RIDING THE WAVE: Social Media in Local Government

By Attorney C. Christine Fillmore

New social media technologies provide dynamic, accessible ways for towns, cities and school districts to communicate with the public and perhaps with a whole new generation of citizens. However, as with all communication, social media presents a number of legal issues for local governments. Attorneys representing municipalities and school districts need to familiarize themselves with what is there now, what is coming in the future, and how to help our clients navigate this new territory. Happily, while these new media outlets may be dressed up as something new, most present legal challenges for local officials similar to more traditional methods of communication. For local government attorneys, it is just a matter of figuring out the jargon (something at which lawyers are particularly adept) and staying one step ahead of our clients.

DO WE HAVE TO?

In a word, yes. Social networking is here in a big way. There are corners in the state where broadband is still unavailable. There are places where cell phone coverage is, at best, spotty. Our clients have told us that in those areas, there is still a general reliance on traditional methods of communication (newspapers, landlines, and face-to-face interaction) and relatively low interest in social media. Even in those areas, however, municipal officials have begun to notice that interested citizens are taking matters into their own hands. Many New Hampshire towns and school districts created their own website only after discovering an “unofficial” site had been established. Similarly, there are Twitter accounts for the towns of Weare and Exeter and the City of Portsmouth which were created and are operated not by the municipality, but by private citizens.

Whether or not local governments welcome it, social media is here. Citizens have a growing expectation that their community will have some sort of virtual presence. In some cases, a website, once the hallmark of innovation, may no longer be enough. There may be different needs in different regions (and different needs among various groups of constituents), but it has become increasingly obvious that towns, cities and school districts need to consider reaching their audience in the places where that audience wants to be engaged.

For some perspective, consider this. In the United States, social networks and blogs reach nearly 80 percent of active U. S. Internet users, and represent the majority of Americans’ time online. Americans spend more time on Facebook than they do on any other U.S. website. In fact, in May 2011, 140 million different American users spent 53.5 billion total minutes on Facebook — that is approximately 101,720 total years. As of January 24, 2012, 250 million tweets were sent every day, and there were more than 100 million active Twitter users. Almost 40 percent of social media users access these sites from mobile phones, rather than from laptops or desktop computers. And lest we think that this is a young person’s revolution, a study by Nielsen (the media research and ratings company) shows that people over the age of 55 are driving the growth of social networking through the mobile Internet.

Imagine that social networking is a river. It’s moving pretty fast these days. If our clients are on a raft going through the whitewater, the only way to steer is to paddle just a little bit faster than the current is moving. If they don’t, they are carried along and it is only sheer luck if they avoid a rock.

DRAW A PARALLEL

The first step, of course, is to figure out what we’re talking about. Merriam-Webster Online Dictionary defines “social media” (a term in use since 2004) as “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 (as videos).”

The most familiar social media outlets may include Facebook, MySpace, LinkedIn, blogs, Twitter, YouTube, along with more traditional websites. Most of these new technologies can be compared to a more familiar traditional form of communication:

Blog: Short for “web log,” it is an online diary or journal, similar
to a municipal newsletter or letter to the editor and column in a newspaper. The author posts whatever he or she likes, long or short. Some authors permit the public to post comments on the blog, making it interactive. Others prefer to have comments sent privately to an email address, responding to those emails only as they feel appropriate.

Listserv and other discussion groups: An email group with an administrator. Those who belong to the group can send an email to the list which everyone receives and may respond to. Messages are generally archived in a single place so members may go back and view previous email “threads” of discussion at a later time.

Twitter: Essentially, a microblog limited to 140 characters. It is used to quickly share information with others. Anyone can sign up to “follow” another Twitter user’s posts (“tweets”), even if they don’t post anything themselves. Users follow the municipality, school district or individual official and may re-tweet to their own followers. Tweets may be received through email, on a mobile phone, or on the Twitter website.

Facebook, MySpace, and LinkedIn: Social networking websites. These are like a combination of many traditional communication methods. Users can send messages to one another (like email), chat online (like instant messaging) and post comments and pictures on their own and on others’ pages (like a message board).

You Tube and Flickr: Places to post videos (like a cable channel) and photos (like a website or bulletin board).

Tumblr: Combines elements of Twitter and blogging, allowing users to post and customize everything from pictures and videos to links and quotes. This is an emerging player in the social media world, tripling its audience from a year ago.7

WHAT CAN LOCAL GOVERNMENTS DO WITH SOCIAL MEDIA?

A traditional website is a bit like a bulletin board in the SAU office or the town hall. It has contact information, schedules, meeting minutes, and pictures. The website is also a bit like going to the desk, because users can find copies of zoning ordinances, policies, annual reports, and proposed budgets. On some websites, users can find forms to print out, and on others they can fill out and file forms online. There are often links to other relevant sites (the police department, individual schools) and email addresses where questions may be sent. Many local government boards and commissions are also using their websites as an official posting locations for notices of upcoming public meetings.8

Moving beyond a website (which at this point has become somewhat traditional itself), Twitter may be useful to share information quickly. This is true particularly because many people follow tweets on their mobile phones, which means they receive and often read tweets immediately. So, for instance, it can be used to announce a school delay or closing, an unscheduled early release, report an unusual traffic condition, construction warning, emergency information about a significant weather event, a public safety issue, or a meeting cancellation. It is also useful for quick reminders about important events, such as an upcoming public hearing, polling hours for an election, the school concert, or the deadline for registering dogs. In addition, it can be a way to alert followers about something that has just been posted to a website, Facebook page or blog.

Blogs provide the option for an ongoing “conversation” with readers about anything. A municipality might use a blog to provide detailed information throughout the process of siting, designing, budgeting for and building a new public library or renovating the town hall. Local officials in a town, city or school district who are perceived by the public as bureaucratic might use a blog to provide a humanizing insight into themselves, explaining their motivations, hopes, and frustrations. (Of course, this is not without peril. But more on that later.)

Simple online tools like Survey Monkey can be used to quickly take the pulse of a community on a particular issue. For instance, if two designs are being considered for a new building, the municipality might post both designs on its website and include a link to a quick survey to ask which one people preferred or other feedback on specific features. These surveys are simple to set up and use, although they are most effective when they are short (4-6 questions maximum) and take one to two minutes for people to complete. A link to a survey can be provided on a website or a blog, a Facebook page, or even in a tweet.

Facebook and other social networking sites can be used in a combination of ways. They can be places for officials or departments to post documents, pictures and videos, to send out quick snippets of information, and to provide links to other relevant sources of information. Nashua school officials recently began considering a policy regarding teacher-student communication via social networking sites. Under the policy, which is only a proposal at the time this goes to press, teachers who want to use Facebook in the classroom would be encouraged to set up a “fan page” to communicate with students, as opposed to “friending” students (keeping the interaction official while facilitating communication).9 Social networking sites are also useful places for municipalities to post information after an emergency so that people can find out where to go, what to do, and what is going to happen. This can be done on a website, of course, but on a social networking site citizens may also ask questions and post comments (again, this may be useful but is not without its drawbacks).

You Tube has already become popular among citizens as a place to post videos of unsuspecting local officials in action at meetings or in other public places. Municipalities and school districts have begun to turn the tables and use this tool themselves to post videos of public meetings, along with running them on their local cable channel.

THERE IS ALWAYS A CATCH...

As lawyers, we are trained to look for the problems so that we can prevent them where possible. Municipal and school attorneys have a lot of experience with the legal issues involving traditional media, and our clients generally have a good deal of familiarity with them as well. New communication methods are really no different, with two exceptions: speed and wide public access. It is easier than ever before for our clients to make very public mistakes, very quickly. Therefore, it is important to help our clients consider and sidestep the potential pitfalls of these exciting new tools before jumping into the river.
PUBLIC V. PERSONAL

No matter what the medium, government communication should be limited to official municipal business, such as notices, minutes, forms, information, alerts, contact information and ordinances.

However, when officials and employees begin using these technologies for personal commentary, the unintended consequences can be significant. If a municipal official discloses confidential information on a website, blog, social networking site or in any other way, he or she may face removal from office and may expose the municipality to liability as well. If comments are defamatory (addressed more below) they may also result in liability for the municipality or school district. Even comments that are merely inaccurate or misleading can affect public confidence in local government and compromise a board’s ability to govern effectively.

In addition, personal comments by any official can affect the legality of a board’s decisions. The Planning Board and ZBA, for instance, are each required to hear testimony and to gather information at a public hearing on all applications before them. Each board member must remain impartial, and the board may not decide the case before it reaches the deliberation stage after the hearing has closed. This impartiality is statutorily required and, in fact, any board member who has prejudged the case or who is unable to set aside personal bias is disqualified from participating in the hearing or decision for that matter. If a disqualified member participated in a case, a court could vacate that decision and the board would have to start all over again. Even if the decision were upheld, the town or city would have to defend a costly legal challenge in court. Statements made by any official on a chat, blog, e-mail, website or other forum about individual applications or even general matters of interpretation of the zoning ordinance or local regulations can lead to real or perceived problems with prejudgment and bias. This can result in the wasting the municipality’s money, time and resources to defend and sort out the problems.

Comments by a single member of a municipal board or committee may also create confusion among the public about whether those comments are being made on behalf of that member or the entire board. Boards and committees act only by majority vote. A single member should be very careful in expressing opinions, answering questions or providing explanations for official matters when he or she purports to do so on behalf of the entire board. Has the board actually taken this position or appointed him or her as spokesperson? This is the same problem that occurs when a single school official or selectman writes letters to the editor or has a column in the local newspaper. An official continues to be a private citizen with the same right to free speech as everyone else. However, caution may be advised. Unless great care is taken to clarify when a person is speaking for a board and when that person is speaking solely for himself or herself as an individual, these comments can create confusion among the public and be very misleading.

RSA CHAPTER 91-A

New Hampshire’s Right to Know Law affects every corner of local government, and social media issues are no different. There are at least three major issues to consider:

The Accidental Meeting: All meetings of a public body must be open to the public and have proper notice. When a quorum of the school board, budget committee, or planning board participate in a discussion via social media, are they having a “meeting”? The answer depends upon a lot of factors (are they discussing a matter within the board’s supervision, jurisdiction, or control? Is it a “chance, social or other encounter”? did they make any decisions? are they using sequential communications outside a meeting to violate the spirit and intent of the open meeting law?), but the key to avoiding even the appearance of a violation is to educate board members about the danger ahead of time.

Creating Governmental Records: A governmental record is any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. It may be obtained in or out of a meeting by a quorum of a public body, in any form. When a town clerk posts a document on a website, is it a governmental record? When a school board participates in an online chat with parents or the superintendent sends out tweets, are governmental records created? And if they are, under whose control are they? Do they need to be retained for any length of time? How will requests for copies be responded to under RSA 91-A:4?

Confidentiality: As mentioned earlier, local officials may be removed from office for violating their oath of office for, among other things, disclosing information they know or should know is confidential under RSA Chapter 91-A. Whether or not that happens, however, the board or commission’s public reputation for ethical behavior may be severely damaged by an inadvertent disclosure of confidential information. Social media can lull officials into a false sense of “chattness,” lowering their guard and permitting mistakes to occur.

IS IT DEFAMATORY?

In New Hampshire, the tort of false light or defamation includes both oral (slander) and written (libel) defamation. A “defamatory” statement tends to lower the plaintiff in the esteem of any substantial and respectable group, even if that group is a small minority. Defamation occurs when a person fails to exercise reasonable care in publishing (in print or by speaking) a false and defamatory statement of fact about the plaintiff to a third party without any valid privilege. A statement of opinion is generally not actionable as defamation unless it is reasonably understood that the opinion is based upon defamatory facts.

Defamatory statements might be privileged in certain situations. For example, statements made in the legislative process or during judicial proceedings are absolutely privileged. Other statements might be protected by a qualified privilege if they are published on a lawful occasion, in good faith, for a justifiable purpose and with the belief, founded upon reasonable grounds, that the statement is true. There is no specific privilege for local officials conducting town, city
or school district business, so they are not protected from liability for making any defamatory statements during meetings or over the internet. However, it is important to note that a defamatory statement must be about the plaintiff, rather than just a generally insulting or politically incorrect statement. Comments of a more general nature, referring to broad groups of people rather than any person in particular, probably are not “defamatory” although they may tend to harm the credibility of the person making them.

Furthermore, when the public is permitted to comment or post on a blog, website or other medium, those comments might also be defamatory. The citizen who makes the comment may be liable— but the town, city or school district may be as well. By republishing these statements made by citizens (perhaps by posting them on YouTube, Facebook, a blog or a website) or, possibly, by failing to remove them, the municipality might also become liable for the defamatory statement in the same way it could be liable for rebroadcasting the video on the government access cable channel.26

It may be useful to consider including a disclaimer on these sites. Although disclaimers rarely eliminate all risk of liability, they can educate readers about the source of the material, may reduce confusion about the municipality’s participation in creating the content, and may have some value in reducing the overall risks. Some sites include a disclaimer which must be read and agreed to before a user can access the site (with an “I agree” button that must be clicked to continue). Language that may be helpful is some variant of “[T]he views expressed on this blog/website/forum are not those of the [municipality] or its officials, but are solely those of the individuals involved. The [municipality] reserves the right to remove or delete any material which in its sole discretion it determines to be defamatory. Users of this blog/website/forum agree to abide by all applicable rules.” The rules of use, in turn, may be set out either with the disclaimer or separately.

Another interesting twist may occur when a citizen makes an anonymous Internet post on a government blog, Facebook page or website, and a plaintiff claims that the comment is defamatory. Aside from being drawn into the case as a defendant itself for permitting or facilitating the defamatory statement (whether or not that claim ultimately survived), would the municipality or school district be required to investigate and determine the identity of the anonymous poster? Perhaps. First Amendment free speech rights include the right to speak anonymously25, and this right extends to speech via the internet.26 However, there are limits, particularly for libelous speech.27 The use of subpoenas to unmask anonymous Internet speakers in connection with civil lawsuits is increasing.28 While local governments have not yet faced this issue in a reported New Hampshire decision, at least one private company has.29

FREE SPEECH?

Some forms of social media involve exchanges of information between local governments and citizens. A blog might be set up to accept public comments on an issue, or officials might have e-mail or chat exchanges with citizens. These exchanges may need to be edited to avoid publishing defamatory statements, to keep the posts on the topic at hand or to avoid obscenity or vulgarity.

Editing and deleting posts by the public may inadvertently violate the First Amendment right of free speech. When this right applies, the inclusion of one viewpoint without equal opportunity for all other viewpoints, or the editing or rejecting of citizen speech based on content, might expose a town or city to liability.30 One solution is to impose a blanket prohibition of the views of any private citizens on a municipal blog or website, which is not likely to violate any citizen’s First Amendment right to free speech. The First Amendment protects the rights of citizens to express their views in a “public forum” such as a commercial newspaper, a personal blog or website, a parade or a sign. However, a town website, blog or Facebook page is not ordinarily a public forum.

The First Amendment does not guarantee access to property simply because it is owned or controlled by the government.31 The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.32 This means that some government sites are simply not open for expression the way that others are.33 A website or blog is not a physical “location” but if the same logic is applied, it seems unlikely it would be considered a public forum unless public expression were “basically compatible with the normal activity” of that medium. A municipal website or blog is a tool of the local government that should be intended to facilitate government business, and would be generally limited to public purposes.

Of course, one of the great benefits of social media is public

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participation. Excluding it entirely would, in many cases, defeat the purpose. As a result, the town, city or school district may wish to open the blog or networking site to public expression. Allowing comments likely turns that site or page into a “designated” or “limited” public forum. A blog might ask for public suggestions about saving energy in municipal buildings, or feedback about the efficiency of a municipal service. It would be appropriate in that case to limit the public comments only to the stated subject. However, if comments opposing the governing body’s preferred plan were always edited out or, if negative feedback were always rejected, a court might find that the municipality had discriminated based on the content of the speech, which is not permissible. The municipality could, of course, still limit comments to a certain length, to a certain number per day or by any other content-neutral method.

The other looming free speech issue in New Hampshire is RSA Chapter 98-E (Public Employee Freedom of Expression). This comes into play when local government employees use social media (or any other medium) to comment about their employer. “A person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications and proceedings.” The statute originally covered state employees but has been extended to include employees of counties, cities, towns, village districts, school districts, and SAUs.

“No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee.” When a public employee speaks as an individual on a matter of public concern, that speech is protected. This has opened a new front on the “wrongful termination” battlefield. Most attorneys who work with municipalities or school districts do not have to imagine these situations; we hear about them on a weekly basis. The office assistant disagrees with the selectmen’s policies; a teacher is frustrated with the administration; a police officer is infuriated by the proposed cuts in the public safety budget. In the world of social media, employees may express these opinions by posting on their own or someone else’s (or the government’s) Facebook page, writing it in a blog, speaking in a video that is uploaded to YouTube, or tweeting it to their friends. No matter how it occurs, if they speak as an individual and it is a matter of public concern, the law places a protective shield around them. Social media merely amplifies the voice with which employees may speak.

ADVOCACY AND ELECTIONEERING

One potential use of social media is to distribute information regarding local government initiatives, suggestions, proposals and plans. Background information regarding warrant articles and other issues is likely to be of interest to voters, of course, and may be communicated in a variety of ways. However, the direct advocacy for or against a particular warrant article, candidate or other measure should be avoided, regardless of the media through which it is communicated. The extent to which local governments may use public funds and resources to advocate on behalf of a specific proposal or action is not yet clear. The U. S. Supreme Court determined in Johanns v. Livestock Marketing Ass’n, 544 U. S. 550 (2005) that, under the U. S. Constitution, government may use tax dollars to endorse its own policy measures without violating the First Amendment. A September 2009 decision of the U. S. District Court for the District of New Hampshire, Sutcliffe, et al. v. Epping School District, et al., 584 F. 3d 314 (1st Cir. 2009), found that, in certain circumstances, it is permissible for a municipality to use its communication channels to express its own views through “government speech” which is exempt from the First Amendment. It may even be possible for the government to “speak” by selecting only certain speech of third parties to present and communicate through its website or other channel.

However, this area of the law is not yet fully settled in New Hampshire. A significant body of case law suggests that some government advocacy may go too far. When local officials spend tax dollars to persuade the legislative body (that is, town meeting voters) to establish a policy in the first place, the answer from Johanns is much less clear. A variety of state and federal courts have long held that government officials may not spend public funds advocating or opposing a ballot measure unless they offer an opportunity for opposing views to be heard. The Sutcliffe decision observed: “There may be cases in which a government entity might open its website to private speech in such a way that its decisions on which links to allow would be more aptly analyzed as government regulation of private speech.”

Another potential area of difficulty lies in the ease with which local officials can post opinions or statements regarding candidate endorsements on Facebook or other sites. In 2009, a board of selectmen wrote a letter to the editor which was published in a local newspaper, endorsing (as a board) a particular candidate for office. The New Hampshire Attorney General’s Office issued a letter to the board advising them that their letter constituted official electioneering and violated RSA 659:44. Although governing bodies might think twice about writing such a letter now, they may feel that the informality of the Internet takes it out of the realm of illegal electioneering. So long as they act in their capacity as local officials, however, it likely does not. (As noted above, of course, individual officials may still speak on their own behalf as private citizens, being mindful to make the distinction clear to the public.)

It is also important to note that public employees are prohibited from electioneering while in the performance of their official duties, or using government property, including but not limited to, telephones, facsimile machines, vehicles and computers, for electioneering. Electioneering in this statute is defined as an action that is “in any way specifically designed to influence the vote of a voter on any question or office.” Violation of this law is a misdemeanor. Therefore, no public employee should take part in creating social media content with local government funds that would be considered electioneering under this statute.

ADMINISTRATIVE BURdens

One additional concern that should not be overlooked is the
administrative burden that the use of social media can create. For example, if selectmen create a blog or a Facebook page to correspond with the public, that correspondence should be limited to municipal business. Someone should review every posting in advance to determine whether and to what extent the comments include personal or off-topic matter that should not be posted. This might be time-consuming and would almost inevitably raise legal questions requiring consultation with an attorney. Furthermore, to the extent the First Amendment right to free speech applied, the editing or rejecting of postings based on content might expose the municipality to liability under the First Amendment. On the other hand, other technologies have a far smaller administrative burden. Twitter, for example, involves only short messages, and specific officials or employees might be tasked with handling that. There are also ways to manage the administrative burden, such as offering an email link on a blog where readers may send comments, rather than posting them online. While someone will still have to read the emails, the burden of constantly monitoring publicly-posted comments is lessened.

AND AGAIN, DO WE HAVE TO?

Well, yes. In the face of all of these potential legal issues, it is tempting for some local officials to decide they don’t want to use any of these technologies at all. That is a fairly impractical solution in the long run, unfortunately, because people are already doing it. Whether citizens are creating Twitter accounts or Facebook pages “on behalf of” (or “in spite of”) their local government, or individual officials are writing blogs and inviting public comment on their own, social media is creeping into government despite the legal issues. If it is going to be there anyway, municipal and school officials might do better to move with the trend instead of fighting it. If they take control of the medium, they may have a better shot at controlling the message. As participation by local governments becomes more common, the municipal attorney’s role may be to help his or her clients craft goals and policies on the use of social media tools.

THINGS TO CONSIDER

Getting Started. Think about using it yourself first. It’s easier to understand the benefits and challenges of Facebook, Twitter, and YouTube (and to convey that to your clients) if you spend some time using them. You can open a Twitter account without ever posting anything, but you can learn a great deal about it merely by “lurking” and following what other people, governments and organizations post.

What Is the Point? It is not uncommon for social media use to spring up in local government a little at a time. Those who are most familiar with it (and who have something to say) may run ahead. Others, relieved that someone is handling it, assume the matter is under control. As with anything else, however, if you don’t know where you are going, it is hard to know when you have arrived.

When discussing the issues with clients, encourage them to identify their goals first. What are they trying to accomplish? Do they want to get information out to citizens or ask them for input? If they are trying to disseminate information, is it a short, urgent message, or a lot of information? Are they interested in providing access to video or audio recordings? Text? Pictures and drawings? Once those questions have been answered, it should be a lot easier to identify the medium that should be used. These questions should be asked periodically as well. Has the purpose changed? What benefit are we getting from the things we are using?

As advisor, it may become part of the attorney’s job to check in periodically with clients on this subject. Finding out which technologies they are using or considering using, and the problems and successes they have experienced, is really the only way to anticipate the information and advice they really need. Attorneys should be prepared to be available for questions about policies and procedures, issues and solutions.

Maintaining Control. Who is in charge? Unless the legislative body votes to vest control of social media in another board or official, the governing body (selectmen, school board, manager/council, mayor/aldermen) has ultimate responsibility for the local government entity’s official use of social media. This responsibility includes decisions regarding which technologies to use, policies that will apply and how to spend the money appropriated for this purpose.

Governing bodies should be encouraged to consider who will be handling day-to-day administration of any social media outlets. Who is sending tweets? Updating Facebook and website content? If public input is permitted, who will monitor it for obscenity and relevance, and how will that input be used? Will someone be in charge of responding to emails, postings and tweets? How often? Some technologies are much more useful when there is some two-way aspect to it. For example,
when a school superintendent follows her Twitter followers, she can see what they are saying about her, the school district, and other relevant matters. If a town department has a Facebook page, someone should be monitoring the public’s posts to capture the information that is being provided. In some cases, local officials may want to respond by taking official action or having a conversation at a public meeting.

**Policies.** While no law requires the governing body to create policies regarding the use of social media, it is highly advisable to do so. For all of the reasons discussed above regarding potential liability, carefully considered policies should be put in place for all official social media use. In addition, to reap the greatest benefit from these technologies, someone needs to consider what the message is, as well as how to make it consistent and relevant. How will employees and officials use social media? When and how will the public be allowed to interact with it? Which officials, boards and employees will be expected to, or permitted to, post content on specific media? Will there be one official account or many? A lot will also depend upon the resources available. Some communities may have a larger staff with more familiarity and experience with technology, while others may have little or no staff. These are all issues to discuss with local officials who are considering using these technologies.

**Disclaimers Aren’t a Silver Bullet.** As mentioned above, it may be useful to include a disclaimer on a website, Facebook page, blog, or other medium. Disclaimers can educate readers and users about the level of municipal control and contribution to the content, and are also a good place to refer to or include rules of use. However, while a disclaimer may be informative, it may be largely ineffective in reducing or eliminating a local government’s risk of liability. An official website, blog, Facebook account or other networking tool would likely be run or endorsed by a town, city or school district and funded with public money. Since all of these communication channels will be under the control of the governing body, and they will remain ultimately responsible for content and distribution, it is hard to see how a municipality could disclaim all responsibility for that content. Discussing these disclaimers with local officials is a great idea, if only to disarm users of the notion that they provide complete protection.

**“Social” Means “Public”.** Local officials are aware of the fact that when they say something at a public meeting or write it in the newspaper, everyone can hear or see it. These things are amplified, alarmingly so to some people, with social media. The same cautions apply with social media as with traditional media, but even more so.

Local governments should remain “official” as much as possible. The tone of social media is often less formal than written letters or public meetings. It is easy to fall into the habit of posting informally and with less caution and precision than would otherwise be used when communicating with the public. While it is incredibly important for local officials to communicate with citizens in a way that is understandable and approachable, they should be encouraged to remain mindful that while they are sending that tweet, they are still speaking on behalf of their government.

In many cases, posting is forever. What is written, posted, emailed, or uploaded is now in the public domain. Although content may be removed from a website and tweets may be deleted, it may still exist on a server somewhere and could be available for discovery in litigation. More disturbing, it may have been copied, re-tweeted, emailed, and saved by other people...and there is no way to stop that from happening. Content is likely out there indefinitely and the public may be able to see or read it many years from now.

If your client wouldn’t want to see it on the front page of the Union Leader or the Concord Monitor (or The New York Times), they shouldn’t post it on the Internet, send it in a tweet, or put it in an email. (Good advice for everyone, actually.)

**CONCLUSION**

For a lot of people, social media technology is not only exciting and useful; it has quickly become ingrained into their daily life. They wake up, make coffee and check their email and Facebook page. Many people wouldn’t dream of leaving the house without their smartphone any more than they would leave without wearing pants. Not everyone is this way, but more and more of us are. As this trend spreads, it is only natural that local officials and the citizens they serve will come to expect local government to be accessible in this way as well.

If this is the future, then we as municipal and school attorneys should be prepared to help our clients navigate through the various forms of technology, along with the legal and practical issues this technology brings. Social media can be an incredibly useful and powerful tool to communicate with the public and facilitate local government operations. It also has a variety of drawbacks which cannot be ignored. However, all communication carries some risk, and it can often be managed. Understanding the potential of social media as well as its risks, and helping clients use it wisely, may ultimately help to improve local government.

**ENDNOTES**

2. id.
3. id.
6. id.
7. id.
8. See RSA 91-A:2, ll (requiring that notice of all meetings of public bodies be posted in at least two public places, one of which may be the public body’s Internet website).
10. RSA 42:1-a, II (violation of a town officer’s oath for the officer to divulge to the public any information which that officer learned by virtue of his official position, or in the course of his official duties, if: (a) a public body properly voted to withhold that information from the public by a vote of 2/3, as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or would render proposed municipal action ineffective; or (b) the officer knew or reasonably should have known that the information was exempt from disclosure pursuant to RSA 91-A:5, and that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective).
11. RSA 673:14, l.
30. See, e.g., State v. Hodgkiss, 132 N.H. 376, 382 (municipalities may regulate protected speech only in a content-neutral manner); see also Bonner-Lyons v. School Committee of City of Boston, 480 F.2d 442 (1973) (city distribution system may not be used to support and promote views of only one group, must provide equal opportunity for all groups to avoid violating free speech rights).


34. See, e.g., Del Gallo v. Parent, 557 F.3d 58 (1st Cir. 2009).

35. See, e.g., State v. Hodgkiss, 132 N.H. 376, 382 (municipalities may regulate speech only in a content-neutral manner).

36. In contrast, it does not provide protection from adverse consequences for appointed or elected officials, such as not being reappointed or re-elected. See Foote v. Bedford et al., 642 F.3d 80 (1st Cir. 2011) (town council did not violate free speech rights of recreation committee member when it refused to reappoint him after he publicly criticized the council’s policies).

37. RSA 98-E:1.

38. RSA 98-E:1.a.


44. Sutliffe, 584 F.3d at 334.


46. RSA 659:44-a.

47. Id.

48. See, e.g., State v. Hodgkiss, 132 N.H. 376, 382 (municipalities may regulate speech only in a content-neutral manner).

About the Author

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