-provided restrooms, showers, locker rooms and other similar

areas. Attorneys advising health care employers will need to advise their clients on how to protect patient and medical records privacy.

While there is no "one size fits all" mobile/camera phone policy, a well thought out, communicated and implemented policy can reduce the risk of related litigation and protect the privacy of employees and visitors.

Blogs

Added to the *Oxford English Dictionary* just two years ago, a "blog" is a "frequently updated Web site consisting of personal observations, excerpts from other sources, etc., typically run by a single person and usually with hyperlinks to other sites; an online journal or diary." Blogs have increased exponentially in recent years. They are a very popular means of sharing views, advertising services and simply interacting with other Internet users. And they are not limited to casual Internet usage. Rather, almost every profession, including law, accounting and medicine, has a large number of influential and well-known blogs.

Blogs are becoming a growing concern for employers. According to some reports, millions of employees spend work time reading blogs not related to company business, representing estimated losses of nearly 10 percent of the work week.

A blog is similar to a Web site, and in some cases, blog visitors may not even realize they are visiting a blog rather than a Web site. However, unlike a Web site, which generally does not interact with visitors, a blog allows the blog owner and its visitors to interact on a personal level. More important to employers and employees, a blog allows its owner to post "diaries" through which visitors can read and interact. Thus, in practice, a blog is very similar to a chat room or message board, but the owner can choose the specific topics visitors can discuss.

In addition, creating a blog is not much more complicated than signing up with an Internet Service Provider (ISP) and creating a Hotmail e-mail account. Even the

most basic blog typically contains Web links to other blogs and Web sites, news stories and an area for visitors to interact.

The popularity of workplace blogs, *i.e.*, employer-sanctioned blogs, is growing. Last May, IBM published internal guidelines that encourage employees to engage in online discussions using blogs. Used appropriately, blogs can be an effective tool for employees to use when providing information to clients, gaining feedback on products and reaching new business.

On the other hand, employees can also abuse blogs by disclosing proprietary information, discussing inappropriate topics or defaming employers, co-workers or customers. These misuses of blogs have been cleverly coined "cybersmear."

One notorious example of cybersmear arose out of California where two former employees posted more than 13,000 uncomplimentary, often defamatory (according to a jury) messages on 100 blogs concerning their former employer. The two former employees vowed to "continue posting until they died." Their conduct triggered litigation and ultimately produced a \$750,000 jury verdict against them plus injunctive relief.

An employer can develop and enforce policies that apply to workplace blogs; however, "regulating" non-workplace blogs is difficult. An employer must carefully balance such factors as the connection to the workplace, the right of "free speech," defamation and similar concerns. Depending on their content and context, disciplining an employee because of his or her blogged comments can trigger claims of retaliation for "whistle-blowing" (under such laws as Sarbanes-Oxley) or "concerted action" (under the National Labor Relations Act).

For attorneys with employer or employee clients, understanding how employer-owned and employee-owned blogs can affect the workplace is important. Keys to analyzing potential legal issues associated with a blog are the nexus to the workplace and the scope of the

employer's blog or electronic communications policy. A policy should also be analyzed in the context of the employer's other policies, such as any employment at-will policy or disciplinary policy. Electronic communications policies should specifically address blogs and other electronic devices and should be tailored to fit the employer's specific needs while minimizing the risks associated with misuse of a blog.

E-mail

With its ease of use, versatility and near universal usage, e-mail has become almost as important as the telephone for communication purposes. Attorneys in South Carolina now electronically file virtually all documents in federal court. The clerk of court sends confirmation of the filings via e-mail. Federal and state judges now request that orders be e-mailed to chambers. In the blink of an eye, a 500-page attachment can be e-mailed to or from a client.

More so than possibly any other development of the last 20 years, e-mail has changed the practice of law. It has also changed the way in which clients do business. With these changes have come new challenges.

In recent years, many non-governmental employers have increasingly sought to monitor employee e-mail. The typical employer policy informs employees that they have no expectation of privacy in anything they do with their computer, including sending and receiving e-mail. Why is all of this regulation of e-mail necessary?

Defamatory comments or proprietary information can be transmitted from an employee to an outside contact in a manner of seconds. Although the employer will have a record of the transmission, the harm is done when the recipient of the e-mail opens it.

E-mail can also be a source of discrimination and harassment claims. Employees tend to say things and transmit images via e-mail much more freely than they would actually do in a face-to-face conversation. These e-mail transmissions could be the "smoking gun"

in a discrimination or harassment case. One commentator aptly described the litigation importance of e-mail and similar electronic communication as follows:

"Workers' e-mail, IM, blog and Internet content creates written business records that are the business equivalent of DNA evidence."

As with other forms of electronic communication and data storage, an employer's best defense against the improper use of e-mail is a properly tailored electronic communications policy. When drafting the policy, be sure to consider pertinent state and federal statutes, such as the federal Electronic Communications Privacy Act or South Carolina's similar law (S.C. Code Section 17-30-10 et seq.). The policy should also balance what employees are being asked to accomplish with e-mail and at the same time reduce the employer's risk associated with inappropriate use of e-mail by an employee.

Instant messaging

Although similar to e-mail and blogging, instant messaging (IM) has its own set of unique characteristics that make it important in a discussion of the electronic workplace. Unlike e-mail, instant messaging allows two Internet users to engage in a real time e-conversation. These IM conversations are normally recorded by both the ISP and the users' hard drives.

Because IM conversations on an employer computer are not as common as e-mail and blogging, IM conversations typically come up in the employment setting in a circumstantial evidence scenario. For example, an after-hours IM conversation between two employees may be used to prove or disprove harassment allegations. Accordingly, attorneys assisting employers or employees in employment-related disputes should be aware that IM conversations away from work may be relevant to their case.

GPS

Although most employers do not employ global positioning system (GPS) devices to keep track of employees or equipment, the use of

GPS units in the workplace is growing. GPS technology allows employers to track exactly where equipment or employees are located, how long they stay there and how fast they are moving. For example, transportation companies increasingly use GPS to track a driver's speed, location and route. An employer can use GPS to monitor the length of breaks or customer stops, if equipment is where it is not supposed to be and whether an employee is using the equipment in a dangerous manner.

On the other hand, GPS technology may be used against the employer. For example, a plaintiff in a case involving an automobile accident may be able to use the employer's GPS information to demonstrate that the employer's employee was speeding at the time of an accident.

Many mobile phones are now GPS-enabled also. Thus, in addition to tracking a delivery truck, an employer can track the location of an employer-issued mobile phone. This use of GPS technology raises privacy concerns, especially if the employer monitors the employee's location during non-working hours.

As GPS technology becomes more widespread and commonly used, attorneys will need to be aware of the costs and benefits of employing GPS technology in the workplace.

Conclusion

The electronic workplace continues to be very dynamic. As new electronic gadgets and gizmos make their way into the workplace, employers should be aware of the changing technology and its impact on their employees and policies. Their employees certainly will. Likewise, attorneys must keep stride with workplace technology. The old "I don't know much about computers" approach simply does not work anymore.

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