Walking the Fine Line of Social Media
(or how I learned to stop worrying and love the tweet)
Walk the Line

**Dangers:**
- Disperses control of brand message
- Potential liability for employee activity
  - Civil
  - Regulatory
  - Criminal
- Difficult to monitor because it is decentralized and “problem” employees may have access to customers.
- Outside work hours and off-premises activities are difficult to restrict—but liability may still attach.
Off-Message Messaging

- IP issues
  - Misuse can undermine your trademark rights
  - Name-blocking – deliberate and inadvertent registration issues when employees use group and page names
  - Trade secret issues – even if not disclosed, can undermine ability to prove that company took steps to maintain secrecy
The Liability Line

- Types of liability for employee statements
  - Civil
    - Lanham Act and State laws (including CCPA)
  - Regulatory
    - Federal Trade Commission
  - Criminal
    - Securities Fraud
– Any person who … in commercial advertising or promotion, misrepresents
the nature, characteristics, qualities, or geographic origin of his or her or
another person's goods, services, or commercial activities, shall be liable in
a civil action by any person who believes that he or she is or is likely to be
damaged by such act.

CCPA - C.R.S. § 6-1-105
– (1) A person engages in a deceptive trade practice when, in the course of
such person's business, vocation, or occupation, such person:
  (c) Knowingly makes a false representation as to the affiliation,
connection, or association with or certification with another;
  (h) Disparages the goods, services, property, or business of another by
false or misleading representation of fact;
Fear the FTC

FTC Blogging Rules (16 CFR § 255)

Bloggers who have “material connection” with a company must disclose that connection anytime he or she makes a comment about that company’s products or services.
Fear the FTC

- 16 C.F.R. § 255 - came into effect December 1, 2009

- FTC now requires employers to monitor reviews or endorsements of your products or services by any person who has a material connection to your company—including employees.
It shall be unlawful for any person, directly or indirectly … to use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance.

Whole Foods CEO John Mackey- 8 years of posts that could have violated Rule 10b-5.
It could happen to you

- **Hypothetical**
  - Employee creates anonymous personal blog devoted to “uncovering” bad actors in your industry
  - Employee creates affirmatively states that he is not associated in any way with any company in your industry.
  - Employee blogs about your competitors-including potentially libelous claims
  - Employee promotes your company as alternative to “bad” companies
  - Employee uses your computers during regular office hours to create the blog
  - Fellow employee promotes the blog via online links and sites such as Digg
  - Employee’s title is managing attorney
Descent into Decentralization

- **De facto** abdication of control to employees for
  - Document retention
  - External communications
    - Liability for statements
    - Ownership issues
- Can impact your legal obligations and protections
  - Speech Act (Recently passed by Congress, awaiting President Obama’s execution)
SCA and Document Retention

- In event of litigation:
  - “It is the duty of a party not to take action that will cause the destruction or loss of relevant evidence, hindering the other side from making its own examination and investigation of all potentially relevant evidence relating to . . . the incident in question.” Aloi v. Union Pacific, 129 P.3d 999, 1001 (Colo. 2006) (jury instruction).

- Can apply to metadata
- Scope of discovery is very broad
- Penalties for not complying
Retain this!
Who has custody and control?

- If relevant, must produce if you have custody or control of it.

- “It is [defendant]'s burden to establish that the Plaintiffs have the requisite possession, custody or control over the social networking sites, and it has not met its burden here. . . . [T]he Plaintiffs do not control over the social networking sites . . . . The Plaintiffs do not control this information – the networking sites do . . . .”

- The legal standard for “control” is the legal right, authority, or practical ability to obtain the materials sought upon demand.
Stored Communications Act

- **Prohibition Against Disclosure:**
  - (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication (such as email or texts) while in electronic storage by that service; and
  - (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

- **18 U.S.C. § 2702(a).**
Stored Communications Act

- May Only Disclose To:
  - Intended recipient
  - Anyone with the consent of the originator or intended recipient
  - Various missing children organizations
  - Law enforcement agencies if inadvertently obtained and pertain to the commission of a crime
  - Governmental entities for emergencies

- No exception for a civil subpoena—in fact parties and counsel have been sanctioned for such subpoenas.
External Communications

- Reasons for “Active Hands” Policies of diligent moderation and upfront review social media posting by employees:
  - Control content and guarantee compliance
  - Marketing discipline and control your brand message
  - Ensure quality of comments
  - Generate the best user generated content
  - Prevent bad grammar and poor syntax
  - Maintain image of ideal customer
Idle Hands May Not be So Bad

- **Active Hands Trap**
  - Too much up front review by employees and you lose protection -- not enough and you lose control.
  - **DMCA**
    - Only protects *passive* ISPs
    - 17 U.S.C. § § 512(a)-(d) add new four “safe harbors”
    - § 512(a) – Transitory digital network communications providers.
    - § 512(b) – System caching service providers
    - § 512(c) – Information residing on networks at the direction of users
    - § 512(d) – Information location tools
  - **CDA**
    - Only protects “information service providers”
    - Does not protect Information *content* providers.
Stay safe out there

CDA:

- “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. . .No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

- Provides immunity if:
  - You are a provider of an interactive computer service.
  - The cause of action asserted by treats you as the publisher of the content.
  - The content was provided by another information content provider.

- Immunity is lost if:
  - you selectively republish content, or
  - edit content to the extent that your edits or comment change the meaning of the content,

- Section 230 does not protect against claims based on:
  - federal criminal law (47 U.S.C. §§ 230(e)(1)),
  - intellectual property law (47 U.S.C. §§ 230(e)(2)), or
  - right of publicity laws (See Doe v. Friendfinder Network, Inc., 540 F.Supp.2d 288 (D.N.H. 2008)).
Stay safe out there

- SPEEEECH Act:
  - Securing the Protection of Our Enduring and Established Constitutional Heritage Act
  - If signed into law, prohibits judgments of defamation obtained abroad that conflict with the First Amendment from being recognized in the US.
  - Extends the CDA to all forums- including UK and Canada – to prevent “libel shopping”
  - Means you have global protection for provided your employees do not cross the line to become ICPs.
You Have No Right

- **Control of Message and Brand**
- **Ownership of employee content**
  - Consideration needed for contract formation.
  - Joint License
    - Content submitted social media site is also licensed to social media site:
    - E.g., Facebook terms of Use:
      
      For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
After Hours…

- Reasons for a policy
  - Single-minded approach
  - Awareness and Compliance within organization
  - Consistency
  - Productivity
  - Minimize risk
  - Restricts off-the-clock but on-the-topic activities
Considerations for a Social Media Policy

- What to include:
  - Use (encouraged, discouraged, tolerated)
  - Restrictions on personal postings about work
  - Compliance with other policies
Considerations for a Social Media Policy

- Compliance and conformity with other policies
- Review and address:
  - IT resources and communications systems policy
  - Protection of trade secrets
  - Privacy policy
  - NDAs and Non-Invention Agreements
  - Code of Conduct Policy
  - Reg FD, Non-Disclosure of Material Non-Public Info Policy
  - Anti-harassment and anti-defamation policy
  - Non-discrimination policies
  - Company recruiting and employee vetting policies
  - Section 255 Disclosure Requirements
Considerations for a Social Media Policy

- **Caveats:**
  - Disproportionate restrictions may invite non-compliance and negatively impact employee morale
  - Overly parental behavior can in some instances create liability. Company’s should respect employees’ right to:
    - Participate in legal, off-duty and off-site conduct;
    - Organize, protest working conditions and report illegal activity;
    - Privacy
    - Non-discrimination and non-retaliation
Considerations for a Social Media Policy

- Implementation
  - Distribute
  - Enforce
  - Update hiring and recruitment policies
  - Educate HR
  - Follow procedures
  - Train company employees
  - Regularly review and update
Questions?