

ORDINANCES

Teaching an Old Dog New Tricks

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Over the past four months, IMLA has hosted a popular four-part webinar series titled *Web 2.0/Social Networking for Local Governments.* At first glance, many local government attorneys may question how Web 2.0 affects their job. After all, services like Facebook and Twitter only apply to teenagers and their social activities, right? This line of thinking is dangerous, as Web 2.0 technologies and future iterations will certainly create an increasing number of legal issues for public entities. If your community has not already done so, it is certainly worth your locality's time to plan and create a viable government Web 2.0 policy.

What is Web 2.0? As with so much concerning the ever-changing world of online technology, there is no singular definition of Web 2.0. However, at the very least, there are a number of descriptors, including online technology that is interactive, social, dynamic, user-centered, user-created, collaborative, and interoperable. The common example is Facebook.com, which allows an individual (or organization) to create accounts containing personal information, provide updates to that account, receive comments from others regarding the account, and share all that information either with the entire public or a smaller group of his choosing.

There are a number of policy and legal issues that a local government attorney must consider with Web 2.0. As IMLA did with our webinar series, one way to breakdown the countless issues is to consider Web 2.0 as being applicable in three scenarios: (1) Web 2.0 and its relation to the community; (2) personnel issues that arise between the public employer and the employee as a result of the employee using Web 2.0 technology; and (3) potential litigation involving data accessed using Web 2.0 technology.

With regards to the community, there are a number of issues to consider with Web 2.0. One issue is the First Amendment's applicability to comments on a city-sponsored page, such as Facebook. Is this a public forum? The Supreme Court has stated:

> "[t]raditional public fora are those places which by long tradition or by government fiat have been devoted to assembly and debate. Public streets and parks fall into this category. In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[1]

In the absence of any disclaimers by the locality, it's arguable that a strict scrutiny standard would apply in the electronic environment. Fairfax County, Virginia, in response to this possibility, has created a "Facebook Comments Policy,"[2] which states that the purpose of the County's Facebook page is to "present matters of public interest in Fairfax County . . . [and] encourage [the public] to submit [] questions, comments, and concerns, but please note this is a moderated online discussion site and not a public forum."[3] The County expressly "reserves the right to delete submissions that contain vulgar language, personal attacks of any kind, or offensive comments that target or disparage any ethnic, racial, or religious group" and/or are spam, clearly off topic; advocate illegal activity; promote particular services, products, or political organizations; infringe on copyrights or trademarks; and use personally identifiable medical information.[4]

There are obviously other issues related to Web 2.0 and the community. An astute local government attorney should be aware that granting a private institution's request to post information on a religious institution's bake sale, while refusing to post information on a controversial pro-life rally, creates a number of issues, including equal protection concerns. For more on these issues, I'd recommend listening to a recording of the second session of the aforementioned IMLA webinar series.

The second "category" of Web 2.0 issues when talking about local governments are the issues that rise in the employer/employee relationship. What are the public employer's options in restricting and employee's electronic communications, using social media sites to conduct background, or searching electronic modalities to gather information about employee conduct? These issues raise some very serious First and Fourth Amendment concerns. There isn't enough space here to go into these issues in this article, but I will pass on this excellent white paper[5] by Robert Brownstone, who presented for IMLA in the third session of the IMLA webinar series.

Finally, when creating your Web 2.0/social networking policy, consider the potential litigation issues that may arise. For example, how do you "freeze" a website with ever-changing content if your organization decides to subject the site to a litigation hold? What is the scope of your entity's duty to produce data that is hosted on a third party site, like Facebook? In case you haven't heard, Dallas Assistant City Attorney Peter Haskel has created an online discussion forum[6] for attorneys who represent local government units and IT staff to discuss these very issues and presented for IMLA's fourth session in our webinar series on *Web 2.0/Social Networking for Local Governments.*

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Supreme Court

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may recover reasonable attorneys' fees as part of the costs.) If the parties could not reach an agreement, the amount was to be determined by the court, which is what happened. Counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic "lodestar" fee (the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community) of just over $6 million, and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10.5 million in fees awarded them. The Eleventh Circuit declined to interfere with the award and denied rehearing *en banc*, but pointed out the "perverse irony" in the "seven figure, court ordered gratuity," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens."

In a 5-4 decision, the majority of the Supreme Court overturned the award and remanded, on the basis that the district court's enhancement, by 75 percent, of the lodestar as the award of reasonable attorneys' fees under § 1988, was essentially arbitrary. Reviewing the "six important rules" established by prior decisions on the federal fee-shifting statutes —including that an enhancement of a lodestar amount for performance could be awarded in rare and exceptional circumstances, as established by the applicant—the Court held that the district court failed to provide proper justification and a "reasonably specific explanation" for the large enhancement. There was nothing in the record tying the 75% amount to what would be appropriate hourly rates in the relevant market, or to a calculation of the cost to counsel of any extraordinary and unwarranted delay. By relying solely (it seems) on an "impressionistic" comparison of the performance here against "the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review." Echoing the Eleventh Circuit, the Alito opinion noted that allowing a huge enhancement, not supported by any discernible methodology, was particularly unwarranted where the fees awarded were paid, in effect, by state and local taxpayers, as "state and local governments have limited budgets, [and] money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services." **ML**

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The space permitted in this column just skims the surface of a cutting-edge and ever-deepening topic. Your citizenry are looking for information using countless number of modalities, and Web 2.0 and its future iterations will play a key role in information distribution. Web 2.0 will play a key role, also, in personnel and litigation issues, and as a local government attorney, you must be well-versed in this emerging and growing area. You can be confident that IMLA will provide the timely educational opportunities to help guide you through this ever-changing landscape.

Notes

1. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985). (internal citations committed).
2. Fairfax County Facebook Comments Policy, http://www.fairfaxcounty.gov/opa/getfairfax/facebook-comments-policy.htm (last visited April 30, 2010).
3. *Id.*
4. *Id.*
5. Robert Brownstone, *Workplace Privacy Policies*, white paper presented at the National Employment Law Institute (August 28, 2009), available at http://fenwick.com/docstore/publications/EIM/eWorkplace_Policies_Materials_Public_Sector_EEO_8-28-09.pdf.
6. Subscribe to the CityAttorneyTech Group on Yahoo Groups at http://groups.yahoo.com/group/ CityAttorneyTech. **ML**



Correction

Please note that an inadvertent error in the numbering of IMLA's magazine appears in the March/April 2010 issue of the *Municipal Lawyer*. The correct designation should read: **"March/ April 2010, Volume 51, No. 2."** We apologize for any inconvenience and ask that you correct your records.