

# Technology Can Move Fast and Companies Can't Fall Behind

By Jason Paroff and Richard Plansky

Jeff Quon, a police sergeant and member of the city of Ontario California Police Department's SWAT team, learned a hard lesson last week when the U.S. Supreme Court decided in *City of Ontario v. Quon* that the personal text messages he sent via his department-issued pager were not so personal after all. After Quon exceeded his monthly texting allotment several months in a row, the police department retrieved transcripts of his messages

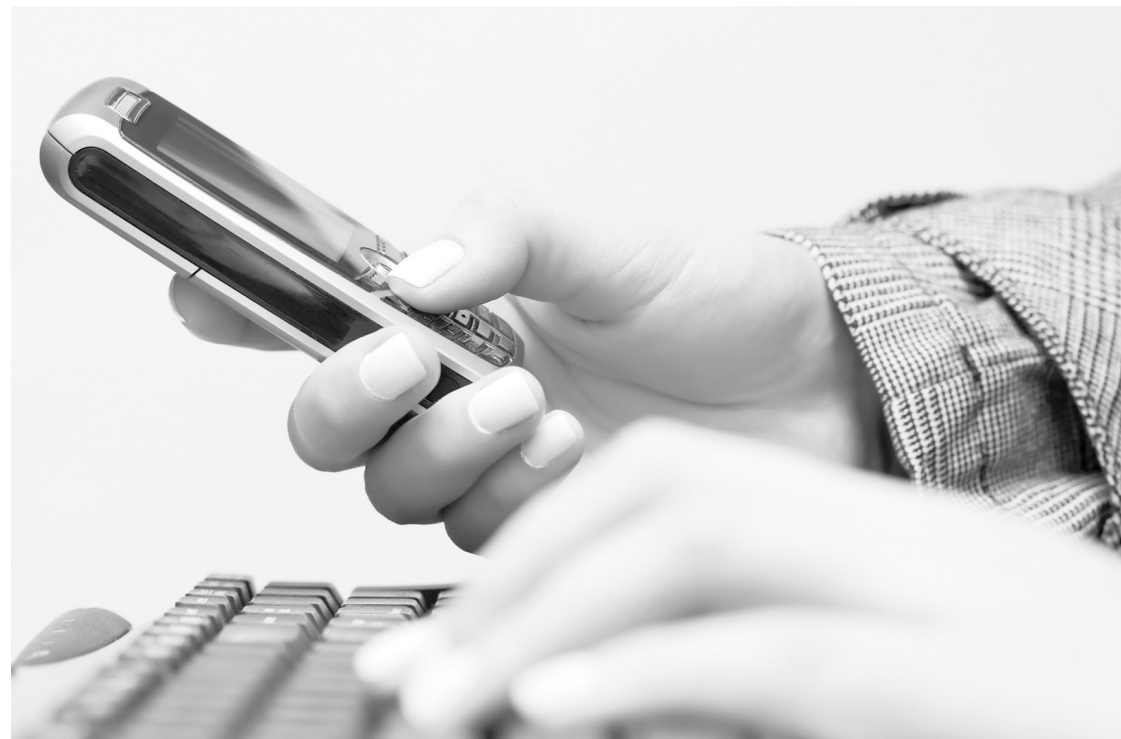
the uncertainty that comes with hitting "send." If there is one common theme throughout the recent decisions regarding employee privacy in workplace communications, it is this: ambiguity in corporate policies and practices is a main point of contention, and is therefore a driving force for court intervention. Companies need to establish usage policies that are clear and address all forms of communication they employ. In one recent New Jersey case, the usage policy at issue declared all communications to be company property, but also permitted occasional personal use (*Stengart v. Loving*

permissible, it served as another point of contention that could easily have been avoided. This type of pitfall will only become more prevalent as new forms of media—such as cloud storage, social networking sites and rapidly changing mobile technology—become integral parts of modern business. Technology may move fast, but companies can't risk falling behind. For employees, what they don't know can definitely hurt them. It is important for employees to know current usage policies and, just as important, to understand them so they can govern their conduct accordingly. In today's world of integrated technol-

Many employees fail to recognize that a deleted file may not be gone forever. Even after a user deletes data, it can often be restored by forensic experts. Moreover, with the price of data storage constantly decreasing, the quantity of information companies are keeping is perpetually on the rise. However, in *Alamar Ranch v. Boise*, a federal case out of Ohio, deleted e-mails exchanged between the defendant and her attorney were later recovered and used against her at trial. Employees must recognize that it may be possible — and permissible — for their employers to retrieve every text message, voice mail and e-mail they have sent or received on company equipment — months and even years later.

One of the hallmarks of technology today is seamlessly integrating our various modes of communication. The irony is that, as we become more connected, our information may become less secure. Companies have a legitimate interest in monitoring activity that takes place on their networks and devices. At the same time, exercising this interest can sometimes lead to unnecessary and expensive litigation when the rules of the road are not made clear. Indeed, a failure to monitor ones' systems may subject a company to liability of a different sort — liability for subjecting unwitting employees to objectionable content such as pornography, harassment, etc. In a tough economy security is often initially a "tough sell" to senior management. However, in a world where the courts have provided little practical guidance, having a clear, up-to-date, easy to understand workplace communication policy would seem to be the best policy for employers and employees alike.

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from the service provider and discovered that many of the messages sent during work hours were not work-related, including some that were sexually explicit. Ruling against Quon's Fourth Amendment challenge, the Supreme Court determined that the police department's search was reasonable.

Quon demonstrates that issues surrounding employee privacy and the employer's right to know how the systems they pay for are being used are growing more complicated as technology increasingly blurs the line between work and personal life. Courts are currently engaged in a balancing act — weighing employee expectations of privacy against company interests in monitoring communications sent over their information systems. While recent decisions have attempted to create some certainty in the law, they clearly illustrate the importance of proactively addressing the issues surrounding an employee's right to privacy and an employer's right to investigate potential wrongdoing. Despite the murky nature of the law on these issues, there are concrete steps that both employers and employees can take to reduce

Care Agency). In this case, Marina Stengart used her personal Yahoo! e-mail account to communicate with her attorney from her work computer. The *Loving Care* policy created a natural ambiguity — if the communications are personal, how or why should the company own them? In *Quon*, the usage policy stated pager messages may be audited, but the established practice was not to audit the messages so long as employees paid overage charges. The take away: companies can avoid subjecting themselves to the expense and uncertainty of prolonged litigation by drafting and implementing clear, consistent and defensible usage policies, and then regularly exercising their rights under such policies.

Moreover, technology usage policies need to be regularly evaluated and updated. Stagnant usage policies create gaps between policy and practice that practically invite judicial intervention. In *Quon*, the use of pagers was not included in the original policy, but was included as an employee-acknowledged addendum upon receipt of the pager. Although the informal addition of pager use to the policy was considered

ogy, it is common for people to use one e-mail and mobile device for both personal and work communications. Recent decisions like *Quon*, however, have made clear that in some circumstances, private communications on company-owned devices may be subject to lawful review by employers. Employees can protect themselves from unwanted intrusions by taking the time to understand where their employers draw the line and then acting accordingly. The mere knowledge that communications may not be private should always inform the content of those communications, making situations like the one in *Quon* less likely. Likewise, ensuring that employees are aware of and understand usage policies is also beneficial for companies. Informed technology users can help bring any inconsistent or ambiguous policies to light and can also help identify technology gaps. The bottom line: clear and up-to-date policies are important, but ensuring they are easy to understand is imperative.

Along these lines, it is critical for employers to communicate, and for employees to understand, which of their communications are retained and for how long.



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By Amy Spach

Confucius became one of the earliest career coaches when he said, "Choose a job you love and you will never have to work a day in your life." Most attorneys enter the profession fueled by a passion for justice and the law but somewhere along the way a job can shift from joy to feeling like hard work.

To transform your practice into a job you love, consider a modern twist on the wisdom of Confucius. Try pursuing your off-the-clock interests to develop your practice. Focusing on activities and hobbies that energize you — hiking, travel, music, surfing, writing, whatever puts a smile on your face — can attract quality clients, the kind you will enjoy representing.

Spending time with cool clients is just one of the reasons that regularly propels labor and employment attorney Ben Gipson of Winston & Strawn away from the office and on to hiking trails and mountains across the country.

A lifelong outdoor and adventure enthusiast, Gipson never consciously connected business development to his love of a rigorous trek. As his fraternity of outdoor compatriots grew, and his connections and conversations expanded, he found himself attending the Outdoor Industry Association's annual meetings.

The members of this powerful trade association are Gipson's ideal clients. He easily speaks "their language" and literally walks their walks. He's been able to distinguish himself among like-minded colleagues as one of the few lawyers who happily participates in the group's physically demanding service projects.

"Seeing an attorney sweaty and covered in grime counters most people's perception of a typical lawyer. People take notice, which allows me to connect with them on a meaningful level," said Gipson. Non-traditional marketing activities, such as fundraising for Big City Mountaineers, are a perfect fit for him and Gipson is grateful that his firm supports his style of client development. It's not necessary to let people see you sweat to turn your hobbies into productive networking and business opportunities. But it does help if you aren't perceived as pushing a business agenda too blatantly during everyone's good times. Making the transition from recreational buddy to prospective client does require subtlety and patience.

"There's no magic time when a friend becomes a referral source. You'll know when the time is right and when it is, if you are really good, it is okay to ask for the business," according to Miles J. Feldman, an entertainment litigation partner at Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor. Feldman's lifelong love of music led him to form the rock group, The Wannabins. He credits his pro bono band gigs and fundraisers with bringing in substantial new business to his practice and raising his profile in the community.

His other passion — surfing — spurred him to be one of the founding members of the Association of Surfing Lawyers, an interest which led to new business, but not immediately.

He recalls that after years of catching waves with a friend, who was an executive at an action sports/entertainment company, the right time to ask for a referral to the general counsel finally appeared. His patience and timing, both key elements in surfing, paid off. Feldman's request was met with enthusiasm and a warm introduction. Joining a sport, association or affinity group with the express purpose of asking for business is not likely to yield the desired result or make you popular. Your passion and interest should be genuine and your motiva-

tion true. A lack of authenticity is easily detectable and will get you rejected by people who are there for the love of it.

"One of my passions is music and I notice that there are many attorneys who are frustrated artists who love music and the arts," said Elizabeth Watson, a land use and real estate partner at Greenberg Glusker. At a recent program presented by the Legal Marketing Association's Los Angeles Chapter on networking while you play, Watson spoke about her successful business development strategy centered around her love of music and the city of New Orleans.

Watson organizes annual outings to the New Orleans Jazz and Heritage Festival and invites local real estate professionals from across Southern California to join her and her husband. The city's bonhomie and high-profile land use issues create a natural and relaxed way for the attorney to soak up Cajun culture and shine as an expert in her practice area without trying too hard.

"It's always easier to talk about someone else other than yourself, so I try to suggest other services people might need or ways I can help them," explained Watson.

In the art of attracting new clients, focusing on what you can give others, rather than what you can take, is how the most productive business builders succeed. Being helpful and giving, or acting as a "fixer" for sophisticated clients, as Barry H. Lawrence, Of Counsel at Kaye Scholer describes himself, is how he blends his skill at closing deals with his passion for talking to people. Convinced there's something interest-

ing about everyone, Lawrence credits his conversational gifts and personal commitment to getting the job done appropriately with allowing him to sustain and enjoy a 45-year legal career.

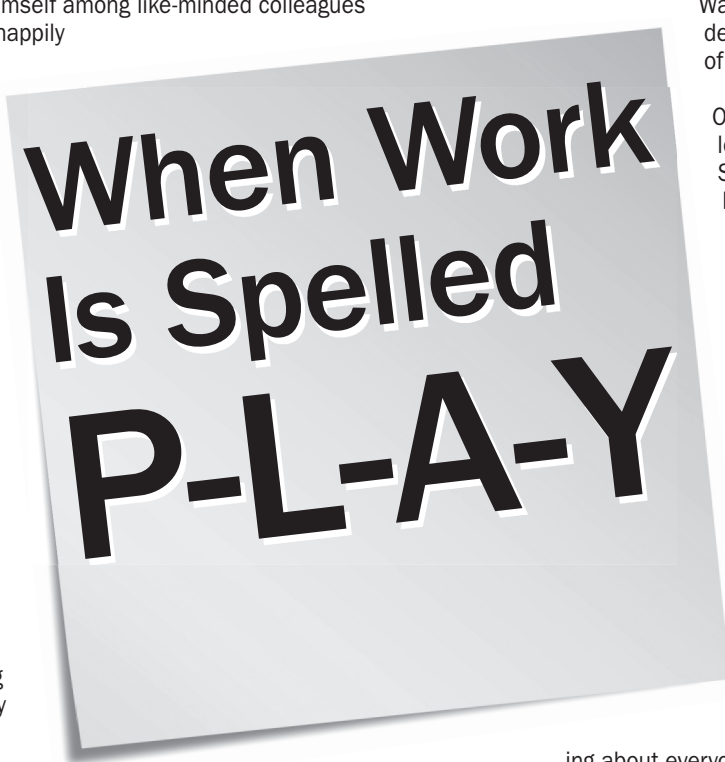
Sustaining a long, happy career is much easier when your dreams and your job intersect. And while most attorneys may find mountaineering lawyer Gipson's dream of "taking a meeting at the top of Mount Rainier" a bit extreme, there are less strenuous ways to build a practice around your interests.

There's the experience of a withdrawn but brilliant law firm associate whose lack of a client pipeline dampened her future at the firm. With a bit of coaching, she learned to parlay her passion for the theatre into a seat on the board of directors of a new theater company.

Not only did the associate help draft the fledgling group's bylaws but she also regularly invites clients to the theater she supports. The best news of all — she loves every minute of her involvement.

Granted, every day at work won't be as thrilling as a trip to Disneyland. But by introducing your personal passions, interests and hobbies into your work life, you might create surprising opportunities to grow your practice to a whole new level and quite possibly find yourself in a job you love.

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