

TECHNOLOGY TRENDS THAT ARE TRANSFORMING THE INSURANCE INDUSTRY AND PRACTICE OF LAW

Speakers:

Karen Painter Randall - *Partner* - Connell Foley LLP

Kimberly L. MacDonald, AIC - *Vice President/Supervising Claims Counsel* - XL Insurance

Ian T. Matyjewicz - *Assistant Vice President* - Jamison Risk Services

Gareth Tungatt - *Director* - Ascent Underwriting

HYPOTHETICAL 1:

Hypothetical 1: Michael Misleading is a recent law school graduate who decides to start his own practice. Although it initially seemed like a good idea, Michael soon learns that it is not so easy to obtain new clients, especially since he has no experience practicing law. After another quiet day, Michael receives an opportunistic telephone call from a friend, Jimbo, who tells him about a social media website called “LinkedIn,” a professional networking website that allows a person to create either a personal or company profile accessible to other members of the website. Jimbo further explains that since he created a company profile for his law firm, the phone has been ringing off the hook. Jimbo also promises to “endorse” Michael's skills as a trial attorney to help him generate business faster as long as Michael agrees to do the same for him in return. A few days later, Michael's LinkedIn profile is up and running. The profile describes Michael as an experienced trial attorney, who works hard for his clients. In addition, Michael lists his specialties as intellectual property and general litigation (intellectual property was his best class in law school!). As promised, Michael also received an endorsement from Jimbo not only for Michael's superior trial skills, but also his specialty in intellectual property. Shortly thereafter, the list of clients lining up to meet with Michael is out of the door, and he could not be happier!

QUESTIONS FOR DISCUSSION:

- Is there any problem with Jimbo endorsing Michael's trial skills?
- What if Michael had actually represented Jimbo at trial and then after receiving a successful outcome endorsed his skills?
- Is there anything misleading about Michael listing his specialties as intellectual property and general litigation?
- Should attorneys like Michael in general be prohibited entirely from using LinkedIn, or similar social media websites for lawyer advertising purposes?

HYPOTHETICAL 2:

Scarlett Scandal is a history teacher at Pleasantville High School, where she has worked for the past ten years. During her tenure, Scarlett is highly regarded by both the faculty and her students for her passion and dedication to her work. Recently, Scarlett finally gave in to the peer pressure from her friends and created a Facebook page. Initially, the purpose of creating a Facebook page was to keep in touch with family and friends as well as share photographs with them. Shortly thereafter, a friend of Scarlett's posted a picture of Scarlett from college in a provocative pirate costume holding a beer bottle with a caption, “Drunken Pirate!” When Scarlett saw the picture she laughed and even wrote a comment, “Oh, the good old days!” Because Scarlett is new to Facebook she did not set her profile to private, and is soon receiving friend requests from her students and even their parents! Not wanting to be rude, Scarlett accepts any and all friend requests sent her way. Thereafter, Scarlett's use of Facebook expanded as she followed and liked the NRA's Facebook page even posting a comment that states, “It is our Second Amendment right to bear arms!” One day a parent of one of Scarlett's students happens to stumble upon Scarlett's Facebook page and was absolutely appalled with the content of same. Ultimately, the parent decided to report Scarlett to the superintendent of her school district and demanded her termination immediately stating that she was not fit to be a teacher. Before making a decision the superintendent speed dialed the town's attorney for

QUESTIONS FOR DISCUSSION:

- Can the school punish Scarlett for any of the comments/photographs posted on her social media website?
- Is the school district permitted to monitor its employees' use of social media websites?
- Can the school use the photographs and comments obtained by a parent as the basis to terminate her?
- Is Scarlett responsible for an inappropriate picture of her posted by another to her Facebook page?

HYPOTHETICAL 3:

WeSellShoes is a popular shoe store that caters to high end women shoes. A week ago it was learned that computer hackers used a local wireless network at one of WeSellShoes' stores to access their main computer. Once on the system, the hackers accessed both credit card and checking account information for more than 1.4 million of WeSellShoes' customers. Using this confidential information, the hackers made fraudulent transactions using the customers' credit and checking accounts. Upon being notified of this breach, WeSellShoes incurred thousands of dollars in expenses for addressing issues related to customer communication, public relations, lawsuits, attorney fees, etc. Thereafter, WeSellShoes submitted an initial partial proof of loss to their insurance adjuster. In response, the insurance adjuster denied coverage claiming that the theft of confidential consumer information was not covered by WeSellShoes' insurance policy because it was an "indirect loss."

QUESTIONS FOR DISCUSSION:

- What duty does WeSellShoes have to notify its customers of the security breach?
- What is considered "personal information" of customers to warrant notification of a security breach?
- Should WeSellShoes have been covered under its insurance policy for a "direct loss?"
- Can WeSellShoes be held liable for the breach of its computer system by a hacker?

HYPOTHETICAL 4:

Oliver Honest is representing Best Root Beer in a trade secret lawsuit against Coca-Cola arising out of Coca-Cola's alleged misappropriation of Best Root Beer's recipe for making root beer. Because Best Root Beer's corporate office is located across the county from where Oliver's office and the litigation itself is venued, Oliver almost exclusively relies upon email to communicate with Best Root Beer's general counsel. As part of Oliver's initial investigation, he requests that Best Root Beer send him a copy of their super-secret recipe for root beer. While Best Root Beer's counsel is somewhat reluctant to send the recipe to Oliver, as only three people in the world have ever seen it, he assumes Oliver will take all necessary precautions to protect the confidentiality of the recipe. A decade later, Best Root Beer finally settles the matter with Coca-Cola for an undisclosed amount. Being the diligent attorney that Oliver is, he sends Best Root Beer a closing letter memorializing that the case is over and advising that he will be closing his file. While Oliver's file contains hard copies of all correspondences, pleadings, etc. he does not print out any of his emails since they are saved on his hard drive. Now that the matter is complete he decides to shred the secret recipe, send his files out to storage, and treat himself to dinner for a job well done!

QUESTIONS FOR DISCUSSION:

- Does Oliver have an ethical duty to warn Best Root Beer about potential risks concerning communicating via email?
- What sort of safety precautions should Oliver take with regard to using email for communicating with Best Root Beer, in particular, the sending of the recipe?
- What is Oliver's duty to Best Root Beer with regard to storing and transmitting the documents received via email during litigation, including the secret recipe?
- Does Oliver have an obligation to print the emails and put them into his file?

HYPOTHETICAL 5:

Ryan and Rita Smith live in a small suburb in North Dakota. Due to their private nature, the Smiths do not list their telephone number or street address. In order to ensure the secrecy of their information, the Smiths regularly "Google" themselves to confirm that nothing comes up regarding their personal information. Google Maps has a "Street View" program that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street. The Smiths, who live on a private road, discovered that Google took colored imagery of their residence, including their swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy waiver or authorization. The Smiths claim that their road is clearly marked with a "Private Road, No Trespassing" sign, and they contend that, in driving up their road to take photographs for Street View and in making those photographs available to the public, Google disregarded their privacy interest.

QUESTIONS FOR DISCUSSION:

- Does Google owe the Smiths a duty of care with regard to taking photographs of their residence and making said photographs available to the public?
- Is the taking of photographs by Google an invasion of privacy?
- Do the Smiths have a claim for unjust enrichment against Google for using the photographs taken of their residence in connection with Google Maps?
- What, if anything, can the Smiths do to protect their right to privacy?

HYPOTHETICAL 6:

Craig Caffeine is partner at a firm that is in the process of changing offices. As a result, for the past month there have been movers at his office every day causing quite a commotion. One day Craig finally snaps because the noise from the workers is unbearable, and leaves the office for his favorite coffee joint, Starbucks, to seek a brief reprieve from the movers. While sipping on a caramel macchiato, Craig begins responding to emails from clients and adversaries on cases he is working on. In order to have better service, Craig signs on to Starbucks' free Wi-Fi using his company cell phone. Craig ends up spending the rest of the day at Starbucks concluding that he has never been able to respond to more emails as promptly and efficiently as he accomplished that afternoon. Thus, the next morning he returns to Starbucks and spends the whole day working there, this time signing onto their free Wi-Fi using his company laptop. While drinking a calm tea, Craig contemplates if he will ever return to the office again!

QUESTIONS FOR DISCUSSION:

- What concerns as to confidentiality should Craig have as to working on his files in a public coffee shop?
- Has Craig waived the attorney-client privilege by using a public wireless connection?
- What security measures should Craig take with regard to using a public wireless connection?
- Does Craig have a duty to warn his clients that he is working from a public wireless connection?
- Would it make a difference if Craig was responding to emails/doing work using Wi-Fi from his private residence as opposed to a public coffee shop?

HYPOTHETICAL 7:

Abe Adjuster has toiled away for 13 years as a senior claims handler for a well-known insurance carrier. He handles mostly bodily injury claims arising out of commercial automobile accidents or accidents covered under commercial general liability policies. In recent years, Abe has noticed an alarming upswing in the monetary demands sought by claimants suffering from injuries at the hands of his insureds. He is concerned about this trend, both in terms of his own job performance, and as it relates to the overall profitability of his Underwriting counterparts. Abe is extremely conscientious and diligent, thus, he decides he must find a way to address these outrageous demands. Abe is convinced that many of the claimants are exaggerating their losses, but he has no proof of same. Abe, essentially computer illiterate, learns from a colleague about social media websites where people post photographs and discussions regarding things going on in their lives. While Abe is shocked and dismayed that people share and reveal so much of their personal life for the whole world to see, he also sees it as an opportunity. Abe takes a course called Discover the World of Social Media. Thereafter, Abe is the talk of the office, as he is unearthing exaggerated and even false injury claims left and right through his own investigations on social media sites. Not only has he brought numerous claimants to justice by discovering proof that their allegations are false or exaggerated, but his social life has taken off! Abe has created an alter ego on Facebook and MySpace as he tells unsuspecting claimants that he is a hip talent scout, seeking stand-ins for blockbuster movie shoots.

QUESTIONS FOR DISCUSSION:

- What concerns do you have with Abe researching claimants on the internet?
- If Abe did not pretend to be someone else, but was rather "friending" people with full disclosure that he was a senior claims handler would that matter?
- Can defense counsel use the information provided to them by Abe?
- Is an attorney who uses the information obtained by Abe restricted by any sort of ethical rules?

CONTACT THE SPEAKERS:

Karen Painter Randall

Partner

Connell Foley LLP

85 Livingston Avenue, Roseland, NJ 07068
973.535.0500 / krandall@connellfoley.com

Kimberly L. MacDonald, AIC

Vice President - Supervising Claims Counsel

XL Insurance

505 Eagleview Boulevard, Exton, PA 19341
610-968-9209 / kimberly.macdonald@xlgroup.com

Ian Matyjewicz

Assistant Vice President

Jamison Risk Services

A Division of Herbert L. Jamison & Co., LLC
100 Executive Drive, Suite 200, West Orange, NJ 07052
973.669.2346 / imatyjewicz@jamisongroup.com

Gareth Tungatt

Director

Ascent Underwriting

3 Minster Court, Mincing Lane, London, EC3R 7DD
+44 (0) 203 642 8250 / gareth.tungatt@ascentunderwriting.com