Balancing and Protecting Employee and Client Relationships in the Social Media Age: An Overview of the Current Legal Framework

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Introduction

- Introduction to the role of social media and mobile technology in the workplace
- Employer's obligation to protect the privacy rights of both clients and employees
- Confidential information can be widely disseminated nearly instantaneously
- Challenges for employers in safeguarding the confidentiality of client information

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Overview

This presentation will address:

- The ways in which mobile technology and social media have led to the erosion of the division between employees' personal and work lives and the challenge this creates for employers;
- When employees can properly be disciplined for comments and pictures published on the Internet or social media sites;
- Best practices and policies for employers with respect to the confidentiality of work-related information and cell phone use in the workplace.

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Work Life/Private Life

- Employee breaches of privacy and confidentiality obligations online is increasingly a problem for employers
- Breaches of confidentiality in the news
- Breaches of confidentiality are a particularly important concern for employers who provide medical care or other public services
- Employers providing public services may be required by statute to maintain the privacy of client information

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Legislation – The *PHIPA*

- The *Personal Health Information Protection Act* (the "*PHIPA*")
- Responsibilities of "health information custodians":
  - Take all reasonable steps to ensure that personal health information in its custody/control is protected against theft, loss and unauthorized use or disclosure
- "Personal health information" is identifying information about an individual if the information:
  - Relates to the physical or mental health of the individual
  - Relates to the provision of health care to the individual
  - Is a plan of service within the meaning of the *Home Care and Community Services Act, 1994*
  - Is part of a record that contains personal health information, even if it is not itself personal health information

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The *PHIPA*

- The custodian's employees and volunteers are "agents" of the custodian for the purposes of the *PHIPA* if they collect, use or disclose personal health information on behalf of the custodian

- Breaches of obligations under the *PHIPA* may lead to a complaint being made to the Commissioner

- If the Commissioner makes an order that the *PHIPA* has been breached, an individual can sue for damages for breach of privacy or mental anguish in Superior Court

- Employers who are health information custodians must be vigilant in ensuring that employees and volunteers maintain confidentiality

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Disciplining Employees for Breaches of Confidentiality

Credit Valley Hospital v CUPE

- In this case, an employee was discharged for posting pictures of a suicide scene in the hospital's parking lot
- The grievor took two pictures on his cell phone:
  - A picture of the crowd at the scene of the suicide
  - A picture of a glove, gauze and "absorption" on the ground at the scene
- On his break, the grievor uploaded both pictures to his Facebook page with accompanying captions:
  - The picture of the crowd was captioned "Mother pleads with kid not to jump off PRCC side of the parking lot but did anyways poor thing"
  - The picture of the cleanup was captioned "This is what I have to clean up"

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Disciplining Employees for Breaches of Confidentiality

Credit Valley Hospital v CUPE

- The grievor had signed a confidentiality agreement when he was hired by the hospital
- The confidentiality agreement stated that all employees were expected to respect the confidentiality of all patient, staff and corporate information
- The confidentiality agreement specifically provided that disclosure of confidential information without authorization would result in disciplinary action up to and including dismissal

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Disciplining Employees for Breaches of Confidentiality

Credit Valley Hospital v CUPE

- The grievor's Facebook posts could be seen by anyone who was the grievor's Facebook "friend"
- The posts were seen by a security guard at the hospital who told the grievor to remove them from Facebook
- The grievor denied having posted any pictures on Facebook when questioned by the employer
- The employer investigated and determined that the grievor had posted the pictures to Facebook and terminated his employment for breach of confidentiality

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Disciplining Employees for Breaches of Confidentiality

Credit Valley Hospital v CUPE

- The union made the following arguments:
  - The hospital's policy did not apply, as the incident had occurred in a public area outside the hospital
  - The grievor had not known that the suicide victim was a patient at the hospital
- The arbitrator found that the grievor either actually knew or had constructive knowledge that the suicide victim was a patient
- The arbitrator also noted that in light of the grievor's confidentiality obligations, he should have assumed that the victim was a patient because the incident occurred on hospital property

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Disciplining Employees for Breaches of Confidentiality

Credit Valley Hospital v CUPE

- The arbitrator concluded that the grievor had breached his confidentiality obligations in the form of both pictures and comments
- Although the suicide victim was not named, the posts disclosed information surrounding the patient's death
- The grievor's actions were premeditated, as he waited until his break to post them on Facebook
- The grievor's discharge was upheld due to the nature of his misconduct, and in order to deter other employees from disclosing confidential patient information

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- Grievor was a personal caregiver at a retirement home
- The employer learned that the grievor was operating a "blog" which included resident information as well as inappropriate comments about residents, and negative comments about co-workers and management
- The grievor had signed two confidentiality agreements, and had received trained on confidentiality
- The grievor was dismissed for breaching confidentiality and insubordination

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- The grievor's online postings were visible to anyone with internet access
- The grievor's posts included the following:
  - Seven pictures, including pictures of co-workers and a picture of one resident in a wheelchair
  - Written posts expressing her displeasure about the decisions of management, her working conditions, and the work ethic of her co-workers
  - Written posts referring to co-workers, members of management and residents by their first names, or first names and second initials

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- At the hearing, the employer emphasized its duty to protect the personal information of residents
- The employer explained that the grievor had signed a confidentiality agreement which acknowledged her duty to respect the privacy of residents and employees, and keep all clinical and administrative information confidential
- The confidentiality agreement also stated that breaching the confidentiality agreement would result in discipline up to and including termination of employment
- The employer had also been trained and provided with examples of situations that would breach confidentiality

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- Through its investigation of the grievor, the employer became aware of blogs operated by two other employees
  - One employee had posted pictures of residents on her website without consent
  - Neither of the other employees' blogs contained any malicious or disrespectful comments about residents or the home
  - Neither of the other employees' blogs contained any information about residents' medical diagnoses
  - The employee who had posted pictures of residents received a three day suspension, and the other employee received a written warning

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- The grievor claimed that she believed her blog was private, not public
  - The grievor claimed to have set up the blog in order to keep in touch with a co-worker on a different shift
  - The grievor claimed that she believed that only three co-workers could view the blog
  - The grievor had not taken any independent steps to ensure that the blog was private, and had followed the basic instructions for the website program
  - The basic set-up made it clear that the information would be accessible to everyone on the Internet

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- The arbitrator rejected the union's argument that the company's confidentiality agreement was unreasonable
  - The agreement was not inconsistent with any term of the collective agreement
  - The grievor's obligations under the agreement had clearly been brought to her attention
  - The arbitral caselaw demonstrated that employees in the health care sector are properly held to a high standard in matters of maintaining confidentiality of personal information
  - The confidentiality agreement stated that termination of employment could result from breaches of confidentiality, and the grievor had been trained on her obligations

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Disciplining Employees for Breaches of Confidentiality

Chatham-Kent (Municipality) v CAW

- The arbitrator also found that the employer had just cause to discipline the employee for insubordination
  - In her written posts, the grievor had referred to the home as a "hole", and claimed to have been threatened by management
  - The grievor made numerous insulting comments about management on her blog
- Notwithstanding the grievor's apologies and cooperation in the employer's investigation, her discharge was upheld

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Chatham-Kent (Municipality) v CAW - Takeaway

- Offering training on confidentiality obligations is the best practice for employers
- Management and employees often have different views of the scope of confidentiality obligations
- Employers should not assume that employees will innately understand what is and is not permissible to disclose
- Employers should expressly refer to blog and Facebook posts related to the workplace in its training on confidentiality

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Disciplining Employees for Breaches of Confidentiality

ORNGE v OPSEU

- The grievor was a flight planner for ORNGE, and was dismissed for breaching patient confidentiality and for downloading pornography onto the employer's computer
  - Employer engaged in the transport of medicine and provided specialized medical in a mobile environment
  - Flight planners worked in the employer's communications centre and had access to confidential personal health information
  - The grievor had signed a confidentiality agreement
- The grievor made a post on "GTAMotorcycle.com" which included confidential information about a recent motorcycle accident
  - The grievor commented that the victim of the accident had been so severely injured that it had taken five hours to clean the helicopter after transporting him

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Disciplining Employees for Breaches of Confidentiality

ORNGE v OPSEU

- One of the medics who had responded to the accident Googled the accident and came across the grievor's message board post
  - The grievor initially denied making any post on GTAMotorcycle.com
  - The grievor subsequently admitted to making the post, but denied having written the part of the post about the grievor's injuries and the clean-up of the helicopter
  - At arbitration, the grievor finally admitted to authoring the post in its entirety, but had not realized that the post could be harmful
  - At arbitration, the grievor expressed regret and apologized
  - The grievor also recognized that the information he posted could only have been known by a person with inside knowledge of the helicopter, which could have reflected negatively on ORNGE

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Chatham-Kent (Municipality) v CAW - Discharge Is Not Always an Appropriate Disciplinary Response

- The union conceded that the grievor had breached confidentiality by making the post, but argued that the images downloaded by the grievor were not pornographic and did not warrant discipline
- The arbitrator agreed that the pictures were not pornographic, and did not warrant discipline
- Although the grievor's breach of confidentiality was serious, the arbitrator concluded that it was appropriate to substitute a lesser penalty in lieu of discharge
- The grievor's acknowledgement of wrongdoing and expressions of remorse led the arbitrator to conclude that he was unlikely to repeat his misconduct
- The grievor was reinstated on a "time served" basis and ordered to attend a re-orientation process on confidentiality and workplace policies

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Cell Phone Policies

- Employers may wish to limit or prohibit the use of cell phones in the workplace because of their potential to distract employees
  - Distractions may pose a safety risk (*Amalgamated Transit Union, Local 1587 v Metrolinx (Go Transit)*, *PGI Fabrene v International Assn of Machinists and Aeroospace Workers, Local Lodge 2922 (Montgomery Grievance)*)
  - Distractions may negatively impact customer service (*Saskatchwan Government and General Employees' Union v Saskatchewan Liquor and Gaming Authority (Ross Grievance)*)

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Cell Phone Policies - *Saskatchewan Liquor and Gaming Authority (Ross Grievance)*

- The grievor's employment was terminated after the employer learned that he had been using his cell phone during working hours, and had taken inappropriate pictures of customers
- The employer had a strict policy against having cell phones accessible during working hours, and restricted cell phone use to breaks
- One of the grievor's co-workers reported that the grievor had taken a picture of a customer in a wheelchair, and a customer who appeared to be transgendered
- Another co-worker reported that the grievor had taken a picture of a customer bent over, picking up a bottle of vodka

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Cell Phone Policies - *Saskatchewan Liquor and Gaming Authority (Ross Grievance)*

- The arbitrator was satisfied that the grievor had contravened the employer's policy against cell phone use by using his cell phone on the sales floor and taking photos of customers
- The arbitrator noted that because the employer was a public organization, it had cause to be concerned about news of the grievor's actions entering the public domain
- The grievor told a coworker that he had taken one of the pictures to "show to his friends", which raised a legitimate concern that he planned to share the pictures
- The arbitrator rejected the union's argument that due to the culture of mobile technology, the grievor's actions should be viewed as a momentary lapse in judgement
- The grievor's discharge was upheld

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Video Surveillance in the Workplace

- Employers may wish to monitor activities in the workplace by installing recording devices
- There is no privacy legislation which applies directly to Ontario-regulated employment relationships, but employees may have limited rights to privacy in the workplace
- In a unionized workplace, arbitrators have recognized that unionized employees have privacy rights
- Non-union employees may claim constructive dismissal if unreasonably subjected to video monitoring
- Video monitoring should only be used where it is required for safety purposes, or where an employer has reasonable cause to believe that an employee is engaging in misconduct

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Monitoring Employees' Use of Employer Technology

- Employees will not have any reasonable expectation of privacy on an employer's computers if the employer has expressly advised employees that their activities may be monitored

- If employers permit personal use of its technology, monitoring employees' use of technology may be viewed as an invasion of privacy

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Use of Video Monitoring By Relatives or Caregivers

- Concerned relatives or caregivers may create video recordings of employees out of concern about the level of care being provided
- Such videos will generally be admissible in evidence at arbitration or in court, subject to the evidentiary test of probative value vs. prejudicial effect
- Employers will be entitled to rely on video footage obtained by clients or relatives in defending against claims of wrongful dismissal

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Versa-Care Centre of Brantford Discharge Cases

- Several employees of a long-term care home in Brantford were discharged based on footage obtained by a concerned private-duty caregiver which depicted resident abuse
- The caregiver installed a hidden-camera in the room of a resident of the long-term care home
- The footage taken from the resident's room was broadcast on public television, and led to the discharge of several employees

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Versa-Care Centre of Brantford - DB Grievance

- The grievor's employment was terminated after being caught on tape looking through a resident's wallet
- The arbitrator found that there was no principled basis to refuse to admit the video evidence, and viewed it to assess its probative value
- The arbitrator was satisfied that the video evidence clearly and cogently showed the grievor going through the resident's wallet for about 30 seconds, which constituted resident abuse under the employer's policy
- The arbitrator rejected the union's argument that the grievor's public humiliation should have any mitigating effect on the penalty for her misconduct
- The grievor's discharge was upheld

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Versa-Care Centre of Brantford - CR Grievance

- The grievor was a health care aide depicted in the video footage dressing a resident roughly
- The video depicted the grievor leaving the resident in bed half-dressed with her shoes on and her pants around her knees
- The employer argued that the actions shown in the video constituted resident abuse
- The arbitrator agreed, and found that there were no mitigating factors that would lead him to order reinstatement
- The grievor's discharge was upheld

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Versa-Care Centre of Brantford - VM Grievance

- The grievor was a nurse's aid who was discharged for allegedly failing to report resident abuse
- The employer argued that the video footage clearly and cogently showed the grievor witnessing resident abuse which she did not report
- The arbitrator found that the videotape did not establish that the grievor had actually witnessed any resident abuse
- The video evidence was the only evidence relied on by the employer, which resulted in the grievance being allowed
- The grievor was reinstated with full redress

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Investigating Misconduct

- Complaints or reports of misconduct should be investigated in order to determine whether they can be substantiated
- When an employer receives information about alleged misconduct, it should begin investigating as soon as possible
- If an employer believes an employee has made inappropriate postings online, it should visit the websites in question and take screenshots of all offending posts
- Employees will have an incentive to delete their posts once they learn that they are being investigated
- It may be appropriate to put an employee on leave with pay pending the outcome of an investigation

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Investigating Misconduct

- Employers should be guided by the principles of procedural fairness in conducting an investigation:
  - Interview any person who may have knowledge of the alleged misconduct
  - Advise employees who may be subject to discipline about the allegations against them
  - Employees who may be subject to discipline should be given an opportunity to respond to the allegations against them
  - Employees should be advised of the possible outcomes of an investigation, and the potential for discipline
  - Unionized employees have a right to union representation at disciplinary meetings
  - Employers should keep excellent records of all interviews held throughout the investigation process

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Policies

- Implementing clear policies and providing training on those policies is the best to prevent employee breaches of patient or client confidentiality
- Employees are more likely than managers to believe in “network privacy”, i.e. that personal information posted online is private as long as it is limited to their social network
- Employers should develop guidelines and codes of conduct related to the use of social networking to make sure that employees understand their obligations
  - Policies should be clearly worded
  - Employees should be advised of the policy
  - Employees should be trained on the policy, if possible

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Policies

- Policies must be consistently enforced, or the employer may be unable to rely on them for the purposes of imposing discipline
- Employers should always ensure that the discipline imposed for the breach of any workplace policy is proportional to the misconduct
- Termination will not always be appropriate
- Good policies and consistent enforcement will significantly minimize an employer's risks due to employee breaches of confidentiality

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Contact

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