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Social Networking in Law Enforcement

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First Amendment, Retaliation:

U.S. Supreme Court:

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006)

1. When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline.
2. The Court noted that supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.
3. The Court also pointed out that exposing governmental inefficiency and misconduct is a matter of considerable significance; and public employers should, as a matter of good judgment, be receptive to constructive criticism offered by their employees.)

City of San Diego v. Roe, 125 S. Ct. 521 (2004)

1. Roe, a San Diego police officer, made a video of himself stripping off a police uniform and masturbating.
2. Under the user name "Code 3 stud@ aol.com," he sold the video on the adults-only section of eBay. He also sold police equipment including San Diego Police Department uniforms and men's underwear.
3. Roe's supervisor discovered Roe's activities while on eBay.
4. A SDPD investigation revealed that Roe had violated various SDPD policies including conduct prejudicial, outside employment, and immoral conduct.
5. SDPD ordered Roe to cease selling any sexually explicit materials or engaging in any similar behaviors via the Internet, U.S. mail, or any other medium available to the public.
6. SDPD subsequently learned that Roe only partially complied with the order.
7. Consequently, SDPD terminated Roe's employment.
8. The U.S. Supreme Court stated that a governmental employer may impose certain restrictions on the speech of its employees that would be unconstitutional if applied to the general public. On the other hand, when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection,

absent some governmental justification far stronger than mere speculation in regulating it.

9. The Court stated that "public concern" is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.

10. The Court easily concluded that Roe's expression did not qualify as a matter of public concern. The expression did not inform the public about any aspect of SDPD's functioning or operation.

11. The Court found that Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer, SDPD – through the use of a police uniform, a law enforcement reference in his website, the listing of the speaker as in the field of law enforcement, and the "debased parody of an officer performing indecent acts while in the course of official duties." All of these acts reflected negatively on SDPD and the professionalism of its officers.

12. Accordingly, the U.S. Supreme Court concluded that Roe's expression was not protected by the First Amendment and that his employer, SDPD, could take disciplinary action against Roe.

Rankin v. McPherson, 107 S. Ct. 2891 (1987)

1. First Amendment's free speech provision applies to probationary and at-will employees.

2. The fact that a statement is inappropriate or controversial is irrelevant to the question whether it deals with a matter of public concern.

3. If a statement is on a matter of public concern, the court must balance the employee's interest in making the statement against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. The manner, time, place, and context of the statement are relevant to the balancing.

    - Pertinent considerations include whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

    - In weighing the state's interest in discharging an employee based on any claim that the content of her statement somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. Where an employee serves no confidential, policymaking, or public contact role, the danger

to the agency's successful functioning from that employee's private speech is minimal.

Connick v. Myers, 103 S. Ct. 1684 (1983)

1. When a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.
2. Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. Not all matters that transpire within a government office are of public concern.
3. The First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Courts other than the U.S. Supreme Court:

Hill v. City of Chicago, 2010 WL 3735723 (N.D. Ill. 2010)

1. Hill, an assistant commissioner of legal compliance with the City of Chicago, claimed that the city retaliated against her for complaining that she did not get a particular job due to illegal hiring practices.
2. Court determined Hill did not speak as an employee but as a private citizen.
3. Court further determined that whether the city's employment practices conformed to the law was a matter of public concern. The fact that an employee has a personal stake in the subject matter of the speech does not necessarily remove the speech from the scope of public concern.

Foley v. Town of Randolph, 598 F.3d 1 (1st Cir. 2010)

1. Fire Chief spoke at the scene of a fatal fire by stating that the fire department did not have sufficient staffing due to budget cuts.
2. Court found that Foley spoke on a matter of public concern because the budget and effectiveness of the fire department are important issues to the public.
3. However, Foley did not speak as a citizen, primarily due to the context of his speech – he was at the scene of a fire; he was in charge of the scene; he was in uniform; and, although not required to speak to the media, he was partially evaluated on media interaction.

4. In dicta court stated that Foley might be able to speak as citizen in a different forum – *e.g.*, at a town meeting, in a letter to the editor, or even in a statement to the media under different circumstances.

Desrochers v. City of San Bernandino, 572 F.3d 703 (9th Cir. 2009)

1. Two police sergeants claimed one received an unfavorable assignment and the other a 15-day suspension due to filing a grievance in which they criticized two lieutenants who supervised them.
2. Court held the speech was not on a matter of public concern and, therefore, not protected by the First Amendment. While the plaintiffs tried to characterize their speech as addressing competency, efficiency, and morale, the court found the speech focused on one lieutenant as a bully. Court said a reference to government functioning does not create a matter of public concern; court looks to what was actually said in the speech at issue rather than the speaker's subsequent characterizations of his/her speech. Because the speech was contained in an internal grievance, it did not reach a large public audience.

Ranck v. Rundle, 2009 WL 1684645 (S.D. Fla. 2009)

1. Plaintiff was an attorney in a prosecutor's office
2. He investigated a police shooting and determined there were possible problems with the shooting; he conveyed that information to the lead detective on the investigation and his superiors (in a memo).
3. His superiors decided to remove him from the investigation
4. After obtaining via a public records request a copy of the memo and other internal documents, Ranck posted them on a blog he created and sent a link accessing those postings to a blog used by criminal defense lawyers.
5. He was suspended without pay for 30 days for publicly releasing information about an ongoing police shooting investigation; posting offensive comments about his colleagues; inflicting harm to the integrity, reputation, and well-being of the prosecutors' office; exhibiting a lack of candor as to approval for payment of expert witness fees in a separate matter; and in-court misconduct in a separate matter.
6. Court determined that plaintiff wrote the memo pursuant to his official duties but that he posted the memo as a private citizen whose speech was intended to raise concerns about the handling of the shooting investigation; because the content of the speech related to whistle-blowing, because it was communicated to the public at large, and because his motivation was to

raise concerns about the investigation, the speech was on a mater of public concern.

7. The court found that plaintiff's First Amendment interests in the speech outweighed the state's interest in promoting the efficiency of its services.

8. However, the court concluded that the agency had legitimate reasons for suspending the plaintiff and, as a result, there was a legitimate issue as to whether he was disciplined due to his speech. Summary judgment granted for employer.

Herdegen v. City of Los Angeles, 2008 WL 224011 (Cal. Ct. App. 2008)

1. Police department issued to recruit officers a document discussing a specific requirement to become a police officer and instructed them to sign the document.

2. Plaintiff, one of the recruits, allegedly made comments to some of the other recruits that they should not sign a document they did not understand, that they should contact the union, and that the city was looking out for its own interests rather than those of the officers.

3. Court determined that the speech was not on a matter of public concern because officer did not comment substantively on the policy. The fact that the speech referred to a union did not automatically mean the speech merited First Amendment protection.

Nixon v. City of Houston, 511 F.3d 494 (5th Cir. 2007)

1. City police officer wrote articles for a local magazine in which he identified himself as a police officer; discussed police-related duties and activities; and made caustic, offensive, and disrespectful comments toward certain minority groups, women, and the homeless. Also, without authorization he went to the scene of a highly-publicized, high speed police pursuit; asked a supervisor if he could make a statement to the media; and, when the supervisor's only response was to laugh, he made a statement to the media in which he criticized HPD's decision to disengage the pursuit and stated he was embarrassed to be an HPD officer because the department did not stop fleeing felons. The next day, he made statements on numerous radio talk shows and to TV interviewers criticizing DPD and its pursuit policy.

2. As a result of these statements, DPD terminated Nixon's employment.

3. The Fifth Circuit found that Nixon (who was on-duty, in uniform, and requested permission to make the statements) made his statements at the scene of the accident during the course of performing his job and not as a citizen despite the fact that he was not authorized to make the statements.

4. With respect to Nixon's statements to radio talk shows and TV interviewers: They are more like citizen speech. However, Nixon's interests in making the statements are outweighed by HPD's interests in maintaining discipline and order among employees and in promoting and maintaining public confidence in HPD. Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.

5. With respect to Nixon's comments regarding minorities, women, and the homeless: The exposure to Houston's minority community and the caustic nature of the comments could negatively impact HPD's relations with the minority community. Those relations are important because citizens need to respect law enforcement officers, often provide valuable information regarding crimes, serve as witnesses, and provide financial support.

Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008)

1. Chandler Police Officer Ronald Dible posted on a website: (a) photographs of his wife, Megan Dible, in various sexual poses and sexual activities with Ronald Dible, another woman, and inanimate objects; and (b) a videotape of Megan masturbating that had been filmed by Ronald. Viewers had to pay see those photographs and videotape. The website also offered for sale a CD-ROM with content similar to the photographs and videotape. The home page to the website featured partially nude pictures of Megan to entice viewers to pay to see the photographs and videotape. The Dibles promoted their website at meetings and on other websites.

2. The Dibles did not intend to express any kind of message on the website; they intended only to make money.

3. Because Ronald Dible believed that his role with the website was not compatible with his position as a police officer, he attempted to conceal its existence from Chandler P.D. officials.

4. However, CPD eventually learned of the website and terminated Ronald's employment.

5. Before CPD dismissed Dible, the press learned of the website and reported on it in an unflattering manner. That publicity resulted in members of the public showing disrespect to CPD officers, potential police recruits asking questions about the website, possible problems in recruiting female officers, and diminished officer morale.

6. In evaluating Ronald's First Amendment free speech claim, the Ninth Circuit applied the analysis enunciated by the U. S. Supreme Court in *City of San Diego v. Roe*.

7. Ronald's attempt to separate the website from his position as a police officer did not aid his First Amendment claim because CPD officers and the public eventually learned of the website, causing injury to CPD.

8. The Ninth Circuit noted that the interest of the city in maintaining the effective and efficient operation of its police department is particularly strong. Police departments and the persons who work for them are engaged in a dangerous calling and have significant powers. The public expects officers to behave with a high level of propriety and is outraged when they do not. The law and officers safety demands that officers be given a degree of respect and the "sleazy" activities of the Dibles undermined that respect.

9. The court concluded that Ronald's First Amendment free speech claim must fail.

10. The Ninth Circuit also rejected Ronald's First Amendment right of privacy claim. The court pointed out that, while Megan engaged in "intimate" activities, those activities were not intimate in the sense that the Dibles made them available to the public for the price of admission to the website.

11. With respect to Ronald's First Amendment freedom of association claim: The court held that Ronald did not have a right to participate in the activities and to avoid city discipline.

See v. City of Elyria, 502 F.3d 484 (6th Cir. 2007) (Officer's claim for First Amendment retaliation due to being discharged survived defendant's motion for summary judgment where officer reported the following issues to the FBI: (a) concerns about the grand jury procedures used by the department; (b) policies prohibiting officers from speaking to the press; (c) the police chief's allegedly allowing an officer to work unnecessary overtime; and (d) plaintiff's belief that the police chief had manipulated the results of an investigation in order to protect a public official. The court concluded that issues these are matters of public concern which demand strong First Amendment protection.)

Gonzales v. City of Calexico, 2007 WL 2001180 (S.D. Cal. 2007) (good discussion of why the federal district court rejected defendant's summary judgment motion where plaintiff probationary police officer engaged in limited participation in protest related to fellow officers' desire to maintain possession of certain rifles and defendant's dismissal of plaintiff subsequent to the protest; the type of personnel matters that are unprotected under the public concern test are employment grievances in which the employee is complaining about his/her own job treatment and no about personnel matters pertaining to other persons)

Golt v. City of Los Angeles, 2006 WL 3804367(9th Cir. 2006) (Plaintiff Golt's First Amendment claim failed because she did not speak on matters of public concern: (a) her distribution of cards requesting that the police chief not attend funerals of LAPD officers killed in the line of duty pertained only to an internal workplace grievance and did not inform the public about any aspect of LAPD's functioning or operations or reveal failure to discharge governmental responsibilities, illegal conduct, breach of the public trust, or misuse of public funds; and (b) her testimony at a disciplinary hearing concerned only a specific issue of sexual harassment and did not contribute to the resolution of an administrative proceeding in which discrimination or other significant government misconduct is at issue.)

Miller v. Jones, 444 F.3d 929 (7th Cir. 2006) (plaintiff stated First Amendment claim sufficient to withstand summary judgment motion where speech that opposed a proposed merger between police program and another organization touched on a matter of public concern)

Wallace v. Suffolk Cty. Police Dep't, 396 F. Supp. 2d 251 (E.D.N.Y. 2005) (plaintiff police officer's comments were on matters of public concern: he alleged that the police department did not have proper training protocols or equipment to ensure the safety of its officers or the public; also, plaintiff's claim that his injuries were purposefully omitted from his retirement application in order to penalize him for his protected speech was sufficient, at the summary judgment stage, to establish an adverse employment action (which is a material adverse change in the terms and conditions of employment))

Signore v. City of Montgomery, 354 F. Supp. 2d 1290 (M.D. Ala. 2005) (police officer was not speaking on a matter of public concern when he assumed a media representative already knew about a police vehicle's being stolen and his speech to the media representative was intended, at least in part, to obtain information for the officer; furthermore, the officer's disclosure of information about an on-going investigation can cause the *Pickering* balancing to weigh in favor of a police department)

First Amendment, Discovery of Identity of Anonymous Posters:

Juzwiak v. Doe, 2 A.3d 428 (N.J. Superior Ct., App. Div. 2010)

1. Plaintiff high school teacher received e-mails containing the following statements: (1) "Hopefully, you will be gone permanently. We are all praying for that. [signed] Josh." (2) "You don't deserve to teach anymore.

I will make it my life's work to ensure that wherever you look for work, they know what you have done."

2. A third e-mail that was sent to plaintiff and community members contained the following statement: "We can not continue to allow the children of this school system nor the parent to be subjected to his evil ways."

3. Plaintiff did not know who was responsible for authoring and sending the e-mails.

4. Plaintiff filed a complaint in New Jersey state court against a John/Jane Doe defendant.

5. Plaintiff served a subpoena on Yahoo!, the internet service provider, seeking the author's identity.

6. Yahoo! notified the subscriber of the subpoena, who moved to quash the subpoena.

7. The appellate court noted that the right to speak anonymously is protected by the First Amendment and derives from the principle that, to ensure a vibrant marketplace of ideas, some speakers must be allowed to withhold their identities to protect themselves from harassment and persecution. But the right to speak anonymously is not absolute. Plaintiffs have the right to seek redress for legally cognizable speech and speakers cannot escape liability simply by publishing anonymously.

8. New Jersey law on the right of plaintiffs to obtain the identity of anonymous speakers is as follows: First, the plaintiff must attempt to directly contact the anonymous poster. Second, in the complaint the plaintiff must set forth the exact statements made by the poster. Third, the court must carefully review the complaint and all information provided to determine whether the plaintiff has set forth a *prima facie* cause of action. Fourth, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed. These guidelines should be flexible, non-technical, and fact-sensitive and applied so as to prevent plaintiffs from using the discovery process to ascertain the identities of unknown defendants in order to harass, intimidate, or silence critics in the public forum opportunities presented by the Internet.

9. The appellate court concluded that plaintiff failed to satisfy two of the elements of a *prima facie* case for intentional infliction of emotional distress, even though the poster was angry with the plaintiff.

10. Accordingly, the appellate court ordered the trial court to quash the subpoena.

In re Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010)

1. Quixtar sued TEAM, claiming TEAM orchestrated an Internet smear campaign via anonymous postings and videos.
2. During discovery Quixtar sought testimony from a TEAM employee regarding the identity of five anonymous online speakers who allegedly made defamatory statements about Quixtar.
3. The district court ordered TEAM to disclose the identity of three of the five speakers.
4. Both sides sought intervention from the appellate court, one side seeking to prevent disclosure of the information and the other side seeking to compel.
5. The Ninth Circuit noted that anonymous public speech in America stretches back at least to *The Federalist Papers* and papers published by their opponents, the Anti-Federalists.
6. The court said the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves more freely without fear of economic or official retaliation or concern about social ostracism.
7. The court determined that the speech at issue related solely to the economic interests of the speaker and, therefore, was properly categorized as commercial speech.
8. Commercial speech enjoys a limited measure of First Amendment protection, commensurate with its subordinate position on the scale of First Amendment values.
9. The court opined that the standard for allowing disclosure of the identity of anonymous commercial speakers should be lower than that for anonymous political speakers.
10. Here, the Ninth Circuit affirmed the district court's decision to allow disclosure of the identities because the district court had concluded that disclosure was proper even under the most stringent standard for protecting the identities of anonymous speakers. That standard, adopted from *Doe I v. Cahill*, 884 A.2d 451 (Del. 2005), requires, among other things, that the speaker be notified of the request for his/her identity and that the requester be able to survive a hypothetical summary judgment motion on its claim for relief. The Ninth Circuit noted that there was a protective order in place which would protect sensitive matters that implicate First Amendment rights.

Salehoo Group, Ltd. v. ABC Co., 2010 WL 2773801 (W.D. Wash. 2010)

1. Court said the weight of authority favored applying a test modeled after *Dendrite, Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct., App. Div. 2001).

2. Court applied a four-part test. First, the plaintiff must undertake reasonable efforts to give the defendant adequate notice of the attempt to discover his or her identity and provide a reasonable opportunity to respond. Second, the plaintiff must, in general, allege a facially valid cause of action and produce *prima facie* evidence to support all the elements of the cause of action within his or her control. Thus, the strength of the plaintiff's case must be evaluated before he or she is permitted to unmask by subpoena an anonymous defendant. There must be sufficient evidence to create a jury issue on the underlying claim.

   The court recognized that, at an early stage of the litigation, a plaintiff may not possess information about the role played by every defendant or other evidence that could be obtained through discovery. Third, the plaintiff must demonstrate that the specific information sought by subpoena is necessary to identify the defendant and that the defendant's identity is relevant to the plaintiff's case. Fourth, where the preceding factors do not present a clear outcome, the court should balance the interests of the parties. In doing so, the court should assess and compare the magnitude of harms that would be caused to the competing interests by a ruling in favor of the plaintiff and a ruling in favor of the defendant.

The Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184 (N.H. Sup. Ct. 2010) (adopting the *Dendrite* test)

McVicker v. King, 266 F.R.D. 92 (W.D. Pa. 2010)

1. Plaintiff sued, claiming he was terminated in violation of various federal and state anti-discrimination laws.

2. Plaintiff filed a motion to compel disclosure of identities of seven persons who posted anonymous statements on a website near the time the borough council dismissed plaintiff.

3. The owner of the website, Trib Total Media, informed plaintiff that it objected to the subpoena and would not produce any names without a court order.

4. The court said a party seeking disclosure must clear a higher hurdle where the anonymous poster is a non-party to the lawsuit.

5. The trend among courts is to hold that entities such as newspapers, ISPs, and website hosts may, under the principle of *jus tertii* standing, assert the rights of their readers and subscribers.

6. Trib Total Media's privacy policy emphasized TTM's intention to protect the privacy of its users and expressly stated that TTM may "disclose your information in response to a court order, at other times when the Company believes it is reasonably required to do so . . . ."

7. That privacy policy created an expectation of privacy for any registered user.

8. Court denied the motion to compel the identities because the court was not persuaded that the plaintiff needed the identities in order to impeach the individual defendants.

In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31, 2010 WL 2219343 (E.D.N.Y. 2010)

1. An anonymous person posted on Internet message boards numerous messages that were critical of Prospect and its employees.

2. Prospect issued a subpoena to Yahoo! seeking user information on several posters.

3. The magistrate judge for the federal district court stated that, in addition to a First Amendment right to engage in anonymous speech, the poster has a privacy interest in maintaining the confidentiality of his/her identity and whereabouts as a customer of Cablevision, the ISP.

4. The magistrate judge said many federal courts have applied the test enunciated in *Sony Music Entm't Inc. v. Does 1-40*, 323 F. Supp. 2d 556 (S.D.N.Y. 2004).

5. The magistrate judge utilized the following five factors in analyzing the poster's First Amendment right to anonymous speech and the plaintiff's desire to obtain the poster's identity: (a) the nature of the speech of the anonymous Internet user; (b) the nature and strength of the claims and defenses of the party seeking the discovery; (c) the importance of the identifying information to such claims and defenses; (d) the availability of other sources of information; and (e) the conduct and relationship of the parties and subpoenaed party.

6. The magistrate judge found these facts to be significant: A number of factors in addition to the identity of the poster would play a role in whether Prospect prevailed in the lawsuit; Prospect could present its arguments without knowing the poster's identity; as a publicly traded company, Prospect is necessarily the subject of rumors and speculation; and, most

importantly, there is no evidence the trustee relied upon the postings in making any significant decisions.

7. Accordingly, the magistrate judge recommended granting Doe's motion to quash the subpoena.

Sedersten v. Taylor, 2009 WL 4802567 (W.D. Mo. 2009) (court determined this was not the exceptional case that warranted disclosure of the identity of an anonymous, non-party speaker who posted critical comments on a newspaper's Internet site)

Cohen v. Google, Inc., 887 N.Y.S. 2d 424 (Supreme Ct., N.Y. Cty. 2009) (court held that plaintiff was entitled to pre-action disclosure of identity of anonymous blogger who made allegedly defamatory statements about the plaintiff, including use of the words skank, skanky, ho, and whoring)

Solers, Inc. v. Doe, 977 A.2d 941 (D.C. Ct. App. 2009)

1. Plaintiff software developer filed suit against John Doe and served a subpoena on SIIA (which describes itself as the principal trade association for the software and digital content industry), seeking the identity of Doe, who purportedly defamed plaintiff.
2. SIIA enables sources with knowledge of software piracy to report them anonymously by Internet or telephone.
3. Doe reported by Internet that plaintiff had engaged in illegal activity.
4. An interesting aspect of this case is that Doe did not post his accusations on an internet bulletin board. Instead, he apparently followed the instructions on SIIA's website and used the internet to report his allegations directly and more privately.
5. The appellate court set out a five-part test for the District of Columbia to use in addressing these requests for the identity of anonymous Internet sources.
6. The appellate court remanded to give the parties the opportunity to present evidence in accordance with the newly-adopted test.

Doe I v. Ciolli, 611 F. Supp. 2d 216 (D. Conn. 2009)

1. Holding that the presence of pseudonymous defendants does not destroy diversity jurisdiction.
2. Defendant's postings on the Internet site specifically targeted plaintiffs in Connecticut, providing long-arm, personal jurisdiction.

3. Defendant had sufficient contacts to satisfy due process because he purposely and repeatedly posted messages about the plaintiffs. He knew that: (a) the plaintiffs were law students; and (b) he had posted the messages on a message board which was viewable by the plaintiffs and their classmates.

Enterline v. Pocono Med. Ctr., 2008 WL 5192386 (M.D. Pa. 2008) (Plaintiff filed a sexual harassment suit against her employer; she served a subpoena on a non-party newspaper, seeking the identities of persons who posted anonymous comments on the newspaper's Internet site and who claimed to possess information related to plaintiff's sexual harassment suit; plaintiff failed to establish that the information was not available from other sources; therefore, the court denied plaintiff's motion to compel)

Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008)

1. Does I and II, both female law students, filed suit against 39 unknown individuals who the plaintiffs alleged made defamatory, threatening, and harassing statements on an Internet site. Among the postings were statements about the women's breasts, the posters' desire to have sexual relations with the women, the alleged criminal history of Doe II's father, and gay lovers.
2. Plaintiffs issued a subpoena to AT&T for information regarding the identities of the posters.
3. The federal district court concluded that plaintiffs' interest in pursuing discovery outweighed defendant Doe 21's First Amendment right to speak anonymously.
4. Consequently, the court denied Doe 21's motion to quash the subpoena.

Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008)

1. The court noted that many Internet sites allow users (a/k/a posters) to express themselves anonymously by using screen names traceable only through the hosts of the sites or their Internet service providers (ISPs). The use of pseudonymous name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political ideas, or criticize corporate or individual behavior with fear of intimidation or reprisal.
2. The court also noted that the poster's message may be passed onto to an expanding number of recipients as readers may copy, forward, or print those messages.
3. Yahoo! warned its users that it will reveal their identifying information when legally compelled to do so.

Greenbaum v. Google, Inc., 845 N.Y.S.2d 695 (Supreme Ct., N.Y. Cty. 2007) (Courts recognize a difference between a statement of opinion that implies a basis in facts that are not disclosed and a statement of opinion that is accompanied by a recitation of facts on which it is based. The latter ordinarily are not actionable because a proffered hypotheses that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.)

McMann v. Doe, 460 F. Supp. 2d 259 (D. Mass. 2006) (addressing First Amendment, defamation, and jurisdiction issues)

Best Western Int'l, Inc. v. Doe, 2006 WL 2091695 (D. Ariz. 2006) (adopting a "summary judgment standard" for analyzing requests for identities of anonymous posters)

Doe I v. Cahill, 884 A.2d 451 (Del. Sup. Ct. 2005)

1. Plaintiff-appellant Cahill was a city council member.
2. Defendant-appellee Doe I posted two statements on an Internet website sponsored by a news organization. The statements criticized Cahill including stating that he has "character flaws, not to mention an obvious mental deterioration. Cahill is a prime example of failed leadership . . . ."
3. Cahill filed a defamation suit against four Doe defendants.
4. During discovery Cahill sought to have the ISP, Comcast, provide the identity of Doe I.
5. If the ISP knows the date and time that a posting was made from a specific IP address, the ISP can determine the identity of its subscriber.
6. According to the court, the Internet is a unique democratizing medium unlike anything that has come before. The advent of the Internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate. Speakers can reach an enormous audience.
7. Because Internet speakers can remain anonymous, the audience must evaluate a speaker's ideas based upon her words.
8. Anonymous Internet speech in blogs or chat rooms can become the modern equivalent of political pamphleteering.
9. In general our society accords greater weight to the value of free speech than to the dangers of its misuse.
10. The First Amendment does not protect defamatory speech.

11. The revelation of identity of an anonymous speaker may subject the speaker to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwarranted exposure to her mental processes.

12. Court held that, before a defamation plaintiff can obtain the identity of an anonymous defendant through compulsory discovery process, the plaintiff must satisfy the following obligations. First, to the extent reasonably practical under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure. The plaintiff must also withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request. When a case arises in the Internet context, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted. Second, the plaintiff must support his defamation claim with facts sufficient to defeat a summary judgment motion. Thus, the plaintiff must submit sufficient evidence to establish a *prima facie* case for each essential element of the claim in question.

13. Finally, the court held that Cahill had failed to establish a prima *facie case* of defamation because a reasonable person would have realized the statements about Cahill were only opinion and not facts.

Sony Music Entertainment Inc. v. Does 1 – 40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (anonymity is a shield from the tyranny of the majority)

Polito v. AOL Time Warner, Inc., 2004 WL 3768897 (Pa. Ct. Common Pleas 2004) (Internet users who choose to violate the law by transmitting harassing or defamatory communications should not be entitled to conceal their identity and avoid punishment or liability for their actionable conduct)

Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Superior Ct. 2001)

1. Plaintiff Immunomedics filed suit against anonymous poster on Internet site that a suspected employee had posted information that was confidential and proprietary to the corporation. Plaintiff alleged the posted information violated the company's confidentiality agreement and several provisions of the company's employee handbook.

2. Plaintiff served on Yahoo! a subpoena seeking discovery of the poster's identity.

3. Plaintiff corporation presented sufficient evidence that the poster was a current or former Immonumedics employee and that all employees are bound by several company policies and a confidentiality agreement.
4. The court stated that there must be an avenue for redress of those who are wronged. Individuals choosing to harm another or to violate an agreement through speech on the Internet cannot hope to shield their identity so as to avoid punishment through invocation of the First Amendment.
5. The court concluded that disclosure of the poster's identity was warranted.

First Amendment, Miscellaneous Issues:

U.S. Supreme Court:

Reno v. ACLU, 117 S. Ct. 2329 (1997)

1. U.S. Supreme Court upheld the district court's entry of preliminary injunction against enforcement of the provisions of the Communications Decency Act.
2. The Court found the CDA was too vague, particularly considering that it utilized content-based regulation of speech and was a criminal statute.
3. The Court also found the CDA to be overly broad.
4. Significantly, the Court recognized that "[t]hrough the use chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."

Courts other than the U.S. Supreme Court:

People v. Hickman, 988 P.2d 628 (Colo. 1999) (discussing interplay of First Amendment and threats)

Privacy:

Fourth Amendment to the U.S. Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ..."

U.S. Supreme Court:

City of Ontario v. Quon, 130 S. Ct. 2619 (2010)

1. City of Ontario, CA had a Computer Usage, Internet and E-Mail Policy that applied to all employees. The policy provided that the city:

> "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources."

2. Quon was a member of the Ontario Police Department.

3. The city issued Quon a pager, which was subject to the computer policy set forth above.

4. Quon signed a statement acknowledging that he had read and understood the computer policy.

5. The computer policy did not expressly reference text messages.

6. However, the city informed its employees that it would treat text messages the same as it would treat e-mails.

7. The city limited its employees with pagers to a certain number of characters per billing cycle.

8. Because Quon and another employee regularly exceeded the character limit, the city reviewed transcripts of their text messages to determine whether the character limits were too low or whether those two employees were sending personal messages.

9. The city learned that many of the messages Quon sent were personal messages, some of which were sexually explicit.

10. The city disciplined Quon, who sued under 42 U.S.C. § 1983 and the Stored Communications Act (18 U.S.C. § 2701, et seq.).

11. The Fourth Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government without regard to whether the government actor is investigating crime or performing another function.

12. The court found that the search of Quon's text messages was justified at its inception because there were reasonable grounds for suspecting that the search was necessary for a noninvestigatory, work-related purpose: To determine whether the city's character limit on text messages was sufficient to meet the city's needs. The scope of the search justified because reviewing the transcripts was an efficient and expedient way to determine whether Quon's overages were the result of work-related or personal messages.

13. Even if Quon had some level of privacy in his text messages, due to the city's informing its employees of the computer policy, it was not reasonable for him to think his messages would always be secure from city scrutiny.

14. It is not necessary that the search be conducted in the least intrusive manner because that could raise insuperable barriers to the exercise of all search and seizure powers. For all these reasons, the search was reasonable.

15. The Court noted that it must proceed with care when considering the whole concept of privacy expectations made on electronic equipment owned by a government employer. There are rapid changes in both the dynamics of communication and information transmission and in what society accepts as proper behavior.

O'Connor v. Ortega, 107 S. Ct. 1492 (1987)

1. Searches and seizures by government employers or supervisors of the private property of their employees are subject to the restraints of the Fourth Amendment.

2. In evaluating what privacy expectations society is prepared to accept as reasonable, the Supreme Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.

3. Public employees' expectations of privacy in their offices, desks, and file cabinets may be reduced by virtue of actual office practices and procedures or legitimate regulation.

4. The employee's expectation of privacy must be assessed in the context of the employment relation – it is the nature of government office that fellow employees, supervisors, consensual visitors, the general public, and others may have frequent access to an employee's office.

5. The standard of reasonableness applicable to a particular class of searches requires balancing the nature and quality of the intrusion on the employee's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

6. Thus, courts must balance the employee's legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace.

7. Public employees are entrusted with tremendous responsibility; and the consequences of their misconduct or incompetence to both the agency and the public can be severe.

8. Because government offices are provided to employees for the sole purpose of facilitating the work of an agency, employer intrusions into employees' workplace involve a relatively limited invasion of employee privacy.

9. The Court held that public employer intrusions on the constitutionally protected privacy interests of government employees for both noninvestigatory, work-related purposes and investigations of work-related misconduct should be judged by the standard of reasonableness.

10. A search must be: (a) justified at its inception; and (b) as actually conducted, reasonably related in scope to the circumstances which justified the interference in the first place. Ordinarily, a search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a file. The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.

Courts other than the U.S. Supreme Court:

Jennings v. Jennings, 697 S.E.2d 671 (S.C. Ct. App. 2010)

1. E-mails stored on Yahoo's server were in "electronic storage" and were stored "for purposes of backup protection" for purpose of the Stored Communication Act.

2. SCA's prohibition against intentionally accessing without authorization an electronic communication service facility does not extend to persons who did not access the facility but instead were provided information by a person who did access it.

Crispin v. Christian Audigier, Inc., 2010 WL 2293238 (C.D. Cal. 2010) (addressing the SCA and social networking websites)

Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009) (court said information disclosed to a few people may remain private; however, there was no reasonable expectation of privacy in posting on popular social network website of disparaging comments about author's hometown because comments could be distributed to a vast audience)

Brown-Criscuolo v. Wolfe, 601 F. Supp. 2d 441 (D. Conn. 2009)

1. In determining whether an employee has a reasonable expectation of privacy in e-mails sent or received on his/her employer's computer or e-mail system, the court should consider four factors.

2. First, does the employer maintain a policy banning personal or other objectionable use;
3. Second, does the employer monitor the use of the employee's computer or e-mail;
4. Third, do third parties have a right of access to the computer or e-mails; and
5. Fourth, did the employer notify the employee of, or was the employee aware of, those employer policies relating to computer usage?

Discovery – Attorney-Client Privilege Issues:

Green v. Beer, 2010 WL 3422723 (S.D.N.Y. 2010) (plaintiffs did not waive attorney-client privilege with respect to e-mails that plaintiffs' counsel sent to technically unskilled plaintiffs through their son)

Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. Sup. Ct. 2010) (courts have found that the existence of a clear company policy banning personal e-mail messages can diminish an employee's claim to privacy of e-mail messages between the employee and his/her attorney; here, plaintiff had a reasonable expectation of privacy in e-mails with her attorney because she used a personal, password-protected e-mail account and did not save the e-mails on the employer's computer)

Forward v. Foschi, 27 Misc. 3d 1224(A) (N.Y. Supreme Ct., Westchester Cty. 2010) (discussing waiver of attorney-client privilege)

Ranch v. Cty. of Boise, 2009 WL 3669741 (D. Idaho 2009) (plaintiff waived attorney-client privilege as to e-mails where governmental employer put its employees on notice that e-mails: (a) would become property of the employer; (b) would be monitored, stored, accessed, and disclosed by the employer; and (c) should not be considered confidential)

Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 1067018 (D. Colo. 2009) (protective order covers information sought from social network sites)

U.S. v. Etkin, 2008 WL 482281 (S.D.N.Y. 2008) (employees do not have a reasonable expectation of privacy in the contents of their work computers when their employers communicate to them a policy under which the employer may monitor or inspect the computers at any time)

Scott v. Beth Israel Med. Ctr. Inc., 847 N.Y.S.2d 436 (Supreme Ct., N.Y. Cty. 2007) (employer's policy of no personal e-mails and allowing monitoring of the system vitiated plaintiff's attorney-client privilege in the e-mails)

Long v. Marubeni Am. Corp., 2006 WL 2998671 (S.D.N.Y. 2006) (plaintiffs' disregard of employer's e-mail policy stripped the confidential cloak from the e-mails)

Curto v. Med. World Communications, Inc., 2006 WL 1318387 (E.D.N.Y. 2006) (plaintiff did not waive privileges attached to e-mails where her laptops were not connected to the employer's servers and were not located in the employer's office, thus preventing the employer from monitoring or intercepting plaintiff's e-mails; also, before returning the laptop to her employer, plaintiff deleted all her personal files, making it reasonable for her to believe that her personal documents remained confidential)

In re Asia Global Crossing, Ltd., 322 B.R. 247 (S.D.N.Y. 2005) (discusses right to privacy as to computer files and e-mails)

People v. Jiang, 33 Cal. Rptr. 3d 184 (Cal. Ct. App. 2005) (criminal defendant's belief that his attorney-client communications were confidential was objectively reasonable; no reason to believe that employer would make any effort to gain access to information in documents on employee-issued computer where documents were segregated as personal and password-protected)

Other Discovery Issues:

Barnes v. CUS Nashville, LLC, 2010 WL 2265668 (M.D. Tenn. 2010) (Magistrate judge offered to create a Facebook account if two witnesses were willing to accept the magistrate judge as a "friend" on Facebook solely for the purpose of reviewing photographs and related comments *in camera*. After reviewing and disseminating to the parties any relevant information, the magistrate judge would close the Facebook account.)

EEOC v. Simply Storage Mgmt., LLC, 2010 WL 3446105 (S.D. Ind. 2010)

1. EEOC filed suit against defendant business for alleged sexual harassment of two complainant women by a supervisor.
2. Defendant sought discovery of electronic copies of the profiles and all other information and statements on the Facebook and MySpace accounts of the two sexual harassment complainants. The basis for seeking the information was that the complainants had allegedly placed their emotional health at issue beyond that typically encountered with garden variety emotional distress claims. The EEOC objected to production as overly broad, not

relevant, unduly burdensome, and harassing and embarrassing to the complainants.

3. The court stated that discovery of social network sites ("SNS") requires the application of basic discovery principles in a novel context.

4. The court said the challenge was to define appropriately broad limits on the discoverability of social communications in light of a subject as amorphous as emotional and mental health and to do so in a way that provides meaningful direction to the parties.

5. A person's expectation and intent that her communications be maintained as private are not legitimate bases for shielding those communications from discovery.

6. Merely locking a profile from public access does not prevent discovery, either.

7. When privacy or confidentiality concerns have been raised, those interests can be addressed by an appropriate protective order.

8. SNS content must be produced when it is relevant to a claim or defense in the case. The substance of the communication – rather than the fact of communication – determines relevance. Although anything a person says or does might, in some way theoretical sense, be reflective of her emotional state, that possibility does not justify requiring the production of every thought the person may have reduced to writing or of depositing everyone with whom she may have talked. Nevertheless, it is reasonable to expect severe emotional or mental injury to manifest itself in some SNS content. Examination of that content might reveal information relating to the onset of such injuries and the degree of distress.

9. The court decided that some degree of SNS discovery was warranted in the subject case. The court determined that the appropriate scope of relevance is any profiles, postings, or messages and SNS applications for the two claimants during the relevant time period that reveal, refer, or relate to any emotion, feeling, or mental state or any communications that reveal, refer, relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.

10. Pictures of the claimants during the relevant period would generally be discoverable because the context of the picture and the claimant's appearance may reveal the claimant's emotional or mental state. In general a picture or video of someone else is unlikely to be discoverable.

11. Facebook is not used as a means by which account holders carry on monologues with themselves.

12. A protective order to limit disclosure of certain discovery materials might be useful as to SNS content.

Major Tours, Inc. v. Colorel, 2009 WL 3446761 (D.N.J. 2009) (discovery of e-mail on back-up tapes)

Bass v. Miss Porter's School, 2009 WL 3724968 (D. Conn. 2009) (Defendants sought text messages and information on plaintiff's former Facebook account that were allegedly related to plaintiff's teasing and taunting. Plaintiff provided some documents to defendants. The court reviewed *in camera* documents not produced, found some to be relevant, and ordered them produced.)

Arteria Property PTY Ltd. v. Universal Funding V.T.O., Inc., 2008 WL 4513696 (D.N.J. 2008) (spoliation of website evidence)

Ex parte Cooper Tire & Rubber Co., 987 So.2d 1090 (Ala. Sup. Ct. 2007) (discovery of e-mails)

Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004) (improper disclosure of e-mails by Internet service provider (ISP) pursuant to defendant's invalid and overly broad subpoena)

Civil Litigation, Miscellaneous:

Mackelprang v. Fidelity Nat'l Title Agency of Nevada, 2007 WL 119149 (D. Nev. 2007)

1. Plaintiff sued her employer for sexual harassment, alleging that two Fidelity vice-presidents sent her inappropriate and sexually explicit e-mails and coerced her into having sexual relations under the threat that, if she did not, her husband (who also worked for Fidelity) would be fired.
2. Defendant Fidelity served a subpoena on MySpace.com to obtain two MySpace.com Internet accounts allegedly set up by plaintiff.
3. Fidelity contended that one of those MySpace account allegedly indicated that plaintiff did not want kids while the other MySpace account allegedly identified plaintiff as a 39-year old married woman with six children and stated that she loved all her children.
4. MySpace produced certain "public" information regarding the two accounts but refused to produce private e-mail messages on either account in the absence of a search warrant or letter of consent for production by the owner of the account. Plaintiff refused to consent to production of the private

messages on the grounds that the information was not relevant and improperly invaded plaintiff's privacy.

5. The court noted that in a sexual harassment case a plaintiff's workplace-related sexual behavior, including sexually provocative speech or dress, can be admissible to support a defense that defendant's conduct was not unwelcome or that defendant had reasonable grounds to believe it was not unwelcome.

6. However, Fed. R. Evid. 412(a), which limits the admissibility of evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim, aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. The rule also encourages victims of sexual misconduct to institute and participate in legal proceedings against alleged perpetrators.

7. The court stated that courts have often allowed discovery of work related sexual behavior but not non-work related sexual behavior because a person may view conduct that is acceptable in his/her private life as off-limits at work.

8. The court determined that defendant Fidelity was engaging in a fishing expedition because its interest in the accounts was based only on suspicion and speculation.

9. The court concluded that Fidelity had not demonstrated a relevant basis for production of plaintiff's MySpace.com private e-mail messages.

Evidence:

U.S. v. Drummond, 2010 WL 1329059 (M.D. Pa. 2010) (motion in limine to exclude as evidence in a criminal trial photographs of defendant on his MySpace page)

Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007) (courts should be wary of taking judicially notice of facts on websites)

Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. MD. 2007) (lengthy discussion of evidentiary issues relating to electronically stored information ("ESI") including preliminary rulings on admissibility (Fed. R. Evid. 104); relevance (Fed. R. Evid. 401, 402, and 105); authenticity (Fed. R. Evid. 901 and 902) of e-mail, Internet website postings, text messages and chat room content, computer stored records and data, computer animation and computer simulations, and digital photographs; hearsay (Fed. R. Evid. 801-807); the original writing rule

(Fed. R. Evid. 1001-1008); and balancing probative value against the danger of unfair prejudice (Fed. R. Evid. 403).

Telewizja Polska USA, Inc. v. Echostar Satellite Corp., 2004 WL 2367740 (N.D. Ill. 2004) (admission of exhibit to show what a website looked like on a particular date; authentication of a redacted e-mail)

In re Homestore.Com, Inc. Securities Lit., 347 F. Supp. 2d 769 (C.D. Cal. 2004) (authentication of e-mails)

Discipline cases:

State v. Mandi, 2009 WL 2869943 (N.J. Superior Ct., App. Div. 2009) (court upheld dismissal of defendant police officer who was convicted of a petty disorderly conduct violation for creating a false and offensive profile of a female co-employee on MySpace.com.)

Cromer v. Lexington-Fayette Urban Cty. Gov't, 2008 WL 4000180 (E.D. Ky. 2008) (plaintiff police officer was dismissed due to allegedly inappropriate postings on a social networking site regarding an arrest plaintiff had made)

Pietrylo v. Hillstone Restaurant Group, 2008 WL 6085437 (D.N.J. 2008) (employee created an invitation-only group on MySpace.com for employees of defendant Hillstone to vent about the employer; the posts included sexual remarks about management and customers, jokes about customer service and quality, references to violence and illegal drug use, and a copy of a new wine test to be given to employees; after members of management were afforded access to the site, they fired two members of the group; there was a question of fact as to whether a member of the group had voluntarily consented to allowing management to view the site)

Garrity v. John Hancock Mutual Life Ins. Co., 2002 WL 974676 (D. Mass. 2002) (plaintiffs who voluntarily communicated sexually explicit jokes over the employer's e-mail system had no privacy interests in those communications; furthermore, defendant employer had a legitimate business interest in dismissing plaintiffs for sending the offensive e-mails because federal and state laws require employers to take affirmative steps to maintain a workplace free of sexual harassment and to investigate and take prompt and effective remedial action when potentially harassing conduct is discovered)

ADC Telecommunications ERISA Lit., 2005WL2250782 (D. Minn. 2005) (plaintiff was fired for posting an internal memo on a message board)

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