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Social Media: The Good, the Bad and the Ugly for Municipalities

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**I.
INTRODUCTION**

This paper provides an update on a variety of topics regarding the increasingly extensive development and use of online social media by individuals, businesses and governments. This presentation builds on prior publications by our firm in related areas, including, “Legal and Policy Issues Relating to Social Networking Applications.”¹

We will discuss current trends, issues, lawsuits, problems, etc. in an effort to help broaden the scope of municipal attorneys’ understanding of this emerging, ever-changing, and expanding communications development.

Local governments’ use of various online social media tools is expanding tremendously, and promises to do so for the foreseeable future. We are just beginning to see the outlines of emerging legal issues, which are numerous, and court decisions. Legislative guidelines are responding in kind.

The questionable legal landscape is even leading municipal attorneys to advise their client to cease social media activities.²

We hope that this brief paper, together with prior papers prepared by our firm and others will give municipal attorneys a better understanding of Internet media services, legal issues including potential liability, and the need to get started on the development of local polices and guidelines.

**II.
TRENDS IN SOCIAL MEDIA IMPORTANT TO MUNICIPAL ATTORNEYS**

- Privacy issues in the wake of the Supreme Court’s *City of Ontario v. Quon* Decision (see further discussion below).
- Links in blogs, etc. – are you endorsing content by linking to it? If the content turns out to be false – can you be sued? Check policies for coverage for libel.
- “Astroturfing” issue: paid representative leaving positive comments about products, etc. on a blog, Twitter who appears to be independent.
- Increasing existence and enforcement of social media Policies. Today’s policies need to be adaptable with the blurring of the line between personal and official and cover the use of personal and official networks, mobile devices, etc. (see further discussion below).

¹ http://www.baller.com/pdfs/IMLA_2009.pdf

² Debra Cassens Weiss, “California Town Abandons Facebook Page Amid Legal Concerns,” ABA Journal, August 24, 2010
http://www.abajournal.com/mobile/article/california_town_abandons_facebook_page_amid_legal_concerns

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- Increasing use of Internet and social media on employee's personal mobile devices such as the iPhone and BlackBerry.
- Increasingly the workforce is becoming “untethered,” working from somewhere else other than the traditional office.
- Increasing need to filter and organize information with the massive amounts of both information and social interactions that are available daily.
- New location based applications such as Foursquare and Gowalla as well as the “Nearby” application on iPhone can become a great tool for municipalities. They show where you are and can link to what is fun, useful to do nearby such as tourist destinations, historical sites, parks, municipal offices, museums, etc.
- Similarly, Augmented Reality (AR) is increasingly important. It overlays data so that if you are on a map application, you could see information about a local point of interest such as a municipal golf course, a Wikipedia entry about a historical site, the specific services in public buildings, etc.
- Increased integration of social media platforms with existing municipal resources, e.g., a website which is linked to Facebook, Twitter, LinkedIn, My Space, etc. Also, home page integration of employees (think iGoogle – Facebook, calendar, e-mail all on one page).
- Also on the horizon is the net neutrality issue following the Comcast decision (see further discussion below)
- Further privacy issues need to be addressed as a result of the following:
 - Geotagging (disclosing of personal information as a result of the embedded information in a digital photograph showing the location that the photo was taken).
 - Smart Meters (Smart meters can gather much more data than how much electricity is used).
 - Google Earth (use of Google Earth's satellite images to locate structures that are erected without a permit and then fine the owners for doing so).
 - Facebook Places (a new product that allows users to show where they are in real locations and to tag friends that they are with, an additional feature also lets the user see anyone else who has checked into the same place).
- Campaign Regulation – Government understanding the vast capabilities of this kind of communications as a modern time; greatly increasing use for a variety of governmental purposes but at the same time recognizing due to potential privacy and other risks, the need to establish guidelines for users.

Highlights and Further Discussion about Some of the Above Trends

Privacy – *City of Ontario v. Quon*³

This past June, the Supreme Court *City of Ontario, et al v. Jeffrey Quon, et al*, 130 S. Ct. 2619 (2010), took on an issue concerning privacy rights under the Fourth Amendment in the Digital Age. *City of Ontario, et al v. Jeffrey Quon, et al*, 130 S. Ct. 2619 (2010). The case involved whether a police officer, in using a department provided pager for personal use, had an expectation of privacy regarding personal text messages. The City of Ontario had a general policy of limiting the use of computers, etc. to official, non personal communications. The City, in an effort to determine if its monthly limit on the number of characters in text messages was reasonable, obtained transcripts of the text messages and searched same to determine how many were work related. The Court found that because the search was reasonable, the City did not violate Quon’s Fourth Amendment rights, noting that the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope. The Court also noted that it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny as Quon was told that his messages were subject to auditing. Importantly, the Court stated “[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.”

Social Media Policies

Social Media Policies are becoming increasingly adopted by businesses and local governments. The development of local policies, guidelines, and requirements are critical for any municipality. The policies and guidelines should cover all employees, elected officials, and committee or commission personnel who either utilize or provide information through these services under the name of municipality, or through use of the municipal-owned equipment. As noted, we have previously written extensively on Social Media Policies and therefore we will not get into much depth now. There are, however, two recent papers that we would like to bring to your attention. The first is a paper from the Center for Technology and Government entitled, “Designing Social Media for Policy Government: Eight Essential Elements,” copyrighted by the Research Foundation from the University of New York in 2010.⁴ The paper describes eight essential elements of a social media policy, including:

1. Employee access
2. Account management
3. Acceptable use
4. Employee conduct
5. Content
6. Security

³ <http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf>

⁴ http://www.ctg.albany.edu/publications/guides/social_media_policy

7. Legal issues
8. Citizen conduct

Secondly, a paper entitled, “Making the Most of Social Media – 7 Lessons from Successful Cities,” prepared by Penn Fels Institute of Governments,⁵ provides extensive information about social media and governments. We recommend reference to it to help with the instructional material to help participants in the local planning process.

III. THE BAD: THE “MY BAD” OF SOCIAL MEDIA

Recent Problems Associated with Social Media Sites

- Inadvertent downloading of worms, viruses and spyware through such seemingly simple things as agreeing to install a program update, or opening an attachment in an e-mail. These can do such things as disable the computer’s security and firewall settings, hack into e-mail and send fake messages which appear to be real, and steal passwords, social security, banking and credit card numbers.
- Almost one quarter of employees report that they use the Internet while at work and recent polls have indicated that employees spend as much as 75 minutes per day using the Internet for personal reasons.
- Social Media sites are often used to “vent” by an employee about their boss, co-workers, and/or company.
- Municipal requirements, including First Amendment, open meetings records retention, and liability for employee comments and misconduct.
- Conversely, use of social media sites by an employer to verify an employee’s sickness or disability or to vet a potential new employee.
- Unthinking acceptance of user “Terms of Agreement” connecting user to social network.

Highlights and Discussion about the Bad Use of Social Media by Municipalities

A recent decision of the City of Redondo Beach, California to abandon its use of Facebook for legal reasons is undoubtedly a decision that many other local governments have made about the use of social media. The municipal attorney advised the City Council of various issues, including First Amendment problems, relating to the rights of City officials to deal with and remove vulgar posts, misinformation, and other

⁵ <http://www.fels.upenn.edu/news/making-most-social-media>

comments that may be protected by the First Amendment. Further, questions were raised about comments by City Council members on a Facebook post and whether or not there could be a problem of an open meeting law. Additionally, questions were raised about the City's obligation to retain user comments under the state's public records law and whether or not the City could face liability for employee comments deemed offensive in the workplace. For further information we have footnoted several references.⁶

IV. THE UGLY: SOCIAL MEDIA LAWSUITS

Social Media lawsuits are generally falling into several categories:

- Privacy
 - Control over what is private (Suits against Facebook).
 - Fourth Amendment issues (*Quon* case).
 - What marketers etc know about you via your use of the web both surfing and purchases – collecting and sharing data for targeted ads.
- Intellectual Property
 - Photographs you have posted.
 - Content you have posted.
 - Safe Harbor provisions of Digital Millennium Copyright Act.
- Defamation
 - What is written or posted in a blog (Sherrod matter).
 - Posting fake Facebook Pages, etc.
- Self-Incrimination
 - What you put online can be used against you.
 - Criminal, disability and divorce cases.
 - Employment – cause not to hire.
 - Employment – inappropriate conduct or lying about sick days, etc.
- Other Lawsuits
 - Does social media contact such as use of LinkedIn violate terms of a non-compete clause?
 - Does providing directions that are not complete or up to date resulting in injury a basis for a lawsuit?

⁶ California Town Abandons Facebook Page Amid Legal Concerns
http://www.abajournal.com/news/article/california_town_abandons_facebook_pag
Media Law: Does A Public Official's Blog Violate the Open Meeting Law?
<http://medialaw.legaline.com/2010/05/does-public-officials-blog-violate-open>
The Daily Breeze http://www.dailybreeze.com/news/ci_15863747

Highlights and Discussion about the “Ugly” Social Media and Lawsuits

Privacy

Privacy continues to be a major issue on most social media sites. Many users are unfamiliar with tricks or tips on how to protect the privacy of information exchange. The very nature of many of the social media networks is to provide a free flow of information. In fact, when you become a friend on Facebook, for example, the information that you supply to a friend, whether it is about yourself, employment or other matters and even pictures, financial information or other data, may be shared by that person with others and soon the availability of you and your information is exposed to a vast audience.

Some of the most popular sites, including Facebook and Twitter, have been experimenting with ways in which to allow for privacy and have attempted to address the privacy in changes in their terms of use. Facebook, however, was hit with a class action lawsuit early this year. The lawsuit was filed against Facebook over changes that the social networking site made to its privacy settings in late 2009. The U.S. District for the Northern District of California complaint alleges that the modifications are in fact a reduction in privacy protection for Facebook users, rather than increasing as claimed by the company.

Twitter has also faced considerable controversy involving privacy and the availability of information to others. For example, Twitter recently into a settlement agreement with the Federal Trade Commission concerning the ability of hackers to gain information despite Twitter’s policy. There are security lapses allowed in the Twitter format that allows hackers to view private messages and send “tweets” from other people’s accounts. According to a settlement that was reached between Twitter and the Federal Trade Commission, Twitter is required to maintain a “comprehensive information security program.” According to the Federal Trade Commission, Twitter was vulnerable to hackers attacks because of it failed to take “reasonable steps” to prevent unauthorized administrative control of it system.

Copyright

Copyright claims based on user content present significant issues and may affect the sharing of information on social networks. However, there may be protection against such claims under the Digital Millennium Copyright Act (DMCA)⁷. Under the DMCA, persons may protect themselves from liability if they establish “effective notice-and-take down” procedures and promptly remove content when a copyright owner notifies you that it is infringing and have no knowledge that the material in question is infringing. You will not be held liable for money damages for infringing content posted “at the direction of a user” as long as you:

⁷ 17 U.S.C. § 512. Also, *Ellison v. Robertson*, 375 F3d 1072, 1080 (9th Cir. 2004)

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- Receive notice.
- Do not have actual knowledge of its infringement.
- Do not receive any financial benefit attributable to the infringement activity.
- Act expeditiously to remove or disable access to the infringing material upon gaining knowledge that the material is infringing or you have received a notice of infringement.

The above will be helpful to local governments and municipal attorneys to ensure that local liability for copyright infringement does not become a liability. As part of the communication plan(s) and policy guidelines, a clear disclaimer provision needs to be developed consistent with the DMCA. This will ensure the protections from copyright liability or infringement that may be imposed as a result of any communication transmission either through the municipal website, e-mail transmittals or social media networks.

The Communications Decency Act (“CDA”)⁸ provides additional liability protection for online service providers. In particular, section 230 of the CDA provides protection and immunity from liability for information posted by users or for any actions taken in good faith to restrict access to obscene, lewd, or objectionable materials. Further, the exemption extends to preempt all state and local laws that may be in conflict with this Act.

Section 230 also protects online providers from liability that stems from publication of information provided by another to the provider, if the information gathered turns out to be untrue and libelous. For example, in California, the Supreme Court decided after several dismissals and reversals of lower courts that a woman who re-posted an e-mail rewritten by another party regarding the practices of two doctors was protected under the shield law in Section 230 of the CDA.

A property management firm in Illinois, Horizon Group Management sued a tenant for defamation over a short Twitter message claiming, “Who says sleeping in moldy apartment was bad for you? Horizon Reality thinks its okay.”⁹ Apparently, the woman had 20 followers at the time. The lawsuit was dismissed and comments were considered “too vague” and did not meet the qualifications to be considered libelous. This does not mean there cannot be defamation via Twitter, so if you are going to defame someone at least be vague about it in your 140 characters.

There are increasing lawsuits involving complaints about businesses and reactions of individuals to a business’ practices claimed to be libelous. For example, in Knoxville, Tennessee, a marketing firm sued the Pizza Kitchen for its Facebook and Twitter comments. The company had posted entries calling the marketing company “crooks.” Pizza Kitchen now faces a \$2 million suit for making comments on Facebook.¹⁰

⁸ 47 U.S.C. §§ 223(a) and (d), and 47 U.S.C. § 230

⁹ [More and More Lawsuits Over Rants on the Web that Blast Businesses - News - ABA Journal.](#)

¹⁰ [Monica Faram: Facebook + libel = lawsuits » Features / Living » Cleburne Times-Review, Cleburne, TX, Lawsuit Over Facebook Gets Hand Tossed at Pizza Maker.](#)

In Kalamazoo, Michigan, a college student was outraged because of a \$118 charge to retrieve his towed car he claimed was unjustified and finds himself in a defamation lawsuit from the towing company seeking \$750,000 in damages. The college student created a Facebook page entitled, “Kalamazoo Residents Against T&J Towing” that has over 12,000 members and has cost, according to T&J Towing, business and has unfairly damaged their reputation.¹¹

Cases of this nature have interesting questions, including: What are the rights to free speech? First Amendment lawyers sometimes claim that suits like these amount to so-called SLAPP¹² (strategic lawsuits against public participation) lawsuits). To protect individuals against the “chilling” effect resulting from such a SLAPP lawsuit and individuals rights to express an opinion, approximately 30 states have anti-SLAPP measures on the books.¹³ It would not be the case in the Kalamazoo matter, though, because Michigan does not have such a law.

By way of example, the Minnesota Anti-SLAPP Statute¹⁴ describes the procedures and immunity that may be increasingly important with regard to interactive communication capabilities on the wide range of social media, including protections for local employers as well as the local government. A statute describes government as, including a branch, department, “government” includes “a branch, department, agency, official, employee, agent or other person with authority to act on behalf of the federal government, this state, or any political subdivision of this state, including municipalities and their boards, commissions and departments, or other public authority.” “Participation” means speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.

The statute applies to any motion or judicial proceeding that will allow a disposition of a claim on the grounds that the claim materially relates to an act of the moving party that involves public participation.

The intent is to provide immunity to such person which is described in the Minnesota statute as “lawful conduct or speech that is generally aimed in whole or in part of procuring favorable government action is immuned from liability, unless the conduct or speech constitute a tort or a violation of a person’s Constitutional rights.”

Self-Incrimination

We all engage in discussion over coffee, in a restaurant or at other locations, and naturally assume that as friends whatever is said may not become public knowledge. However, using social networks changes this. With increasing frequency, courts are

¹¹ [When Companies Respond to Online Criticism With Lawsuits - NYTimes.com.](#)

¹² <http://www.barbieslapp.com/slapp.htm>.

¹³ <http://www.legal-project.org/149/anti-slapp-statutes-in-the-us-by-state>.

¹⁴ Declaratory, corrective, administrative remedies. Free speech; participation in government. Minn. Stat. §§ 554.01-554.05 (2008).

recognizing information made available through various social networks may result in self-incrimination. For example, in divorce cases, the Tiger Woods incident this past year, although on a mobile device, makes it apparent that the availability of information about an outside affair may be discoverable and result in problems for an individual. Social networking sites which are intended to allow for a free exchange of information must be understood may not be private and can be used as evidence against you or your employer. In the case of municipal employees sharing information about the municipality or other employees within the municipality, the potential impact not only to them personally, but to the municipality or others within the municipality as well can be incriminating evidence in a lawsuit.

Non-Compete Violations and Other Lawsuits

A lawsuit was recently filed in the State of Minnesota, *TEKsystems v. Hammernick, et al.*,¹⁵ in the United States District Court. It is the first known lawsuit involving a restrictive covenant and communicating allegedly unlawful content via the social network (LinkedIn), which was claimed to be contrary to the employment contract. Hammernick, after termination from TEK, connected on LinkedIn with various professional contacts. Her employment contract with TEK prevented solicitation of others for a period after her termination from employment. The question is whether or not “connecting” via LinkedIn constitutes “solicitation” or “contact” contrary to her employment contract. This raises a question of whether or not a non-solicitation restriction requires individuals to “disconnect” or “de-friend” colleagues, customers, clients or former employers until the non-solicitation period expires.

In a most interesting suit, Google was recently sued when Google Maps instructed a person to walk along a very busy highway with no pedestrian walkway which were followed exactly. Unfortunately, she was hit by a car in the process. According to the lawyers for her, Google is liable because it did not warn her that the route would not offer a safe place for a pedestrian to walk. According to an article concerning the lawsuit claimed, contrary to the employment contract, actually shows the route, and also included a caution that the route may be missing sidewalks or pedestrian paths. Even though, the case demonstrates the potential nature the misinformation and potential lawsuits for misinformation made available via social network.¹⁶

V. LOCAL PLANNING

The creation of local plans and policies addressing social media is essential. Social media create considerable opportunity for local government officials and employees to communicate with their constituents but also present a wide range of pitfalls.

¹⁵ *TEK Systems, Inc. v. Hammernick, et al.*, No. 0:10-CV-00819. See also, “Employment Law Alert,” a publication of Nixon Peabody LLP, June 2, 2010.

¹⁶ [Google Maps Lawsuit: Woman Follows Directions, Gets Run Over](#)

A plan should establish a framework for the local community's use, taking into account how its plan can provide better service for public safety, education, health, local politics and decisions, economic development opportunities, recreational and other civic interests and concerns. In the development of any plan or policy, the human element needs to be taken into account and recognition must be given to the fact that not all persons have the same abilities to interact with city hall.¹⁷ For example, a community is required to comply with the Americans with Disabilities Act and Electronic and Technology Accessibility Guidelines. That is, some may not be digitally literate and a variety of forms of communication or social media services are necessary. Further, it needs to be understood that information and privacy concerns and legal issues are involved.

It is the local government's role to plan and develop through its plan the policies and guidelines to enhance the information and communication capabilities and services available from city hall. To the extent city hall can train, teach or help not only its employees, but, also its citizens to have the skills necessary to utilize the information services will undoubtedly enhance the information service capabilities and improve and extend the network of availability of city hall to a broader range of persons. It is important to recognize that the opportunity for all persons whether they have digital skills, or no matter what their housing area is or economic status is, should be treated in a similar manner and be able to create and share information. Thus, availability of information with multi-language or multi-cultural issues and other unique matters that relate to a particular community are important to consider.

In 2005, the FCC adopted four principles to encourage broadband deployment and preserve both the open and interconnected nature of the public Internet (FCC 05-151). According to these principles, individuals are entitled to access lawful Internet content of their choice; run applications and use services of their choice (subject to needs of law enforcement); connect their choice of legal devices that do not harm the network and choose between multiple network providers, application and service providers and content providers.

While these principles as adopted by the FCC are exceedingly important, there may be change underway resulting from the above-referenced Comcast case and the FCC's pending rulemaking proceedings about "net neutrality."

Not only is it likely that there may be change resulting from current FCC proceedings with regard to net neutrality, it is just as likely that in this information age there will be ongoing and ever-changing new technologies, services, and legal and regulatory matters that must be made part of the ongoing oversight and administration by local governments with regard to any telecommunications plan and use policies.

¹⁷ See 42 U.S.C. § 12101, et. seq. and 29 U.S.C. § 774d.

**VI.
SUMMARY AND CONCLUSION**

Internet communications, including use of social networks, websites, and e-mail transmittals and other similar Internet communications can provide a tremendous capability for local governments to present news, information, advice, guidelines, recreational, health and educational material to residents, businesses, and industries. They are here to stay. All such services are experiencing tremendous growth in terms of use by local governments. Further, the use of these communication capabilities and the technological advancements will continue to grow and expand into the foreseeable future. There are numerous legal questions and issues and vagaries involved with “what is,” “who is responsible,” “in what ways will we be liable,” and other materials and important matters for local review.

This paper is not intended to be a hands-on policy development guideline. Rather, it is intended to provide a broad scope overview of a variety of matters that are important for consideration by municipal attorneys and other community leaders within their municipality. We believe because of its significant importance and risks associated with the use of the wide range of Internet communications by local governments and employees, officers, and elected officials, the development of a communications plan organizing and planning the local governments goals for communications and identifying the particular service capabilities to be used by it and as part of such a plan, development of policy guidelines and instructional materials for all concerned within the local government, including employees, officers, and elected officials, must be at the forefront of any community’s ongoing current and long-range community development plans and directives.

We trust this paper will help municipal attorneys to be instrumental in the initiation of the processes necessary within their own communities. We will make our services available to provide assistance, as a resource for additional information and material, and if needed a local or community workshop to provide a better understanding at the local level to a broader range of personnel within the local government that may become involved or should be involved in helping with the development of the communication plan and policies and guidelines.

**VII.
BIOS**

ADRIAN E. HERBST

Adrian E. Herbst is a Principal with the Washington, D.C. based law firm The Baller Herbst Law Group, P.C., in charge of its Minneapolis, Minnesota office. He has over 35 years of experience in municipal and governmental work, with an emphasis on cable television franchising and regulation and new and emerging technologies and services related to cable, telecom and internet, including municipal websites, social networks and e-government and municipal legal and regulatory matters. He has been extensively involved in representing local governments throughout the country on these matters. Adrian is a frequent participant and presenter at IMLA conferences and various state leagues, municipal legal and administrative conferences and working with members of his firm helps produce the "Baller Herbst List" distributed nationally every business day throughout the country about broadband and related matters. Adrian was a City Councilmember for the City of Bloomington, Minnesota for 16 years and its City Attorney for 7 years. He has served as a past President of the Minnesota Trial Lawyers Association and Vice President of the League of Minnesota Cities. Adrian is a charter member of the National Association of Telecommunications Officers and Advisors (NATOA) and a member of IMLA, the Federal Communications Bar Association, and the Telecommunications Committee of the Minnesota State Bar Association.

CASEY LIDE

Casey Lide is a Principal with The Baller Herbst Law Group, P.C., a national law firm based in Washington, D.C. and Minneapolis, Minnesota, that specializes in representing local governments and public power utilities in matters involving telecommunications, cable television, high-speed data communications, Internet access, wireless telecommunications, right-of-way management, pole and conduit attachments, and barriers to the public-sector entry into telecommunications.

Prior to joining Baller Herbst, Mr. Lide worked in-house for Digital Signature Trust Co., a leading provider of Internet security and authentication tools. He has also held policy-related positions for the Federation of American Research Networks (FARNET) and for EDUCAUSE, a national information technology association of higher education institutions.

Mr. Lide is a widely-respected expert on informational privacy. He has co-authored an extensive guidebook on federal privacy law, analyzed the privacy, freedom of information, and open records laws of more than 25 states, and provided counsel on privacy, surveillance, and related issues to numerous public and private clients. He is also a frequent author, speaker, and instructor on these topics.