PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Announcement

After over 10 years of service with our firm, legal assistant, Jessica Bush, has left with plans to find a job closer to her East Bay home. We offer Jessica our deepest gratitude for playing an integral role in the growth and success of our firm. You will be missed. Thank you, Jessica!

Upcoming Webinar

Denis Kenny will be speaking at a prominent labor and employment industry event next month in San Diego. The presentation centers on recent trends, notable decisions, and risk avoidance/mitigation measures concerning the increasingly-important field of independent contractor compliance/misclassification.

Join Denis on Wednesday, September 18, 2012, from 10:45 a.m. to 11:45 a.m., as he co-presents at the 4th Annual Contingent Workforce Risk Forum with Maria Goyer, Vice President of Global Solutions for Populus Group, a Scherer Smith & Kenny client, at a session titled: "Making it Work: the Building Blocks of a Comprehensive Compliance Program."

To register and learn more go to:

http://www.staffingindustry.com/Store/Conferences/2012-CW-Risk-Forum-Registration-1306

Audio recordings of the presentations will be available upon request.

Use and Impact of Social Media in the Workplace

Facebook, Twitter, LinkedIn, Instagram, YouTube, Yelp blogs. . . Social media provides a veritable cornucopia of ways to suck time from our daily lives. And it is becoming an increasingly common assumption that if you're not engaged with social media, you're seen as falling behind on the playing field from both a personal and business perspective. The reality is- -love it or hate it- -social media is here to stay.

In This Issue

Brandon Smith

One of the best things about our practice here at Scherer Smith & Kenny is that each day brings new changes and surprises. We are constantly challenged with new (and hopefully) interesting projects, new clients, new ideas, and above all, constant change in the legal field and in our client's industries. While we may arrive at work with a general idea about the projects

Given the already significant work, social and family responsibilities most of us face in our daily lives, something has to give in order for us to have time to post photos on Facebook of the weekend party or family reunion, to add and respond to LinkedIn connections, to "Tweet" about Matt Cain's perfect game, or to maintain fresh content on our blog. The solution for many who are wrapped up in social media is to keep constant social media connectivity by using work time.

The statistics in this regard are telling:

A 2010 Nielsen online study reported that the greatest number of Internet videos are watched on weekdays between 12 p.m. and 2 p.m.- -when most people are (or should be) working.

In a 2011 survey of 3,000 college students and young professionals by Cisco Systems, a third said the Internet is as important to them as air, water, food and shelter. Forty percent would choose a lower-paying job with more social-media freedom over a better-paying job with more restrictions on use of social media.

Network bandwidth-related research published in late 2011 by network security/firewall company, Palo Alto Networks, revealed a 300-percent increase in active social networking (e.g., active usage of Facebook postings, plug-ins, games and other applications) by employees compared with activity during the same period in the latter half of 2010.

Pros and Cons of Social Media in the Workplace

According to a 2009 study published by IT staffing firm Robert Half Technology, 54% of U.S. companies reported that they had banned workers from using social networking sites like Twitter, Facebook, LinkedIn and MySpace while on the job. The study also found that 19% of companies allow social networking use only for business purposes, while 16% allow limited personal use.

A lot has changed since 2009 in the ever-changing social media space. For example, one of the then-social media leaders, MySpace, is a diminished presence on the web today. Indeed, the more recent social media workplace usage statistics outlined above reveal a compelling trend toward exponentially higher social media workplace usage despite many companies' efforts to prohibit or contain it.

Unquestionably, there is good reason for employers to be concerned about social media usage in the workplace. A few of the more notable cons include: increased distractions resulting in loss of productivity (as "multi-tasking" has been proven to be highly inefficient and ineffective), exposure of company computers/networks to viruses/spyware, liability concerns relating to social media content (such as disparagement of competitors' products or services) and leaking of confidential/proprietary company information and trade secrets.

On the other hand, there are tremendous potential benefits associated with social media in the workplace. Notably, a large number of companies use social networks (e.g. Monster.com, Craigslist) to recruit and hire employees. And, much like a company's website, many clients and prospective clients now view a company's social media presence as an indicator of viability, accessibility, legitimacy and market presence. Particularly in the high-tech space, companies are embracing rather than attempting to thwart workplace usage of social media. Some of the workplace social media-related benefits recognized by many in the industry include: greater access to information and attendant increased problem-solving capabilities, a seamless medium for sharing knowledge and information between employees, suppliers/vendors and customers, and basis for better co-worker/project collaboration and internal structure in the workplace.

Management of Social Media in the Workplace

before us, more often than not a call, email, newsletter or meeting brings with it something new to handle or learn. Sometimes this change is thrust upon us, while other times we bring it upon ourselves.

To me, while occasionally overwhelming, this change is what keeps my practice interesting and engaging. I know that many, if not all of you, also face this constant change to your fields and jobs as well. For us here at the firm we are facing a change as our longest tenured employee, Jessica Bush, who had been with us for over 10 years decided to pursue opportunities closer to home in the East Bay. While this change is hard and we wish Jessica the best, we know, from past experience, that this is the start of a new chapter and we are looking forward to it.

For changes that are thrust upon us, relying on past experience often proves the best resource, both to help you adjust to the change ("it's going to be ok, just like it was last time!") and to give you ideas about how to best handle it. After 18 years of practice I feel confident with dealing with these changes, especially with experienced partners by my side.

However, changes that we instigate prove, at least for

If you can't beat 'em, join 'em. This may be a tired cliché but it rings true in this age of technological innovation. Much like Friendster, what's here today may very well be gone tomorrow. But if we miss out on today, we may not be here tomorrow. So, when it comes to social media, especially for those of us doing business in the high-tech mecca that is the greater Bay Area, workplace policies regarding the use of social media are critical to protect and define both companies' and employees' rights under the law. To this end, companies should consider several big-picture guideposts in drafting and putting into place such policies.

Extend Policies Governing Appropriate Behavior Into the Realm of Social Media

In the present day, protections in the workplace against such conduct as harassment, discrimination, and retaliation are ubiquitous. Most of these protections are set forth explicitly in employee handbooks. However, they are generally couched in language that envisions discriminatory conduct as non-virtual acts occurring in face-to-face situations between employees. By adding provisions addressing conduct in social media channels (in the form of cyberbullying or discriminatory online posts), employers may better protect themselves against potential liability under well-established anti-discrimination, -harassment, and -retaliation laws in an increasingly digital world.

Set Forth Explicitly What Content May Not be Divulged via Use of Social Media

Nearly every company that deals with proprietary information has a policy in place to protect such information in the event of an employee's termination or separation. Given the widespread use of social media, such protections should explicitly include prohibitions against current employees divulging confidential or proprietary information through social medial channels. Examples of the types of information that employees may be prohibited from disclosing via social media include secret, confidential, or attorney-client information. However, in crafting such language be aware of potential violations of employees' protected speech rights as discussed below.

Understand the Limits of Privacy Protection

As with anti-discrimination and anti-harassment provisions, nearly every company has in place a written policy regarding the use of its information technology resources. Such a policy typically warns employees that any use of company resources should not be considered private or confidential and that employees should consider any communications made on company computers to be viewable by the company. These policies should be explicitly extended to cover social media platforms that are accessed using company computers.

However, in extending such policies, employers should be aware of the boundaries of their ability to legally control employee conduct. Policies restricting social media use may in certain instances be found to infringe on other rights afforded to employees if they affect employee speech. For example, the Office of the General Counsel for the National Labor Relations Board ("NLRB") has indicated that an employer's discharge of an employee for posting negative comments about her supervisor on another employee's Facebook page outside of work could very well constitute a violation of the National Labor Relations Act. The NLRB's General Counsel has more broadly advised employers to avoid drafting social media policies that contain language that could be interpreted as infringing on employees' rights to communicate with one another about the terms and conditions of their employment. Consequently, while an employer may extend its guidelines regarding the use of its own computers into the realm of social media, it should tread carefully in attempting to regulate employees' social media speech related to non-proprietary interests outside of the workplace or to employees' communications with one another about their jobs.

me, the most challenging. Figuring out the right approach, the right timing and the right method is a skill. For example, changing internal process to be more efficient, accurate and cost-effective when it comes to trademark work takes investigating the issues (not too much to avoid analysis paralysis), figuring out the best solution and then getting everyone's buy in and support on that approach by figuring out how to motivate them, or more likely, how to make it easier for them to make the change we all agree should be made.

A book that I read recently, *Switch: How to Change Things When Change is Hard* by Chip Heath and Dan Heath is a great book for anyone looking to change, whether that change is personal or to a business or an employee. Your success in implanting change often comes down to figuring out whether you need to give someone a reason to change, motivate them to make the change, or making it easier for them to make a change they already know they need to make and want to make (or a combination of all three).

Here at Scherer Smith & Kenny we are constantly looking at new ways to change to better assist our clients, make our

To conclude, the daily use of social media by workers is almost certain to increase exponentially in the coming year. As many companies are already aware, these platforms bring with them numerous benefits, including increased marketing opportunities and larger and more easily accessed pools of qualified job applicants. Nevertheless, social media also presents new and evolving risks to companies that were almost unfathomable little more than a decade ago. To this end, employers should give serious consideration to how they wish to limit and control the use of social media in the workplace and set forth clear and explicit guidelines for employees to follow. Should you have questions regarding the creation of a social media policy, Scherer Smith & Kenny remains available to assist you with this or any other employment-related matters.

Please contact Denis S. Kenny at dsk@sfcounsel.com for more information.

-Written by Denis S. Kenny

Maintenance Issues in Common Interest Developments

One of the more confusing and contentious issues confronted by common interest developments, such as condominium developments, stock cooperatives, and planned developments (collectively, "CIDs") are the obligations of maintenance and repair within these projects. This is especially true in older CIDs and those that have no instituted maintenance program, because these CIDs have significant deferred maintenance and the proper allocation of financial responsibility for repairs carries with it a significant expense.

As such, it should come as no surprise to anyone that a significant portion of my CID practice involves resolving maintenance and repair responsibilities between owners and also between owners and their homeowners' associations ("Associations"). People ask whether there is an easy rule of thumb to apply in these circumstances, and the answer is generally "yes." Here is a short primer, which applies solely to condominium ownership, the bulk of my CID clients:

Conceptually, a condominium buyer purchases a "cube of air" that is suspended within a larger building envelope that constitutes the condominium development. So for example, a 20-unit condominium development would include within the building envelope 20 individual "cubes" in the form of each condominium's floor plan, each of which constitutes a unit that is owned by an owner. In general, the owner is responsible for the upkeep of all fixtures, equipment, finishes, and other physical elements that are inside the unfinished surface of this airspace.

Likewise, everything outside this airspace is "common area," the maintenance, repair, and replacement of which, with one exception, is the responsibility of the Association. Examples of common area include the building's water-tight envelope – the roof, windows, exterior walls, etc. – as well as the project's hallways, lobbies, and stairwells.

The exception to this binary equation is "exclusive use common area," which are specific areas of common area which the Association has deeded to an owner for his or her exclusive use. Examples of exclusive use common area normally include garage spaces, storage areas, and outdoor balconies. The Davis-Stirling Act (Civil Code Section §§ 1350, *et seq.*), which governs CIDs (the "Act"), defines exclusive use common area, at Civil Code Section 1351(i)(1) by stating:

> "…any shutters, awnings, window boxes, door steps, stoops, porches, balconies, patios, exterior doors, doorframes, and hardware incident thereto, screens and windows or other fixtures designed to serve a

firm a great place to work and enrich all of our lives. We look forward to the second half of 2012 being a time of positive change for all of you.

- Written by Brandon Smith

> single separate interest, but located outside the boundaries of the separate interest, are exclusive common areas allocated exclusively to that separate interest."

Under the Act, the condominium owner is responsible for the ***maintenance*** of exclusive use common area, but the Association is responsible for its ***repair and replacement***.

The Act assists in institutionalizing these concepts at Civil Code Section 1364(a) by stating:

> "Unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing or maintaining the common area, other than exclusive use common areas, and the owner of each separate interest (*i.e.*, the condominium unit, for this article) is responsible for maintaining that separate interest and any exclusive use common areas pertinent to that separate interest."

So given the foregoing and the generally straightforward definitions, how does this issue create so much trouble? In my experience, this trouble comes in threes:

First, do not forget that Section 1364(a) begins by stating "Unless ***otherwise provided*** in the declaration of a CID…", which means that the Association's declaration, otherwise known as its CC&R's, can stray from these concepts. Unfortunately many CC&Rs are poorly drafted or inconsistent, leading to confusion as to their interpretation.

Second, disputes often arise between the owner who must "maintain" exclusive use common area, and the Association which must "repair and replace" these improvements. Typically, there will be a dispute as to whether a repair to exclusive use common area is necessitated by the improvement's age or the owner's neglect.

Finally, issues often arise as to whether improvements that need repair are truly common area or whether they were improvements installed by owners as part of the renovation of a unit. One culprit of this confusion is the owner who carries out such improvements (for example, the installation of plumbing, electrical, greenhouse windows, or other structural elements) outside of the four walls of the unit's "cube of air," and which impinge upon common elements or even cause their failure.

To prevent these problems, there are several steps an Association might take. Chief among these is conducting a review of the CC&Rs in order to identify ambiguities that may exist or be fodder for future disputes. Carrying out an audit of the features within your development can be an incredibly useful exercise. By doing so, your Association can identify features that might not otherwise be defined within your CC&Rs, and the Association can then delegate responsibility of repair to either the Association or the unit owner. Upon their discovery, these ambiguities may be removed through proper action, which may include adopting Association policies or amending the CC&Rs.

In addition, an Association should take a more active role both in monitoring and identifying maintenance issues that are the responsibility of the owner and enforcing such responsibilities. This should both result in Association repairs and replacements that are not necessitated by an owner's neglect, and also a lengthened useful life of these improvements.

Finally, I always recommend that Associations empower a robust architectural control committee to both (a) review and approve detailed architectural plans submitted, and (b) monitor improvements to be undertaken by, owners within their units in order to assure that common area elements are not threatened or damaged by these renovations.

Please contact Bill Scherer at wms@sfcounsel.com for more information.

-Written By Bill Scherer

Charity for Profit

The increasing public demand for attention toward social and environmental issues has for-profit corporations struggling to find a way to devote corporate resources to the public good while upholding their fiduciary obligations to increase profits for shareholders. Until recently, California law tied the hands of for-profit corporations seeking to blend those principles; traditional for-profit corporations are organized to pursue profit and only nonprofit corporations can be used to promote social benefits.

Enter Senate Bill 201, the California legislature's answer to the trend among states to address this for-profit/social benefit problem. In an effort to assist corporations in striking a balance between social consciousness and economic profit, the recently enacted Corporate Flexibility Act of 2011 and related "benefit corporation" laws (housed in Senate Bill 201), now allows two new sub-types of business corporations known as the "flexible purpose" corporation (codified in California Corporations Code §2500, et seq.) and the "benefit" corporation (codified in California Corporations Code 14600, et seq.).

The purpose of these entities is to allow socially minded corporations to pursue social welfare objectives while exempting directors from liability for failing to maximize profits to shareholders. The new corporation subtypes allow entrepreneurs and investors to organize stock corporations that can pursue both economic and social objectives.

Specifically, in discharging their fiduciary obligations under California law, in addition to the financial interests to the shareholders, directors of *flexible purpose corporations* may consider the purposes of the flexible purpose corporation as set forth in its articles (which may include, but not be limited to, charitable and public purpose activities that could be carried out by a nonprofit corporation).

Taking it a step further, directors in *benefit corporations* are statutorily required to consider the interests of customers as beneficiaries of the general or specific public benefit purposes of the corporation, the community and societal considerations, the local and global environment, and the ability of the benefit corporation to accomplish its general, and any specific, public benefit purpose in carrying out their obligations to the corporation.

In either case, as long as directors discharge their duties in accordance with the stated purposes of the corporation, they shall not be liable for monetary damages for any alleged failure to discharge the person's obligations as a director.

Flexible Purpose Corporation

To form a flexible purpose corporation, customers will need to draft free-form Articles of Incorporation, which must include the unique purposes for the specific entity type. Pursuant to the California Corporations Code Sections 2500 through 3503, the Articles of Incorporation of a flexible purpose corporation must include one of the purpose statements required by California Corporations Code section 2602(b)(1), as well as a statement that a purpose of the flexible purpose corporation is to engage in one or more of the specific purposes provided in California Corporation Code section 2602(b)(2).

Benefit Corporation

In addition to the statutory stock purpose clause required by Corporations Code section 202(b), the Articles of Incorporation for

a benefit corporation must include the following additional statement: “This corporation is a benefit corporation.” Notwithstanding California Corporations Code section 202(b), the Articles of Incorporation for a benefit corporation may identify one or more specific public benefits that shall be the purpose or purposes of the benefit corporation. Further requirements of the benefit corporation are detailed in California Corporations Code section 14600 et seq.

Please contact Heather G. Sapp at hgs@sfcounsel.com for more information.

- Written by Heather G. Sapp

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

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