Kaplin Stewart Attorneys at Law

Keeping You Informed

TO THE POINT

Spring 2013

Whose LinkedIn Connections Are Those Anyway?

Does an employer have any control over an employee's use of LinkedIn or any rights in their account when they leave? The current answer is uncertain due to a lack of case law on what may be an important issue, made difficult by the fact that most employees establish personal accounts and the dual use of LinkedIn as a business tool and career advancement mechanism. While most employees lead their profiles with their current employment and add new connections through their work, personal account holders may have an established group of connections, developed independently or through previous employment, on which they will continue to build through their job and personally. The new connections gathered for or as a result of the current employer's business may have commercial value to the employer and the way an account is used or displayed may raise questions of competitive advantage, confidentiality and contractual compliance.

For example, consider an employee who allows visibility of connections to other connections and broadcasts an update when assigned to a new customer's project. The employee's visible connections with key personnel of customers can provide sensitive, competitive information to the employee's connections at a competing business. Broadcasting the update of assignment to a new customer project may be a violation of the employee's confidentiality agreement with the employer. The broadcast or listing of a specific project could also be a violation of the employer's contract with the customer, which may restrict any form of publicity mentioning the customer name, including the fact that a business relationship exists.

There is currently very little case law on these issues, which go beyond the National Labor Relations Board decisions on non-supervisory employee use of social media involving concerted activity and free speech, as well as the case law on discrimination in hiring through access to social media. While we do know that some of the basic old rules like don't lie, cheat or steal still apply, the new rules necessary to deal with social media and their nuances are definitely in early development.

There is one trial court case which holds that the availability of information on a company's customers or vendors on LinkedIn or other social media may result in loss of trade secret status of such lists, and another trial court decision holding that an employer may take over an executive employee's personal LinkedIn account on termination, at least where no damages recoverable under the Computer Fraud and Abuse Act can be shown. While a court in England ordered a former employee who resigned to operate a competing business to turn over all LinkedIn connections to his former employer, the question of what can happen when employers encourage employees' use of social media for work and then claim that connections are confidential information when the employment ends is far from settled there or here.

The identity of a company's customers, vendors and business partners as well as its ongoing relationships with

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Kevan F. Hirsch

Kevan Hirsch is a principal and member of the Business & Commercial Litigation, Employment Law for Employers and Construction Law groups and also serves as outside General Counsel for e5 Solutions Group, LLC. In addition to commercial and construction disputes resolution, for his business clients, Mr. Hirsch advises on commercial and employment contracts, internal governance and employment issues, and represents shareholders, owners, public and closely held corporations in matters such as dissenters' rights, fiduciary duty claims and employment termination, Mr. Hirsch has extensive experience with protection of trade secrets and intellectual property rights by contract and through enforcement litigation.

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those entities is, in many industries, critical information which requires protection. There are some practical measures a company can take which may provide more internal certainty when these issues arise and perhaps more predictable results if litigation ensues. An employer with the need to protect this kind of information from public disclosure or even own it for future use should consider:

- **Creating company owned LinkedIn accounts for use by employees, which would totally resolve the question of ownership of connections and methods of use or at least put the question on the table at the outset for negotiation.**

- **Use of confidentiality, non-disclosure or non-compete agreements with employees that specifically address customer, vendor and competitive information on LinkedIn or which could be available on other social media or internet sites.**

- **Adoption or development with employee participation of an employee policy on social media which clearly addresses use and disclosure of company information and connections developed through employment on LinkedIn and similar social media sites, with consequences for violation.**

- **Educating employees on why dissemination of sensitive company information on LinkedIn and other social media can be detrimental to the business, for what the Director of Sales understands innately may not be at all apparent to a junior level worker.**

These are not universal solutions to the myriad of new business problems that social media is presenting on a daily basis, but practical crafting of old tools to deal with these new problems. Using these traditional tools may, however, serve to answer the questions of who LinkedIn connections belong to and what information is fair game for posting until more guidance from the courts develops.

Mohammad Ghiasuddin was recently re-appointed as Chair of the Diversity Committee of the Montgomery Bar Association for 2013. Mr. Ghiasuddin has been active with the Montgomery Bar Association for many years, serving on several committees and previously on the Board of Directors. In his practice, Mr. Ghiasuddin handles contractual disputes, payment issues, bond claims, construction defect issues, product liability matters, as well as commercial loan workouts and matters involving consumer credit.

Joshua C. Quinter, has been appointed as Chair of the Construction and Public Contract Law Committee of the Montgomery Bar Association for 2013. Mr. Quinter is a principal in the Construction Law group and represents both private and public entities for issues involving litigation, mediation and arbitration, contract drafting and review, and general business planning. He has extensive experience litigating complex commercial cases, insurance coverage and bad faith issues, claims for breach of contract, perfection and enforcement of liens, enforcement of surety bonds and other construction related matters. **Joshua Quinter** was also re-elected to another three year term on the Board of Directors for the Mid-Atlantic Chapter of the Metal Building Contractors and Erectors Association and a second term as Vice President of the organization.

Neil Stein, principal in the Land Use, Zoning & Development group, presented a program for the Dean's Forum at the James E. Beasley, School of Law on February 27, 2013. The program was to introduce the nuts and bolts of a land use practice to first year law students.

Robert A. Korn and Karin Corbett are contributing authors of the Pennsylvania Bar Institute's recently published "Pennsylvania Construction Law: Project Delivery Methods, Execution, and Completion", having authored the Chapter titled "Tort Actions Arising on Construction Projects" which focuses on tort claims against the design professional and others involved in the construction process. Mr. Korn and Ms. Corbett's work discusses professional malpractice as well as other tort theories, including ordinary and gross negligence and negligent misrepresentation. The publication is a comprehensive and practical resource for construction lawyers looking for a resource in the area of construction law.

KUDOS...

Dirk Simpson, of the Estates, Administration & Planning group, successfully tried an unusual estates case in the Philadelphia Orphans' Court, and **Pamela Tobin**, of the Business & Commercial Litigation group, successfully handled the appeal, resulting in a victory for our client, the executrix of the estate. The executrix wanted her sister to return the proceeds in a bank account that their late mother had long ago titled jointly with her sister. Under the Pennsylvania Multiple Party Accounts Act, 20 Pa. C.S.A. §6303, however, the sister benefited from the presumption that, as surviving joint owner, she legally inherited the account absent clear and convincing contrary intent. This case was unique in that before death, the decedent had deposited $300,000 in the account to use to purchase a home which she intended to title in both daughters' names. Death occurred before the house was purchased and the surviving account holder took control of the account. Mr. Simpson persuaded the Orphans' Court that the presumption of survivorship was overcome based on clear and convincing evidence that the decedent had intended to benefit both daughters. The disappointed sister argued on appeal that the lower court erred by considering evidence arising after the account was opened, in violation of the statute. The Superior Court disagreed, holding that under the unique facts of this case, the funds in the joint account belonged to the estate.

Meet Our Land Use, Zoning & Development Professionals

George Broseman is a principal in Kaplin Stewart's Land Use, Zoning & Development department. He has over 20 years experience in zoning, development and real estate matters.

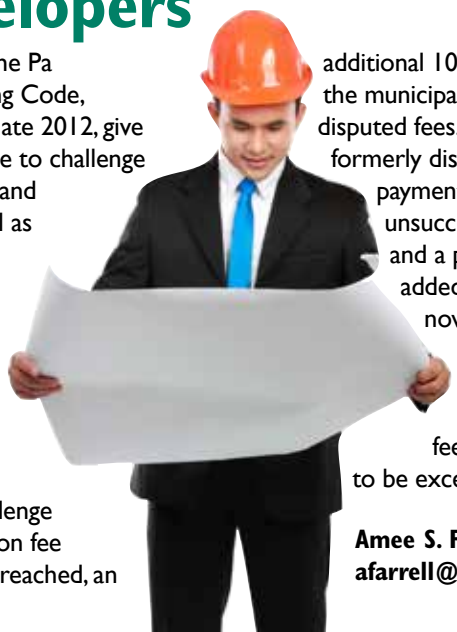
George Broseman

George grew up in rural upstate New York after his family relocated there from the New Jersey suburbs. George's family moved to a 100 acre, no longer working farm that included barns, fields, streams, ponds and a large woodland. As he grew up, he worked side by side with his father transforming the farmland into a park-like setting. This work included cutting firewood, clearing brush, planting thousands of trees and participating in what his father called "Rock Festivals" – hand picking rocks from the old pastures. Growing up in the country was not all work – there were lots of "toys" as well – ice skates, cross country skis, ponies, horses, motorcycles, an old Jeep and even a vintage fire truck (to water the plants). This upbringing embedded a strong work ethic in George and an appreciation for both the natural landscape and property rights. This background, coupled with an interest in the activities of his grandfather who had chaired the Planning Commission in a high growth suburb, and his uncles who were involved in construction, spurred an interest in real estate and development.

While attending Villanova University Law School, George worked part time and summers for a small, local law firm with a strong reputation in land use and zoning, which led to an associate position after graduation. Starting out at a small firm provided immediate hands on experience and George developed a "can-do" reputation. As a young lawyer, George was charged with getting a plan recorded for a client who had waited until the last days before expiration of the approval. After completing the entire final plan process in just a couple of days, George literally ran across Norristown with plans in hand to avoid a traffic jam, reaching the Recorder of Deeds' Office in time to beat the deadline.

George lives in Wayne with his wife and daughter – and their dog. He enjoys travelling to warm places and spending time with his family and friends.

Do You Know That… Recent MPC Amendments Make Fee Challenges More Palatable for Developers



Amendments to the Pa Municipalities Planning Code, which took effect in late 2012, give developers more time to challenge municipal inspection and oversight fees, as well as additional monetary protections should they choose to do so. Developers now have 100 days (up from 30) to review municipal fees and notify the municipality of a challenge and, if an agreement on fee reduction cannot be reached, an additional 100 days (up from 45) to notify the municipality of an intent to arbitrate the disputed fees. Most significantly, however, the formerly discretionary provisions related to payment of the arbitrator's fees by the unsuccessful party are now mandatory and a penalty provision has been added to the arbitration provisions, now requiring an arbitrator to impose a 4% surcharge against the charging party, payable directly to the challenger, on fees paid but subsequently found to be excessive by more than $10,000.00.

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Legal Perspectives

The Sandy Effect

For many practicing lawyers and their clients, the "casualty" clause in a lease is just another paragraph towards the back of an otherwise scintillating read that lulls only the most vigilant readers to sleep. However, the aftermath of the most wide-reaching natural disaster to strike our geographic area in many of our lifetimes has left those same readers scrambling to see what they agreed to in their documents.

Super-storm Sandy left millions of dollars of physical damage in its wake. In addition, many businesses were without power for extended periods of time. In referring to their leases, many business owners were surprised to see that they were not entitled to any rent relief, even though they were unable to use and occupy their spaces due to electricity interruptions. The reason is that carefully worded leases treat utilities completely separate from a "casualty," and provide that the landlord is not responsible for losses caused by utility interruptions. Had the lease not treated utility interruption separately, then Sandy would most certainly qualify as a "casualty" (which is generally defined as loss or damage from a sudden and unexpected event), and virtually every lease gives the tenant a rent abatement in the case of a casualty.

Jeffrey L. Silberman

There are several lessons learned from Sandy. First, there is no reason that a utility interruption caused by a casualty event should not entitle a tenant to the same relief as any other natural disaster. Second, negotiate the utilities clause to fairly allocate the risk of a Sandy-like event. For example, many leases provide that no rent abatement is allowed if the interruption is only one or two days, but rent can be reduced for longer utility interruptions. Third, review your insurance program. Insurance is a viable way of mitigating the risk of business interruptions, often for minimal cost compared to the harm done by effectively being shut down by the weather.

Keep the lights on when you read those leases… cover to cover.

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