

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

David T. Ritter

BROWN & HOFMEISTER, LLP

Texas City Management Association

Annual Conference – Fort Worth, Texas

June 27-30, 2019

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

PRESENTATION OVERVIEW:

- I. What is Social Media and Why is it Important to Texas Cities?
- II. Social Media Defense Strategies for Texas Cities.

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

I. WHAT IS SOCIAL MEDIA AND WHY IS IT IMPORTANT TO TEXAS CITIES?

1. The Definition of Social Media
2. The History of Social Media
3. Important Social Media Platforms for Cities

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

I. WHAT IS SOCIAL MEDIA AND WHY IS IT IMPORTANT TO TEXAS CITIES?

I. The Definition of Social Media

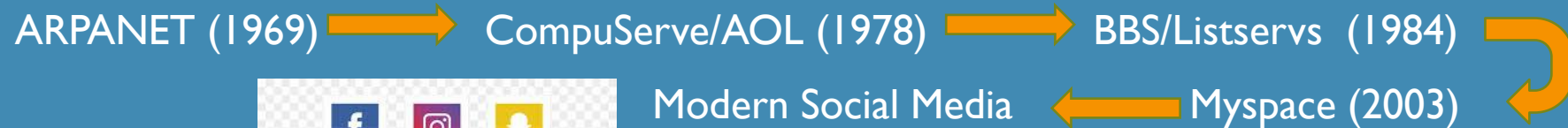
“Computer-based technology that facilitates the sharing of ideas, thoughts, and information through the building of virtual networks and communities. By design, social media is internet-based and gives users quick electronic communication of content. Content includes personal information, documents, videos, and photos. Users engage with social media via computer, tablet or smartphone via web-based software or web application, often utilizing it for messaging.” - *Investopedia.com*

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

I. WHAT IS SOCIAL MEDIA AND WHY IS IT IMPORTANT TO TEXAS CITIES?

II. A (Very) Brief History of Social Media

One of the most remarkable aspects of social media is speed at which it has developed and continues to develop. The internet itself has gone from a theoretical concept, to a four-computer node, to a near ever-present component of daily life in only a few decades:



SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

I. WHAT IS SOCIAL MEDIA AND WHY IS IT IMPORTANT TO TEXAS CITIES?

III. Social Media of Importance to Cities

Rank	Social Media Site/App	Number of Global Users
1	Facebook	2.3 Billion
2	YouTube	1.9 Billion
6	Instagram	1.0 Billion
12	Twitter	326 Million
N/A	NextDoor	10 Million

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

1. Understand the First Amendment Pitfalls of Social Media: (*Packingham*)
2. Blocking Users and Deleting Content: (*Knight Institute + Davison*)
3. Understand Disciplinary Limits for Employee Social Media Content: (*McCullars*)
4. Select Your Social Media Platforms Carefully
5. Adopt a Comprehensive Social Media Policy
6. Consider Open Meetings (TOMA) and Public Information (TPIA) Aspects

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

- I. Understand the First Amendment Pitfalls of Social Media, or
“How to Build a Public Forum without Really Trying”



SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

I. Understand the First Amendment Pitfalls of Social Media:

Packingham v. North Carolina (U.S. Supreme Court, 2017)

City Takeaways: (1) First Amendment rights are strongly attached to social media use; and (2) governmental actions may unconstitutionally infringe upon the First Amendment rights of social media users.

- Cyberspace – and social media in particular – are “ the most important places, in a spatial sense, for the exchange of views,” and the internet is a “vast democratic forum.”

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

2. Blocking Users and Deleting Content:

Knights Institute v. Trump (Federal District Court, 2018)*

City Takeaway: (1) Blocking members of the public, or otherwise impairing their access to an interactive social media feature, may be a First Amendment violation: (2) the interactive portion of social media is a [designated] public forum.

- “Blocking the individual plaintiffs [from the President’s Twitter account] has the discrete impact of preventing them from interacting with the President’s tweets, thereby restricting a real, albeit narrow, slice of speech. No more is needed to violate the Constitution.”

*Appealed to Second Court of Appeals, argued March 26, 2019.

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

2. Blocking Users and Deleting Content:

Davison v. Randall (Federal Appeals Court, 2019)

City Takeaway: Deletion of a comment from a Councilmember's personally owned and administered social media account may be a First Amendment violation, if the account is primarily concerned with matters of public government.

- “In sum, the interactive component of the Chair’s Facebook page constituted a public forum, and Randall engaged in unconstitutional viewpoint discrimination when she banned Davison . . . from that forum.”

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

3. Understand Disciplinary Limits for Employee Social Media Content

*McCullars v. Maloy (Federal District Court, 2018)**

City Takeaways: (1) First Amendment protections extend to “vehement, caustic, and sometimes unpleasantly sharp,” speech made by an employee on personal social media; (2) Be familiar with the *Pickering* test, balancing the interests of a governmental employee’s interests to comment as a citizen on matters of public concern, with the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees; (3) realize the analysis is very fact specific.

- Test applied: “(1) whether the speech impedes the government’s ability to perform its duties efficiently; (2) the manner, time and place of the speech; and (3) the context within which the speech is made.” In this case, the fact that McCullars had no: “confidential, policymaking, or public contact role” minimized impact of his comments on the County’s successful functioning.

*Currently pending in Florida federal district court.

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

4. Select Your Social Media Platforms Carefully

- Be aware of the Terms of Service (“ToS”) of your chosen social media platforms, and how they treat controversial content such as hate speech, obscenity, and harassing behaviors, as they may or may not impose restrictions on content that are more stringent than your city may be able to impose under the First Amendment.
- However, be aware that *Davison* has raised the issue that a governmental body’s mere “decision to select a private social media website for use as a public forum --- and therefore select that website’s suite of rules and regulations – could violate the First Amendment, if the private website included certain types of exclusionary rules.”

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

5. Adopt a Comprehensive Social Media Policy

- It is imperative to adopt a comprehensive social media policy before you need it. The *McCullars* court noted that the governmental defendant did not have a social media policy at the time that the plaintiff made his claims – this could not have been a helpful fact for the County in that case.
- Identify: (1) employees authorized to issue official social media statements on behalf of the city; (2) basic usage standards; (3) moderation standards for interactive content; (4) records retention. When drafting a policy, management, legal, public relations/communications, and HR are stakeholders.
- Education of both staff and elected officials on social media usage regulations and possible First Amendment issues is a key risk control component.

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

6. Consider Open Meetings (TOMA) and Public Information (TPIA) Aspects

- Texas Open Meetings Act: TEX. GOV'T CODE Chapter 55 I

While the previous “walking quorum” provisions are currently nullified by the February 2019 *State of Texas v. Doyal* decision, it is both possible and very easy for an un-posted public meeting to occur if a quorum of the governing body engages in a social media discussion (e.g. Facebook, NextDoor) regarding a government business matter.

The Texas Legislature was briefed on these dangers as early as 2010 by the Senate Committee on State Affairs. Training on these pitfalls are key for elected officials.

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

II. SOCIAL MEDIA DEFENSE STRATEGIES

6. Consider Open Meetings (TOMA) and Public Information (TPIA) Aspects

- Texas Public Information Act: TEX. GOV'T CODE Chapter 552

Online content may be considered “public information,” within the terms of the PIA, and employee or elected official content may be subject to the Act, if it concerns “the official business of the governmental body.”

Check with your Records and/or City Secretary’s office to ensure that Texas State Library and Archives Commission retention policies are being followed with regard to governmental social media.

SOCIAL MEDIA DEFENSE STRATEGIES FOR TEXAS MUNICIPALITIES

THANK YOU FOR THE OPPORTUNITY TO PRESENT TODAY!

David T. Ritter

BROWN & HOFMEISTER, LLP

740 E. Campbell Road, Ste. 800

Richardson, Texas 75081

214.747.6100

www.bhlaw.net

dritter@bhlaw.net

