INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Electronic Social Media and Local Government:

New Technologies, New Issues

"A Patient Waiter Is No Loser"

Presented by:
Marshall Seeder
Eric J. Yehl
Raysa & Zimmermann, LLC
22 S. Washington Avenue
Park Ridge, IL 60068
Telephone: 847.268.8600
Email: mseeder@rzllc.com

©2011 International Municipal Lawyers Association.

This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2011 Annual Conference, held September 11-14, 2011 in Chicago, IL. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

Introduction

If the quotation on the title page of this paper sounds a bit old-fashioned and stilted, there is good reason for that to be so. The quote is more than 173 years old and was the first message publicly sent and received within a New Jersey warehouse over a then new social media utility named by its inventors, Samuel F.B. Morse and Alfred Vial, the "electro-magnetic telegraph." It would be another six years – in 1844 – when in a far more well-known telegraph line transmission, the question "what hath God wrought?" would be sent from the basement of the United States Capitol Building to a railroad station in Baltimore, Maryland about 40 miles away.

But consider a similar six years in the development of another social media utility, an Internet website called Facebook, famously conceived in a Harvard University dormitory room by four college friends in February, 2004. Six years later, in February, 2010, Facebook announced it had reached 400 million users around the world. By the end of 2010, another 100 million would be added to the Facebook community.[1] And, of course, the intervening 170 years or so have seen many other developments that all perform the same function – the electronic transmission of information in the public or social arena. Nor of course, is Facebook unique within today's explosion of communication methods that utilize the revolutionary platform created by the Internet and the world wide

[1] As of the time this paper was being written, Facebook has 750 million users, spending 700 billion minutes per month on Facebook. See http://www.facebook.com/press/info.php?statistics.

web. Business persons, professionals and even neighbors, can "gather" to meet each other, market to each other and learn from each other via LinkedIn or Plaxo, photographs and information can be organized and shared via Flickr or Picasa or full video can be watched on a computer by immediate friends and family, or by millions, on You Tube. And finally, communications limited to no more than 140 characters can be instantly "tweeted" over the Internet to a handful or if you are the entertainer Lady Gaga, to more than 12 million "followers" or other Internet content can be embedded into the "tweet." The list could of course go on and on with new applications of Internet technology being created daily.

Whatever the application or whatever the technology, while the purposes have remained constant – the communication of information via technology – the interconnection and public nature of the communications obviously have dramatically changed since Mr. Vail and Mr. Morse's exchange in 1838. It is precisely those changes that have significant and permanent impacts on the way local government interacts with its citizens and engages in the public's business. This paper will look at some of the issues raised by the new technologies of social media. This paper will address some of the important developments in social media law that have special importance to the units of government we represent whether or not they arose in litigation involving local government.

Social Media Policies and the Question of Defamation

Very few individuals would argue against the idea that social media is a useful tool for expressing oneself to a friend, enemy, the entire world or your unit

of local government. The argument can become heated when the stakes are high or feelings are intense as they often are in matters of local concern, and often leaves us trying to determine whether an individual's expression falls within the limits of protected free speech under the First Amendment – particularly when an individual can express themselves on social media sites by way of a widely distributed tweet proclaiming "The Mayor is crook – everyone knows it!" or the posting of a picture on Facebook of oneself smoking marijuana while wearing a t-shirt with an employer's logo on it.

This is a highly volatile area of law and hardly a week goes by without a court decision attempting to set out the "rules of the road" that govern the interplay between First Amendment protections of robust speech (especially in the public arena), the rights of individuals to be free of reputational injury or invasion of privacy, the rights of employers to manage their workplace and the rights of employees to appropriate free expression.

In 2010, a New York court followed established United States Supreme Court precedent in determining a former employee's right to criticize his former employer on his website. Cambridge Who's Who Publishing, Inc. v. Sethi, Index No. 009175/10 (N.Y.S.C. Dec. 14, 2010). The former employee had created a website specifically to accuse his former employer of covering up the loss of confidential and personal information of its customers. The company sought to enjoin the former employee from making any statements about the company that might interfere with its good will, including maintaining any blog or website concerning the employee's former employment.

In its analysis of First Amendment law, the New York court cited to FEC v Wisconsin Right to Life, 551 U.S. 449, 469 (2007), in stating that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matter of public concern . . ." Id. The court went on to state that the "content of the communication, rather than 'amorphous considerations of intent and effect,' is the focus in a court's determination of whether the particular statements are a matter of public concern. Id. quoting FEC, 551 U.S. at 469. And most telling, the New York court again quoted the United States Supreme Court in stating that the "court must 'give the benefit of any doubt to protecting rather than stifling speech.'" Id.

The New York court went on to conclude that the former employee's website was protected speech under the First Amendment. The court reasoned that the former employee's statements were a matter of public concern because the claimed confidential data loss, including credit card information, implicated the economic interests of a large number of people. Additionally, the former employee's statements were protected speech "even though its intent and effect may have been to disparage [the company's] business, retaliate for [the employee's] discharge, or shift responsibility for the data loss." Id.

When used by units of government or their elected or appointed officials, social media platforms can provide essential and timely information about local events, upcoming meetings, tax payment deadlines or general community news. However, these same platforms can result in difficult questions of defamation for a municipality that, as a government entity subject to the First Amendment, is

limited in its ability to delete or remove speech. One problematic situation that can arise is when another user posts a defamatory comment on the municipality's own social media page. The question that follows is whether or not that municipality can be held liable for defamation based on the other user's defamatory comment. If it is unconstitutional to censor a user's posting but the municipality can be held liable for another user's defamatory comments, creating a social media page would be more trouble than it is worth.

Relief may well be available via the federal Communications Decency Act ("CDA") which deals with this exact type of hypothetical. Based on Section 230 of the CDA, a municipality would likely not be liable for any defamatory comments posted on its social media pages by other users. By creating the municipality's social media profile or webpage, the municipality would be considered "a user of an interactive computer service," as defined by the CDA. See 47 U.S.C.A. 230.

As such a user, the CDA prohibits the municipality from being treated as the publisher or speaker of any information provided by another information content provider (e.g. another Facebook or Twitter user). Id. Since the municipality would not be considered the publisher or speaker of the defamatory comment, it would not be held liable for another user posting a defamatory comment on the municipality's social media page. Recently, this immunity was extended to a user who forwarded a defamatory email because the user was not the original creator of the email. See Mitan v. A. Neumann and Associates, LLC, No. 08-6154, 2010 U.S. Dist. LEXIS 121568 (D.N.J. 2010).

Since Federal law prevents a user from being held liable for another user's defamatory comments, a municipality does not need to monitor for defamatory comments or remove them from its social media page, at least from the standpoint of ultimate legal liability. If the municipality or the defamed individual feels a defamatory comment has been posted on a municipality's page, the municipality or the defamed individual can attempt to have the comment removed by contacting the user who posted the comment or the social media site. Additionally, the municipality's terms of service should make it clear that defamatory content or other types of offensive content such as obscene or discriminatory content will be considered a violation of the terms of service and could lead to loss of the right to post on a website.

Illinois has extended the protection of speech beyond the First Amendment with the 2007 enactment of the Illinois's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. See 735 ILCS 110/1, *et seq*. The Illinois anti-SLAPP statute provides that a court shall grant a motion and dismiss any judicial claim "on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government" unless the plaintiff can establish by clear and convincing evidence that the anti-SLAPP statute does not apply to the defendant's act. 735 ILCS 110/15; 735 ILCS 110/20(c).

The purpose behind an anti-SLAPP statute is to prevent the chilling affect defamation lawsuits can have in diminishing "citizen participation in government,

voluntary public service, and the exercise of these important constitutional rights." 735 ILCS 110/5. This purpose is furthered by the anti-SLAPP statute's award of attorneys' fees to a moving party who prevails in a motion under the statute. 735 ILCS 110/25.

The Illinois Appellate Court sitting in the Second District recently decided its first case involving the Illinois anti-SLAPP in Sandholm v. Kuecker, 405 Ill. App. 3d 835 (2d Dist. 2010). The plaintiff in Sandholm was a public high school basketball coach who filed defamation, false light and invasion of privacy claims against a number of defendants. The defendants in Sandholm had organized a group and created a website for the purpose of getting the plaintiff fired from his position as basketball coach. Moreover, the Sandholm defendants had engaged in conduct ranging from speaking out at public school board meetings to posting comments on their website stating that the plaintiff was a "psyco nut" who badgered, humiliated and bullied players and was excessively abusive. The plaintiff was eventually fired from his position as high school basketball coach.

The trial court dismissed all of plaintiff's claims against the defendant's based on the Illinois anti-SLAPP statute and the Sandholm court affirmed the ruling. The Sandholm court began by finding that the anti-SLAPP statute was constitutional under both the United States and Illinois Constitutions. The court went on to determine that plaintiff's claims were properly dismissed pursuant to the anti-SLAPP statute because all of defendants' actions were in furtherance of their right to participate in government.

In specifically addressing the comments defendants' posted to a website, the Sandholm court reasoned that the defendants were immune from liability for posting those comments because the purpose behind posting the comments was to procure government action, which in this case was to get the public school board to replace the basketball coach. Referring to the Illinois anti-SLAPP statute, the Sandholm court stated that "in protecting the rights of citizens to participate in government, the legislature provided a qualified privilege to speak *even with actual malice*. 405 Ill. App. 3d at 855 (emphasis added).

Under the United States Constitution and Illinois law, individuals are heavily protected from civil liability for statements made online so long as those statements involve a matter of public concern or the individual's purpose for making those statements is in furtherance of procuring government action. As the Sandholm court noted, statutes such as Illinois's anti-SLAPP statute are so broad that they are "changing the landscape of defamation law." Id.

Social Media and the Illusion of Privacy

A majority of social media users have come to understand, and even embrace, the lack of privacy involved with the use of social media. Over the years, social media sites such as Facebook have begun implementing more powerful privacy controls that allow users to determine their own level of privacy. While these overt controls leave users with a sense of power over the protection of their personal information, the hidden terms and conditions of these social media sites would leave many of those same users feeling exposed. Should a

municipality decide to create a social media platform it is essential that it fully understand the privacy functions of the site. Failure to do so can results in embarrassment or worse if citizen users of the site find their privacy inadvertently compromised.

When a user signs up for a social media site, that user agrees to the site's terms and conditions. Since most users simply check the "I agree to the terms and conditions" box when they sign up, most would be surprised at the various types of terms to which they have agreed. For example, Facebook's terms and conditions include terms wherein the user agrees to grant Facebook "a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook," and another term where the user agrees that if "anyone brings a claim against [Facebook] related to your actions, content or information on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim."[2]

Relating to privacy, all Facebook users also agree that, regardless of the individual's privacy settings, when a user uses an application "your content and information is shared with the application."[3] This sharing of information includes

[2] See http://www.facebook.com/terms.php.

[3] Id.

"your and your friends' names, profile pictures, gender, user IDs, connections, and any content shared using the Everyone privacy setting".[4]

This aspect of information sharing on social media sites is unknown to most users. It is through the use of these applications where companies can obtain a slew of information on each individual user based on those terms and conditions to which the user has previously agreed. That information can in turn be used to direct specific advertisements to each individual user. Considering Facebook has over 750 million users, and Facebook users install 20 million applications every day,[5] it may not be outrageous that some value Facebook to be worth $50 billion.[6]

Privacy settings also mean very little when a court of law is involved. In the criminal sphere, social media sites routinely turn over user information to law enforcement officials who can request the information pursuant to the federal Stored Communications Act. See 18 U.S.C. 2701, *et seq*. When faced with a court order, subpoena or warrant, the social media site may well find itself in the position of turning over publicly available information such as a user's name or picture as well as private messages or privately stored information that would otherwise have been private under the user's privacy settings. Often times

---

[4] See http://www.facebook.com/policy.php.

[5] See http://www.facebook.com/press/info.php?statistics.

[6] Foreman, Tom. How much is Facebook really worth?. March 8, 2011. http://articles.cnn.com/2011-03-08/tech/facebook.overvalued_1_mark-zuckerberg-facebook-worldwide-users?_s=PM:TECH.

though, the site will inform the user that the information is being sought so that the individual can contest the effort.

Courts in the civil sphere have also been ordering parties to turn over otherwise private information. This is particularly true for a party who raises an issue under which relevant information could be obtained from that party's social media page. For example, a court in New York recently ordered a plaintiff to turn over private information on her social media pages because it may have been relevant to her claim for damages based on loss of enjoyment of life. In Romano v Steelcase Inc., 2010 NY Slip Op 20388 (N.Y. Sup. Ct. 2010), the court stated that "it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence." The court went on to state that to deny the defendant the opportunity to view the plaintiff's private material would be to "condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings." Id.

To be fair, social media sites also fight on behalf of its users. For example, Facebook filed suit against a marketing company, Maxbounty, alleging violations of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"). The CAN-SPAM Act regulates against deceitful marketing sent through electronic mail messages. Facebook alleged in its complaint that Maxbounty created fake Facebook pages with links on its Facebook "wall" that would unsuspectingly direct the user to a third party

website. The case is still pending in the U.S. District Court for the Northern District of California.

As is common with all Internet sites, another issue municipalities must be aware of is third party access to the site and misuse of available information once access has been achieved. Even if the municipality legally has access to citizens' personal information or has legal authority to access databases containing personal information, the municipality must be cautious in extending access to that information to third parties.

In Snap-On Bus. Solutions Inc. v. O'Neil & Assocs., 708 F. Supp. 2d 669 (N.D. Ohio 2010), an information technology consulting firm ("IT Firm") sued a former client ("Client") alleging that the Client provided a third party replacement IT consultant ("Third Party") access to the IT Firm's database in violation of the Consumer Fraud and Abuse Act ("CFAA"), among other state and federal laws. The Client had employed the IT Firm to construct information databases using the Client's customer information. Terminating the services of the IT Firm and engaging the Third Party to construct and maintain similar databases, the client requested the IT Firm provide the Third Party with all of the information provided to the IT Firm to construct the databases. The terminated IT Firm refused, claiming the information in database form was the property of the IT firm.

After the IT Firm refused to surrender the information, the Client nonetheless provided the Third Party with usernames and passwords to access the IT Firm's databases and the Third Party proceeded to use a "data scraping"

program to extract the information from the databases. A data scraping program is an automated simulation that works interactively on a website to point, click and copy information from that webpage. The Third Party's data scraping program crashed the IT Firm's servers, which alerted the IT Firm to the presence of the Third Party's data scraping program. The IT Firm then filed suit against both the former Client and the Third Party under the CFAA.

The IT Firm's allegations under the CFAA stemmed from a provision of the CFAA that makes anyone liable who "intentionally access a protected computer without authorization," and either causes damage or obtains information from the protected computer. 18 U.S.C. § 1030 (a)(5); 18 U.S.C. § 1030 (a)(2)(C). On a motion for summary judgment by the Client and Third Party, the Snap-On court's analysis focused on whether the Third Party accessed the IT Firm's databases without authorization.

The Client and Third Party argued that the Client had proper authorization to enter into the databases and, therefore, could authorize the Third Party to enter the databases on the Client's behalf and, further, that it could grant the Third Party authorization because the Third Party was merely retrieving information that belonged to the Client. The IT Firm countered that its contractual relationship with the Client prohibited the Client from giving a Third Party authorization to log into the databases because access codes were only suppose to be given to select employees of the Client.

Ultimately, the court denied summary judgment based on the genuine issue of material fact that existed regarding whether or not the Client could properly authorize the Third Party to access the IT Firm's databases. As of this writing, it is known that a jury verdict was returned in favor of the IT Firm, but unfortunately, it is unknown under what counts the jury found against the Client or Third Party. See Snap-On Bus. Solutions, Inc. v. O'Neil & Assocs., 2010 U.S. Dist. LEXIS 81502 (N.D. Ohio July 2, 2010).

The Snap On case provides important guidance to municipalities to be cautious both in its handling of personal information and in the agreements it enters into with information technology and internet consultants. Municipalities collect a wide range of personal information from its citizens and that personal information is highly regulated by Illinois and federal law. The Illinois Identity Protection Act,[7] the federal Driver Privacy Protection Act[8] and the Illinois Freedom of Information Act[9] are just a very small sampling of the vast number of laws regulating the collection, storage and disclosure of individual's personal information.

Thus, municipalities should already be very careful in determining its own level of authority in collecting, storing and disclosing information it collects first hand. Adding the CFAA into the mix, municipalities should also be vigilant in

[7] 5 ILCS 179/1.

[8] 18 USCA 2722.

[9] 5 ILCS 140/1.

both confirming it has authority to collect that same information from third parties and also how it allows third party access to municipally-stored information. As the Snap On case demonstrates, providing access to a third party, or obtaining access from a third party, to otherwise confidential or proprietary information has the potential to result in liability under the CFAA.

Self-Regulation of Municipal Social Media Pages and the First Amendment

There is currently no precedent in the area of online censorship by a municipality on a municipal created social media page, such as a Facebook page, Twitter account or government created blog. However, as the courts have begun deciding First Amendment cases involving the Internet and based their decisions within the framework of established First Amendment jurisprudence, these decisions provide a framework with which to predict how the court might determine what First Amendment rights an individual has when posting on a municipality's social media page.

With a municipality's social media page, there are two issues that arise in determining a citizen's First Amendment rights in relation to that page: (1) the type of forum created by the municipality's social media page, and (2) the permissible restrictions on content posted to that page.

As described below, a municipality's social media page would be considered a public forum for purposes of the First Amendment. In turn, a municipality would be limited by the First Amendment in what postings to its social media page it could delete or otherwise remove. Based on these

limitations, it is recommended that a municipality either bans all users from posting on its page or it does not restrict or remove any comments from other users. Depending on the social media site, the former may not be possible.

Also depending on the social media site, some restrictions may already apply to what content may or may not be posted according to the site's term of use. For example, Facebook already restricts comments, postings, and the like that: bully, intimidate, or harass any user; are hateful, threatening, or pornographic; incite violence; contain nudity or graphic or gratuitous violence; or are anything unlawful, misleading, malicious, or discriminatory.[10]

Thus, it may be in a municipality's best interest not to restrict any comments on its Facebook page, but instead contact Facebook if the municipality believes the contact violates Facebook's terms of use. This would create a situation where Facebook would be restricting the comments and postings on the municipality's page, giving the municipality the greatest protection against First Amendment lawsuits. [11]

Social Media Sites Would Be Considered Public Forums

[10] See http://www.facebook.com/terms.php.

[11] At least one municipality apparently found the challenges created by maintaining a Facebook page too daunting and voted to abandon its page entirely. See "California Town Abandons Facebook Page Amid Legal Concerns," http://www.abajournal.com/news/article/california_town_abandons_facebook_page_amid_legal_concerns.

The first step in a First Amendment analysis is to determine the type of forum created by the municipality's page. The forum could range from a public forum, where a municipality cannot restrict speech without a compelling reason, to a non-public forum, where a municipality can restrict speech so long as it is reasonable and viewpoint neutral. Consequently, the type of restrictions that can be implemented in relation to a citizen posting statements on the municipality's social media page depends on the determined forum.

Public forums are places which "by long tradition or by government fiat have been devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In addition to traditional public forum or designated public forums, where a public forum is 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. *Id*. at 45-6, n. 7; *See* Madison Joint School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (where open school board meetings were considered a public forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities).

Specifically in relation to social media sites, a municipality's page or profile might well be considered a public forum under the First Amendment. Social media sites such as Facebook and Twitter were created specifically for speech-related activities and the users of these sites create profiles for the core purpose of engaging in speech. A municipality would presumably be creating a

Facebook page or Twitter account for the purpose of communicating with its community members and, again presumably, would like to receive communication from its community members through various polls and discussion topics.

Municipal websites, such as a municipality's main www.municipality.com website, are typically created to provide information and not to provide a forum for speech and debate. However, a court would consider a municipality's Facebook profile or Twitter account as pages created for the purpose of encouraging communication with its citizens. Facebook and Twitter were created so that individuals could assemble together in one place and communicate. By creating a Facebook profile or Twitter account, the municipality is designating those webpages as channels of communication for use by all other Facebook and Twitter users.

For these reasons, a court would likely find that a municipality's social media page is a public forum for purposes of the First Amendment and would apply all the privileges conferred under First Amendment law.

Restrictions on Content

Once the forum is established, it must be determined which restrictions are constitutional and which are unconstitutional. A municipality has options on how to restrict speech. For example, a content-neutral restriction could mean that no user is allowed to post to the page, whereas a content-based restriction could mean that no user is allowed to post obscene content or content that may cause

immediate violence. It is important to note that these "restrictions" would come in the form of the municipality deleting or otherwise removing a user's comment from its page.

A municipality is essentially presented with three content restriction options from which to choose: (1) prohibit all users from posting comments, (2) create a specific content-based restriction on obscene and "true threats" speech, or (3) permit all user comments. As a designated public forum, the municipality has the option to place a content-neutral restriction on its social media site. That means that a municipality can restrict all users from posting on its page, regardless of the content that user wishes to post. A municipality also has the option to place a narrowly drawn content-based restriction regarding its social media page. That restriction would restrict users from posting sexually obscene comments on its social media page. Finally, a municipality has the option to permit all comments on its page.

The Constitution forbids a municipality from excluding speech from a forum that is generally open to the public even if the municipality was not required to create the forum in the first place. Widmar v. Vincent, 454 U.S. 263 (1981). Although a municipality is not required to indefinitely retain the open character of the forum, as long as it does so it is bound by the same standards as apply in a traditional public forum; a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 269-270.

Content-Neutral Restrictions

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech. Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994). Speech-regulating rules are content-neutral for purposes of First Amendment scrutiny when the rule is not related to the subject or topic of the speech. Bartnicki v. Vopper, 531 U.S. 990 (2000). Content-neutral regulations which address the place of speech are constitutional as long as they: (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative avenues of communication. Madsen, 512 U.S. at 764.

For example, in Sussman v. Crawford, 548 F.3d 195 (2d Cir. 2008), West Point imposed a blanket ban on demonstrations on its grounds. A First Amendment claim was brought by a political organization and three individuals who sought to demonstrate inside the gates of West Point during a graduation ceremony. The court found that the demonstrators' First Amendment rights had not been violated given that no protestors had been allowed to protest there since the speech policy's enactment. The content-neutral blanket ban was a valid First Amendment restriction on speech.

Also, in Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006), a municipality passed an ordinance prohibiting against airborne signs. The court found that the ordinance was

viewpoint-neutral, for the purpose of First Amendment. The court reasoned that it was content-neutral and did not violate the First Amendment since the ordinance did not say anything about the content of the signs or views expressed.

Hence, if a municipality's policy was to completely ban users from posting on a municipality's social media page, a court would likely follow the reasoning above and decide that the restriction was content-neutral and did not violate the First Amendment.

Content-Based Restrictions

It is presumptively unconstitutional for a municipality to place burdens on an individual's speech because of the content of that speech. *See* Citizens United v. Federal Election Com'n, 130 S. Ct. 876 (2010). When the government opens a forum for discussion, it may not impose restrictions that discriminate among viewpoints. *See* Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995); Grossbaum v. Indianapolis-Marion County Bldg. Authority, 100 F.3d 1287 (7th Cir. 1996).

The First Amendment's hostility to content-based regulation extends not only to restrictions on a particular viewpoint but also to a prohibition of public discussion about an entire topic, inasmuch as allowing a government the choice of permissible subjects for public debate would be to allow that government control speech. Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530 (1980). Where a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling

government interest, and it must be the least restrictive means available to promote that interest. U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000). Where the designed benefit of a content-based speech restriction is to shield the sensibilities of the listeners, the general rule is that the right of expression prevails. Id.

To be valid, a restriction on the content of speech must be narrowly tailored to achieve a compelling government interest. A municipality has a compelling interest in the following categories of speech which are deemed "unprotected" speech under the First Amendment:

1. Inciting Imminent Lawless Action: Speech can be burdened if it creates a clear and present danger of imminent lawless action. It must be shown that imminent illegal conduct is likely and that the speaker intended to cause it.

2. Fighting Words: True threats are not protected by the First Amendment. Speech also can be burdened if it constitutes fighting words, which are personally abusive words that are likely to incite immediate physical retaliation in an average person. Words that are merely annoying are not sufficient. Furthermore, restrictions cannot punish only certain viewpoints, such as restrictions on speech that insults on the basis of race, religion, or gender.

3. Obscenity: Obscene speech is not protected. Speech is obscene if it describes or depicts sexual conduct that appeals to the prurient interest in

sex, is patently offensive, and lacks serious literary, artistic, political or scientific value.

See U.S. v. Williams, 128 S. Ct. 1830 (2008).

A municipality could adopt a policy wherein all postings on its social media sites that fall into one of the three categories above would be removed. The municipality must ensure that it does not overstep its authority, however, by removing a posting that does not technically fall into one of the three categories above. For example, the unprotected speech categories of inciting imminent lawless action and fighting words both require the danger of that speech to be "imminent" or "immediate." While a Twitter posting could be sent instantaneously to large numbers of people, it may still be difficult to argue that a posting could present imminent or immediate danger.

In Kaplan v. California, 413 U.S. 115 (1973), California had a law restricting the distribution of obscene material. A proprietor of an "adult" bookstore was convicted of violating the California obscenity statute by selling a plain-covered unillustrated book containing repetitively descriptive material of an explicitly sexual nature. The Supreme Court held that obscene material in written form is not entitled to First Amendment protection merely because it has no pictorial content. A municipality may place restriction on such speech to avoid the deleterious consequences it can reasonably conclude result from the continuing circulation of obscene literature.

If a municipality adopted a policy wherein all obscene speech or speech that constituted true threats would be removed from the municipality's social media pages, a court would likely decide that while the restriction was content-based, it was valid under the First Amendment because it restricted only unprotected speech.

Social Media and Potential Sunshine Law Violations

The Open Meetings Act

The Illinois Open Meetings Act ("OMA") defines a "meeting" to include "any gathering, whether in person or by *video or audio conference*, telephone call, *electronic means* (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business ..." 5 ILCS 120/1.02.

There is little argument that this definition of "meeting" encompasses social media sites as a possible gathering place, in as much as all social media sites would be constitute the electronic means portion of the definition. Thus, if a majority of a quorum discusses public business on a social media site without previously posting a public notice or opening the meeting up to the public, such action may constitute an OMA violation.

For example, suppose that one member of a five member public body updates his Facebook status to, or tweets, the following statement: "Reviewing

the Main Street development project at next mtg. Something fishy here." Assume further that at least a quorum of the body is a "friend" of that Facebook page or "follows" that Twitter account. And if other members of that body "like" that post or "re-tweet" the Twitter entry? Has a "meeting" violation of the OMA occurred?

The central issue is determining whether the Attorney General said that a meeting need not be prearranged, occur at an official meeting place, or have a quorum present for the OMA to apply to the gathering. Still, the OMA does not apply to every gathering of two or more members of a public body. The Attorney General said that the circumstances in the particular case must be analyzed to decide whether a gathering is a meeting within the scope of the Act. Not every encounter between members of a public body is subject to the OMA. In some cases, members could meet socially and discuss business and still not run afoul of the Act. According to the Attorney General, the facts of the particular case will determine whether the meeting is a gathering.

Social Media Policies and the National Labor Relations Act

Employers have long worried about their public reputations being harmed by the actions of their employees. Employee policy manuals commonly outline the type of behavior an employee can engage in out of the workplace that could lead to disciplinary action in the workplace, such as being convicted of a felony or violating alcohol and drug policies. With employers becoming more vigilant of their employees' actions and comments by way of social media sites – many of

which are being employed by units of government – employers have attempted to extend their disciplinary policy to include "inappropriate behavior" displayed on such sites.

For municipalities that have unionized employees, the National Labor Relations Board ("NLRB") is monitoring the impact of restrictive social media policies on employee rights to determine if employers are violating the National Labor Relations Act ("NLRA"). The NLRB has gone so far as to take under consideration a complaint against a company alleging, not that the company has taken unlawful disciplinary action, but simply that the company has implemented an overly broad social media policy. The NLRB has yet to issue any findings.

The NLRB has very recently begun carving out a standard for employer's who take disciplinary action against employees based on those social media policies. According to two recent decisions by the NLRB, the line is being drawn between actions that relate to the terms and conditions of employment and actions that do not. The NLRB has shown it will issue a complaint under the NLRA if the employee is disciplined for actions relating the former, while it will not issue a complaint if the employee is disciplined for actions relating to the latter.

For example, the NLRB issued an Advice Memorandum on April 21, 2011, regarding an employee who was terminated from the Arizona Daily Star newspaper for "inappropriate and offensive" tweets. The tweets included the followings:

> The Arizona Daily Star's copy editors are the most witty and creative people in the world. Or at least they think they are.
>
> You stay homicidal, Tucson. See Star Net for the bloody deets.
>
> WHAT?!?!? No overnight homicide? WTF? You're slacking Tucson.

After finding that the tweets "did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment," the NLRB declined to issue a complaint against the Arizona Daily Star for terminating the employee.

On the other end of the spectrum, the NLRB has issued a complaint against a company for its termination of five employees who criticized their working conditions on Facebook. Since the employees' actions related to the terms and conditions of their employment, the NLRB concluded that the company's termination of the employees violated the NLRA. The case has yet to reach a conclusion.