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## Staying Right and Honourable

the corporate counsel's guide to dealing with  
media, government and the public

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# Overview

1. Public Appearances and Statements:  
Lawyers in the Media
2. Interactions with Government Regulators
3. Lawyers and Lobbying
4. Social Media
5. Questions



# Ethical Consideration – Sources

- Rules of Professional Conduct and Commentary
- CBA Conduct of Conduct
- LSUC and CBA Technology Guidelines

# Ethical Considerations – Communication with the Public

- An extension of the lawyer's conduct in a professional capacity
- In the client's best interests and within the scope of the retainer
- Free from any suggestion that the lawyer's real purpose is self promotion or self-aggrandizement

# Ethical Considerations – Communication with the Public

- Depends on the context: No set rules on media contact
  - Providing a valuable contribution to the community
  - Assisting with the public's understanding of legal issues
  - What does client want/need

# LSUC Rules of Professional Conduct – Communication with the Public

- “Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.” [6.06(1)]

# LSUC Rules of Professional Conduct – Integrity



- “A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.” [6.01(1)]

# Ethical Considerations – Communication with the Public

- Think Ahead: Lawyers will likely have no control over any editing of the statements made or the context in which the appearance or statement might be used





# Practical Considerations

- When an organization is involved in a public dispute with a legal component, the lawyer must balance:
  - Ethical Obligations and/or Defending the Corporate Reputation
  - Low Profile vs. High Profile
  - Communication Lines and Procedure

# Practical Considerations

## Constraints

- Client instructions (policies of company)
- Truth
- Role as lawyer
- Duty to the administration of justice

## Case Study: Lawyers in the Media Speaking on Behalf of Clients



- (A) Syncrude Canada - 'Duck Trial' Conviction (2010)
  - Robert White

## Case Study: Lawyers in the Media Speaking on Behalf of Clients



- (B) WikiLeaks – Julian Assange Controversy (2010 & 2011)
  - Mark Stephens – obligation to speak!

# Conquering the Media – Tips to Win in the ‘Court of Public Opinion’

- Maintain control of interviews and press conferences
  - Master the sound bite:
    - Key messages
    - Anticipation
    - Avoid speculation
    - Know the audience
    - Take time to explain the basics
    - Courtesy, respect, confidence
- Consult a professional

## 2. Regulatory bodies & Public comment

- Rule 6.06(1) and Commentary
  - “Circumstances will arise ... where the lawyer is under a specific duty to contact the media ... often in the context of administrative boards and tribunals where a particular tribunal is an instrument of government policy and hence is susceptible to public opinion”
  - But see the Glaxo case

# 3. Lobbying

- Federal Legislation:
- *Criminal Code*
- *Lobbying Act and Lobbyists Registration Regulations*
- Lobbyists' Code of Conduct
- *Conflict of Interest Act (Part of Federal Accountability Act)*

# Provincial and Municipal Legislation

- Ontario
  - *Lobbyists Registration Act, 1998*
  - *Members' Integrity Act, 1994*
- Toronto
  - *Toronto Municipal Code, Chapter 140 (Lobbying)*
  - *Lobbyists' Code of Conduct*



# Lobbying Regulations

- Canadian lobbyist registration laws share the same basic structure. Typically, each Act will:
  - Outline the communications, officials, and decisions to which it applies
  - Distinguish Consultant Lobbyists from In-house Lobbyists (20% rule)
  - Define “public office holder” to whom lobbying directed
  - Identify the types of government decision included

# Excluded Interactions

- Request for information (in writing)
- Submission to a legislative committee
- Submissions made in proceedings that are a matter of public record
- Communication regarding the enforcement, interpretation or application of an Act or regulation on that organization

# The Practical Rule

When in doubt, register.

# Ethical Obligations: Lawyer as Counsel vs. Lawyer as Lobbyist

- Specific ethical considerations targeting lawyer-lobbyists?
- Different than those required of a lawyer as an advocate appearing before a court, tribunal, or quasi-judicial body?
- Lobbyist's Code of Conduct



# Ethical Considerations of the Lawyer-Lobbyist

- No specific lobbying rules that exclusively target lawyers
- Nevertheless, a number of LSUC Rules are applicable to the activity of lobbying
  - 1.02 – Professional Misconduct definition, (f) (implying an ability to improperly influence a public official)
  - 2.02 – Honesty and Candour
  - 2.03 – Confidential Information

# Ethical Considerations of the Lawyer-Lobbyist

- 4.06 (1) – Encouraging Respect for the Administration of Justice
- 4.06 (2) – Seeking Legislative or Administrative Changes (disclose the lawyer's interest)
- 6.01 (1) – Integrity
- 6.03 – Courtesy and Good Faith

# Ethical Considerations of the Lawyer-Lobbyist

- 6.04 – Outside Interests and the Practice of Law
- 6.05 – Lawyer in Public Office
  - Standard of Conduct; Conflict of Interest; Appearances before Official Bodies; Conduct after Leaving Public Office
- 6.06 – Public Appearances and Public Statements

## 4. Social Media

- Participation in online forums can pose concerns for:
  - client confidentiality (inappropriate sharing)
  - unintended formation of client relationships
  - conflicts of interest

### Rule 1.02 – “client”

- Client relationship can be established informally, and extends to prospective clients



# The Good: Benefits

Social media can be a powerful toolkit for lawyers, their employers and their clients.

It can help:

- build and maintain professional networks
- promote accomplishments
- attract new business
- follow new developments in law and business



# The Bad: Risks

A man in a dark suit and tie is shown from the chest up, with his hands covering his eyes. He has a pained or frustrated expression on his face, with his mouth open as if shouting or crying. The background is a plain, light color.

If misused, social media can be a minefield of ethical and professional responsibility issues.

For example:

- Confidentiality and loss of privilege
- Unbecoming conduct (professional and private)
- Unintentionally giving advice & creating conflicts
- Improper advertising and marketing

# Loss of Privilege and Social Media



- A U.S. court recently required that a plaintiff who discussed legal strategy in blog posts produce related correspondence with her lawyers
  - *Lenz. v. Universal Music Corp.*
- To maintain privilege, do not discuss ongoing legal matters online

# What Not to Tweet

## Conduct Unbecoming

Defence lawyer tweet:

*“This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch’”.*



# Deception is Never Acceptable

As a young Texan lawyer learned, you never know who is following your online persona:

*A young lawyer requested to delay a trial due to a death in her family. Texas District Court Judge Susan Criss granted the delay.*

*However, Judge Criss also checked the lawyer's Facebook page. After the funeral, the lawyer spent a week posting photos of parties, drinking, and motorcycle riding.*

*When the lawyer requested an additional delay, the judge refused, and forwarded her Facebook research to the lawyer's senior partner.*

*(New York Times, Sept. 13, 2009)*

# What Not to Blog

Fort Lauderdale lawyer blogged about a judge, repeatedly calling her an “*Evil, Unfair Witch.*”

Lesson: It may be tempting to vent online, but think twice before posting about a hard day at work or court, no matter the forum.



# How Not to... Judge?

A magistrate in Shropshire, U.K., resigned after tweeting about decisions between hearings.

His tweets included:

*“Just about to hear application from three robbers from Manchester as to whether to remand or not.”*

*“Called into court today to deal with those arrested last night and held in custody. I guess they will be mostly drunks but you never know.”*


*(Shropshire Star, April 25, 2009)*




# Tweet-jacking

**Tweets** All / No replies


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 **hmv** @hmvtweets 1m  
Just overheard our Marketing Director (he's staying, folks) ask "How do I shut down Twitter?" [#hmvXFactorFiring](#)  
Expand


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 **hmv** @hmvtweets 14m  
Sorry we've been quiet for so long. Under contract, we've been unable to say a word, or -more importantly - tell the truth [#hmvXFactorFiring](#)  
Expand



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 **hmv** @hmvtweets 15m  
There are over 60 of us being fired at once! Mass execution, of loyal employees who love the brand. [#hmvXFactorFiring](#)  
Expand

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 **hmv** @hmvtweets 16m  
We're tweeting live from HR where we're all being fired! Exciting!! [#hmvXFactorFiring](#)  
Expand

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 **hmv** @hmvtweets 14 Jan  
With our [#hmvBlueCross](#) Sale underway, who took advantage of the 25% off 1000s of products? What did you pick up?  
[pic.twitter.com/Dm0M5LqK](http://pic.twitter.com/Dm0M5LqK)  
 [View photo](#)



# Employee Discipline

- One case:
  - Employees could not have an expectation of privacy as Facebook postings were "akin to comments made on the shop floor."
- An “evolving” area of law
- Facebook ‘friending’ the defendant

# Social Media Policies

Two areas to control:

1. Employee conduct (work & non-work)
2. Official social media space

Keep it simple. Establish core values/principles

- e.g.: Transparency, Respect, & Personal Responsibility

Different policies for different classes of employees

- e.g.: Official spokespersons, executives, employees

# Social Media Policy - Suggestions

- Development of Corporate Social Media Policies
  - broad, expansive definition of social media
  - clearly stated purpose and application
  - cover both work and non-work usage, to the extent the latter reflects on the employer

- address non-disclosure of employer/customer confidential information
- prohibition against defamatory comments or violation of copyright
- prohibition against obscene/offensive communications

- clearly state that usage may be monitored
- address potential for disciplinary action
- consistent application along with regular reminders

# Anonymous Defamers on Social Media

- ***Warman v. Wilkins-Fournier*, (2011) ONSC 3023**
- Plaintiff sought e-mail, subscriber information, and IP addresses for ‘john doe’ defamers from two other defendants who ran the website.
- Test whether the requested documents should be produced:
- (1) whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances;
- (2) whether the [plaintiff] has established a *prima facie* case against the unknown alleged wrongdoer and is acting in good faith;
- (3) whether the [plaintiff] has taken reasonable steps to identify the anonymous party and has been unable to do so; and
- (4) whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.



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