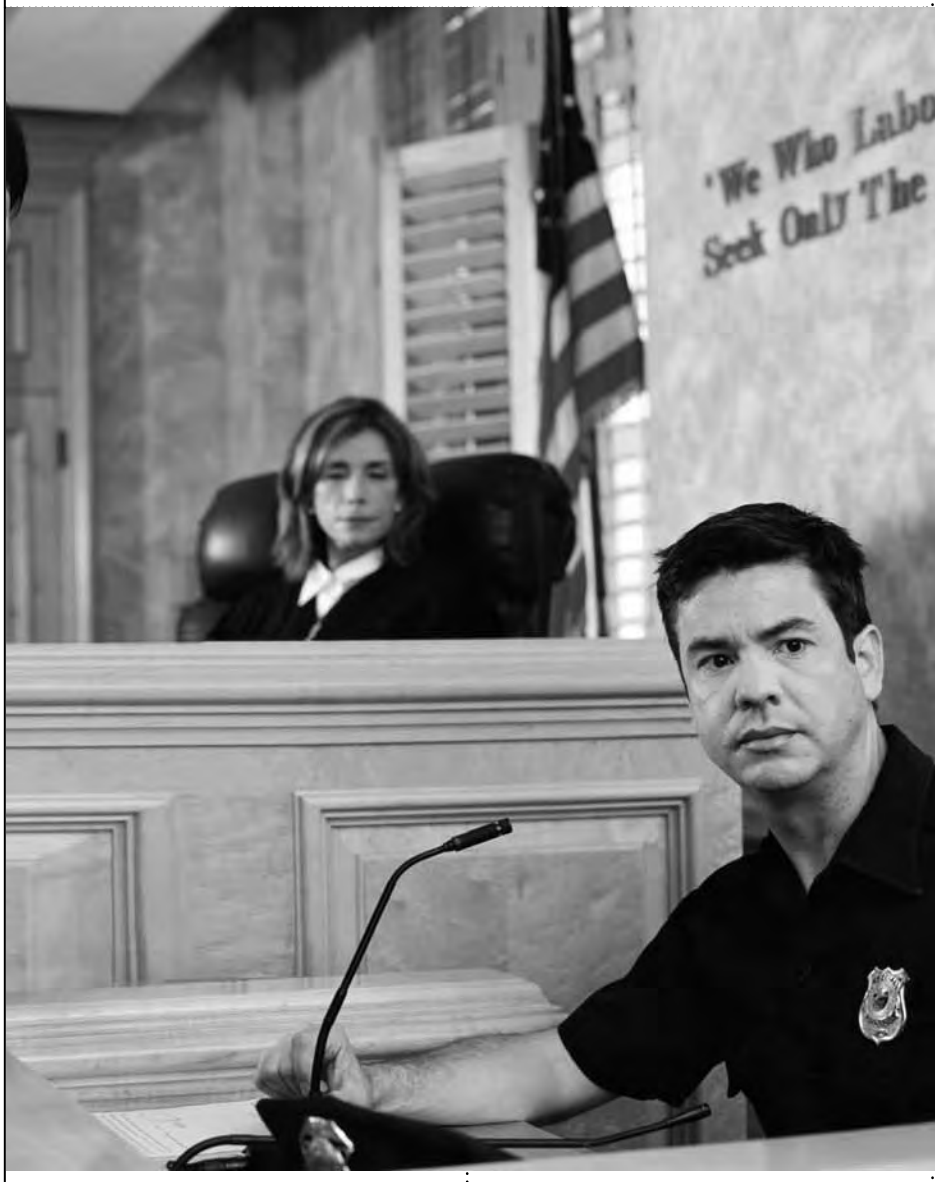
The Prospects, Pitfalls, and Pains of Social Media in the Context of Public Safety

by Ken Wallentine



Law enforcement investigators, public information officers, and recruiters have raced to embrace social media web sites as potential sources of evidence, and as tools for effective public communications and for attracting new recruits. At the same time, some agencies have found themselves in the crosshairs of devastating news stories about improperly released private information, with embarrassing photographs posted on web sites and the resulting potential liability for privacy violations. This article provides municipal counsel with an overview of the social media web world and public safety, and provides some pointers on keeping your clients safe in the social media sphere.

Just what is "social media?" The best-known social media includes social networking web sites such as MySpace, Facebook, LinkedIn, and others. Think more broadly, though—consider the media that you traditionally use for news and communication. You might have started your day with a cup of coffee and the morning newspaper. Perhaps the television or a radio was playing in the background. When you get home from work tonight, your mail will be waiting, including the ubiquitous junk mail. This is traditional media that, once delivered, can't be changed, isn't usually aggregated, is hard to conveniently archive, and spurns feedback beyond the occasional letter to the editor. It is also limited — for example, television news delivers only 16 or 17 minutes of actual news in a half-hour period, and the morning paper contains a finite number of pages. Its content is designed to inform, persuade, and sell.

In contrast, social media is virtually unlimited. Social media includes media forms primarily intended for web-based, interactive social contact. YouTube posts hundreds of hours of video in a single 24-hour period. A blogger who changes his or her opinion, or wants to incorporate a new idea, can easily edit what appears on the screen, even after the initial publication. Most forms of social media can be syndicated and distributed instantly to an unlimited number of readers or recipients. Cutting and pasting social media does not involve scissors and glue! Though social media may have been created for socializing and communicating, it has also assumed a commercial character, with pop-up and side-bar advertising.

Social media differs from traditional media in other ways. Social media easily reaches a global audience. Anyone with a laptop, a web cam and an Internet connection can become a broadcast journalist. The concept of recency for this magazine differs in light years from recency in social media. Social media builds communities. Whoever heard of a pen-and-ink user forum for the *Los Angeles Times*? On the other hand, hundreds of thousands of virtual communities exist in social media.

Law Enforcement Uses of Social Media

One of the most common public safety social media applications is for recruiting. Search YouTube for "police recruiting" and you'll find hours of recruiting presentations. Do these efforts reach only the "computer couch potatoes" that won't likely be hired, do they simply add to the interest that a potential good recruit already had prior to looking online, or do they truly reach a candidate pool that would not otherwise be available to the agency? Time will tell.

Public safety agencies use social media to connect with constituents. The Boston Police Department uses Twitter as a digital "wanted poster," to inform the public where the bomb squad is heading, to provide crime statistics in real time, and, generally, to let the people of Boston know what is happening on the streets.[1] Every tweet reader becomes another potential citizen informant, and the communications further good public relations, too. The Boston Police Twitter response to a man who wanted to know whether an officer was bitten by a human or a zombie earned high praise for both its humor and open communication.[2]

Hundreds of agencies use Facebook to provide a more human face for the agency. The Houston Police Department's Facebook page features video safety tips, requests for crime-solving help, lighthearted contests for citizens, and community outreach messages.[3] These pages become much more impersonal when two-way communication tools, such as comment pages, are disabled, as one of the great benefits of social media is performance and perception feedback from the community. However, an agency launching a social media tool must recognize that someone has to work the tool or it will quickly become irrelevant. Before an agency launches an online presence, it is necessary to ask, "Why are we doing this? What do we want to achieve?" It is also vital to prepare for the inevitable issue of censorship: "What will we do when there are negative or inflammatory postings on our Facebook wall?"

Some agencies reach out through all of the popular social media tools. One leading example is the Salt Lake City Police Department, which uses Twitter, Facebook, MySpace, Flickr photosharing, YouTube and CrimeReports.com.[4] A stand-off with an armed prison escapee, believed to be holding a hostage at gunpoint, captured the interest of hundreds of thousands of Salt Lake City residents, particularly when an important traffic route was blocked. Citizens could follow the progress of the negotiations and learn instantly when the traffic artery was reopened by following the police department on Twitter. Twitter is the Internet equivalent of an opt-in digital police scanner that provides real-time information about crime and traffic conditions. The Salt Lake City Police Chief, Chris Burbank, says that the Department turned to social media to promote transparency in a diverse metropolitan community, noting that "online services increase department transparency and make it easier for people to stay informed and participate in partnership with the police."[5]

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Press releases that appear in the following day's newspaper or on the eleven o'clock news can't begin to match the transparency and timeliness of a police department's social media posts. When the traditional print or broadcast media report a story with an unfair slant or bias (or, worse still, get the story plain wrong), social media allows for a quick and detailed response. A police agency can post its own commentary or video footage. A department can also "cover" its own story. For example, the Toronto, Canada, police department countered media stories about mistreatment of gays by posting its own YouTube video of the Toronto police chief speaking at a Pride gathering.[6] Police officers reinforced the social media campaign at the Pride gathering by handing out thousands of condoms labeled with the "Crime Stoppers" tipster web site and bearing the legend, "Your tip is safe with us."[7]

Social media is also proving to be a fruitful investigative source. After riots and vandalism in Los Angeles in June, the Los Angeles Police Department used YouTube videos, Facebook pages, and Twitter tweets to identify the looters. Police have already made arrests and expect more arrests based on the identification of suspects through the use of social media.[8] Social media sites can be both the source of the evidence of a crime, and the instrumentality of the crime. A 19-year-old Florida man found himself locked up after he posted nude photos of his 15-year-old girlfriend on his MySpace page. Though the girl willingly posed in the nude, the posting constituted a child pornography crime.[9] Even private citizens are using social media to fight crime. When a couple's home in Atlanta, Georgia was burglarized, they posted a surveillance video on YouTube. A tipster identified the burglars, enabling the police to make arrests.[10]

Social Media and Background Checks

Today's public safety applicants are savvy in the application of social media tools. Rare, indeed, will be the candidate who does not have a Facebook or MySpace page, or photos posted on Photobucket, Slickr, SmugMug, or Picasa. An applicant who has posed nude or semi-nude in a

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questionable environment isn't likely to abandon that practice once he or she dons a badge for a police agency, and an applicant who has posted photos of a drinking party where the participants appear to be juveniles won't likely be changing party friends completely, either.

City officials in Bozeman, Montana drew fire last year after requiring job applicants and city employees to surrender all social media accounts, user names, and passwords to the City.[11] Critics observed that third-party privacy rights were impacted by the City's broad policy. Following international media attention (most of it, not surprisingly, in the social media realm), the City quietly discontinued the practice.[12] Though the Bozeman policy was clearly aimed toward improving the City's workforce, the broad brush approach proved unworkable.

Nonetheless, public safety agencies should not abandon social media as a potentially fertile field for background investigations. The right approach at the right time may yield results without creating liability: one that strikes a balance between the information that may be gleaned in an extensive search of paid and free Internet sources, and concerns over the accuracy and completeness of that information and the associated privacy concerns. While it is tempting to spend a great deal of time surfing the Internet for a job applicant's past history, it should not be done at the expense of proven background investigation techniques.

An employer breaching social media privacy controls without consent may be liable for a privacy violation.[13] Checking social networking and other Internet sites may implicate federal and state statutes.[14] For example, the Fair Credit Reporting Act (FCRA) provides job applicants with the right to know the contents of a background check in the case of an adverse hiring decision.[15] However, the FCRA does not apply if the background investigation is done by the hiring agency; it applies only if the agency contracts for background investigation services. Consider delaying any scrutiny of social media web sites until after a conditional offer. Such sites may reveal the applicant's sexual orientation, perceived or actual disability, ethnicity, or race — all of which are potential grounds for a discrimination suit under Title VII of the Civil Rights Act or the Americans with Disabilities Act. Even when an agency makes a hiring decision without regard to such factors, examining web sites that reveal such information may unnecessary provide an unsuccessful applicant with just enough evidence to file a suit, a suit that survives a summary judgment motion.

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Social Media and Current Employees

There have been several high-profile cases of law enforcement officers posting questionable photos or sending ill-advised messages, with the officers' agencies paying the price in poor publicity. The Oviedo, Florida Police Department was confronted by a news reporter who reported on an officer's self-description on his MySpace page as "a super-trained killer ninja fighter of the night who has not had a chance to use his special skills yet."[16] It didn't help that the officer had already racked up two dozen internal affairs complaints, including a sustained complaint that the officer notched his TASER® after each use. The officer was eventually cleared because his MySpace page did not mention his employment with the police department.[17]

Bozeman, Montana officials found themselves embroiled in another Facebook controversy after an arrest, when the arresting officer's comments were posted on his Facebook page. The officer wrote: "I think there should be a law saying police can take people to jail for being stupid. ...Speaking of messing with people. ...I like messing with people."[18] Though the officer's comments could be viewed as relatively benign (and intended as a joke), they are now included in the plaintiff's lawsuit against the City of Bozeman.

Both the Oviedo officer and the Bozeman officer believed that their social media web sites were protected by online privacy settings. Facebook recently agreed to modify its ineffective and confusing privacy setting options following congressional scrutiny.[19] Given these examples, social media users should assume that their postings will be open to public view, despite privacy settings or passwords.

What rules govern the inevitable collision of an officer's First Amendment right to post on social media sites and the agency's need to preserve internal discipline and its public image? Two guiding cases, *City of San Diego* v. *Roe*[20] and *Dible v. City of Chandler*,[21] address situations where an officer posted sexually-explicit material online. In *Roe*, the U.S. Supreme Court rejected a First Amendment defense of the officer, who had been fired after marketing videos (of him stripping off a police uniform and masturbating) came to light.[22] In the second case, Dible and his wife operated a web site with photos and video clips of Dible's wife masturbating with inanimate objects, and having sex with Dible and with another woman. The Dibles also arranged for their fans to meet them at bars for photo sessions, and sold DVD recordings of these "barmeets." Though Dible's wife used a pseudonym, many people in the local community were aware of her identity and the fact that Dible was employed as a police officer.[23] Chandler police officers spoke of department morale "hitting bottom" after the media reported about the Dibles and their connection to the Chandler police.[24] As a result, the police chief fired Dible, and Dible sued, asserting his free speech rights and claiming that, unlike the plaintiff in *Roe*, he had not gone out of his way to identify himself as a police officer in the web site and recordings.[25] The depart-

ment countered that, nonetheless, Dible's activities reflected poorly on the department and hurt its efforts to recruit female police officers, adding that Dible had lied during an internal affairs investigation.[26]

The U.S. Court of Appeals for the Ninth Circuit sided with the municipality, holding that Dible could not meet the "public concern" test established by the Supreme Court in *Pickering v. Board of Education of Township High School District 205*[27] and *Connick v. Myers*.[28] The *Pickering-Connick* test requires a public employee to establish that the speech in question addresses a matter of public concern. If that is found to be the case, the court is required to balance the employee's free speech rights against the public employer's right to maintain order in the workplace. In 2006, in *Garcetti v. Ceballos*,[29] the Supreme Court supplemented this test by holding, further, that speech made in the capacity of, or in furtherance of one's duties as, a public employee generally lacks First Amendment protection: "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[30] The Ninth Circuit was unpersuaded that Dible's efforts to mask his identity as a police officer effectively differentiated the case from *Roe*: "Ronald Dible's attempts to conceal his activity came to nought and do not distinguish the underlying situation in *Roe*. Many a rule breaker does so clandestinely in the hope that his violations will not come to light and have untoward consequences."[31] The court held that Dible's online "activities were simply vulgar and indecent. They did not contribute speech on a matter of public concern."[32] Though the Dibles' purely commercial (and sexual) web site was pay-per-view and was not freely accessed through social media, the court's reasoning under the *Pickering-Connick* test applies equally to any balancing of an officer's online social media activities and a public employer's rules of conduct. This balancing, however, is always difficult, as a public employee's exercise of free speech rarely falls clearly at the black or the white end of the scale. Municipal counsel should carefully consider the *Pickering-Connick* test and weigh the sparse precedent provided by *Roe* and *Dible*.

Social Media and Impeaching Witnesses

Much of the controversy surrounding the O.J. Simpson murder trial centered on the attempts to impeach a former L.A.P.D. detective, Mark Fuhrman, for his racist statements.[33] Following the U.S. Supreme Court's decision in *Brady v. Maryland*[34] over 40 years ago, the impeachment of officers in both civil and criminal trials has long been possible when the adversarial party could show that the officer had lied in a former proceeding.[35] Now, social media posts are providing a new kind of fodder for impeachment tactics, beyond untruthfulness. Waters, a parolee who had allegedly been caught with an illegal weapon, was acquitted after a jury heard evidence about the arresting officer's MySpace posts and the movie, *Training Day*.[36] Waters claimed that the officer, Vaughan Ettienne, and his partner had beat him and then planted a gun on him. Ettienne had posted a description of his mood ("Devious") on his MySpace account, and the jurors were told that, before the trial, Ettienne's Facebook page read: "Vaughan is watching 'Training Day' to brush up on proper police procedure."[37] Ettienne expressed regret for his postings and acknowledged that they contributed to the acquittal.[38]

The Los Angeles County Sheriff's Office has published an excellent training tool to educate officers on the dangers of posting to social media and the resulting potential for creating online impeachment material.[39] Law enforcement officers need to recognize that social media postings can endure forever, even after being removed by the poster.[40]

Pitfalls in Monitoring Social Media

Several companies monitor employees' social media postings for a monthly fee. An agency can spend time online searching for postings, and can even create a false identity for "friending" an employee and to breach privacy protections. However, this course is pitted with liability potential. The federal Stored Communications Act includes penalties for unlawfully accessing employees' private e-mail or protected social media site content.[41] (State privacy laws may also apply.) In addition to the Title VII background investigation concerns raised previously, the agency must also resolve questions of how far it can go in managing its employees' off-duty, lawful conduct.

An employee may have a cause of action for invasion of privacy when the employee holds a reasonable expectation of privacy in the social media posting. This remains relatively uncharted legal territory. However, in a recent decision, the U.S. Supreme Court held that the Ontario Police Department did not violate Officer Jeff Quon's privacy rights when department officials read sexually explicit text messages that Quon had sent to his wife and girlfriend, using his department-issued, two-way pager.[42] The department had warned the officers that all city e-mail, Internet, and computer resources could be monitored by the municipal employer, and that the officers should have no expectation of privacy. Significantly, however, this case turned on messages sent through department communications resources,[43] and its application for wider searches by an employer is unclear.

A Measured Response

Many police agencies have implemented social media policies. Some govern the use of social media as an agency communications tool, others do that and, also, attempt to govern the employees' private social postings. As the recent *Quon* case illustrates,

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the law surrounding the Internet and modern electronic communications is in its infancy. Constant monitoring of developments and a policy firmly grounded in the agency's interests in an orderly workplace and its public perception, and shaped by the limits of the latest court decisions, are essential to legal risk management. Municipal counsel must remain at the cutting edge of the law in this area to ensure a defensible policy, or rely on a reputable policy risk management firm to provide guidance to the local government. One of the first to get ahead of the social media curve and provide defensible policies for its clients is Lexipol (www.Lexipol.com). Whether one uses a risk management service or handles this issue in-house, it is essential to ensure that your city is protected.

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13. Konop v. Hawaiian Airlines, Inc. 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003); *see generally*, Carly Brandenburg, *Newest Way to Screen Job Applicants: A Social Networker's Nightmare*, Note, 60 Fed. Comm. L.J. 597 (June 2008).
14. Some state laws give employees greater rights of access to background investigation information. California's Civil Code § 1786 gives employment applicants access to their background investigation files whether or not an adverse decision resulted. California law applies whether the agency conducts the background investigation or delegates it to a third party. Agencies should explore whether state law protects employees and applicants from adverse decisions based on lawful, though potentially objectionable, private conduct. *See, e.g.*, N.J. Stat. Ann. § 34:6B-1 (West 2010) (employer discrimination against persons who do or do not smoke or use tobacco products prohibited); Mo. Rev. Stat. § 290.145 (West 2010) (discrimination, refusal to hire or discharge employee for alcohol or tobacco use not during working hours); N.Y. Lab. Law § 201-d (McKinney 2009) (discrimination and employee's legal recreational activities, legal off-duty use of consumable products, political activities outside of working hours, and membership in a union).
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20. 543 U.S. 77 (2004).
21. 515 F.3d 918 (9th Cir. 2008).
22. 543 U.S. at 78.
23. 515 F.3d at 922.
24. *Id.* at 923.
25. *Id.* at 925.
26. *Id.* He was being investigated for violating a department rule prohibiting engaging in outside employment unless the officer first filled out and filed a request to engage in employment outside the department.
27. 391 U.S. 563 (1968).
28. 461 U.S. 138 (1983).
29. Garcetti v. Ceballos, 547 U.S. 410 (2006).
30. *Id.* at 421.
31. 515 F.3d 918, 920 (9th Cir. 2008).
32. *Id.* at 927.
33. *See* People v. Orenthal James Simpson, No. BA097211 (L.A. Super. Ct. Aug. 31, 1995), ruling on motion in limine.

34. 373 U.S. 83 (1963).
35. Jeff Noble, *Police Officer Truthfulness and the Brady Decision*, POLICE CHIEF, vol. 70, no. 10 (Oct. 2003).
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38. *Id.*
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40. Web tools such as the Wayback Machine at www.archive.org can retrieve outdated and removed web sites that were automatically archived, often without the web site owner's knowledge.
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rapidly escalate into large sums.

Some states have pre-conviction forfeiture provisions or bond laws that require an offender to provide a bond from which the costs of care can be covered. If such a bond cannot be posted, the animals become forfeit and can be placed in permanent homes. The Animal Legal Defense Fund provides recommended language for such a statute.[29] Another option is for the prosecutor to file a motion for priority setting on the court docket and expedited hearing dates, but, as the ALDF has noted, delays through continuances and a defendant's repeated firing of counsel are common.[30]

Some agencies have become more flexible in their approach to housing animals while a case awaits trial, and have used, as an acceptable practice, the placement of animals into supervised care in foster homes. Other civil approaches to recovering the costs incurred for animal care include filing a *quantum meruit* action to recover sums for unjust enrichment, or attachment of a common law or statutory lien to use the animals as collateral for the services rendered. Moreover, with the high recidivism rate of animal hoarders, a prosecutor would be well advised to secure a pre-trial condition of release that bans the defendant from owning, possessing, providing care for, or otherwise having access to animals during the life of the underlying case.

Conclusion

Animal hoarding will continue to pose challenges for local governments and public health authorities, as hoarding of any sort poses significant health concerns for both the occupants of a home and the nearby residents. However, this problem is gaining increased attention from public agencies and the clinical and research communities, and more resources are becoming available. For additional publications on this issue, visit the Hoarding of Animals Research Consortium's website at http://www.tufts.edu/vet/hoarding/index.html.

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