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## **Online Networking, Texting and Blogging by Peace Officers Part One – Impeachment, Policy & First Amendment Issues**

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### **❖ Introduction**

More than half of all adult Americans ages 25-35 have personal networking places on media websites such as Digg, Facebook, Flickr®, LinkedIn®, MySpace™, Picasa™, PoliceLink, Twitter and YouTube. [1] [Wikipedia hosts a list](#) of the more prominent site providers. Registered users usually create a profile and often upload photographs and videos. While some people access sites exclusively via a wired Internet point, many also use a wireless web portal provided by their mobile phone carrier. [2]

A web blog (blog) is a continuing commentary on the Internet, [3] whereas texting refers to the exchange of brief written messages between mobile phones and pagers using SMS enabled cellular networks. [Technorati™](#), an Internet search engine that searches blogs, has indexed over a hundred million blogs and more than 250 million pieces of [tagged social media](#).

Police officers often possess a personal [smartphone](#) while on duty, allowing them to access websites and chat rooms, to send and receive private e-mail, and to exchange text messages with their friends and coworkers. PoliceOne offers its own [blogs](#), and has links to [Cops on Line](#) and to dedicated space on [Facebook](#).

Officers have been embarrassed and disciplined for creating “inappropriate” social net sites and sending messages with sexual, racially biased, insensitive or derogatory content.

Part One of this article addresses courtroom impeachment problems, policy implications and First Amendment considerations. Part Two will discuss the limitations on management’s right to monitor the content of networking sites and text messages.

### ❖ **Courtroom testimony impairment**

Criminal defense attorneys have challenged the credibility of police officers, have exposed their biases, and have revealed an alleged propensity for violence because of statements or comments found on a social network website. This danger was highlighted in a 2009 advisory bulletin of the Los Angeles County Sheriff’s Dept.

- See [Impeachment Via Social Network Websites](#), LASD Newsletter No. 09-07 (5/27/2009). *Editor’s note: This is an important document!*

A prosecution witness may be confronted on cross-examination with evidence of specific instances of conduct concerning his or her character for truthfulness or untruthfulness. This includes the contents of writings, recordings, or photographs that may be relevant to witness character or credibility. [4]

The jury in the famous O. J. Simpson murder trial was told of a racist remark made by a controversial homicide detective. [5] More recently, a firearms expert witness purportedly was disqualified from testifying in an officer-involved shooting because of extremist remarks he made on a website. [6]

### ❖ **Policy implications**

A prominent law firm has noted that social media now permeates the entire life cycle of employment: during pre-employment inquiries, throughout the period of employment, and after separation from employment. Employers must fully consider the use and misuse of social media at each stage. The firm warned that employers that ignore the dangers of social media in the workplace risk legal liability and embarrassment. [7]

The fact that an employee’s writings appear on an Internet profile does not mean that the conduct is private. As the armed forces appellate court has noted, an Internet profile “is the modern equivalent of standing on a street corner in uniform with a sign saying ‘I’m in

the Army and I am a racist and Aryan extremist.”” [U.S. v. Wilcox](#), #05-0159, 66 M.J. 442, 2008 CAAF Lexis 1216 (2008).

Public safety agencies should have a written policy on social networking, blogging, e-mail and texting. Some of the areas that need to be addressed include the following:

1. A warning that misuse of electronic media will be grounds for disciplinary action, including termination.
2. A prohibition of the use of the agency’s name, logo, patch, badge, marked vehicles and other identifying symbols. Consider registering indicia as official trademarks.
3. A prohibition against posting one’s photograph while wearing the agency’s official uniform (or in a similar attire, which could be misidentified as the official uniform).
4. A ban on the disclosure of the agency’s confidential or proprietary information.
5. A rule that employees must not surf, post, text or blog during duty hours, unless for agency purposes. (List and illustrate any exceptions).
6. A prohibition against using agency e-mail addresses to register for or to respond to social media sites.
7. A rule requiring all employees who maintain a blog, or who reply to blogs that identify the agency must identify themselves, and include a disclaimer that their viewpoints are personal, private, and do not necessarily reflect the position of the agency.
8. A policy that encourages employees to voluntarily refer work-related complaints to their supervisors or the [agency’s personnel office] before blogging or posting about such complaints.
9. A prohibition against knowingly or recklessly posting false information about the agency, superiors, coworkers, public officials and others who have a relationship to or with the agency. This should include the wrongful disparagement of fictitious characters that resemble known personnel or officials.
10. Exceptions to the agency’s electronic media policies must be approved, in writing, by the chief of the agency or designated subordinates.

In a 2009 presentation at the IACP annual conference, Orlando attorney Jody Litchford offered “Policy and practice tips for employers.” See [Employment Issues Related to Electronic Communications](#) at pp. 3-4, which is posted on the AELE website.

She advised that management should encourage employees to “interact positively” with an employer’s social networking site, and to have policies in place that ensure that the agency’s reputation is enhanced.

Most governmental entities now have written policies on electronic messaging. The IACP issued a Model Policy on *Electronic Messaging* (2002) and another on *Cellular Telephones* (2003).

The IACP’s e-messaging policy applies to “all media which are:

- a. Accessed on or from departmental premises;
- b. Accessed using department computer equipment or department paid access methods;
- c. Communications that make reference to the department in a manner; and/or
- d. Used in a manner that identifies the employee with the department.”

It admonishes that “no e-mail or other electronic communications may be sent that attempts to hide the identity of the sender or represents the sender as someone else or someone from another agency.”

The IACP’s cell phone policy states that the use of personal cellular phones either in voice or data transmission while on duty should be restricted to essential communications and should be limited in length. “Engagement in multiple or extended conversations unrelated to police business or similar use that interferes with the performance of duty is prohibited.” It also requires officers to provide their mobile numbers to their supervisors.

- Social media attributes and capabilities expand frequently. An agency’s policies must be fluid and continually adapt to changes in cyberspace.

Neither of the IACP’s policies address social media websites directly. Facebook was not launched until 2004, the same year that MySpace™ transitioned from a virtual storage site to a social networking site. The two IACP Model Policies were published before 2004.

- AELE has collected a few specimen policies that address the use of social media by law enforcement and military personnel.

[Specimen social networking policies](#) (opens a new menu)

The Brook Park policy provides that no employee shall represent himself in any public forum as a department member in any manner that “reflects a lack of good moral character,” whatever that means! There is nothing wrong with saying that, but it is hard to prove in court.

Brook Park very properly prohibits the posting, transmission or dissemination of any pictures or videos of official department training, activities, or work-related assignments without the express written permission of the chief of police.

Brook Park officers may not post photos of, or comments made by other department employees without their approval. Additionally, employees are warned not to “gossip about the affairs of the department with persons outside of the department,” although that raises some First Amendment issues.

The policy ends by reminding employees to consider “the possible adverse consequences of internet postings, such as future employment, cross-examination in criminal cases, and public as well as private embarrassment.”

#### ❖ **First Amendment considerations**

The First Amendment protects the content of public employee speech, provided they speak as a private citizen. Specifically:

1. The Constitution does not protect work-related gripes, and has not since 1983. [8]
2. The content of the speech must address a matter of public concern.
3. Since 2006, the reason for the “speech” must be outside the duties and responsibilities of the public employee.
4. Even if the content of the speech is protected, the employee’s interests in the speech must outweigh the employer’s interest in promoting efficient operations. A public employer need not allow events to unfold that would disrupt the workplace and impair working relationships. [9]

In a 5-to-4 decision, the Supreme Court rejected the claims of a deputy district attorney who had criticized a case handled by his office. The majority found that because his statements were made as a public employee, and not as a private citizen, his speech lacked any First Amendment protection. [Garcetti v. Ceballos](#), #04-473, 547 U.S. 410, 126 S.Ct. 1951 (2006).

It is beyond the scope of this article to discuss the First Amendment nuances of this important decision. An excellent article was written by the chief of the Legal Instruction Unit at the FBI Academy, which we urge you to read and save on your computer:

- [Speech and the Public Employee](#), by Lisa Baker, FBI Law Enforcement Bulletin (Aug. 2008).

One of the more debated cases involved Lexington, Kentucky, police officer Joshua Cromer, who was fired for comments in his MySpace™ webpage. Following his DUI arrest of celebrity country singer [John Michael Montgomery](#), the officer's troubles began. He was charged with conduct unbecoming an officer:

“On or about March 20, 2006, Officer Cromer, identifying himself as a Lexington Police Officer through word and image, posted, or allowed to remain posted, to web site MySpace.com language and/or images that reflected discredit upon Officer Cromer as a member of the Division of Police, brought the Division into disrepute, and impaired the operation and efficiency of himself and the Division. Such postings include profane language; inappropriate or derogatory comments or images concerning homosexuals and the mentally disabled; inappropriate or derogatory comments about the people and/or the city of Lexington; inappropriate comments concerning the use of force; an entry concerning the use of his authority for his own benefit related to a car alarm that was annoying him; the use of his authority for the benefit of a friend by not arresting the friend for DUI; inappropriate sexual comments; and an altered photograph depicting him with John Michael Montgomery after he had arrested Mr. Montgomery for DUI.” [10]

The city council discharged officer Cromer and the trial court confirmed his termination. The Court of Appeals affirmed, noting that the record did not support an allegation that he received a harsher treatment than was warranted under the circumstances. “Rather, the record aptly supports the Council’s decision to terminate Cromer for misconduct, inefficiency, and insubordination.” [Cromer v. Lexington-Fayette Urban Co. Govt.](#), #20088-CA-000698, 2009 Ky. App. Unpub. Lexis 71. [11]

## Notes:

1. [Social Networks Grow](#), Pew Internet & American Life Project (Jan. 14, 2009).
2. “In addition to the standard voice function, current mobile phones may support many additional services, and accessories, such as SMS for text messaging, email, packet switching for access to the Internet, gaming, Bluetooth, infrared, camera with video recorder and MMS for sending and receiving photos and video, MP3 player, radio and GPS.” Wikipedia, [Mobile phone](#).
3. *Blog* is an abbreviation of the phrase *web log*. It is an online journal in the *blogosphere*. Blogs are characterized by minimal barriers to entry, the lack of an editorial process, the absence of permanent content archiving, and anonymous posting

capabilities. An employee who is terminated for blogging is said to have been “*dooiced*,” a term coined by Heather Armstrong, who in 2002, was fired for her web journal entries at [dooce.com](http://dooce.com). *Sources*: 44 Hous. L. Rev. 777 at fn. 19 (2007) and the [Urban Dictionary](#).

4. [Federal Rules of Evidence](#), Rules 401, 404, 608 & 1007.
5. Evidentiary [order](#) in *People v. Orenthal James Simpson*, # BA097211, Los Angeles County Super. Ct. (31 Aug. 1995), concerning a racial utterance by [then] police detective Mark Fuhrman.
6. [Law Update](#) for Border Patrol Agents & Customs & Border Protection Officers (S.D. Calif., Nov. 2009).
7. Nixon Peabody, Employment law alert, “Social media and the workplace: what every employer should know.” (11/13/2009).
8. [Connick v. Myers](#), #81-1251, 461 U.S. 138 (1983).
9. *Connick*, 461 U.S. at 152.
10. [Official Minutes](#), Council of the Lexington-Fayette Urban County Government, Special Session, Feb. 20, 2007.
11. A parallel action was filed in federal court and is pending. *Cromer v. Lexington-Fayette Urban Co. Govt.*, #507-cv-00256, [interim order](#) (E.D. Ky. 2009). Several other Lexington police officers received suspensions for their online remarks.

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8. [Speech and the Public Employee](#), by Lisa Baker, 77 (8) *FBI Law Enforcement Bulletin* 23 (Aug. 2008).
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10. What Anyone Can Know: The Privacy Risks of Social Networking Sites, by David Rosenblum, 5 (3) *IEEE Security & Privacy* 40 (May-Jun. 2007).

***B. Law review articles (alphabetical)***

1. [Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression](#), by Helen Norton, 59 *Duke L.J.* 1 (Oct. 2009).
2. [Electronic Discovery Bibliography](#), by Paul Richert, 42 *Akron L. Rev.* 419 (2009).
3. [\[The\] Electronic Workplace: To Live Outside the Law You Must Be Honest](#), by William A. Herbert, 12 (1) *Empl. Rts. & Employ. Pol'y J.* 49-104, *Chicago-Kent Coll. of Law* (2008).
4. Emerging Technology and Employee Privacy, Symposium: [Rethinking Information Privacy in an Age of Online Transparency](#), by Robert Sprague, 25 *Hofstra Lab. & Emp. L.J.* 395 (Spring, 2008).
5. [Fired for Blogging: Are There Legal Protections for Employees Who Blog?](#), by Robert Sprague, 9 *U. Pa. J. Lab. & Emp. L.* 355 (Winter, 2007).
6. [Industrial Justice: Privacy Protection for the Employed](#), by Ariana R. Levinson, 18 *Cornell J. L. & Pub. Pol'y* 609 (Summer, 2009).
7. [\[The\] Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers' Right of Free Speech](#), *Note*, by Danley K. Cornyn, 87 *Tex. L. Rev.* 463 (Dec. 2008).
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9. [Networked Activism](#), Molly Beutz Land, 22 *Harv. Hum. Rts. J.* 205 (Summer, 2009).
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11. [Poised on the Precipice: A Critical Examination of Privacy Litigation](#), by Andrew B. Serwin, 25 Santa Clara Computer & High Tech. L.J. 883 (Apr. 2009).
  12. [A] Social Networks Theory of Privacy, Lior Jacob Strahilevitz, 72 U. Chi. L. Rev. 919 (2005). [Abstract](#).
  13. Think Twice Before You Type: Blogging Your Way to Unemployment, *Note*, by Scott R. Grubman, 42 Ga. L. Rev. 615 (Winter, 2008).
  14. [The] Tort of Wrongful Discipline in Violation of Public Policy - Proposed Restatement of Employment Law, by Joseph R. Grodin, et al., 13 (1) Empl. Rts. & Employ. Pol'y J. 159, Chicago-Kent Coll. of Law (2009). [Abstract](#).
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