Social Media
Pitfalls for Municipalities

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Social Media

Concerns your municipality should have

Who are the decision makers

What decisions need to be made

What are the considerations for those decisions

2015 Pew Research data

66% of American adults use Facebook® and 17% use Twitter®.

About 63% of Facebook users get news from it.

Seventy percent of Facebook users use the service daily making communication through it happen in near real time.

The considerations for a municipality center around three separate questions:

(1) does your municipality want a social media presence?

(2) if your municipality wants such a presence, what should you have in your terms of use?

(3) if your municipality wants such a page, what considerations go into managing the page?

Who Makes the Decision?

Common Council/Village Board?

Mayor/President?

Administrator?

Department Head?

Other?

ISSUES

First Amendment

Laws Directed To Government

Liability

Contractual Considerations

Practical Considerations

Venue Vistas

FIRST AMENDMENT

Forum

Traditional Public Forum

Designated Public Forum

Limited Public Forum

Non-Public Forum

FIRST AMENDMENT

Exclusions?

Designated Public Forum

Facebook page is

open at all times,

has a very diverse audience,

has nearly unbounded capacity to receive posts, and

does not have a physical presence that would impact the repose of those who choose not participate,

The potential for legitimate time, place, and manner regulation is limited.

FIRST AMENDMENT

Exclusions?

Political Correctness? Maybe.

Fighting Words? Not likely!

Profanity? Not likely.

Obscenity? Yes, but . . . .

Threats? Yes, but . . . .

Obscenity

Jenkins v. Georgia, 418 U.S. 153, 157 (1974)

- Content is obscene if:
  - average person,
  - applying contemporary community standards,
  - would find the content taken as a whole,
  - appeals to the prurient interest, the content depicts or describes sexual conduct in a patently offensive way, and
  - the content wholly lacks literary, artistic, political, or scientific value.

Obscenity

Will You Know It When You See It?

Taken as a Whole Standard

"The notion of judging work as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites."

Ashcroft v. ACLU, 535 U.S. 564, 592-93(2002)(J. Kennedy, concurring).

Obscenity
Will You Know It When You See It?

Average Person of Community Standard

Your Municipality?

Your Intended Target Audience?

The World?

First Amendment

Threats

A Cautionary Tale

Elonis v. United States,
575 U. S. ____ , 135 S.Ct. 2001 (2015)

Bullying and Harassment

Pew Research Center - 2015

Harassment on the Internet through social media:

24% had seen someone being physically threatened,

19% reported seeing sexual harassment,

18% saw incidents of stalking,

Another quarter said they had witnessed someone being harassed for sustained periods of time online.

Bullying and Harassment

Liability

If you take down a post is your municipality liable?

If you don't take down the post is your municipality liable?

Liability

Privacy – Publication of Private Facts

Wis. Stat. § 995.20

(1) **disclosure of facts** concerning the plaintiff in a manner that would insure that the facts became public knowledge;

(2) the **facts were private facts** of the type that the plaintiff would not ordinarily disclose to other than family or close, personal friends;

(3) the facts must be of a nature that would be considered to be **sensitive to a person of ordinary sensibilities**; and

(4) the **defendant knew the public had no legitimate interest** in knowing the facts or the defendant acted recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts

Liability

Defamation

The Wisconsin Jury Instructions recognize three elements to a defamation action:

(1) the statement was false,
(2) the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and
(3) the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

FTC "Guides Concerning the Use of Endorsements and Testimonials . . . ."

16 C.F.R. § 255.0-.5

truth-in-advertising principles may apply to social media posts.

applies to any business, organization, or person who uses the Internet to promote a product or service

The FTC has stated that that an employer should not be held liable if
(1) the employer has a social media policy regulating the "social media participation" of its employees; and
(2) such policy includes procedures establish procedures to monitor compliance with its social media policy and deal with employee non-compliance.

Liability

Right of Publicity

(1) used plaintiff's identity;
(2) appropriated plaintiff's name and likeness to defendant's advantage, commercial or otherwise;
(3) lack of consent; and
(4) injury.

Liability

Copyright

Anyone who violates any of the exclusive rights of the copyright owner as provided by [provisions of the Act], is an infringer. . . .

As used in this subsection, the term **"anyone" includes any State, any instrumentality of a State**, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity.

Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

17 U.S.C. §501(a)

Copyright

Infringement

There are a large number of ways that a municipality could find that its Facebook page contained infringing material:

A poster could have posted a photograph, a film clip, an audio file that directly infringed, or

A poster could have posted a link to an online location containing infringing material

Copyright

Actual Attorney Fees

the average cost of a copyright infringement lawsuit with less than $1,000,000 at issue, through trial for the midwest region (excluding Chicago and Minneapolis, which are typically more costly) is $132,000.

AIPLA Report of Economic Survey 2013

Copyright

Safe Harbor – From Damages

Requirements include:

contact information for the entity in charge of the site be provided to viewers of the site;

an effective "notice-and-takedown" procedure;

prompt action to remove content when a copyright owner provides notice that what has been posted is infringing;

no knowledge that the material in question is infringing prior to the notice; and

municipality can derive no financial benefit from the infringement

Trademark

Section 43 of the Lanham Act, 15 U.S.C. §1125

Infringement

False Designation of Origin

Dilution

Unfair Competition

Liability

A Cautionary Tale

Levitt, et al. v. Felton, 326362 (Michigan Court of Appeals, May 19, 2016) (unpublished)

Levitt, et al. v. Felton

Levitt was a lawyer and adjunct professor.

On Twitter as "Todd Levitt@levittlaw"

Felton was a student at the university.

Felton Created:

"Todd Levitt 2.0@levittlawyer"

included a photo of Levitt and

included a logo used by his law firm.

Felton did post

several tweets that the account was a parody;

a number with arguably damaging concepts.

Venue

Be Prepared to Defend Anywhere in the Country

Government Reponsibility

Public Records

Facebook posts made by the municipality or by citizens on a Facebook page that is maintained by the municipality are records which must be maintained.

See, Wis. Stat. § 19.32(2). see also , memo entitled "Public Records on Social Networking Sites" from Peter Gottlieg, Board Chair for the Wisconsin Public Records Board, to Agency Administrators, dated October 27, 2010.

Public Records

Issues

(1) the maintenance under the record retention law requirements;

(2) the retrieval obligation under the Public Records Law,

(3) the format of retention and disclosure (*e.g.*, maintaining a file size that includes metadata), and

(4) the practical aspects of mass storage.

Public Records

Can't Rely on FACEBOOK

The National Archives and Records Administration (NARA) issued guidance:

> Each agency is responsible for managing its records. . . . Agencies should be aware that a **social media provider could discontinue** their service or delete information from an agency's account. . . . In [such] situation, the agency is not relieved of its records management and possible capture obligations.
>
> Capture is important for temporary records with long-term retentions or for permanent records. **These should be exported from the social media platform into an agency recordkeeping system**.

Public Records

FACEBOOK Terms of Service

Facebook makes no representations in their Terms of Service that they will archive anything.

To the Contrary, in Facebook term 18.10, they specifically reserve to themselves rights not granted.

Public Records

Metadata Requires Massive Mass Storage

Metadata is data that describes other data. **It is typically hidden from the view of a casual observer of the text**

Public Records

Metadata Requires Massive Mass Storage

It has been suggested that Wisconsin law implies that a requester has a statutory right to a record such as a social networking media post in its original format.

See *The Wisconsin Public Records and Open Meetings Handbook, fourth edition,* edited by Melanie R. Swank, State Bar of Wisconsin, 2015, esp. §10.11; see also, Comment, Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records, Leanne Holcomb and James Isaac, 2008 Wisconsin Law Review 515, 560

Open Meetings

Attorney General Compliance Guide

The phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together.

Open Meetings

Courts are likely to consider such factors as the following:

(1) the number of participants involved in the communications;

(2) the number of communications regarding the subject;

(3) the time frame within which the electronic communications occurred; and

(4) the extent of the conversation-like interactions reflected in the communications.

Open Meetings

Remember *Badke*

Concerted Information Gathering Can Implicate the Open Meetings Law Even If No Action is Taken

When is a Private Page a Public Page?

Attorney General, Peckler-Dziki Correspondence, I-06-09 (Dec. 23, 2009)("Making Salem Better" Google Group)

Candidate Page?

JOE FAILED TO READ THE "WE CAN CONFISCATE YOUR FURNITURE AT ANY TIME" CLAUSE IN THE MOST RECENT UPDATE TO THE TERMS OF SERVICE.

Terms of Service

https://www.facebook.com/legal/terms.

(Merely a Gateway)

Terms of Service

Read Them!!!

"[A] federal agency, or a federal employee signing up for the platform for official agency use, cannot merely click 'I accept.' This is because there are about two dozen laws that apply to a federal agency's use of social media, and many of them are violated in boilerplate ToS agreements."

Elizabeth Day Hochberg, Assistant General Counsel, General Services Administration," quoted in Landslide magazine.

Terms of Service

Indemnification

15.2. If anyone brings a claim against us 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. Although we provide rules for user conduct, we do not control or direct users' actions on Facebook and are not responsible for the content or information users transmit or share on Facebook. We are not responsible for any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook. We are not responsible for the conduct, whether online or offline, of any user of Facebook.

Terms of Service

Indemnification

Four Issues:

Liability

§ 893.80 Damage Cap Waiver

§ 893.80 Notice Waiver

Signals Legislative Approval

Terms of Service

Venue

15.1. You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

Terms of Service

Venue

Well-developed copyright and trademark caselaw.

Google v. Oracle (copyright fight over Android code)

Lenz v. Universal Music Corp. (Fair use in YouTube video takedown)

Pacific Century International Ltd., v. Does 1-101 (4:11-cv-02533-DMR) case (improper to sue bittorrent users from different swarms in the same copyright infringement lawsuit, even if they all downloaded the same copyrighted material)

Terms of Service

No Third-Party Beneficiaries

18.1 If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc.

18.9. This Statement does not confer any third party beneficiary rights.

Terms of Service

No Third Party Beneficiaries

Unlike most contracts where this language is seen,

it is the nature of FACEBOOK that bilaterally-contracting parties all interact with each other!

Terms of Service

Release Use of Your Name and Profile Commercially By Third Parties

9.1. **You give us permission to use your name**, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that **you permit a business or other entity to pay us to display your name** and/or profile picture with your content or information, without any compensation to you.

Terms of Service

Release Use of Your Name and Profile Commercially By Third Parties

Probably intended to allow Facebook-compensated advertisers to advertise on your page.

This could provide difficult concerns about sponsorship and endorsement.

Should a community be properly concerned if a mayoral candidate buys up all of the advertising time associated with a municipal Facebook site for the two-week block prior to an election?

Terms of Service Community Standards

"We may ask Page owners to associate their name and Facebook Profile with a Page that contains cruel and insensitive content, even if that content does not violate our policies."

https://www.facebook.com/communitystandards

Policy Considerations

Overarching Policy

versus

Terms of Use

Policy

Content Considerations:
Administrator,
Account Ownership
Training,
Regular Review (Policy and TOS)
Monitoring (Page),
Who is Authorized to Post (different than Monitor)
Takedowns
Employee Posting

Who Determines Policy?

Policy

Government Speech

Pleasant Grove City v. Summum,
555 U.S. 460, 129 S.Ct. 1125 (2009)

Policy

Put Policy in Place

Train in Policy

Execute Policy

Accountability in Managers

Document – Training, Actions

Policy

Employee Posts

Protect for FTC Endorsements and Testimonials Rules,

but,

MUST Protect First Amendment Rights of Employees

Terms of Use

Copy FACEBOOK Terms?

Definition of Non-Protected Speech

Content Neutral Provisions (still viable in light of *Reed*)?

Illegal Yields Takedown?

Terms of Use (continued)

Topicality

Consider provisions from your library's CIPA Policy

Does your municipality
really
want a
FACEBOOK page?

Closing

Your Municipality Should:

Make Certain the Legislative Body Is Fully Informed Before Making Its Decision

Have Clear Terms of Use With Limited Public Forum Considerations in Mind

Have Clear Policies

Train Monitors

Consistently Monitor

Document

SOCIAL MEDIA: LEGAL CONSIDERATIONS FOR WISCONSIN MUNICIPALITIES[1]

by Edward R. Antaramian[2] and Daniel J. Balk, III[3]

INTRODUCTION

Social media are computer-mediated tools that allow people to create, share or exchange information, ideas, and pictures/videos in virtual communities and networks.[4] "Social Media" comes in many different forms including blogs, business networks, enterprise social networks, forums, microblogs, photo sharing, products/services review, social bookmarking, social gaming, social networks, video sharing and virtual worlds.[5] Examples of social networking media include FACEBOOK®, TWITTER®, Linkedin®, YOUTUBE®, reddit®, and tumblr®.

According to 2015 Pew Research data, 66% of American adults use FACEBOOK® and 17% use TWITTER®. Of the Facebook[6] and TWITTER users, about 63% of their users get news from the respective medium.[7] Seventy percent of Facebook users use the service daily[8] making communication through it happen in near real time. It is reasonable for municipalities to consider tapping into social networking media as an inexpensive way to reach a large portion of their adult constituents in an effective and expeditious manner.[9] This potential tool, however, has detriments for municipalities that cannot be overlooked.

The focus of this article will be on considerations for a municipality contemplating a presence in social networking media. As Facebook has the largest presence of the social media, this article will explore social media, in general, through the context of Facebook.[10]

The considerations for a municipality center around three separate questions: (1) does your municipality want a social media presence; (2) if your municipality wants such a presence, what should you have in your terms of use; and (3) if your municipality wants such a page, what considerations go into managing the page? The consideration of these three questions implicates four, distinct avenues of examination: First Amendment, laws directed toward government (*e.g.*, Open Meetings, Public Records, record retention, ethics), liability (for defamation, copyright infringement, trademark infringement, statutory privacy; along with waivers, indemnification, and hold harmless provisions in

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1 Disclaimer: This article is intended to provide general, summarized information that is not to be construed or relied upon as legal advice. Because legal situations are fact-specific, municipal officers should consult with legal counsel regarding the community's specific legal needs with regard to social media.

2 Mr. Antaramian is the City Attorney for the City of Kenosha. He is a graduate of the Marquette University Law School.

3 Mr. Balk has competed his first year of study at the Marquette University Law School.

4 https://en.wikipedia.org/wiki/Social_media (accessed July 22, 2015).

5 *Id.*

6 FACEBOOK® is the registered trademark of Facebook, Inc. Having acknowledged this trademark position, for ease of the reader, herein "Facebook" will be used with the understanding that the rights of Facebook, Inc. to the mark are being honored.

7 http://www.pewresearch.org/fact-tank/2015/07/14/5-key-takeaways-about-twitter-facebook-and-news-use/

8 http://www.pewinternet.org/2015/01/09/frequency-of-social-media-use-2/

9 In announcing it was going to be on TWITTER as well as Facebook, Elections Division Administrator Nat Robinson of the Wisconsin Government Accountability Board said: "Social media like Facebook and Twitter are efficient, low-cost ways to reach voters and provide them with improved customer service." http://www.gab.wi.gov/node/2349

10 While Facebook is the dominant social networking medium, others, such as reddit that provides for a form of community censorship, may be alternatives to consider.

Facebook's terms of service), and practical considerations (who from the municipality agrees to Facebook's terms of service, who monitors, how often is it monitored, who drafts the municipality's terms of use).

Often the decision to have a social media presence is made administratively, with a directive to an employee – and typically an employee chosen for facility in social media technique, but not necessarily for experience in government decision-making – to make it happen. Although the analogy may be harsh, such actions are akin to dumping a pile of wood before a carpenter without a plan and telling the carpenter to build a house to unexpressed expectations.

What follows is intended to be a survey, not an exhaustive analysis, of applicable areas of law. Just identifying First Amendment jurisprudence would entail a multi-volume set. Rather, the intent is to provide the tools to carry out the discussion surrounding the creation and maintenance of the social media page. Then, perhaps, the employee tasked with executing the plan to create and maintain your social media presence can do so with a reasonable plan.

FIRST AMENDMENT

At one time, Facebook allowed the creation of accounts whereby the creator of the page had the option of allowing or prohibiting posts from other Facebook users. With the latter option of creating a type of one-way environment where the municipality controls the entirety of the message, First Amendment considerations are not a real issue. Modern Facebook policy eliminates the one-way option. First Amendment considerations now permeate the decisions of the municipality in the creation and maintenance of the page.

By administering an official Facebook page, the municipality creates a designated public forum

Although public forum analysis has not caught up to the developments in technology that have allowed Facebook to blossom into a widespread social media platform, the reasoning from past precedent indicates that a government Facebook page is a designated public forum.

The extent that government may control speech within a forum depends on what sort of forum it is. The United States Supreme Court has outlined the four types of fora government property may constitute depending on the character of the property.[11] The types of property are traditional public fora, designated public fora, limited public fora, and non public fora.[12]

Traditional public fora are places historically devoted to assembly and debate such as "streets and parks [which] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[13] For government property to be considered a traditional public forum, the property must have a long standing history of usage for the free exchange of ideas.[14]

11 *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 45; 103 S.Ct. 948; 74 L.Ed.2d 794 (1983)

12 *Id.; see also, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788; 105 S.Ct. 3439; 87 L.Ed.2d 567 (1985) for discussion about the limited public forum.

13 *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* , 505 U.S. 672, 679; 112 S.Ct. 2701; 120 L.Ed.2d 541 (1992) quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496; 307 U.S. 496; 83 L.Ed. 1423 (1939). See also *Frisby v. Schultz,* 487 U.S. 474, 481 (1988) (holding a residential street is a public forum).

14 *International Society for Krishna Consciousness,* 505 U.S. at 679.

Traditional public fora are largely confined to places with longstanding historical grounding as a place for expressive activity, thereby precluding many newer developments. For instance, in *International Society for Krishna Consciousness*, the Supreme Court held that airport terminals could not be traditional public fora because air travel and airport terminals "have only recently achieved their contemporary size and character."[15] Thus, the Court reasoned, airport terminals cannot be described as having been immemorially held in the public trust for expressive activity.[16]

Because the technology enabling social media is too new, and because municipal use of the media is even more recent and is evolving, it is unlikely that municipality-run social media, in general, and a municipality-run Facebook page, in particular, will be deemed by a court to be a traditional public forum. Analogous to the airport terminal considered in *International Society for Krishna Consciousness*, a municipality-run Facebook page, does not have an historical basis as a public forum. Truly, Facebook is newer to users today than airport terminals were to the Krishnas in 1992.

In limiting traditional public fora to only certain sorts of sidewalks, the Seventh Circuit showed that courts will be hesitant to apply the public-forum status in borderline cases.[17]

Given the lack of history as a traditional public forum, and the stated reluctance of the courts to find public-forum status in borderline cases, a municipality-administrated Facebook page may not be classified as a traditional public forum.

The second type of public forum is designated public forum. This type of forum is one which is not traditionally open to public discussion but the government intentionally opens it to the public for expressive activity.[18] Whether government property constitutes a designated public forum or a non-public forum is largely dependent upon the government's intention and how exclusive or selective the forum is. Obvious examples of designated public fora include time allotted for citizen's comments during government meetings.[19]

A designated public forum restricted to acceptable subjects and speakers can become a "limited public forum".[20]

If the government, however, did not intend to open property to access by the general public for expressive activity, it is designated a "non-public forum."[21]

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15 *Id.* at 680.

16 *Id. See also, Chicago Acorn v. Metro. Pier and Expo. Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) (holding the public sidewalks on Navy Pier in Chicago are not traditional public fora because the pier is a discrete entertainment center, and the sidewalks and streets within the discrete area that serve the purposes of this discrete entertainment center are not rights of way); *United States v. Am. Library Assoc., Inc.,* 539 U.S. 194, 205-06; 123 S.Ct. 2297; 156 L.Ed.2d 221 (2003) (holding Internet access is not a traditional public forum because the internet did not exist until quite recently and "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking")

17 *See, Chicago Acorn v. Metro. Pier and Expo. Auth.*

18 *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011)(By allowing any member of the public to speak for up to three minutes on any subject a designated public fora was created.)

19 *Id.; Bd. of Regents v. Decker*, 355 Wis.2d 800; 850 N.W.2d 112 (2014); *Theyerl v. Manitowoc Cnty*, 41 F.Supp.3d 737 (E.D. Wis. 2014).

20 *See, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

21 *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679; 118 S.Ct. 1633; 140 L.Ed.2d 875 (1998); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *see also, United States v. Am. Library Assoc., Inc.*, 539 U.S. 194, 206 (2003). (In excluding a candidate from a televised debate, a state agency operating the television station did not violate the candidate's Constitutional rights as even though the debate was a forum for political speech, "[a]

Because the municipality will open its page to the general public for dissemination of information, because a posting to a Facebook page affirmatively opens the door to comment from those who follow a page, and because the primary purpose of Facebook is to facilitate expressive activities within networks of connected people, in creating a municipal page, the municipality will undoubtedly be found to have intentionally opened a designated public forum.

With effort in creating and scrupulously maintaining restrictions regarding acceptable subjects and speakers, a municipality may be able to transform its page from a designated public forum into the more restricted "limited public forum".[22] Most cases examining limited public forum creation refer to a forum's exclusivity, or a requirement to obtain permission to enter the forum, as an indication of limited status. Although the municipality will not be able to limit entry of speakers to the forum (as no permission is required to "like" a Facebook page), the municipality may draft a usage policy by which appropriate topics and manner of conversation are defined. As long as this usage policy is not struck down due to improperly infringing upon other constitutional rights, limiting the page to certain subjects will create a limited public forum.

Strict scrutiny is applied to content-specific restrictions in designated public fora, requiring the state to provide a compelling state interest and a narrowly tailored policy to achieve that end with the restriction.[23] Therefore, a municipality may only remove posts from a designated public forum that are comprised of either unprotected speech or non-topical posts based on a content in violation of a neutral usage policy.

Regulation that references content is presumed unconstitutional.[24] Content neutral restrictions of time, manner, and place in public fora are allowed when the government has a significant interest and the restriction is narrowly tailored to achieve that interest, and "ample alternative channels of communication" are left open.[25]

Time, place, and manner restrictions vary greatly. Moreover, the justification for many time, place, and manner restrictions are in response to difficulties arising from a physical forum's attributes such as scarcity of space and time to allocate to speakers or proximity to private residences.[26] Thus, the reasoning underpinning many cases examining content neutral regulations and restrictions would not apply for metaphysical fora such as a Facebook page.[27]

Further still, some cases putting forth rules that do apply seem contradictory. For instance, 2005 case decided by the Seventh Circuit Court of Appeals found a time, place, or manner restriction is not content neutral if it is based on other people's reactions to the *speech*.[28] Without overruling this

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designated public forum is not created when the government allows selective access to speakers rather than general access for a class of speakers.")

22 *See, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*

23 *Perry Education Ass'n,* 460 U.S. at 45; *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 783-84 (7th Cir. 2011).

24 *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377; 112 S.Ct. 2538; 120 L.Ed.2d 305 (1972).

25 *Perry Education Ass'n,* 460 U.S. at 45

26 *See e.g., Ward v. Rock Against Racism*, 491 U.S. 781; 109 S.Ct. 2746; 105 L.Ed.2d 661 (1989).

27 *See e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 870; 117 S.Ct. 2329; 138 L.Ed.2d 874 (1997) ("Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low cost capacity for communication of all kinds.")

28 *Ovadal v. City of Madison, Wis*., 416 F.3d 531 (7th Cir. 2005). In *Ovadal*, a Christian minister paraded signs and banners, which included controversial statements regarding homosexuality, on a bridge overpass of a major highway. Numerous motorists called the police to complain of heavy congestion from other motorists slamming on their breaks in

precedent, that same court later upheld a restriction on the manner of speech based on the nature of the forum and the demographic of its audience.[29]

Ultimately, as the Facebook page is open at all times, has a very diverse audience, has nearly unbounded capacity to receive posts, and does not have a physical presence that would impact the repose of those who choose not participate, the potential for legitimate time, place, and manner regulation is limited.

If, however, the municipality is successful in making the page not merely a designated public forum, but a limited public forum, the usage policy will simply need to be reasonable in light of the nature of the forum and viewpoint neutral.[30]

The municipality may be able to remove some offensive, abusive, or profane language

Courts have also considered regulation of specific speech similar to content that may predictably end up on the municipality's Facebook page. First, some posts to the municipality's Facebook page will doubtless contain profanity. The controversy that surrounds even seemingly menial government matters arouses passionate debates among citizens, who may use profanity, especially when able to hide behind a computer screen rather than face their audience. The municipality will be unable to remove profanity generally, as it will often constitute protected speech.[31] If speech posted to the page is, however, intended to incite a disturbance, the municipality may be able to remove it.[32] Nonetheless, government cannot, under the guise of "fighting words," prohibit or favor certain speech "based on hostility—or favoritism—towards the underlying message expressed."[33]

An attempt at limiting profanity or other abusive language may be included in the usage policy for the page. Such policies that regulate speech must, on their face, prohibit only unprotected speech.[34] But, cases construing governmental limitations on the words that one may use in speech activities, specifically regarding abusive language, have produced a body of case law that is difficult to navigate.[35] Among the variety of options available, the municipality may either adopt language taken from Facebook's terms of service or adopt the Wisconsin disorderly conduct statute as part of its policy. In the former instance, upon challenge the municipality could argue that it was merely enforcing

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response to the signs. The court found the overpass constituted a traditional public forum. Noting that the speech very well may have caused some drivers to act recklessly, the court held that if the restriction on Ovadal's protest was part of a normal regulation against protesting during heavy traffic, the regulation may have been acceptable, otherwise it was a "heckler's veto" which is impermissibly content-based.

29 *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 784 (7th Cir. 2011). In *Milestone* an elderly woman was banned from a senior center for violating portions of "Code of Conduct" that prohibited "abusive, vulgar, or demeaning language" and required "patrons treat everyone with respect and courtesy." The court further held that establishing a "'positive,' 'dynamic,' and 'pleasant and upbeat,'" environment for the specific clientele of the senior center qualified as a significant governmental interest. *Id.* at 784.

30 *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 829; 115 S.Ct. 2510; 132 L.Ed.2d 700 (1995).

31 *See, Cohen v. California*, 403 U.S. 15, 21; 91 S.Ct. 1780; 29 L.Ed.2d 284 (1971).

32 *See, Chaplinsky v. New Hampshire*, 315 U.S. 568; 62 S.Ct. 766; 86 L.Ed. 1031 (1942).

33 *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992).

34 *Gooding v. Wilson,* 405 U.S. 518, 519; 92 S.Ct. 1103; 31 L.Ed.2d 408 (1972).

35 Recognizing the need for public order, a Wisconsin disorderly conduct criminal statute disallowing "violent, abusive, indecent, profane, [or] boisterous" behavior was held constitutional in *State v. Zwicker,* 41 Wis. 2d 497; 164 N.W.2d 512 (1969), but a statute that prohibited, "without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace," was held unconstitutionally vague and overbroad in *Gooding v. Wilson,* 405 U.S. 518, 519 (1972).

Facebook's corporate policy to which the poster had to comply. In the latter circumstance, the municipality would have the benefit of precedent, albeit dated.[36]

Further caution must be exercised to assure that policy creates a non-specific ban that does not single out any type of offensive speech. For example, a municipal ordinance that prohibited fighting words with "racial, religious, or gender-specific symbols" was found to be impermissible view-point discrimination on its face.[37]

Thus, before creating a Facebook presence, the municipality will have to consider its tolerance to have charged comments on its page respecting what are otherwise considered protected classes. Then municipality would need to be careful not to remove posts merely because they are offensive to certain demographics, whether protected classes or not.[38]

The municipality will be able to remove obscene posts from the page

Beyond profanity, some people may attempt to publish text on the Facebook page which references sexual activity, or perhaps even depicts it in photographic form (Facebook allows users to respond to posts using pictures as well as text).

If the page has been created as a limited public forum and if sufficient policy has been created, material that is not clearly obscene, but nonetheless contains sexual content, may be able to be removed on the basis of their extra-topicality.

For a designated public forum page, however, the municipality will be able to remove only that material that is unprotected as obscene.[39] Content is obscene if the average person, applying contemporary community standards, would find the content, taken as a whole, appeals to the prurient interest, the content depicts or describes sexual conduct in a patently offensive way, and the content wholly lacks literary, artistic, political, or scientific value.[40]

a. The Average Person and Contemporary Community Standards

The average person is embodied in the jury and the contemporary community standards that jury applies can vary in scope.[41] Despite the Court's reassurance that varying jury verdicts will not abridge constitutional rights, the Court has ruled that the jury's power as trier of fact is not unlimited.[42]

A municipality should exercise great caution in trying to define for itself what constitutes the community standard. In the first instance, it is uncertain what the community is for an Internet

36 Although *Zwicker* was decided before *Gooding*, it is unlikely to have been affected by it.

37 *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

38 These statements are made with the recognition that Facebook has terms of service respecting these issues. But as noted herein, those rules are enforceable by Facebook – should Facebook refuse to enforce their rules (which is their reserved right), unless a limited public forum was successfully established, the municipality will be forced to defend its take-down decision under the higher standard of scrutiny.

39 *Miller v. California,* 413 U.S. 15; 93 S.Ct. 2607; 37 L.Ed.2d 419 (1973) (citing *Roth v. United States,* 354 U.S. 476; 77 S.Ct. 130; 41 L.Ed.2d 1498 (1957)); Wis. Stat. § 944.21; *County of Kenosha v. C & S Management, Inc*., 223 Wis. 2d 373; 588 N.W.2d 236 (1999).

40 *Miller,* 413 U.S. at 24.

41 *Jenkins v. Georgia,* 418 U.S. 153, 157; 94 S.Ct. 2750; 41 L.Ed.2d 642 (1974); *see also Miller,* at 26 n. 9. (The mere fact that juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged.")

42 *Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing a jury verdict finding a movie to be obscene).

application directed toward a particular geographic community but available to everyone.[43] But even if the community is the target geographic community, and a jury applies the standards of that geographic community to find a work obscene, a higher court may nonetheless invalidate a verdict to protect the speech.

b. Taken as a Whole

Under general First Amendment analysis, material should be judged as a whole rather than merely examining an offensive portion of a work.[44] Recently, Justice Kennedy identified the difficulty of extending the doctrine to Internet applications: "The notion of judging work as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites."[45] Courts will be faced with difficulty in applying the taken-as-a-whole requirement to Facebook. When deciding a case, the court will have various options on defining the "whole", including: (1) the single post; (2) the entire collection of posts from a single user; (3) the thread to which the post is relevant to provide context for the post; or (4) the entirety of the page of all users on which the offensive post is added. Without guidance from the courts, municipal Facebook users will need to make common sense determinations, keeping the rights of the poster in mind.

c. Lacking Literary, Artistic, Political, or Scientific Value

Even if the municipality feels confident that a post on the Facebook page clearly appeals to the prurient interest and is patently offensive, according to the average person applying contemporary community standards, the municipality must still be cautious to remove content. The final element of obscenity, that a work, taken as a whole, lacks serious literary, artistic, political or scientific value, is not determined by the jury.[46] The United States Supreme Court reasoned that the First Amendment is meant to protect works that lack approval of the majority but nonetheless have value.[47] Thus, the Court held, the standard is not of the community's values, but rather "whether a reasonable person would find such value in the material, taken as a whole."[48]

d. Civil liability for removing offensive content

If and when the municipality attempts to remove content it considers unprotected and offensive, the municipality may be open to civil liability. The Telecommunications Act of 1996 contains a provision that absolves users of an interactive computer service from liability for:

> any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious,

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43 *Miller,* at 32; see also, *Jenkins* at 157; *Hamling v. United States,* 418 U.S. 87, 104; 94 S.Ct. 2887; 41 L.Ed.2d 590 (1974) (holding jury instruction that community standard is defined as national standard was not reversible error). In *Reno,* the Court expressed concern that regulation of obscenity on the internet would impose a national, as opposed to local, contemporary community standard. 521 U.S., at 877-78; cf., *Sable Communications of California, Inc. v. F.C.C.,* 492 U.S. 115, 124-25; 109 S.Ct. 2829; 106 L.Ed.2d 93 (1989) (noting that federal obscenity statutes apply local community standards rather than national standard). Children may not, however, be included in the hypothetical community. *Pinkus v. United States*, 436 U.S. 293 (1978).

44 See, *Miller*

45 *Ashcroft v. ACLU*, 535 U.S. 564, 592-93, 601; 122 S.Ct. 1700; 152 L.Ed.2d 771 (2002) (J. Kennedy, concurring).

46 *Pope v. Illinois,* 481 U.S. 497, 500; 107 S.Ct. 1918; 95 L.Ed.2d 439 (1987).

47 *Pope,* at 500.

48 *Id*. at 501. *See also, County of Kenosha v. C & S Management, Inc.,* 223 Wis. 2d 373 (1999).

> filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .[49]

While the concept is helpful to municipal users of social networking media such as Facebook as a potential defense, it is unclear how broadly "good faith" will be construed to protect the municipality against First Amendment claims for takedowns of citizen posts.[50]

PRIVACY

Another concern the municipality will face when operating a Facebook page is what duty or power will the municipality have to remove content due to privacy concerns of citizens.

Assume Restaurant is a fine-dining establishment in a community. Restaurant posts a photo of Alderperson on the municipality's page with a caption suggesting Alderperson's endorsement of Restaurant; both the use of the photo and the suggestion are without Alderperson's permission. Citizen sees the Restaurant post and responds with a rant on Alderperson's ineffectiveness. Using charged epithets, Citizen suggests Alderperson is homosexual (which is true, but was not generally known outside his immediate family) and that Alderperson has AIDS (which is not true). Alderperson requests both posts be taken down.

May the municipality remove the picture and/or the comment and/or the response? Must the municipality remove them? While there are a number of issues involved, including Alderperson's right of publicity, possible defamation, and the inevitable First Amendment considerations, there is also the privacy interest of Alderperson to consider.

By statute, Wisconsin recognizes a civil cause of action for invasion of privacy.[51] The statute identifies four separate classes of action that could give rise to a claim under the statute, one of the classes being publication of private facts.[52] That latter cause of action has four elements: (1) the defendant made a disclosure of facts concerning the plaintiff in a manner that would insure that the facts became public knowledge; (2) the facts were private facts of the type that the plaintiff would not ordinarily disclose to other than family or close, personal friends; (3) the facts must be of a nature that would be considered to be sensitive to a person of ordinary sensibilities; and (4) the defendant knew the public had no legitimate interest in knowing the facts or the defendant acted recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts.[53]

The purpose of this discussion is not to opine on whether a jury would find liability in this hypothetical situation, but rather to make the municipality aware of the potential as it creates its page and its policies on use and maintenance of the page.

DEFAMATION

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49 47 U.S.C. § 230(c)(2)(A).

50 There has been no binding authority found on the issue, but see, *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783, esp. 790 (E.D. Va. 1998) (noting "§ 230 was not enacted to insulate government regulation of Internet speech from judicial review").

51 Wis. Stat. § 995.20; *see also,* Op. Att Gen March 1, 1979.

52 *See,* 2550 Wis JI-Civil (Invasion of Privacy: Publication of a Private Matter: Wis. Stat. § 995.20(2)(c), copyright Regents, University of Wisconsin). *See also*, *Zinda v. Lousiana Pacific Corp.*, 149 Wis. 2d 913, 474 N.W. 2d 913 (Ct. App. 1991).

53 2550 Wis JI-Civil.

Consideration of action to take with regard to a potentially defamatory post implicates consideration of three competing interests: the First Amendment rights of the poster in aspects that are protected, the reputational rights of the person alleged to have been defamed, and the interest of the citizenry to avoid having to pay defense costs and damages for a defamation action against the municipality.

The Wisconsin Jury Instructions recognize three elements to a defamation action:

> (1) the statement was false,
> (2) the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and
> (3) the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.[54]

There are, of course, different standards for public-figure plaintiffs as opposed to non-public-figure plaintiffs.[55] The focus of this section, as with the article, is on the existence of the cause of action as well as the impact the existence has on the decisions the municipality makes with regard to a social networking media presence. Nuances of the individual causes of action is beyond the scope of this article.

Defamation is a viable cause of action against an entity broadcasting the falsehood. A non-public figure plaintiff must prove that the defendant publisher was negligent in publishing the libel in order to recover actual damages.[56]

If a municipality has made the decision to have a social networking media presence, the exposure to this potential cause of action, perhaps more than the other considerations discussed herein militates toward a municipality having a designated person to regularly monitor posts. That monitor should be acting pursuant to a policy to catch and suppress defamation as soon as it is discerned. Moreover, the potential exposure also militates toward having an attorney at the ready to help navigate the channel between liability for First Amendment censorship and liability for defamation.

INTELLECTUAL PROPERTY – COPYRIGHT, TRADEMARK

Intellectual property liability exposure for an interactive Internet presence can come from a variety of bodies of law. These include copyright infringement, trademark infringement, trade dress infringement, unfair competition, right of publicity, and moral rights (such as the right of attribution). As with the larger article, this section does not presume to provide an exhaustive analysis of the law, but to raise the specter of potential liability for which consideration must be made.

Copyright Act

The Copyright Act provides for the protection of authors of works. The current Copyright Act[57] is actually a series of acts such as the Berne Convention Implementation Act of 1988, Piracy and

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54 2500 Wis JI-Civil (Defamation: Law Note for Trial Judges).

55 *New York Times v. Sullivan*, 376 U.S. 254, 84 S,Ct 710, 11 L.Ed.2d 686 (1964), *Denny v. Mertz,* 106 Wis.2d 636, 318 N.W.2d 141 (1982)

56 *Denny v. Mertz,* 106 Wis.2d 636, 318 N.W.2d 141 (1982).

57 17 U.S.C. §101, *et seq.*

Counterfeiting Amendments Act of 1982, the Copyright Remedy Clarification Act of 1990, the Digital Millennium Copyright Act of 1998, and the Satellite Home Viewer Improvement Act of 1999. Infringement is for:

> Anyone who violates any of the exclusive rights of the copyright owner as provided by [provisions of the Act], is an infringer of the copyright or right of the author, as the case may be. . . . As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.[58]

The cause of action is brought in federal court as a federal question. Remedies include injunctive relief,[59] damages (including lost profits),[60] and actual costs and attorney fees.[61]

There are a large number of ways that a municipality could find that its Facebook page contained infringing material. A user could have posted a photograph, a film clip, an audio file that directly infringed, or could have posted a link to an online location containing infringing material.[62]

Realizing that innocent providers of interactive Internet pages could find themselves infringing by post made to their sites, a safe harbor has been provided against money damages in the Digital Millennium Copyright Act.

The Digital Millennium Copyright Act implemented the World Intellectual Property Organization treaties. Included in the larger act was the "Online Copyright Infringement Liability Limitation Act," which provided a safe harbor for Internet users against damages if its requirements are followed. The requirements include that contact information for the entity in charge of the site be provided to viewers of the site. It also requires establishment of an effective "notice-and-takedown" procedure, and prompt action to remove content when a copyright owner provides notice that what has been posted is infringing. Moreover, the municipality can have no knowledge that the material in question is infringing prior to the notice and the municipality can derive no financial benefit from the infringement.[63]

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58 17 U.S.C. §501(a)

59 17 U.S.C. §502

60 17 U.S.C. §503. Damages are actual or statutory, at the option of the plaintiff. Statutory damages require no proof of damage, but is left to the discretion of the judge. For non-willful infringement, the range is $750 to $30,000; for willful infringement, the range is up to $150,000.

61 17 U.S.C. §504. These can be expensive, eclipsing actual damages. From the AIPLA Report of Economic Survey 2013 (Prepared under the Law Practice Management Committee of the American Intellectual Property Law Asssociation), the average cost of a copyright infringement lawsuit with less than $1,000,000 at issue, through trial for the midwest region (excluding Chicago and Minneapolis, which are typically more costly) is $132,000. (Report at page I-171)

62 See also the observation in footnote 87, that all citizen posts are subject to copyright protection. The municipality's terms of use should consider the inclusion of a provision by which the poster gives the municipality license to reproduce posts in response to Public Records requests.

63 17 U.S.C. §512, especially (c) and (d). *See also, ALS Scan Inc. v. RemarQ Communities Inc*, 239 F.3d 619, 57 USPQ2d 1996 (4th Cir. 2001)("The DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider. . . . This immunity, however, is not presumptive, but granted only to 'innocent' service providers who can prove they do not have actual or constructive knowledge of the infringement, as defined under any of the three

It bears reiteration that the safe harbor provision does not absolve the municipality of infringement, merely makes the innocent municipality safe from paying damages.

Trademark

Another area of intellectual property subject to consideration on the Facebook page is trademark law. At the federal level, the body of law is found in the Lanham Act.[64] Federal protection is afforded for marks used in interstate commerce. Proving interstate commerce is relatively easy since the advent of the Internet. For marks not protectable by the federal law, the Wisconsin counterpart will be at issue.[65]

The Lanham Act protects trademark owners against infringement,[66] false designation of origin,[67] and dilution.[68] Infringement is the use of another's mark on the same goods (*e.g.*, selling basketball shoes with the Nike swoosh® without permission). False designation of origin is applying the mark to similar goods to suggest that they are from the same source (*e.g.*, applying the Nike-like swoosh to items similar in nature or related to what Nike sells, such as basketballs – if Nike were not already selling basketballs). Dilution is the lessening of the uniqueness of a famous mark (*e.g.*, selling motorcycles or similar goods that are very different than what Nike sells but with the Nike-like swoosh).

Posting of a trademark on the municipal page may invite a cease & desist letter. The good news is that the cease & desist letter is rarely followed by a lawsuit if immediate cessation occurs. Further good news is that the municipality will have an affirmative defense that the statute is inapplicable as the alleged illegal use was not used in commerce. The bad news is that the post may have First Amendment overtones giving the municipality pause on complying with a takedown. Further bad news is that the trademark lawsuit defenses are as expensive as copyright defenses.

BULLYING, HARASSMENT, AND WHEN IS A THREAT NOT A THREAT

The Pew Research Center conducts surveys on Internet use. In 2015, they surveyed harassment on the Internet through social media. The survey probed internet users on incidents of harassment that the respondents witnessed online. About a quarter (24%) said they had seen someone being physically threatened, 19% reported seeing sexual harassment, and 18% saw incidents of stalking.[69] Another quarter said they had witnessed someone being harassed for sustained periods of time online.[70]

As with other First Amendment considerations, there is also a component of protection of the municipality from liability. Assume that a post is made on the municipal page that constitutes bullying of another citizen. A true threat is not discerned by the municipal employee monitoring the municipality's page. The subject of the bullying commits suicide leaving a note tying his personal

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prongs of 17 U.S.C. §512(c)(1). The DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe." 239 F.3d at 625.)

64 15 U.S.C. Chapter 22

65 Wis. Stat.§132.01

66 15 U.S.C. §1114.

67 15 U.S.C. §1125(a); this section is also frequently described as "Section 43(a) of the Lanham Act".

68 15 U.S.C. §1125(c); this section is also frequently described as "Section 43(c) of the Lanham Act".

69 http://www.pewresearch.org/fact-tank/2015/06/01/the-darkest-side-of-online-harassment-menacing-behavior/

70 *Id.*

distress to the posts on the municipality's page. Aside from the moral and political outrage, it is foreseeable that the municipality will face a civil complaint from the decedent's estate.

Separate from the liability issue is the constitutional issue. The Constitution does not protect true threats.[71] Such being the case, true threats can be taken down from a social media site without abridging the constitutional rights of the poster. What constitutes a "true" threat, however, may be as nebulous as what constitutes pornography. The recent decision in *Elonis v. United States*[72] may help illustrate the concern.

Elonis was convicted for making "any communication containing any threat… to injure the person of another" in violation of 18 U.S.C.§ 875 (c). The basis for the conviction was Elonis's posting of alleged threats on his Facebook page. Although the abridgments of a Elonis's First Amendment rights were argued to the court, the conviction was overturned on other grounds. Nonetheless, the facts and discussion of the facts in that case illustrate the difficulty that municipalities will face in considering the quality of threats posted on their Facebook pages.

Elonis fancied himself a rap artist (although there was no evidence he ever attempted to perform professionally). In defense of the charge against him, he alleged he was exercising his First Amendment rights in a similar manner as other performers. To make this point, his brief includes a lengthy excerpt from lyrics or rap song in which a very well-compensated rapper imagines killing his ex-wife and dumping her body in a lake.[73]

Elonis's lyrics included: "If I only knew then what I know now… I would've smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like a rape and murder."[74] The lyrics also included: "There is only one way to argue but 1000 ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all little cuts."[75]

Moreover, the context of the Facebook posts included that: (a) he had reason to be angry with his wife, the target of the "threat", who left him with his two children after seven years of marriage, (b) he took affirmative action to make certain she saw his posts, and (c) he posted a photograph on Facebook of himself holding a toy knife to a co-worker's throat at a park where he had worked, caused him to be fired by his employer.[76]

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71 *Elonis,* 135 S.Ct. at 2016 (Justice Alito concurrence, citing *Virginia v. Black*, 538 U.S. 343, 359 – 360 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)).

72 575 U. S. ____ , 135 S.Ct. 2001 (2015).

73 135 S.Ct at 2016

74 *Id.*

75 *Id.* An additional basis for the original indictment included a post on Facebook by Elonis that was a parody of a comedy skit about what is legal to say about killing the president from a series called "Whitest Kids U Know": "I am Tone Elonis. Did you know that it's illegal for me to say I want to kill my wife?… It is one of the only sentences that I am not allowed to say… Now, it was okay for me to say it right then because I was just telling you that it's illegal for me to say that I want to kill my wife… Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife . . . . But not illegal to say with a mortar launcher. Because that's its own sentence… I also found that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because it has easy access to a getaway road and you have a clear line of sight through the sunroom…. Yet even more it illegal to show an illustrated diagram [diagram of the house]. 135 S. Ct at 2005

76 The firing resulted in another post: "Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main

The majority did not need to address the First Amendment argument of Elonis, reversing his conviction on failure of the prosecution to prove *scienter* as an element of the offense. While both Justice Alito in a concurring opinion and Justice Thomas in a dissenting opinion addressed the First Amendment argument, therein finding that Elonis's actions did constitute a threat, the majority did not find a violation of the federal statute for delivering a threat.

It will take a nuanced argument to find that a series of words that does not as a matter of law constitute the delivery of a threat for federal criminal law purposes, can somehow nonetheless constitute a true threat allowing for the removal of a post without abridging the poster's Constitutional Rights.

Absent that nuanced argument, the municipality will suffer at least the moral outrage of the public for allowing what is at least boorish comments, if the ultimate lawsuit is not brought.

PUBLIC RECORDS/ARCHIVE SPACE

For purposes of the Wisconsin Public Records Law, Facebook posts made by the municipality or by citizens on a Facebook page that is maintained by the municipality are records.[77] "Record" also includes records produced or maintained by Facebook pursuant to its user agreement with the municipality.[78]

There are four considerations surrounding maintenance of the Facebook posts as public records: (1) the maintenance under the record retention law requirements; (2) the retrieval obligation under the Public Records Law, (3) the format of retention and disclosure (*e.g.*, maintaining a file size that includes metadata), and (4) the practical aspects of mass storage. Special aspects of these questions will be discussed in the two subsections that follow.

Retention

The National Archives and Records Administration (NARA) issued guidance to heads of all federal agencies on the maintenance by the agencies of social media records.[79] For federal purposes, if an agency uses the social media tool to convey official agency information, its content is a public record.[80] The NARA also notes:

> Each agency is responsible for managing its records. At a minimum, these responsibilities include the ability to identify and retrieve Federal records that are being created and maintained on social media. Agencies should be aware that a social media provider could discontinue their service or delete information from an agency's account. Additionally, agencies may stop using a social media platform at any time. In either situation, the agency is not relieved

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attraction. Whoever thought the Halloween Haunt could be so f***in' scary? *"Id.*

77 See, Wis. Stat. § 19.32(2)

78 See, Wis. Stat. § 19.36(3); see also *Wisconsin Public Records Law Wis. Stat. §§ 19.31-19.39, Compliance Outline*, Department of Justice, Attorney General J.B. Van Hollen (September 2012), section IV. A. 4.

79 NARA Bulletin 2014-04, Guidance on Managing Social Media Records (to Heads of Federal Agencies)(issued October 25, 2013, and expiring on October 31, 2016). It is available at http://www.archives.gov/records-mgmt/bulletins/2014-02.html (accessed July 22, 2015).

80 *Id.* at question 3.

> of its records management and possible capture obligations.[81]
>
> Capture is important for temporary records with long-term retentions or for permanent records. These should be exported from the social media platform into an agency recordkeeping system.[82]

The same results are likely under Wisconsin Law for use by Wisconsin municipalities.

Under Wisconsin record retention law,[83] the record custodian must keep and preserve all property and things that are in the possession or control of the custodian in the course of his or her duties. This includes social media postings.[84]

The threshold observation is that the records custodian for the Facebook posts cannot be a Facebook employee, but rather must be a municipal employee or officer.[85] The next observation is that Facebook provides some level of archiving by providing space on their servers for posts to be maintained on a page. But, as will be explored later herein, Facebook makes no assurances that it will continue to archive anything.[86]

These observations lead to the conclusion that the municipality must rely on itself to archive and manage the archive of its Facebook pages and posts.[87]

Metadata

Metadata is data that describes other data. It is typically hidden from the view of a casual observer of the text, but can be revealed to those who are technology-savvy. The information in metadata can include when the document was created, what revisions were made to text, who created the revisions, when a document was opened, and when it was printed.

Even those savvy with technology can miss implications of metadata. Adam Savage, co-host of the television show Mythbusters, posted on Twitter a photo taken with his iPhone® of his Toyota that was at the time parked in front of his home. Embedded in that post was metadata, including the geotag for his home. He revealed with that social media post of his car, the location of his home.[88]

Geotagging is just one type of metadata automatically created and automatically associated with many digital applications.

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81 *Id.* at question 8.
82 *Id.* at question 7.
83 Wis. Stat. §19.21(4)(b) (2013-2014). References herein to Wisconsin statutes are to this biennium.
84 See, Memo entitled "Public Records on Social Networking Sites" from Peter Gottlieg, Board Chair for the Wisconsin Public Records Board, to Agency Administrators, dated October 27, 2010.
85 Wis. Stat. §19.33(4).
86 See the Terms Of Service section below for a discussion of Facebook term 18.10.
87 Among the interesting anomalies that arises as Facebook policy meets the Wisconsin Public Records Law is the consideration of ownership of the posts. Paragraph 2 of Facebook terms of service states: "You [the poster] own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings." https://www.facebook.com/legal/terms, accessed August 10, 2015. This is in keeping with federal copyright law. When applying the Public Record Law to a request for a Facebook page, a court will have to decide if all citizen posts must be redacted as copyrighted material. See definition of "record" in Wis. Stat. §19.32(2) (that exempts material protected by copyright from the definition) and 15 U.S.C. §§ 102, 106, and 201 (that material recorded in a tangible medium is subject to copyright protection that is owned by the author).
88 See, http://www.nytimes.com/2010/08/12/technology/personaltech/12basics.html?_r=0 (accessed August 10, 2015)

Metadata has at least two considerations for the municipality. First, there may be information in the metadata that should not be revealed. Using the geotagging as an example, the posting a photos of children on a municipality's social networking media page, could have compromised their security.[89]

More pressingly, perhaps, is the application of the Public Records Law to the existence of metadata.

It has been suggested that Wisconsin law implies that a requester has a statutory right to a record such as a social networking media post in its original format.[90] No Wisconsin appellate court has considered the issue of whether a specifically-made request for a digital record with all metadata included and intact will require a records custodian to provide it.[91]

One set of commentators correlated metadata treatment of e-discovery rules to the Wisconsin Public Records Law:

> In the context of e-discovery, federal courts have held that the electronic form of a document contains essential characteristics rendering a paper printout of electronic records inadequate. The new e-discovery rules ensure that litigants produce documents in the same form as "they are kept in the usual course of business." This stance in the realm of civil litigation compliments Wisconsin statutes and common law, both of which generally oblige a records custodian to provide access to records in their original form. [92]

The correlation (and the unanswered questions) must further be extended to the Record Retention Law.[93] Does the municipality's Facebook page need to be archived by the municipality with metadata associated with the citizen posts incorporated? Stated another way, will a pdf daily snapshot of a Facebook page be sufficient as an archive, or will the entire page need to be preserved in its native format with all metadata intact?[94]

OPEN MEETINGS

It is undoubtedly the case that members of the governing body will want to actively monitor

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89 It appears Facebook has established a policy of stripping geotags from new posts. Facebook continues to post other metadata. Other social media may not be as proactive on stripping geotags from their posts.

90 See *The Wisconsin Public Records and Open Meetings Handbook,* fourth edition, edited by Melanie R. Swank, State Bar of Wisconsin, 2015, esp. §10.11.

91 *Id*. at §10.10. Note that in *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, 310 Wis.2d 397, 751 N.W.2d 736, 36 Media L. Rep. 2414, the Court was able to delay answering this question, finding that the request for an "electronic/digital" copy was satisfied by the data converted into a pdf file and then provided by the custodian.

92 Comment, *Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records*, Leanne Holcomb and James Isaac, 2008 Wisconsin Law Review 515, 560 (footnote cites omitted). See also, Wis. Stat. §§ 19.35(1)(c), (d); see also, 75 Op. Wis. Att'y Gen. 133, 145 (1986).

93 Wis. Stat. 19.21(4)(b).

94 One conference report observed: "Tools for preservation and collection of social media content are constantly evolving. Because each social media site is unique, the tools to preserve and collect content from one site may not work for others." *The Sedona Conference® Primer on Social Media (Public Comment Version)*, October 2012, Part Two, section II, page 38 (footnotes omitted). While technical collection and preservation procedures are beyond the scope of this article, the importance of these technical issues cannot be ignored as the consideration for a social media presence is being made.

posts on the municipal Facebook page. This raises the specter that the Open Meetings Law will be violated.

The open meetings law requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law."[95] The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes.[96]

A "meeting" is defined as: [T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.[97] The Wisconsin Supreme Court has held that a village board conducted a "meeting," in violation of the Open Meetings Law, when a quorum of the board regularly attended the village plan commission meeting to merely listen to the matters unfolding at the plan commission meeting and did not actually discuss the matters among themselves.[98]

The phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together.[99]

The Attorney General has considered the open meetings law in the context of the use of electronic communications. While particularly interested in email communication, the reasoning has direct application to social media. The Attorney General observes that:

> Written communications transmitted by electronic means also may constitute a "convening of members." Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion *e.g.,* a rapid back-and-forth exchange of viewpoints among multiple members. . . . In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.[100]

Use of new communication technology and applications of the new technology, such as Facebook, makes it dangerously easy to violate the Open Meetings Law.[101]

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95 Wis. Stat. § 19.81(2).
96 Wis. Stat. § 19.81(4); *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993).
97 Wis. Stat. § 19.82(2).
98 *State ex rel. Badke v. Greendale Village Bd*., 173 Wis. 2d 553, 572-74, 494 N.W.2d 408 (1993),
99 *Wisconsin Open Meetings Law: A Compliance Guide* Department of Justice, Attorney General J.B. Van Hollen (August 2010), page 7.
100 *Id.* at page 8.
101 *See,* Daniel M. Olson, *Balancing Technology and the Law: Basics for Local Officials*, The Municipality magazine, Vol. 110, No. 6, June 2015, p. 196. The article is geared toward ease of use of the portable hardware associated with the electronic applications.

Assuming a governing board of thirteen who have all enrolled as "friends" for the municipal page, it is entirely possible that at any one time seven may be on Facebook reviewing posts on the municipal page. The possibility of a quorum "meeting" on the municipality's site increases for smaller governing boards and for smaller committees of the parent organization.

While a chance gathering does not rise to a violation of the law,[102] given the ease of logging onto Facebook and logging off of Facebook, and of seeing who is posting in real time, such a defensive argument that the members constituting a quorum (or negative quorum in certain instances) of a body continuing to monitor the comments in the presence of each other for any length of time will probably fall flat before a court.

FACEBOOK TERMS OF SERVICE

Facebook has Terms of Service (TOS) to which users must agree. The gateway to the Facebook TOS is found at https://www.facebook.com/legal/terms. But that extensive list of conditions is merely a gateway with additional hyperlinks to additional terms under such designations as "community standards". Users agree to all of these terms when signing up.

While most users have no choice but to accept the TOS as written, the federal government does not.[103] While a municipality may not have the clout of the federal government, the municipality must nonetheless review the TOS before agreeing to their terms by clicking "I accept".

Several of the TOS provisions will be examined.

Indemnification

The TOS states:

> 15.2. If anyone brings a claim against us 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. Although we provide rules for user conduct, we do not control or direct users' actions on Facebook and are not responsible for the content or information users transmit or share on Facebook. We are not responsible for any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook. We are not responsible for the conduct, whether online or offline, of any user of Facebook.

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102 See, Wis. Stat. § 19.82(2)

103 *See*, Matthew P. Hintz, *An Interview with Elizabeth Day Hochberg, Assistant General Counsel, General Services Administration*, in Landslide magazine, published by the American Bar Association (Intellectual Property Section), March/April 2014, page 9 ("[A] federal agency, or a federal employee signing up for the platform for official agency use, cannot merely click 'I accept.' This is because there are about two dozen laws that apply to a federal agency's use of social media, and many of them are violated in boilerplate ToS agreements.") *See also,* http://www.digitalgov.gov/resources/negotiated-terms-of-service-agreements/ (links to amendments made to standard TOS for many social media providers to accommodate the legal requirements of the federal government; one of the links is to a draft of the Facebook TOS amendments, the actual document of which purports to be confidential). (Accessed July 23, 2015.)

(Emphasis added).

This term carries at least three onerous implications. The first, most explicit provisions are the dual agreements for the municipality to indemnify and hold Facebook harmless for claims.

The second is the arguable waiver of the $50,000 liability cap for torts asserted against municipalities.[104] Assume the above-introduced hypothetical situation in which a person who felt harassed by a Facebook post on the municipality's page commits suicide. The estate of the decedent sues Facebook for $2,000,000. It will indubitably be argued by Facebook that the municipality will pay for the defense of Facebook and for any judgment entered against Facebook (that is not subject to the municipality's tort-liability cap) with regard to that claim.

The third onerous implication is related to the waiver – effective loss of the notice provision.[105] Assume the hypothetical situation posited in the previous paragraph. Assume further that the estate provides no notice to the municipality, but sues Facebook within the three-year statute of limitation.[106] Although the estate of the decedent may have forfeited a direct action against the municipality, the municipality's wallet is still very exposed through the indemnification obligation.

Choice Of Venue

> 15.1. You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

Attorneys are typically concerned with choice of law and choice of venue provisions outside of Wisconsin for at least three reasons: (1) the forum outside of Wisconsin (and in this case, California) presents huge financial and logistical burdens, (2) the law of the other state is unknown to the local attorney (perhaps carefully having been chosen by the large corporation because of specific and unique laws that impair the municipality's position[107]), and (3) there is a concern of local parties to a lawsuit having "home field" advantage in motions decided by local judges and verdicts made by local juries.

No Third-Party Beneficiaries

> 18.1 If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc.
> 18.9. This Statement does not confer any third party beneficiary rights.

As with many contracts, the TOS agreement is between the two contracting parties. In this

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104 Wis. Stat. §893.80(3).

105 Wis. Stat. §893.80(1d) (Subject to some substantial exceptions, failure of the injured party to give notice to the municipality of the circumstances giving rise to the claim within 120 days of the incurrence of the injury, is a bar to the claim.)

106 Wis. Stat. §893.54.

107 For example, potential loss of the municipality's protections under Wis. Stat. § 893.80.

case, however, where various bilaterally-contracting parties all interact with each other, there are considerations not often found in the typical service contract to which a municipality may become a party.

Assume a post is made of potentially discriminatory, defamatory, or intellectual-property-infringing material on the municipality's page that could subject the municipality to a claim for liability. The municipality and the abusing poster each have signed their own TOS agreement. Each TOS agreement prohibits posts that are discriminatory, defamatory, or intellectual-property-infringing. The municipality, while considering what actions it will take with regard to its own First Amendment exposure and hoping for an easy resolution of its issue through action by Facebook, sends a note to Facebook complaining about the post. Facebook does not have to take action (see terms of 15.2. reproduced above). More importantly, by these provisions to which the municipality agreed, the municipality cannot force action by Facebook against the abusive poster.

Release Use of Your Name and Profile Commercially By Third Parties

> 9.1. You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.

This may be intended to allow Facebook-compensated advertisers to advertise on your page. This could provide difficult concerns about sponsorship and endorsement. Should a community be properly concerned if a mayoral candidate buys up all of the advertising time associated with a municipal Facebook site for the two-week block prior to an election?

While this provision may be intended to allow Facebook-compensated advertising on a municipality's page, the actual words portend more ominous construction. The words of the agreement do not merely allow the vendor's advertising on your page, but that your name and/or profile picture with your content or information may be displayed on the vendor's page. Without control of how the message is being delivered, concerns about sponsorship and endorsement are legitimate.

Facebook Has No Obligation to Archive

> 18.10.We reserve all rights not expressly granted to you.

Nowhere in the TOS is an obligation that Facebook will archive for its users any posts. This provision 18.10. underscores that Facebook has no obligations, other than those they explicitly granted to the user (which are none).

How Does a Municipality Respond to a Takedown Demand From Facebook for Offensive But Protected Speech?

Linked to Facebook's denominated Terms of Service are other terms to which the user agree to abide. Another of these terms is “Community Standards”. In Community Standards Face book states the following: “We may ask Page owners to associate their name and Facebook Profile with a Page

that contains cruel and insensitive content, even if that content does not violate our policies."[108]

While the exact import of that language is subject to debate, it may be intended to mean that Facebook can at its discretion demand the municipal user take cruel and insensitive material down. Can a municipality accede to denying the Constitutional rights of a poster at the demand of another?

ELECTIONEERING AND OTHER ACTS OF DUBIOUS ILLEGALITY

It might be valuable to have a provision in a municipal page use policy a provision prohibiting posts that violate law. Such a provision is not a panacea.

Assume a candidate for local office offers on the municipal Facebook page to provide free rides to the polls to his constituents. Assume a person takes a photo of that person's completed Indiana ballot to show either support or disdain for Governor Walker's presidential aspirations and posts it on the municipality's Facebook page. Assume a photo of the state flag is posted with offensive political markings. Can the municipality through a Facebook-savvy, but otherwise unsophisticated monitor mechanistically take any of these down based on such a policy?

The offer of rides to the polls might be illegal as private use for candidacy of public property, but it is arguable that it is not. [109] The posting of a vote cast in Wisconsin would be illegal[110] but is the posting to a "Wisconsin" site of an Indiana ballot illegal in Indiana, much less in Wisconsin? The desecration of the state flag is technically illegal[111] but a takedown pursuant to a blanket policy will likely be a violation of the First Amendment.[112]

INACCURACIES

A separate consideration must be made for inaccurate material posted. Assume that a citizen posts an incorrect date for an election, inaccurately identifies a state official as a local official, mistakenly attributes a comment to a wrong person, or unfairly paraphrases a statement made by an official. While the obvious remedy is a clarifying post, the policy questions to be answered are who determines what is inaccurate, and to what the municipality will post a clarification (as opposed to what the municipality will be leave to other posters to remedy).

REMEDIES – DISCLAIMERS, CORRECTIONS, TAKEDOWNS

The most effective remedy for a "bad" post is removal – if it can be done legally. As discussed above, there are many instances in which a municipality will have to suffer the post.

A less drastic option to removal is redaction. Municipal authorities are already familiar with this type of decision making in the context of Public Records responses. Although the concept is the same – to surgically remove offensive content – the factors involved are broader. Using the Restaurant/Alderperson/Citizen scenario above, rather than removal of the entire rant post, surgically removing privacy-invading and defamatory portions of the post without affecting the ineffectiveness portion of the rant may work to create a more defensible position, if not avoiding the lawsuit in the first

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108 https://www.facebook.com/communitystandards (accessed August 10, 2015).
109 Wis. Stat. § 11.33(1)
110 Wis. Stat. § 12.13(1)(f)
111 Wis. Stat. § 946.06
112 *Spence v. State of Washington*, 418 U.S. 405 (1974), *Koser v. County of Pierce*, 834 F.Supp. 305 (W.D. Wis. 1993)

instance.

The next way to address the post is through a remedial post. As discussed in the previous section, care has to be taken by the municipality in identifying what type of posts will receive response, who is able to craft the response, and what guidelines should be followed by the responder.

Finally, there is the ubiquitous disclaimer, that the municipality takes no responsibility for the posts of citizens. While such a statement may be worthwhile, its actually efficacy has not been tested.

WHO CAN AUTHORIZE THE CREATION OF A FACEBOOK PAGE?

To create a Facebook page, the municipality must approve the terms of service offered by Facebook. The ability to enter into such contracts flows from the implied authority given to the municipal government.[113] As a general rule, only the governing body or an officer or employee authorized by the governing body may enter into contracts on behalf of the municipality.[114]

Such rules contemplate legislative action by the governing body to affirmatively approve the creation of the account with the concomitant approval of the terms of service. These rules do not contemplate an administrative determination that on a particular day, a municipal employee should create the municipality's Facebook account, blindly accepting the terms of service. Similarly, the rules do not contemplate individual departments creating Facebook accounts without the approval of the governing body, regardless of whether Facebook is an effective way of communicating with citizens.

CONCLUSION

Social media in general, and Facebook in particular, are inexpensive and effective ways of communicating with citizens. For that reason, Facebook is used by municipal governments, state agencies, and federal agencies.

Nonetheless, the decision by the legislative body of the municipality to create a Facebook page should not be made without consideration of the potential pitfalls. The purpose of this article is not to suggest municipalities eschew this effective means of communication. Rather, this article advocates for full consideration prior to making the determination to create a page. Full consideration should be made with the input of a team composed of: a person knowledgeable in the nuances of the medium under consideration, a person who is knowledgeable in the existing policies of the municipality (*e.g.*, for human resources and brand use), a lawyer knowledgeable in the legal considerations exemplified in this article, an information technology expert to address capture and retention issues, and a decision-maker from administration to determine relative risk and ascribe relative priority to policy creation.

Moreover, it is hoped that once a decision to create a page has been made, further consideration will be made by the municipality with regard to the management of the page. The municipality should have a plan in the form of written policy identifying how the page be managed. The municipality should identify a person who is knowledgeable in the municipality's written policy to manage the page, and to make continuously available to that manager someone of the legal staff to assist in the execution of the policy.

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113 Wis. Stat. § 61.34 (1) for villages and Wis. Stat. § 62.11 (5) for cities.

114 *See, Kocinski v. Home Ins. Co.,* 154 Wis. 2d 21, 452 N.W. 2d 360 (1990); *see also*, Handbook for Wisconsin Municipal Officials, the League of Wisconsin Municipalities, Chapter XI, page 283 (2002)

STATE OF MICHIGAN

COURT OF APPEALS

TODD L. LEVITT and LEVITT LAW FIRM, P.C.,

Plaintiffs-Appellants,

v

ZACHARY FELTON,

Defendant-Appellee.

UNPUBLISHED
May 19, 2016

No. 326362
Isabella Circuit Court
LC No. 2014-011644-NZ

Before: BOONSTRA, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In this dispute arising from a Twitter account, plaintiffs, Todd Levitt and Levitt Law Firm, P.C., appeal as of right the trial court's order granting summary disposition to defendant, Zachary Felton, pursuant to MCR 2.116(C)(10) (no genuine issues of material fact). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Todd Levitt is an attorney and a former adjunct professor at Central Michigan University (CMU). Allegedly, university students are a primary clientele of plaintiff law firm. Levitt was actively involved in marketing his law firm on various social media platforms, including Twitter. His since-deleted Twitter account represented that he was a "badass lawyer." In addition to promoting his law practice on Twitter, Levitt admittedly made several posts which referenced marijuana and alcohol use. For instance, he posted a tweet about serving alcohol in a class he taught at CMU, and in another, stated that "Mr. Jimmy Beam just confirmed a guest appearance in class next week." In other tweets, he reminisced about his days as a student at CMU, stating that he "tore it up" in the 1980s, and warning students not to "jump [while] drunk" in the elevators at a certain dormitory. He tweeted about being a guest bartender at a local bar and about throwing an end-of-semester party. He also referenced marijuana in several tweets; in one tweet he posted an ode to "mommy marijuana," who "always put me at ease." In addition, he tweeted that if marijuana were legal in Mount Pleasant, Michigan, the CMU "dorms would look like they were on fire."

In April 2014, Levitt, who identified himself on Twitter as "Todd Levitt@levittlaw," noticed an unidentified individual had created an account, "Todd Levitt 2.0 @levittlawyer" that included a photograph of Levitt and a logo used by his law firm. Levitt later discovered, and defendant admitted as much, that defendant, a CMU student at the time, was responsible for the imposter Twitter account. Levitt alleged that defendant attempted to confuse Levitt's Twitter followers by using his likeness and logo. He also alleged that defendant attacked his credibility as an attorney and as a professor by posting the following tweets to the imposter account:

1. "What's the difference between the internet and my tweeted legal advice? A: none. They're both 100% accurate!"

2. "Buying me a drink at Cabin Karaoke will get you extra [credit], but it's not like that matters because you are guaranteed an A in syllabus."

3. "Partying = Defense Clients[.] Defense Clients = Income[.] If I endorse partying, will my income grow? It's like a Ponzi scheme for lawyers!"

4. "@twebbsays should either meet me at 4/20 in my satellite office or take a hiatus from the medical card" and "#inToddWeToke" and "4/20 = Pot smoking holiday[.] Possession of marijuana = Client[.] Client = Income[.] In the words of Snoop Dogg: smoke weed every day. #inToddWeToke[.]"

After allegedly enduring defendant's harassment for two weeks, Levitt deleted his Twitter account to "prevent further damage to his reputation." Levitt contended that during the two-week period, he received dozens of phone calls from clients, potential clients, and parents who were distressed that Levitt had exhibited the behaviors discussed in defendant's tweets. According to plaintiffs, two potential clients also informed Levitt that they declined to hire him because they believed that defendant's tweets were an accurate representation of his character. Levitt contended that he could not continue as an adjunct professor and has suffered loss of income. Plaintiffs' theories of liability against defendant included claims of false light, intentional infliction of emotional distress, libel, tortious interference with business relations, defamation per se, business defamation, and unfair competition. Plaintiffs asked for the immediate termination of the "Todd Levitt 2.0 @levittlawyer" Twitter account in order to prevent future injuries to their reputation and business.

In answering the complaint, defendant admitted that he was responsible for the imposter account and characterized the account as a "parody." He asserted that on April 15, 2014, he posted this tweet: "Remember Kiddoes, parody accounts are #badass and #lawful." On April 16, 2014, he posted: "Word of the day for @twebbsays is satire. Three syllables. Once you get a grasp of the concept a lot of things will start making sense." And on April 22, 2014, he tweeted the following disclaimer: "A gentle reminder to potential seekers of Todd Levitt: This is not him. This is a parody account. You can find the real Todd(ler)@levittlaw."

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the posts were constitutionally protected free speech. The trial court granted defendant's motion for summary disposition and held that:

> Defendant's Twitter account, Todd Levitt 2.0, is a parody account that is protected under the First Amendment of the United States Constitution. The [t]weets are meant to ridicule and satirize plaintiff's social media presence in a humorous way. However, whether defendant succeeded in creating a *humorous* parody is irrelevant for purposes of the First Amendment. It is clear that Todd Levitt 2.0 cannot reasonably be interpreted as anything other than a parody account. Therefore, it is protected speech under the First Amendment.

In reaching this holding, the court also reasoned that defendant's disclaimers were sufficient to put a reasonable person on notice that the tweets were not from Levitt.

II. ANALYSIS

Plaintiffs argue that the court erred in granting summary disposition to defendant. An appellate court reviews de novo a circuit court's summary disposition ruling. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph*, 491 Mich at 206. Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The court considering the motion "must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Joseph*, 491 Mich at 206. All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

Plaintiffs' various claims are premised on the notion that the statements posted to the imposter Twitter account were defamatory. In resolving these claims, we must keep in mind that

> [w]hen addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the records to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection. [*Northland Wheels Roller Skating Ctr, Inc v Detroit Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).]

"A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991). However, "[t]he First Amendment protects statements that cannot be interpreted as stating actual facts about an individual from serving as the basis for a defamation action or similar claim under state law." *Ghanam v Does*, 303 Mich App 522, 545-546; 845 NW2d 128 (2014). "Such statements include the usual rhetorical hyperbole and imaginative expression often found in satires, parodies, and cartoons." *Id*. at 546, citing *Hustler Magazine, Inc v Falwell*, 485 US 46, 53-54; 108 S Ct 876; 99 L Ed 2d 41 (1998). The statements are protected if they, "although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual

facts about the plaintiff." *Ireland v Edwards*, 230 Mich App 607, 617; 584 NW2d 632 (1998). Further, parodies and satire are protected even when they are intended to be highly offensive of the person criticized. *Ghanam*, 303 Mich App at 546. When evaluating allegedly defamatory statements, we consider whether a reasonable reader, viewing the statements in context, would understand the statements to be "rhetorical hyperbole." *Id*. (citation and quotation marks omitted).

When read in context, defendant's tweets are a parody and cannot reasonably be interpreted as coming from Levitt, an attorney and college professor. The cited tweets ridicule and demean the legal profession, as well as Levitt's status as an attorney and a college professor. In particular, some of the tweets encourage followers to commit alcohol and drug-related offenses in order to further Levitt's business. As aptly stated by the trial court, "[i]t would be quite foolish for an attorney to outright state by way of self-promotion that he wants college students to drink and use illegal drugs so that he can increase his income by defending them in court." Other tweets suggest that Levitt's students can earn extra credit in his class by buying him a drink. Surely this statement cannot be interpreted as coming from a college professor. As noted by the trial court, when the challenged tweets are read in the context of Levitt's own tweets, a reasonable person would see defendant's tweets as attempting to ridicule and satirize Levitt's tweets about alcohol and marijuana use. See *Ireland*, 230 Mich App at 618-619 (examining allegedly defamatory statements and concluding that they were "rhetorical hyperbole" because "any reasonable person hearing these remarks in context would have clearly understood what was intended.").

Moreover, the idea that the tweets were a parody is soundly reinforced by several disclaimers posted to the imposter account stating that the account was indeed a parody. At the outset, the account itself was styled as "Todd Levitt 2.0," which has come to be commonly accepted jargon for describing an upgrade of an original concept. Thus, "Todd Levitt 2.0" signals that the account was identifying itself as a superior or upgraded version of Levitt, which hints at the notion that it is a spoof. Further, defendant's tweets expressly stated, on multiple occasions, that the account was intended as a parody. For instance, one tweet read that the account was "[a] badass parody of our favorite lawyer . . . ." Another gave a "gentle reminder to potential seekers of Todd Levitt: *This is not him. This is a parody account*. You can find the real Todd(ler) @levittlaw." (Emphasis added). In light of these statements, a reasonable reader could not have interpreted the account as stating actual facts about Levitt.

Contrary to the suggestions made by plaintiffs on appeal, it does not take any factual determinations or fact-finding in order to conclude that the challenged tweets are not actionable. "[A] court may decide as a matter of law whether a statement is actually capable of defamatory meaning." *Ireland*, 230 Mich App at 638. "Where no such meaning is possible, summary disposition is appropriate." *Id*. Because the statements at issue in this case could not reasonably

be interpreted as factual statements by or about Levitt, summary disposition in favor of defendant was appropriate.[1]

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[1] Because all of plaintiffs' claims were premised on the allegedly defamatory statements, we conclude that the trial court properly dismissed all of the claims, notwithstanding the different labels placed on the claims. See *Ireland*, 230 Mich App at 624-625. Moreover, we reject plaintiffs' fleeting request on appeal that they should be given the opportunity to amend the complaint. Plaintiffs fail to specify how they could have amended the complaint, and we find their cursory request to be abandoned. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).

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Social Media Policy
June 1, 2011

BACKGROUND

The evolution of the internet has increasingly transformed the nature of web site content from static presentation of information to creation of interactive applications that encourage dialogue and collaboration. These two-way applications, otherwise known as "Web 2.0", include web sites such as blogs, wikis, social networking sites, and video-sharing sites among others.

The City of Milwaukee encourages its departments to communicate, collaborate, and exchange information in support of the City's mission, using social media technologies. Interactive social media web applications such as Facebook, Twitter, and LinkedIn offer enormous opportunities to City of Milwaukee residents to interact directly with their City government. Using these tools, constituents may request services, report problems in their neighborhoods, or express opinions to elected officials and policymakers. Moreover, by opening more direct channels of communication with residents, the City will enhance its ability to respond more quickly to their needs

These opportunities, however, do not come without risk and potential costs. To ensure proper and appropriate use of these new resources, the City has established the following Social Media Policy. The policy prescribes the actions that employees and representatives of the City must follow when posting in an "official" capacity using social media. It also strives to maintain compliance with state and local laws regarding public records, open meetings, record retention, and elections.

GENERAL

For purposes of this policy, "social media sites" are defined as interactive online pages that allow for and encourage multiple postings or interactions and whose information is constantly altered by its readers and producers. Examples of these sites include blogs, wikis, RSS feeds, and web sites such as Facebook, Twitter, GovLoop, YouTube, LinkedIn, Flickr, MySpace, LiveJournal and others.

Any information or materials posted to such sites by City employees representing the City of Milwaukee using tools provided either by the City or the web site is considered "social media content." "City-related content" will be determined based on the substance of the information or materials posted rather than the identity of the poster, the equipment used, or the site on which it is posted. For purposes of this policy "City-supported" or "City-sponsored" social media web sites are defined as sites created and/or maintained by designated City employees and used for the purpose of posting City-related social media content.

All official City presence on social media sites is an extension of the City's existing information systems and networks. To ensure that the City's website (www.city.milwaukee.gov) remains the primary and predominant internet presence for the City of Milwaukee and the central repository for the City's web-based information, wherever possible, content posted to City social media sites must also be made available on the City's website. Social media content should contain links directing users back to the City's official website for in-depth information, forms, documents or online services necessary to conduct business with the City.

AUTHORIZATION AND ACCESS

City departments that choose to participate in social media must designate an individual or individuals who will act as spokespersons for the City and the department on various social media websites. To ensure consistency of message, departments should limit the number of staff personnel authorized to post to social media sites. Employees must have prior authorization to act as a spokesperson for the City before posting official comments regarding City-related business on social media sites. City departments must also ensure that any and all contractors, vendors, or agents of the City who may represent the City in postings to social media sites will comply with all policies, rules, and requirements regarding such actions.

Departments should routinely review access privileges for specific employees to determine if continued access to social media sites remains warranted. Decisions on allowing continued access should be based on the needs of the department and the employee's job responsibilities. The City of Milwaukee reserves the right to deny access to post information on City-sponsored social media sites to any employee or representative of the City who violates this Social Media Policy. Any reference in this document to "employee" or "City employee" shall be considered to include any contractor, vendor, or agent working for or representing the City but not in City employ.

Notwithstanding other provisions of this policy, the policy does not intend in any way to limit or restrict the ability of City employees to speak as private citizens on matters relating to City business. City employees may post comments, questions, or opinions on social media sites, including City-sponsored sites, so long as they make clear that they are acting as private citizens and that their statements in no way represent the official position of the City.

OFFICIAL AND ACCEPTABLE EMPLOYEE USE

Once granted access by the department, employees may post to social media sites in an official capacity only information that pertains to City of Milwaukee business or operations. City employees, in their role as designated representatives of the City of Milwaukee, must never post personal information to a City-sponsored social media site. Instead, City representatives who wish to post personal information on social media sites must maintain separate personal pages on sites such as Facebook or Twitter. Personal messages and the like received on an "official" page must be referred to the owner's personal page. Messages relating to City business sent to a personal page must be forwarded to an official City page.

The same principles and policies that govern interactions with the public generally apply also to social media. Employees representing the City of Milwaukee on social media sites must, at all times, conduct themselves in accordance with all state and local laws and all existing City policies. The City

requires all employees who participate in social media on behalf of their departments to adhere to and follow all existing work rules and the City's Code of Ethics.

With the exception of elected officials, City employees posting official information to social media sites generally may do so only for the department they represent. They may post information or links to information already published on existing City web pages or social media sites but may not post any new or original materials relating to the activities or operations of other City departments, governments, organizations, or individuals without prior approval from the group or person discussed. City representatives should refer any questions, comments, or discussion outside of their department's responsibility or their personal expertise to an appropriate responder within their own or another City department.

Elected officials, however, hold unique positions in the operations of City government. They must respond to the needs of and answer directly to the constituents who elected them. This requires elected officials to become knowledgeable about all aspects of City government. It also creates expectations that they have the ability to speak on a wide range of City issues and operations, across any and all functional and departmental boundaries. For this reason, elected officials and their representatives are exempt from provisions of this policy restricting employees from posting information regarding other departments.

Employees representing the City of Milwaukee on social media sites must act responsibly in the posting of material and in their online demeanor. Employees must respond honestly to appropriate queries and should not become hostile or argumentative. They should always exercise good judgment regarding the content and potential need for confidentiality (omitting addresses, phone numbers, and other personal data) of posted information.

Employees representing the City must refrain from using social media tools to express personal opinions or concerns. They may never use their access as City representatives to social media sites for personal gain or to promote endeavors of relatives, friends, or associates. Employees and Elected Officials may not post information on City-sponsored social media sites that is protected under copyright, trade secret, or is proprietary in nature without the express written permission from the lawful holder of the information, prior to posting on a City-sponsored site.

Departments must ensure that their employees constantly monitor material posted to social media sites to:

- Respond promptly to questions or replies.
- Replace stale, outdated, and/or incorrect information.
- Remove inappropriate content (as defined below.)

USER RESPONSIBILITIES

The City of Milwaukee participates in and provides information through social media sites as a public service. The City anticipates that users will use such sites as a means of conveying useful information to and engaging in productive discourse with elected officials, City employees and other representatives.

The City expects that all participants on City-sponsored social media sites, including City employees, other representatives and users will display respect and civility when posting comments or information. The City of Milwaukee reserves the right to remove comments and/or materials solely at its discretion if the City deems that comments and/or materials:

- Are profane, obscene, violent, or pornographic in language or content;
- Promote, foster, or perpetuate discrimination on the basis of gender, race, creed, color, national origin or ancestry, age, disability, lawful source of income, marital status, sexual orientation, gender identity, past or present membership in military service, or familial status;
- Unlawfully defame or attack an individual or group;
- Make direct or indirect threats against any person or organization;
- Support or oppose a political campaign or a ballot measure;
- Advertise or solicit business for a personal or private business or endeavor;
- Promote or endorse a specific financial or commercial entity
- Defraud or defame any financial, commercial, or non-governmental agency
- Violate any federal, state, or local law or encourage any illegal activity;
- Violate any existing copyrights, trade secrets, or legal ownerships;
- Compromise the safety and/or security of the public or public systems; or
- Are unrelated to the original topic.

LEGAL REQUIREMENTS

Public records laws of the State of Wisconsin and local ordinances may require retention of any information, materials, and/or discussion on social media sites that involve City of Milwaukee employees and relate to official City business. Individual City departments will be responsible for ensuring proper retention of content posted by their employees to social media sites.

For purposes of complying fully with existing laws, retention of social media content as public records would likely include any comments, queries, information, or materials submitted by end users, including under certain circumstances, personal information submitted voluntarily such as the user's name and/or address. Departments will retain these records in an accessible and usable format that preserves the integrity of the original records for the period designated by appropriate records retention schedules.

Communication among members of governmental bodies using social media may constitute a "meeting" under the Wisconsin Open Meetings Law. For this reason, members of these bodies are strongly discouraged from interactions with other members on social media sites.

The rapidly-changing nature of social media sites, both in terms of the technology they use and unpredictable swings in their popularity, would almost instantly render useless any proposals for implementing specific technology for backup and retention of social media content. To assist departments in adjusting to rapid changes in social media sites and Public Records law, the City's Chief Information Officer (CIO) will provide directives to departments regarding the most cost-effective options for retaining and storing specific types of social media content. The CIO will inform departments no less than annually, or more frequently, as needed.

Various social media sites adhere to their own policies regarding the privacy of site users. The City of Milwaukee makes no claim to protect or preserve the privacy of users who interact with employees or representatives of the City via these sites beyond those protections which the site owner provides. Further, the City of Milwaukee retains the right to review all information or materials written or contributed by City employees on City social media sites, therefore designated City representatives should have no expectation of privacy when posting to City social media sites.

The content of all communications posted by City employees on City-sponsored social media sites is the sole property of the City of Milwaukee. Unless prohibited or otherwise provided for by the terms of service enforced by social media sites used by the City, postings made by other users may also be considered City property.

Violation of this policy by a City employee may result in discipline up to and including discharge. Users should be aware that the information made available by the City of Milwaukee on social media sites may not be timely, accurate or complete. Any communication from or to the City through these sites will not be considered legal or official notice for any purpose. The City of Milwaukee reserves the right to revise or modify this policy at any time, without prior notice.

Social Media Policy

The City of Reedsburg uses social media to interact with residents, businesses and visitors about public issues. Please note this is a moderated online site and subject to Wisconsin Open Records Law and e-discovery laws.

The City reserves the right to delete unacceptable submissions. The following are examples of unacceptable social networking content and comments. The list is not intended to be all-inclusive:

Examples are: Profane or obscene language or content; fighting words, with the obvious intent to intimidate and harass; true threats that encompass statements meant to communicate a serious expression of an intent to commit an unlawful act of violence; content that promotes, fosters, or perpetrates discrimination on the basis of race, creed, color, age, religion, gender, marital status with regard to public assistance, national origin, physical or mental disability, or sexual orientation; solicitations of commerce; infringement on copyrights or trademarks; and, confidential or non-public information.

Please note that the opinions and comments expressed on this social media site do not reflect the opinions and positions of the City of Reedsburg government, its officers, or employees. If you have any questions concerning the discussions, please contact the City of Reedsburg - City Administrator.

SOCIAL MEDIA USE POLICY

PURPOSE

To address the fast-changing landscape of the Internet and the way citizens communicate and obtain information online, City of Janesville Departments/Divisions may consider using social media technologies. As more citizens in our community make the shift towards, or include the use of, social media technologies to receive and share information and communicate their opinions, it is imperative for the City to incorporate social media technologies into the existing communication infrastructure. Where appropriate, the use of social media technologies in work-related activities, events, and announcements is encouraged to enhance customer service, increase citizen involvement, and to further the goals of the organization.

The City Manager has an overriding and legitimate interest and expectation in deciding what is "spoken" on behalf of the City on social media sites. It is the policy of the City that a standard for interaction with social media tools and their associated technology is hereby established.

BENEFITS OF SOCIAL MEDIA

- Provides a low-cost resource for communicating the City's various messages and promoting City services, programs, and initiatives;
- Allows for real-time interaction with the public, thus, enabling the City to better serve the public's needs;
- Creates an additional opportunity for the public to be informed and engaged in the City's affairs;
- Increases efficiency as it pertains to the sharing of information, news, and events;
- Provides a support device to internal departments and divisions for promoting events, partnerships, and other City-driven initiatives and opportunities; and
- Serves as an additional advertising tool for increasing traffic on the City' official website.

GUIDELINES

1. All City of Janesville social media site proposals and uses are subject to prior review and approval by the City Manager's Office.
2. City social media sites are an extension of the City's communication infrastructure.
3. The City's official website (www.ci.janesville.wi.us) will remain the City's primary and predominant Internet presence.
    a. The best and most appropriate uses of social media tools fall generally into two categories:
        i. As channels for disseminating time-sensitive information as quickly as possible (e.g. emergency information, cancellations/closures).
        ii. As marketing/promotional channels that increase the City's ability to

broadcast its messages to the widest possible audience (e.g. recreation programming information).

b. Whenever reasonable, content posted to a City social media site should also be available on the City's official website.

c. Whenever reasonable, content posted to a City social media site should contain links directing users back to the City's official website for in-depth information, forms, documents and online services necessary to conduct business with the City.

4. Social media accounts will be maintained by Authorized Users, who must be approved as an agent of the social media account by the appropriate Department/Division Director and City Manager's Office.
5. Authorized Users are responsible for the content and upkeep of assigned Department/Division social media sites.
6. All City social media sites and the conduct of Authorized Users shall comply with all appropriate City policies and standards.
7. City social media sites are subject to State of Wisconsin and City of Janesville public records laws. Any content maintained in a social media format that is related to City business, including a list of subscribers and posted communication, is a public record. Content related to City business shall be maintained in an accessible format so that it can be readily produced in response to a public records request.
8. Wisconsin State law and relevant City records retention schedules apply to social media formats and their content.
9. Social media sites shall clearly indicate that any content posted or submitted for posting are subject to public disclosure.
10. The City Manager's Office reserves the right to restrict or remove any content that is deemed in violation of this Social Media Use policy, the Terms of Use Agreement, and/or any applicable law found not to be in accord with City purposes and policies, or for any other reason.
11. Any exceptions to the policy are subject to the prior review and approval of the City Manager.

RESPONSIBILITIES

CITY MANAGER'S OFFICE

- Reviews proposals for new social media accounts and grants formal approval.
- Provides counsel to Departments/Divisions as to the appropriate use of the social media tools and guidance as to the types of information that may be posted.
- Monitors content on Department/Division social media accounts to ensure adherence to the guidelines in this policy. Inappropriate use may result in the removal of the content and/or Department/Division page or account from these social media sites.
- Maintains credentials for social media accounts.
- Manages public records requests for information found on City social media sites through the City's record retention service (backupify.com).

CITY ATTORNEY'S OFFICE

- Reviews and approves any changes or additions to the Terms of Use Agreement, as requested.
- Renders opinions on matters regarding disclaimers, terms of use, and privacy concerns as they arise.
- Provides opinions on matters of public records, in accordance with any applicable federal, state, and local laws.

INFORMATION TECHNOLOGY OFFICE

- Maintains the social media record retention service (backupify.com).

DEPARTMENTS/DIVISIONS

Establishing a Social Media Account

- Contact the City Manager's Office to discuss objectives and desired outcomes for utilizing social media technologies and to help determine the site's effectiveness in reaching the Department's/Division's communication objectives.
- Obtain prior formal approval from the City Manager's Office to proceed with any proposed social media account.
- The Department/Division Director shall specify all initial Authorized Users for the project prior to establishing any social media account.
- Obtain a completed and signed Authorized User Agreement Form for each employee responsible for managing social media accounts and return signed agreement(s) to the City Manager's Office.
- Establish the social media account using a City e-mail address and provide the account user name and password to the City Manager's Office, including all subsequent modifications to credentials.

Operating and Maintaining a Social Media Account

- Include an introductory statement that clearly specifies the work-related purpose and topical scope of the social media site. The City's website link should accompany the purpose statement.
- When reasonable, social media accounts should link back to the City website for the purpose of downloading any forms, documents, and other information.
- Conspicuously post the approved Terms of Use Agreement.
- Enable features for public comments, if such capability exists, and comply with and enforce the posted Terms of Use Agreement.
- When possible, hide and do not delete content that violates the Terms of Use Agreement.
- Maintain compliance with all applicable federal, state, and local laws related to public records requests and records retention.
- Authorized Users shall monitor their sites at least once each work day and update content (e.g. post, tweet) once each week.
- When practical and in accordance with Personnel Policy 3.04, as from time to time amended or renumbered, questions and comments received from citizens on social media should be responded to within 48 hours to better serve the public and encourage conversation on social media.

- When social media account credentials are unknown by the City Manager's Office or intentionally excluded from the backupify archive, Department/Division account holders manage public records requests for information found on social media sites.

TERMS OF USE AGREEMENT

It shall be the policy of the City that the following agreement must be conspicuously posted on each social media site established and maintained by the City, if such capability exists. The agreement will also be posted on the City's website (www.ci.janesville.wi.us) for easy access.

Social Media Terms of Use Agreement

While this is an open forum, please keep your comments clean and appropriate. Inappropriate comments are subject to deletion by the administrator of this account. If you do not comply with the terms of use outlined below, your message will be removed. If you post inappropriate content a second time, your profile may be blocked from posting any more information to the site.

This forum is not monitored at all times. Do NOT use this forum to report emergency situations or time-sensitive issues.

Please remember the following rules when posting:

- All content is subject to public records law.
- Content should be related to the subject matter of the social media site where it is posted.
- **If your post violates any of the below rules, it will be deleted:**
  - Content that is graphic, obscene, or explicit.
  - Content that is abusive, threatening, hateful, or intended to defame anyone or any organization.
  - Content that suggests or encourages illegal activity.
  - Content that promotes, fosters, or perpetuates discrimination on the basis of race, creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability, gender identity, sexual orientation, lawful source of income, or arrest/conviction record.
  - Content posted by persons whose profile picture or avatar, username, or e-mail address contains any of the aforementioned prohibited conduct.
  - Solicitations or advertisements, including but not limited to, promotion or endorsement of any private financial, commercial, or non-governmental agency.
  - Content attempting to defame or defraud any person or private financial, commercial, or governmental agency.
  - Content that compromises the safety or security of the public or public systems.
- You participate at your own risk and take personal responsibility for your comments, your username, and all information provided.
- The appearance of external links on this site does not constitute official endorsement by

or on behalf of the City.

- Any public records request for information found on City of Janesville social media sites shall be directed to the City Clerk-Treasurer's Office.
- For more information, please contact the City Manager's Office at 755-3177.

DEFINITIONS

Social Media - are forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos). This policy covers all social media tools, both current and future.

Social Networking - is the practice of expanding one's business and/or social contacts by making connections using a range of social media tools including blogs, video, images, tagging, lists of friends, forums, and messaging that use the Internet to promote such connections through Web-based groups established for that purpose.

Social Media Account - shall mean any registration, login credential, tool, forum, website, or network that is created or maintained by a Department and/or Division for the purpose of establishing or perpetuating a social media presence.

Authorized User - shall mean any employee, and all persons acting on their behalf, who has been authorized by their Department/Division Director and registered with and approved by the City Manager's Office to establish, create, edit, or maintain any social media account and the posts it may contain in the transaction of official business of the City.

Post - shall mean any e-mail, message, picture, graphic, image, advertisement, notification, feed, stream, transmission, broadcast, podcast, video, instant message, text message, blog, microblog, status update, wall post, comment, and any and all other forms, means, or attempts at collaboration or communication that is uploaded, posted to, or otherwise displayed on or transmitted by, any social media account or network.

External Entity - shall mean any person or party not employed by, or an authorized representative of, the City.

External Information - shall mean any social media post by any external entity, and the information or substance it contains.

CITY OF JANESVILLE
SOCIAL MEDIA USE POLICY - AUTHORIZED USER AGREEMENT FORM

Name: _____ Employee ID: _____

Position/Title: _____

Department: _____ Division: _____

Approved by _____

Department/Division Director: (Director Signature) (Date)

Approved by _____

City Manager's Office: (Signature) (Date)

Social Media Site (e.g. Facebook, Twitter, etc.): _____

Account Username: _____

Account Password: _____

I agree to use City-approved social media sites for City business as appropriate and in compliance with the Social Media Use Policy. I understand that I must have prior approval from my Department and/or Division Director and the City Manager's Office to create a social media account on behalf of the City. I also understand that I am responsible for all postings made by me on City social media sites, including, but not limited to, those made in the comments sections.

I acknowledge that all City-approved social media accounts are considered to be property of the City and may be monitored. I understand that employees do not have privacy rights or interests in the use of City social media sites and the postings, data, access to, and distribution of such materials is subject to public records laws. I also agree to immediately forward all public records requests to the City Manager's Office for response.

I understand that content on City social media sites shall be managed according to the Social Media Terms of Use Agreement. I agree to immediately hide or remove all content in violation of the Social Media Terms of Use Agreement.

If I identify myself as a City of Janesville employee or have a public facing position for which my City of Janesville association is known to the general public, then I will ensure my personal social media profile(s) and related content (even if it is personal and not an official nature) is consistent with how I wish to present myself as a City of Janesville employee and professional.

I agree to review the social media site at least once each work day and update the site at least once per work week.

I acknowledge that any abuse of any City social media account, including, but not limited to, violation of the rules and guidelines set forth in this Policy or in any current or future modified policy, can be grounds for disciplinary action including discharge from my employment with the City of Janesville.

_____

Printed Name Signature Date

Village of Grafton

Social Media Policy

1. Purpose. This policy establishes a social media policy for employee's use.

2. Applicability. This policy applies to all Village of Grafton employees. It also applies to contractors engaged in social media on behalf of the Village of Grafton as part of their duties.

3. Background. The Village of Grafton encourages the use of social media technologies to enhance communication, collaboration, and information exchange in support of the Village's mission. By openly sharing knowledge, best practices, and lessons learned within the agency, with and from other federal, state, and local partners, and with and from the public, we can provide more effective solutions and efficiencies to enhance excellence in the business of government.

   As the technology evolves, this policy will evolve, but in general terms, this policy defines guiding principles for use of these technologies by Village employees. The use of social media technology follows the same standards of professional practice and conduct associated with everything else we do. Common sense and sound judgment help avoid the most vexing issues.

4. Definitions. "Social media" and "Web 2.0" are umbrella terms that encompass the various activities that integrate technology, social interaction, and content creation. Social media use many technologies and forms, such as blogs, wikis, photo and video sharing, podcasts, social networking, mashups, and virtual worlds.

5. Guiding Principles.
   a. Know and follow Village conduct guidelines, such as Ethical Standards in Chapter 2.46 of the Grafton Municipal Code and the Village's Personnel Policy Handbook.

   These standards cover topics of prohibited activities such as:
   - Engaging in vulgar or abusive language, personal attacks of any kind, or offensive terms targeting individuals or groups.
   - Endorsement of commercial products, services, or entities.
   - Endorsement of political parties, candidates, or groups.

   b. Published content is persistent in the public domain. When you are representing Village of Grafton in an official capacity, Village of Grafton is responsible for the content you publish on blogs, wikis or any other form of user-generated media. Assume your communications are in the public domain, available for publishing or discussion in all forms of media.

c. When you discuss the Village of Grafton or Village of Grafton-related matters, you may need to coordinate your writing with the Office of the Village Administrator.

d. If you publish content to any website outside of the Village's official online presence (this may include Village of Grafton websites as well as the Village's official presence on third party sites) and it has something to do with subjects associated with the Village of Grafton, consider a disclaimer such as this: "The postings are my own and do not necessarily represent The Village of Grafton's positions, strategies or opinions." Never use or reference your formal position when writing in a non-official capacity. Consult the Office of the Village Administrator when in doubt.

e. Those with leadership responsibilities, by virtue of their position, must consider whether personal thoughts they publish, even in clearly personal venues, may be misunderstood as expressing Village of Grafton positions. They should assume that their team and those outside the Village will read what is written. A public blog is not the place to communicate Village of Grafton policies to Village of Grafton employees. Assume your thoughts are in the public domain and can be published or discussed in all forms of media. Have no expectation of privacy.

f. Respect copyright, fair use and financial disclosure laws. Always protect sensitive information, such as protected acquisition and personally identifiable information. Do not publish or report on conversations that are meant to be pre-decisional or internal to the Village of Grafton unless given permission by management.

g. Be aware of your Village association in online social networks. If you identify yourself as a Village of Grafton employee or have a public facing position for which your Village association is known to the general public, ensure your profile and related content (even if it is of a personal and not an official nature) is consistent with how you wish to present yourself as a Village professional, appropriate with the public trust associated with your position, and conforms to existing standards, such as Ethical Standards for Public Officials. Have no expectation of privacy.

h. Remain focused on customers, existing commitments, and achieving Village's mission. Your use of social media tools should never interfere with your primary duties, with the exception of where it is a primary duty to use these tools to do your job. Existing policies covering employee behavior on acceptable personal usage can be found in the Electronic Communication and Information System Policy.

Kenosha County Social Media Use Policy

This policy outlines appropriate use of social media as it relates to Kenosha County, by employees and department for official and personal use. This policy is to be used in conjunction with other Kenosha County policies.

I. Purpose

Kenosha County recognizes that online communication is fundamentally changing the way citizens, government entities and businesses interact with each other. The County has determined that online discussion through social computing may facilitate the efficient delivery of County services and information and foster a positive public perception and sense of community.

This policy is intended to provide a framework for use of social media when authorized by the County as part of an employee's job duties. This policy also provides general guidelines for the personal use of social media for all employees.

The forms of social media or technology referred to in this policy include, but are not limited to Facebook, LinkedIn, MySpace, Twitter, Yammer, YouTube, video or wiki postings, chat rooms, personal blogs or other similar forms of online journals, diaries or personal newsletters not affiliated with the County.

County-owned technology resources are the property of the County, as is all data created, entered, received, stored, or transmitted via County-owned equipment. All use of social media or similar technology is subject to all County policies, including but not limited to the Ethics Policy, the Electronics Communication Policy & the Harassment Prevention Policy and the Kenosha County Policies and Procedures Manual. Kenosha County employees are instructed to carefully read these policies and ensure all postings are consistent with these policies. Employees may be subject to discipline up to and including discharge for conduct that violates County policies or rules and regulations, whether such conduct occurs on duty or off-duty.

II. Definitions

The following definitions related to terms as used within the context of this policy:

Social Media - a means of interactions among people in which they may create, share, and exchange information and ideas in virtual communities and networks. Social media includes all communicating or posting information or content of any sort on the Internet, including your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with Kenosha County, as well as any other form of electronic communication.

Blog - discussion or informational forum published on the Internet and consisting of discrete entries ("posts") typically displayed in reverse chronological order.

Facebook – social media network found at Facebook.com

Twitter – social media network found at Twitter.com

Spam - unsolicited bulk messages, especially advertising, indiscriminately sent to any number of recipients

Social Media Site – Any platform on which to build social networks or social relations for the sharing of information of common interest

Wiki – collaborative web site comprising the perpetual collective work of many authors.

III. Work Related Social Media Guidelines

The work related use of social media can range from passive review of social media profiles, for informational or investigative purposes, to the authoring of content through a department sponsored social media account. Any such work related use must be approved by an employee's supervisor. The following conditions also apply to such use:

1. Kenosha County employees are responsible for appropriate use of social media in accordance with this policy. Employees using social media platforms are expected to thoroughly review and abide by the Social Media policy in addition to signing the Social Media Acknowledgement Form.

2. Employees shall refer to the guidelines set forth in the Electronic Communications Policy[1] when utilizing County computers or other County supplied devices. Social media sites are to be used to further the goals of Kenosha County's department and provide a service to citizens. Appropriate time spent on updating social media sites should be discussed between the employee and the supervisor, and should not interfere with completion of other job duties.

3. Employees authorized to publish content to a department sponsored social media site shall be designated as social media representatives and such designation shall be made by the employee's Department director with notice to the Social Media Steering Committee.

4. Employees may only establish official sites, blogs, pages, or accounts in their official capacity as County staff on a social media site with the authorization of their Department director and the Social Media Steering Committee. Notification of all new official Social Media sites must be provided to the Social Media Steering Committee. All County authorized social media sites are to be sponsored by a County agency or department and the content of such site will become the responsibility of the department and its management.

[1] "Electronic Communications Policy" http://www.kenoshacounty.org/DocumentCenter/Home/View/374

5. Permission to author content on County authorized social media sites will only be granted to those employees who are authorized to speak on behalf of the County via these electronic communications media.

6. Social media posts should be an extension of Kenosha County's official website. Whenever possible, links to more information should direct viewers back to Kenosha County's official website for more information, forms, documents or online services.

7. Employees are expected to recognize the confidentiality of certain County information, and the privacy rights of employees and residents, and are prohibited from disclosing confidential, personal employee and non-employee information and any other proprietary and/or nonpublic information to which employees have access. This includes, but is not limited to disclosing personally identifiable information such as social security numbers, phone numbers, addresses, email addresses, or other information protected under the Health Insurance Portability and Accountability Act ("HIPAA"). Questions regarding whether information has been released publicly or doubts regarding the propriety of any release, shall be directed to the employee's supervisor before releasing the information and/or the Division of Human Resources.

8. If posting a picture or video of an adult, the individual must consent to the use of their image on the social media site, by signing Exhibit B, a Social Media Permission Form/Waiver, unless the picture or video was taken at a public event.

9. Pictures or videos of minors will not be posted unless the minor is unidentifiable, or a parent or legal guardian has signed a Social Media Permission Form/Waiver, Exhibit B, granting permission to photograph, audiotape, videotape, publish and copyright images of their minor child.

10. Kenosha County employees are expected to adhere to the highest ethical standards when conducting County business. When communicating electronically, employees are expected to speak respectfully about the County and County-related matters, and limited to items in which the employee is authorized to speak and to identify themselves and their role with the County.

11. Employees are expected to follow copyright, fair use and financial disclosure laws when using on-line communications. Note that the use of copyrighted materials, unfounded or derogatory statements, or misrepresentation can result in disciplinary action up to and including termination.

12. Employees are encouraged to publish content that is related to the subjects associated with their position with the County. When writing about County matters employees should try to add value and provide worthwhile information and perspective.

13. All official Kenosha County social media sites and blog posts made or cases where an employee is speaking as a representative of the County will include the following disclaimer: "The information on this site is provided as a courtesy for informational purposes only. Please contact the listed media contact for this (site, page, etc.) to confirm the accuracy of the information on this site. Content on this site is not to be construed as a legal notice."

14. Honor the privacy rights of our current employees by seeking their permission and the permission of their Department director before writing about or displaying internal happenings that involve the employee.

15. Employees should not cite or reference County contractors or suppliers without their approval. Care should be taken to not promote one contractor over another or provide preferential treatment of any kind.

16. Employees may not post employment recommendations or references for current or former employees of Kenosha County on any social media site. All requests for recommendations or references shall be directed to the Division of Human Resources.

17. Authorized social media sites are not be used to express a political view point or endorse a political candidate.

18. Employees should be aware of their association with the County. Employees serve as an ambassador of the County. Employees should not post any comments or postings that violate section IV (8) below regarding inappropriate comments.

19. Employees should be fair and courteous to fellow employees, customers, members, suppliers or people who work on behalf of Kenosha County. Employees should keep in mind that they are more likely to resolve work-related complaints by speaking directly with co-workers or by using the County Conflict Resolution Policy than by posting complaints to a social media outlet. If employees decide to post complaints or criticisms, they should avoid using statements, photographs, video or audio that could be reasonably viewed as malicious, obscene, threatening or intimidating, or that disparages customers, members of the public, other employees or suppliers or that may constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or County policy.

20. Employees shall strive to post honest and accurate information when posting information or news. If a mistake is made, the employee should correct it quickly but be open about previous posts that have been altered. The Internet archives items, therefore even deleted postings can be searched. Employees must never post any information or rumors known to be false about the County, fellow employees, suppliers or people working on behalf of the County.

21. Login information, including User ID's and passwords for information contained on the County's social media sites, must be provided to an employee's supervisor or a member of the Social Media Steering Committee upon request. Upon change of job responsibilities or separation of employment, employees must surrender all login information and passwords.

IV. General Social Media Site Guidelines for Authorized Sites

1. All County social media sites must be sponsored by a Kenosha County department. The department must include a link to this site from their departmental home page and the County's official social media directory, on the County's official website.

2. All social media platforms will clearly indicate they are owned and maintained by Kenosha County and will have Kenosha County contact information prominently displayed.

3. Kenosha County logos, marks and insignia may be used on County social media platforms owned and maintained exclusively for County business and County purposes.

4. It is the responsibility of the department to establish, publish and regularly update its pages on social media websites. It is the responsibility of the department to ensure that information is accurate and up to date.

5. Departments using social media sites must adhere to all applicable Federal, State and County laws, regulations and policies. This includes all copyright laws, public records laws, retention laws, fair use and financial disclosure laws and all other laws that might apply to the County.

6. The sponsoring department will be responsible for all management of an authorized social media site and it is the Department director's responsibility to maintain compliance with this policy and all other applicable policies or laws in the management of their social media site(s).
The accuracy, quality and timeliness of all content on an authorized social media site is the responsibility of the sponsoring department. Likewise, the authorization of the appropriate staff to maintain such a site is also the responsibility of the sponsoring department.

7. When creating a County social media site, page, etc, all departments and employees should adhere to the following guidelines:

   a. Appropriate use: All communications carried out on County equipment or County sponsored electronic media must adhere to the appropriate use guidelines set forth in the technology use policy.

   b. Encourage one-way communication when possible. Use of two-way communication is permitted in cases where limiting the application to one way communication would reduce or negate the value of the social media application.

   c. Comment Policy: Any County authorized social media site which allows comments to be posted must display the following comment policy:

The purpose of this site is to present matters of public interest in Kenosha County, including information regarding its many residents, businesses and visitors. We encourage you to submit comments, but be advised this is not an open public forum. Once posted, the County reserves the

right, but assumes no obligation to delete submissions that are illegal, obscene, defamatory, threatening, invade privacy, or which are considered to be offensive to anyone or may infringe upon the intellectual property or copy rights of others. The County does not necessarily review all posted comment on a regular basis. Furthermore, the County reserves the right to delete any comment for any reason and will immediately delete any comments that include: spam or links to other sites; are clearly off topic; advocate illegal or illicit activity; promote particular products, services or vendors; infringe on copyrights or trademarks; or advocate for a particular political organization, party, candidate or point of view; or contain threats, profane or discriminatory language or other confidential, obscene or repetitive information. Comments expressed on this site do not necessarily reflect the opinions of Kenosha County or its employees. The County takes no responsibility nor assumes any liability for any content posted on this site. Please contact the site administrator for assistance with a comment you believe violates the above policy.

8. Those in charge of publishing and updating within each department must monitor any comments made by the public and employees. Comments containing any of the following should be archived and removed immediately:

a. Spam;

b. Off topic posts or comments outside the forum established to discuss Kenosha County issues, operations and services;

c. Promotion of illegal activity;

d. Unauthorized use of copyrighted or licensed material;

e. Promotion or derogatory remarks relating to a political organization, a political candidate or party;

f. Solicitations of commerce or endorsements of products and/or services;

g. Personal attacks or threats to an individual's safety or other comments that compromise the safety and security of the public;

h. Profane language or content;

i. Comments containing personally identifiable medical or health information;

j. Content that is discriminatory, offensive, or provokes discrimination on the basis of race, creed, color, age, religion, gender, marital status, status with regards to public assistance, national origin, physical or mental disability or sexual orientation;

k. Sexual content or links to sexual content; and

l. Repetitive posts.

9. Kenosha County reserves the right to restrict or remove any content that is deemed in violation of this policy or any applicable law.

10. If the particular social media technology does not provide space for the above, a link from the social media application or user profile to the Social Media Policy page on the County website is to be provided.

V. **Administrative Structure/Required Elements**: Any County authorized social media site will require the following:

1. Assigned administrator: This person will be responsible to see that the use of the social media site adheres to this policy and all related County policies. The name of the site administrator must be filed with a request for an authorized social media site. A back-up administrator shall also be designated to prevent issues related to site administration during the absence of the assigned administrator. The site administrator and backup administrator must be a non-represented employee.

2. Approved content authors: Sponsoring departments must authorize all employee content authors for their departmental social media site.

3. Notification to Administration: The Social Media Steering Committee is to be made aware of any and all department sponsored social media sites, and the Committee must be given the following information:

a. Site Address

b. Purpose of site

c. Administrator of site and

d. Type of communication, one-way, two-way moderated, open two-way

4. Required elements of a County authorized social media page: Technology permitting, all County sanctioned social media sites should contain the following information in a prominent place on the site:

a. County department clearly identified

b. Comment policy

c. Stated purpose of page

d. Notification that violations of comment policy will result in blocking use

e. Disclaimer similar to the following "The information provided herein is provided as a courtesy and for information purposes only. Please contact the listed media contact for this (site, page, etc.) to confirm the accuracy of this information found herein. Content on this site is not to be construed as legal notice.

f. Official contact for page

VI. Public Records/Open Meetings and Retention

Wisconsin's Public Records and Open Meeting Law requirements are mandated by the State of Wisconsin. Any content maintained in a social media format that is related to County business, including a list of subscribers and posted communication, is a public record. Each department utilizing a social media presence is responsible to ensure compliance with all applicable public records laws. The following guidelines are intended to assist departments in maintaining such compliance:

1. It is recommended that County social media authors use only existing material from existing County web pages or previously published documents.

2. Content exclusive to a department's social media site should be captured and saved in an archival copy.

3. Copies of all content removed from the site are to be retained in archival copy.

4. Social media is not to be used as a medium for conducting government business.

5. Technology permitting, it is recommended that a backup of the entire site be captured and retained on a regular basis.

6. Questions regarding the applicability of the Public Records and Open Meetings Law to specific content, or a particular use case, should be referred to the department head and/or the Corporation Counsel before posting the information or using the social media.

7. Wisconsin State law and relevant Kenosha County records retention schedules apply to social media formats and their content.

VII. Personal Use of Social Media

Kenosha County respects the right of employees to use social media and does not discourage employees from self-publishing, self-expression and public conversation and does not discriminate against employees who use these mediums for personal interests and affiliations or other lawful purposes. Employees are expected to follow the guidelines and policies set forth to provide a clear line between you as the individual and you as the employee of Kenosha County.

1. If one should identify themselves as a County employee during their use of social media on a personal level, the profile and any related content should be consistent with how you wish to present yourself to your colleagues, supervisors and the public.

2. Employees should make it clear that he or she is speaking for themselves and not on behalf of Kenosha County. If any information posted is related in any way to the work an employee performs or any topics related to the County, a disclaimer must be used such as, "[t]he opinions expressed on this site are my own and do not reflect the opinions of Kenosha County."

3. Employees shall refer to the guidelines set forth in the Electronic Communications Policy when utilizing County computers or other County supplied devices. Do not use Kenosha County email addresses to register on social networks, profiles, blogs or other online tools utilized for personal use.

4. Employees shall refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your supervisor or manager and consistent with County policy.

5. Employees are personally responsible for their commentary on all social media sites and can be held personally liable for commentary that is considered defamatory, obscene, proprietary or libelous by any party.

6. Employees can be disciplined for using social media in a manner that violates County policies. Information posted on social media sites can be used by the County as evidence in disciplinary actions.

7. When using social media, employees are encouraged to be fair and respectful to fellow employees, supervisors, customers, members, suppliers or people who work on behalf of Kenosha County. If employees decide to post complaints or criticisms, they should avoid using statements, photographs, video or audio that could be reasonably viewed as malicious, obscene, threatening or intimidating, or that disparages customers, members of the public, other employees or suppliers or that may constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or County policy.

8. Employees are encouraged to be careful in their use of social media to avoid the appearance of using that media in an official capacity.

9. Employees cannot post the name, trademark or logo of the County, company-privileged information, including copyrighted information or company-issued documents, or photographs of other employees, residents, vendors or suppliers taken in their capacity as County employees.

10. Employees should not link from a County internal or external web site to a personal social media site without the permission of their Department director and the assigned administrator.

11. Employees are advised that social media platforms may be subject to legal discovery including subpoenas in legal proceedings.

12. Employees shall recognize and maintain the confidentiality of certain County information and privacy rights of employees and Kenosha County residents and therefore shall not release information on personal social media sites.

VIII. Employer Monitoring

Employees have no expectation of privacy while using the County's technology resources for any purpose, including authorized social media. The County monitors all such use and may withdraw content deemed to be inappropriate, outside the scope of an employee's authority, or in violation of County policy as determined by the Department director or the Division Director of Human Resources.

IX. Reporting Violations

The County requests and strongly urges employees to report any violations of possible or perceived violations of this policy to supervisors or the Division of Human Resources. Kenosha County prohibits taking negative action against any employee for reporting a possible deviation from this policy or for cooperating in an investigation. Any employee who retaliates against another employee will be subject to disciplinary action, up to and including termination.

X. Discipline for Violations

The County will investigate and respond to all reports of violations of this policy. Violations may result in disciplinary action up to and including termination.

XI. Changes to this Policy

Kenosha County may from time to time, modify this Social Media Policy to reflect legal, technological and other developments. A current copy of this document can be found at http://www.kenoshacounty.org/DocumentCenter/View/4413.

XII. Accessibility

Kenosha County and/or the applicable departments shall provide an alternate source for any information posted online for individuals who do not have access to a computer or other electronic devices. Similarly, to comply with Section 508 of the Rehabilitation Act, whenever possible and not prohibited by other rules and regulations, when posting photographs, Kenosha County employees shall add text to explain what is in the picture. For video postings, text

should be added explaining what the video is about. For a PDF posted to the County website and linked to a social media site, employees should clearly identify what is in the PDF and an alternative way to obtain the PDF (such as a telephone number).

XIII. Acknowledgement

All Kenosha County employees using social media platforms are expected to thoroughly review and abide by the Social Media Policy in addition to signing a Social Media Acknowledgement Form.

XIV. Specific Social Media Guidelines by Medium for Authorized Sites

Twitter

Twitter is an online social networking site where members can post short updates and keep up with other members through online profiles or cell phone text messages. Effective and approved applications for County use of Twitter would be to re-broadcast the County's blog headlines, news releases, testimonies, statements, public service announcements, accomplishments, job announcements, and to alert citizens of emergency broadcasts, epidemics, recalls, hazardous materials incidents, national incidents, terrorists' threats and natural disasters.

Legal implications of Twitter relate primarily to the privacy of members that follow County Twitter accounts and the appearance of commercial endorsement. County Twitter accounts should not be used to follow personal, commercial, or political Twitter accounts.

In order to comply with the requirements of this policy, a link from the Twitter profile to the disclaimer and comment policy on the County web page should be included.

Retweeting should be limited to information from appropriate, credible sources such as government agencies, authorities/boards, commissions, and industry leaders.

Facebook

Effective applications for County use of Facebook include public outreach programs that target segmented audiences, public service announcements, departmental contact information, emergency broadcasts and other public affairs activities.

Legal implications of County use of social media relate primarily to:

1. Copyrights of video footage and photos uploaded by County representatives. Risks can be mitigated by following these standard operating procedures:

    a. County source materials. Use only photos and videos produced by the County or contractors working directly on behalf of the County

b. Obtain written copyrights. If copyrighted materials are use, be sure to get and maintain physical records of copyright licenses and honor any branding or labeling requirements specified in the copyright license.

2. Privacy rights of individuals who become friends, fans or followers of County sites. Social media users will follow these guidelines:

a. Account. County representatives who set up accounts should use a general office e-mail account, department name and general office phone number if possible.

b. Restrict to Find People and Follow People. County representatives should not follow private citizen or commercial profiles from within their County social networking profile. While the County cannot necessarily stop all people from being Friends, Fans or following us, employees should not click onto the profiles of our Friends, Fans and Followers.

c. Comments and Discussions. Representatives must refrain from participating in dialogue and online discussions with social profile visitors unless to clarify services provided. While it is encouraged for visitors to submit questions, comments, criticisms and concerns, the social profile is a moderated online discussion site and not a public forum.

3. Accessibility rights are governed by Section 508 compliance and web accessibility for people with visual and hearing disabilities. Social media users will follow these guidelines

a. Video captions and transcriptions. Embed captions within videos as part of the postproduction process. Provide transcripts of videos and attempt to include these transcripts on the social networking site. Maintain Section 508 compliant videos, captions and transcripts on the County's website and attempt to link back to the County website from the social networking site.

b. Photo - alternative descriptions. Name the photo after the description before uploading it to the social networking site. Write text captions and descriptions when social networking site makes these form fields available.

c. PDFs. Work to make document compliant in source format before converting to a PDF. Use formatting such as headers when applicable. Embed hyperlinks within the anchor text rather than supplying the physical URL to the right of anchor text.

4. Brand management of County logos and color or style guides. Social media users will follow these guidelines:

a. Profile Picture. County profiles should upload the County or departmental seal or logo as their picture. It is important to use the County/departmental seal or logo to demonstrate authenticity.

b. Profile Design. County profiles should use colors consistent with the County's brand, and should not use extraneous or distracting design. All design should be in keeping with Section 508 compliance (web accessibility) needs and maintain professionalism and consistency with County branding.

5. Open Records requirements are mandated by the State of Wisconsin. County social media authors will use existing material from existing County web pages or previously published documents.

Blogs:

Blogs are forums which allow the posting of information and allow comments to such posts. Individuals who wish to use blogs to keep the public regularly informed of the activities of their departments are required to do so within the bounds of this policy. Kenosha County will allow the use of County related blogs under the following standards and conditions:

1. Whenever possible, blogs should be hosted on County servers or with County approved service provider, managed by the Division of Information Technology.

2. Employees are permitted to create, or use a blog only with the approval of their Department director.

3. Blogs must be reliable and dependable. Once a blog is started, it must be regularly updated and maintained.

4. Only County-related matters are to be addressed in blog entries.

5. All blogs, comments, and postings must be respectful to employees, divisions, departments, residents, and others.

6. Blogs and blog posts must be accurate, fair, unbiased, and reflect positively on Kenosha County.

7. Posts should not be edited after the fact. Those making changes to previous posts should indicate that they have done so.

8. All blog postings will be monitored. Employees have no expectation of privacy in their use of County technology resources. The County may remove any blog entry deemed to be inappropriate, outside the scope of their authority, or in violation of County policy as determined by the Department director and/or the Division Director of Human Resources.

EXHIBIT A - SOCIAL MEDIA ACKNOWLEDGMENT FORM

All employees utilizing social media platforms must read and abide by Kenosha County's Social Media Policy. All Department directors or supervisors that utilize, or allow employees to utilize social media platforms are responsible for enforcing this policy.

Violating Kenosha County's Social Media Policy may be grounds for disciplinary action, up to and including termination of employment, pursuant to the Kenosha County Policies and Procedures Manual.

I acknowledge and confirm that I have read and understand this Policy and agree to the guidelines contained therein.

(Employee Printed Name) (Employee Signature) (Date)

Exhibit B – SOCIAL MEDIA PERMISSION FORM/WAIVER

I give Kenosha County permission to publish and copyright my image (including audio, video or photography) at the _____ event in any publication relating to Kenosha County including, but not limited to brochures and websites, including social media websites.

_____

(Printed Name) (Signature) (Date)

I give Kenosha County permission to photograph, audiotape, and/or videotape my child(ren) during the _____ event.

_____

(initial)

I give Kenosha County permission to publish and copyright those images (including audio, video, and/or photography) of my child(ren) in any publication relating to Kenosha County including, but not limited to, brochures and websites, including social media websites.

_____

(Printed Name of Minor) (Printed Name of Parent/Legal Guardian)

_____

(Printed Name of Minor) (Signature of Parent/Legal Guardian)

_____

(Printed Name of Minor) (Date)