Social Networking in Law Enforcement – Legal Issues



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Discussion Points

- Law Enforcement Use of SN to fight crime
 - To prevent crimes before they occur
 - To gather evidence and intelligence
 - Fourth Amendment considerations
 - Privacy issues
 - Case law



Discussion Points

- SN and its impact on agencies as employers
 - Employee use of SN
 - First Amendment issues
 - Disciplinary issues
 - Potential liability issues
 - Litigation issues
 - Case Law



Social Media – What is it?

- Integrated technology that allows users to generate their own content and then share that through various connections
- Uses new technology and differs from traditional media outlets
 - Immediacy
 - Interaction
 - Audience



Definitions – see handout





Statistics

- 200 million blogs worldwide
- In 12/09 Facebook exceeded 350 million active users
- 50% of Facebook users visit the site on any given day
- I/3 of Facebook users are between the ages of 35 and 49
- 1/4 of Facebook users are over 50



Statistics

- Average teen's monthly text messages = 2,899! (6/09 Nielsen study)
- Twitter showed a growth of 752% in 2008 and an even greater increase in 2009
- More than 27 million tweets per day
- Users have tweeted over 7 billion times since Twitter's inception



Statistics

- I.2 billion YouTube views every day
- The amount of data handled per day by Facebook's servers = 1000 times the volume of mail delivered daily by the USPS
- As of June 2010, LinkedIn had more than 70 million registered users in more than 200 countries and territories worldwide

Law Enforcement Use of SN to Fight Crime



Investigate crimes

 Penn State University police used Facebook to identify students who rushed the field after the Ohio State football game – two students charged with criminal trespass

• Gather intelligence about criminal gangs

 Police used evidence from MySpace and YouTube - incriminating photos and videos of gang members holding guns, illegal firearms and making hand gestures

• To prevent crimes before they occur

- In CO a 16 year old boy was arrested after posting photos of himself holding handguns on his MySpace profile – parents complained and boy arrested for illegal possession of firearms
- To gather evidence of crime
 - Tacoma, WA police used MySpace to prove motive after confirming that the victims and suspects in a triple homicide were on each other's friend list

- Utah AG filed sexual exploitation charges against a 27 year old man after investigators discovered photo of man on his MySpace profile posing with 2 boys with whom he had been court-ordered not to have contact
- A former elementary school teacher was sent back to jail for violating terms of probation after she contacted her rape and sexual battery victim through MySpace blog

 Person posted pictures on his MySpace page showing him brandishing a gun – violation of pre-trial service agreement

 In Florida, cops charged teen with attempted second-degree murder after members of his "fighting crew" boasted on MySpace about their violent exploits

 Two boys firebombed an abandoned airplane hangar and then uploaded video of themselves committing the crime

- Boulder Co detectives assembled photo line up of suspects in a sexual assault case from portrait photos displayed on their MySpace profiles
- Pennsylvania police arrested 10 graffiti artists because they posted numerous pictures of their "artistic exploits" on MySpace

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CONSTITUTIONA L CONSIDERATION S

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- Protects against unreasonable searches and seizures of persons, homes, papers, effects
- Reasonable expectation of privacy in a communication medium is a condition precedent to giving it Fourth Amendment protection

- In context of SNS question is whether people have a reasonable expectation of privacy for the information they post to their individual profiles
 - Is there a reasonable expectation of privacy on a personal web site that is accessible by anyone?
 - Is there a reasonable expectation of privacy on a personal website that has been secured by some sort of privacy protection?

• Are entries on SNS like sealed 1st class mail or are they more like a postcard?

• US Supreme Court has stated:

A person has no legitimate expectation of privacy in information he voluntarily turns over to a third party. Smith v. Maryland, 442 US 735 (1979)

In revealing his affairs to another, a person takes a risk that the information will be conveyed. U.S. v. Miller, 425 US 435 (1976).

- Profile information available to the public includes name, profile photo, list of friends, pages you are a fan of, gender, geographic region, networks you belong to.
- Default profiles are generally public
 - **MySpace:** no restrictions on who may view a user's profile or information
 - Facebook: "general public" access to information consists of those who can obtain email address from the same network (by university, high school, company, government entity)

Employer review of employee's text messages reasonable

• City of Ontario v. Quon 2010 WL 2400087

- Public employer's review of a government employee's (police officer's) text messages was reasonable and didn't violate the Fourth Amendment
- Employer has a legitimate interest in ensuring that employees were not paying out of their own pocket for work-related expenses
- Employer had a policy that allowed it to monitor text messaging
- Based on policy, Quon did not have a reasonable expectation of privacy in the text messages

• Search incident to arrest – pre-Arizona v. Gant

- District Court in Kansas upheld search of cell phones and electronic contents on basis of exigent circumstances
- E.D. Wisconsin court upheld search based on concern about destruction of evidence
- Fifth Circuit upheld warrantless search of cell phone because lawful search incident to arrest extends to "containers" and a cell phone is equivalent of container
- N.D. III. Court approved searches of cell phones because they are analogous to wallets and address books

• Search incident to arrest – post Arizona v. Gant, 129 S.Ct. 1710 (2009)

- Ohio Supreme Court held that law enforcement may not search cell phone incident to arrest without a warrant
 - Not a closed container
 - No police officer safety justification
 - No preservation of evidence justification
 State v. Smith, 920 N.E.2d 949 (Ohio 2009)

- Florida District Court U.S. v. Quintana, 594 F.
 Supp. 2d. 1291 (M.D. Fla. 2009),
 - Search of cell phone pushed search incident to arrest beyond its limits
 - By searching cell phone, officer did not seek to preserve evidence of crime (driving with a suspended license)
 - Search viewed by court as "rummaging" for information related to a separate suspicion

- U.S. District Court, Nebraska U.S. v. McGhee, 2009 WL 2424101 (D. Neb. 2009)
 - Cell phone created no danger to police officers
 - No evidence suggested cell phone concealed any destructible evidence
 - Officers could not have reasonably believed that a search of cell phone in January 2009 would produce evidence related to the arresting offense committed in March 2008

Plain View and SNS

Plain View

 Police may lawfully search on the Internet and any person, including law enforcement may sign up for an account on SNS – profile information would most likely be in "plain view"

Warrant and SNS

• Warrant – sufficiently particular

- Enables searcher to reasonably ascertain and identify things authorized to be seized
- Describe the objective of the search
- Explain that computer, drives, SNS, etc. contain thousands of pages of information and that pertinent information can be stored in any part of computer, hidden under any title or heading. See, US v. Beckett, 2010 WL 776049(C.A. 11 Fla.)

CONSTITUTIONA L CONSIDERATION S

THE FIRST AMENDMENT

- First Amendment
 - Public employee's free speech rights are more limited than the free speech rights enjoyed by the general public
 - Not protected when they speak on matters of purely private concern
 - Key evaluation is whether the public employee's speech touches on a matter of public concern

 If speech touches on matter of public concern, courts must balance public employer's legitimate interest in maintaining an efficient and effective provision of governmental services against the employee's interest in commenting on matters of public concern

San Diego v. Roe, 543 U.S. 77 (2004)

- Police officer's use of video media rather than SN
- Officer made video of him stripping off his police uniform and engaging in lewd acts and sold the videos on eBay
- Terminated for this off-duty conduct
- Claimed termination violated his First Amendment right to free speech

San Diego v. Roe, 543 U.S. 77 (2004)

US Supreme Court holding:

- Performed balancing test
- Determined that officer took deliberate steps to link video to his police work in a way that was harmful to employer
- His expression did not qualify as a matter of public concern under any view of the public concern test
- Termination did not violate employee's free speech rights



- Public employers can be held liable for their employee's actions on social networking sites
 - Failure to train
 - Negligent supervision
- Employers may be held liable under antidiscrimination laws for improperly using or improperly posting information on SNS

Common Anti-Discrimination Statutes

- Title VII prohibits discrimination based on race, sex, color, national origin, and religion
- Americans with Disabilities Act prohibits discrimination against "qualified individuals with disabilities"
- Age Discrimination in Employment Act (ADEA) – prohibits discrimination based on age
- Pregnancy Discrimination Act

Title VII Probibits

- Prohibits discrimination based on race, sex, color, national origin, religion
- Employer can be liable for co-worker harassment if it knew or reasonably should have known about the harassment and failed to take prompt remedial action

Americans with Disabilities Act

- An individual is considered to have a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment
- First line of defense is that employer was unaware of employee's disability

Employers beware

- Dangers of supervisor/subordinate "friend"-ships
 - If supervisor sees harassing comments or offensive/discriminatory dialogue being exchanged by employees on SNS and does nothing, employer may later be accused of having knowledge of co-worker harassment/discrimination and failing to respond
 - If supervisor uses SNS to make harassing/inappropriate/discriminatory comments to other employees/subordinates, creates potential liability for employer for violation of anti-discrimination statutes
 - If supervisor sees post on employee SNS page describing her struggles with "disability" such as manic depression, bulimia, etc., may lose "unaware defense," leaves employer vulnerable for challenges that actions taken against employee were because of disability



- Be cautious when searching an applicant's SNS as part of hiring process
 - An employer may learn information through SNS that it would be prohibited from asking in interviews
 - Timing of the search of SNS is critical
 - failure to hire claims and discrimination claims are less likely to arise if an employer searches SNS after obtaining an applicant's written consent and after a conditional job offer has been made.

Disciplinary Issues

- Conduct Unbecoming policy violations and social media
 - Every agency has one or more "conduct unbecoming" policies
 - Explosive growth of social media and networking has created new categories of employee misconduct that can constitute conduct unbecoming.



Discipline for using SNS

- Posting evidence
 - A 29 year old probationary officer with Trotwood PD was fired for posting photos of evidence from police investigations on the Internet





Discipline for using SNS

- Posting images depicting violent material
 - 26 year old police officer was indefinitely suspended for displaying his horror movie fantasies to the world:
 - Listed his occupation as "super hero/serial killer"
 - Favorite meal: human flesh pizza
 - Could be used to impeach his testimony in criminal cases
 - Would make if difficult for him to defend against excessive force complaints

Discipline for using SNS

Posting Racial Slurs

- Police officer fired after he emailed a friend in the National Guard referring to President Obama using offensive racial slurs to describe the President
- Police officer disciplined for posting racial slurs about President Obama on his MySpace page – conduct unbecoming violation
- Police officer received a warning for comments that could be taken as racial slurs even though the comments were intended to tease his wife

Discipline for Using SNS

- Posting ethically questionable material
 - Patrol cadet was forced to resign when he put pictures of him on his Facebook page standing in front of a police car – pictures of him drinking alcohol were posted in the same account



Discipline for Using SNS

- Posting derogatory comments about authority
 - Officer fired for writing on his MySpace account that some of his peers in police academy were of questionable maturity
 - Six police officers received various discipline for derogatory comments they posted on their MySpace pages about citizens they had dealt with

Discipline for Using SNS

 A trooper is under investigation for controversial statements made on Facebook – also being investigated for posting Facebook blog messages during hours he was on duty (the blog messages described how we was NOT working at the time of the posting).

Bring your policy into the 21st Century – include social media

- Define the devices that are covered
- Describe on-duty and off-duty conduct that is prohibited
- Clearly state that employees have no expectation of privacy on messages sent through work issued devices
- Reserve right to monitor
- Explain that employees cannot post information derived from employment on any SNS whether on or off duty without written permission from Chief



Litigation Issues

- E-discovery
- Admissibility and authentication issues
- Subpoenas
- Impeachment
- Jurors and jury instructions



Social media is a virtual information bonanza about a litigant's private life and state of mind.

E-discovery

Just 10 years ago, one court denounced Internet data as "voodoo information." Now such data is becoming a routine item in every discovery request

Rule 34(a) FRCP:

Any party may serve on any other party a request (1) to produce and permit the party making the request...to inspect, copy, test, or sample any designated documents or **electronically stored information** – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data complications **stored in any medium from which information can be obtained**.

Zubulake v. UBS Warburg – a serious wake-up call

- Favored broad approach to discoverability
- In the world of electronic data, any data that is retained in a machine readable format is typically accessible.
- "Broad discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure."
- Adverse-inference jury instruction
- \$29 million verdict

E-discovery

- Electronically stored information (ESI) given same treatment as paper docs – discoverable if relevant
- Reasons:
 - (I) volume of electronic information dwarfs paper documents;
 - (2) ESI includes information not contained within its four corners (i.e. metadata)
 - (3) ESI is difficult to delete permanently from computer vs. shredding paper documents;
 - (4) ESI may require costly retrieval, restoration or translations

E-discovery – Duty of Preservation

- There is a duty to preserve documents that a party knows or should know may be relevant to future litigation
- Duty extends to preservation of relevant documents that are "reasonably likely to be requested during discovery and/or is the subject of pending discovers request
- Spoliation instruction for failure to preserve implication that information not preserved was damaging to non-preserving party
- Litigation holds update to include social media including texts, blogs, SNS information and other such posts

Severe Penalties for failing to preserve

- In State v. Huggins, 783 NW 2d (Wisc. 2010), the court of appeals upheld the trial court's dismissal, with prejudice, of a single charge of second-degree intentional homicide due to the State's failure to preserve apparently exculpatory evidence consisting of threatening voicemail messages left on two cell phones.
- The defendant claimed he acted in perfect selfdefense and defense of others when he shot the person. The lost voicemail messages were from the victim, who broke into his home.

- The sheriff's department sought and obtained a search warrant for the phones to recover "text messages, call logs/records, and any other records in any form"
 - The deputy on the case was able to recover threatening text messages from the day of the incident.
 - She could not retrieve the victim's voicemail and did not attempt to recover any voicemail from defendant's phone and testified she never attempted to retrieve any messages from defendant's phone, was never asked to, and was unaware of any such message until she viewed a memo from defense counsel.

- The court rejected the State's argument that there was no due process violation because the voicemail messages were not in the State's exclusive control and because there was comparable evidence available. (i.e. threatening text messages).
 - While the physical evidence (the cell phone) was solely within the State's possession, the concomitant electronic evidence was stored elsewhere and could have been accessed by both the State and the defense.
 - Given the facts of this case, however, it was reasonable for defendant to expect that the State would preserve the voicemail recordings.

- Reasonable for defendant to believe State had duty to preserve
 - The sheriff's department was immediately aware of the apparently exculpatory value of the evidence and confiscated the cell phones as part of its investigation
 - It knew, or should have known, that the voice recordings would be automatically deleted by the cell phone provider at some point in timethis is common knowledge.
 - The department was in a better position to preserve the evidence given its collective investigatory experience and access to necessary technical equipment.

- By creating an expectation of preservation, the State became responsible for ensuring that preservation occurred.
- The court rejected the State's argument that defendant had access to comparable evidence through witness testimony and the preserved text messages.
 - Although defendant and witness both recalled generally that victim's messages were threatening, neither could sufficiently recall the precise language used.

- Text messages are not the same as voice messages:
 - The text messages, by their very nature, could not convey victims tone.
 - Further, they likely would not carry the same weight as a "live" threat.
 - "It is one thing to type a nasty text message or email and press send; it is quite another to call a person to convey threats directly."
- Because what may well be characterized as the most important pieces of exculpatory evidence (the voicemail messages) were not preserved by law enforcement officers, defendant's due process rights were violated.
- The evidence simply cannot be adequately reconstructed by any other means, and the only sanction left to the Court is dismissal



E-discovery

- ESI/e-discovery in criminal cases is just beginning to emerge
- Federal Rules of Criminal Procedure do not afford defendants an established right beyond the scope of Rules 16 and 17
- Defendants generally get limited discovery in contrast to civil litigants who get extensive/overwhelming discovery of all things "relevant"

E-discovery -- Disputes

- Privacy vs. relevancy
 - Any expectation of privacy in SN content is probably unreasonable in terms of discovery
 - There is a high likelihood that much of a person's SN content will be irrelevant to the case in litigation
 - Parties should request relevant documents from the user, coupled with a showing of relevance to the case

Evidentiary issues

- Assuming SN information is discoverable, the question becomes whether it is admissible
- Decisions suggest that if the information is relevant courts will allow it as they would any other piece of evidence
 - Defendant sought to admit copies of a web site of a skinhead organization that posted the name, address, and picture of the victim along with a call to attack him. The federal court (III.) rejected objection that pages were hearsay, holding that they were merely images and text showing what the web page looked like, were an admission by a party opponent and were admissible. *Telewizja Polska USA, Inc. v. Echostar Satellite,* 2004 WL2367740 (ND III 2004)



- Requirement of authentication as condition precedent to admissibility is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims (Evid.R 901(A))
 - Proponent does not need to prove beyond any doubt
 - Must only show reasonable likelihood
 - May be supplied by witness with knowledge

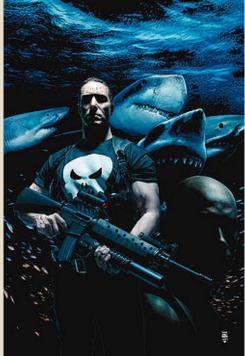


Impeachment

- An evidentiary gold mine for impeaching witnesses and undermining a party's litigation position
- The "smoking gun document" of the preinternet era gave way to the "smoking gun email" which will soon give way to the "smoking gun tweet."
- Public information on SNS: name, profile, photo, list of friends, pages you are fan of, gender, geographic region, networks you belong to are all publicly available



- § 1983 claim for wrongful death arising out of collision with police car
 - At trial, credibility of officer who caused collision challenged by his MySpace
 postings:
 - 4 pictures of officer pointing gun at camera
 - Above picture is PD patrol car with lights flashing and a skull with legend "the PUNISHER"
 - Description of "the PUNISHER": "a vigilante who considers killing, kidnapping, extortion, coercion, threats of violence and torture to be acceptable crime fighting tactics." (*Sitzes v. City of West Memphis Arkansas*, 606 F.3d 461 (8th Cir. 2010))





Subpoenas

- Facebook will share information pursuant to subpoenas, court orders and other requests (including criminal and civil matters) if Facebook has a good faith belief that the response is required by law
- YouTube
- MySpace



Subpoenas

- Motions to compel vs. subpoenas for online information from third parties
- While SNS may respond to subpoena by divulging information, it places an undue burden on these non-parties to disclose information that is already available to a party
- When a party fails to produce SN content in response to discovery request, motion to compel is appropriate

Jurors and SN in the court or jury room

- Sixth Amendment guarantees a trial by an unbiased and unprejudiced jury
- Juror's use of smart phones to search relevant aspects of the case, defendant's information on SNS and news archives has crossed the line and has become the major juror misconduct problem in tomorrow's courtroom
- During a child abduction and sex abuse trial in England, an undecided juror posted details about then case and then created an online poll where the public could vote for a verdict.
- In voir dire simply ask jurors if they could honestly turn off their smart phones during the entire trial. At least 10 potential jurors said they could never abide by that.

Jurors and SN in the court or jury room

- The rise in mistrials and post-trial challenges to verdicts because of inappropriate use of social media by jurors is forcing courts to modify jury instructions
- Jury instructions and court admonishments to jurors at beginning of trial may be in order such as: "You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet, including social networking sites, to obtain or share information."
- Conference of Court Public Information Officers is currently conducting a study to determine the effects of digital media on courts

Case Law Update

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Analysis of cases dealing with social mediaHandout with cases and other articles