Social Media and Local Governments: Navigating the New Public Square

By Patricia E. Salkin & Julie A. Tappendorf
Price $84.95, pp. 176

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Journal of High Technology Law
Suffolk University Law School

Have you ever checked Twitter to see whether a city’s public transportation system is running on time? Local governments, like most industries, have adopted social media as a new medium to communicate with the public. Governments may harness social media to disseminate information and garner support for local projects. For citizens, social media offers tremendous opportunities for civic engagement and social activism. In Social Media and Local Governments: Navigating the New Public Square, co-authors Patricia E. Salkin and Julie A. Tappendorf encourage the use of social media to increase transparency and public participation in government, but cautions readers that local governments’ use of social media emerges with significant legal risks and ethical considerations.

To acquaint the reader to social media, Salkin and Tappendorf define the various types of social media including social networking, multimedia sharing, and blogs. Chapter I explains the differences between each form of social media and provides a

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4 See Salkin & Tappendorf, supra note 1, at 3-5.
general overview of who uses which platform and for what purpose. Interestingly, statistics suggest that the already prevalent use of social media will continue to grow as more citizens utilize social media to engage in routine civic activity such as to search for government jobs, to determine eligibility requirements for government programs, and to comment on proposed regulations.\(^5\)

In Chapter II, Salkin and Tappendorf describe the host of benefits that social media offers to local governments. From fostering economic development to publicizing meetings and events, governments may enhance the efficiency of day-to-day operations when social media is used appropriately.\(^6\) For example, instead of traditional means to distribute information to the public such as newsletters, governments may employ cost-effective communication through social media platforms and essentially grant the public a “direct link to government.”\(^7\) The authors also explain how to utilize social media to engage members of the public through the use of wikis – websites where content may be created and edited by users, thus facilitating public interaction.\(^8\)

In Chapter III, Salkin and Tappendorf introduce the reader to the legal issues that may inadvertently arise from using this new communication channel. Most importantly, the authors emphasize that social media may present a hotbed for First Amendment challenges.\(^9\) To tackle this issue, Salkin & Tappendorf contemplate what level of protection speech on social media platforms must be afforded.\(^10\) Consistent with First Amendment scrutiny, the authors then examine whether certain social media platforms

\(^5\) See Salkin & Tappendorf, supra note 1, at 7-8.
\(^6\) See Salkin & Tappendorf, supra note 1, at 15-35.
\(^7\) See Salkin & Tappendorf, supra note 1, at 15.
\(^8\) See Salkin & Tappendorf, supra note 1, at 20.
\(^9\) See Salkin & Tappendorf, supra note 1, at 46.
\(^10\) See Salkin & Tappendorf, supra note 1, at 47-50.
may be within the purview of the government speech doctrine, thus exempting the speech from First Amendment scrutiny altogether if the government agency “is engaging in its own expressive conduct.”11 Salkin & Tappendorf ultimately settle that a forum analysis is more appropriate, but stress that whether a social media website is a traditional public forum, a designated public forum, or a non-public forum will be fact dependent.12 To avoid potential First Amendment violations, Salkin & Tappendorf encourage local governments to draft and adopt social media policies that will serve to reinforce the government entity’s position on what type of forum it has created.13

In addition to First Amendment concerns, Chapter III addresses social media and open meeting laws. Open meeting laws, or “sunshine laws,” embolden the policy that legislation should be made openly, and that the public should be notified and fully informed.14 Salkin & Tappendorf warn the reader that communication on web-based platforms may constitute a meeting under most statutes, and encourage governments to stick to traditional meetings for deliberations.15 The authors also consider the applicability of the freedom of information statutes to social media, specifically, whether the communication must be retained, and whether it be must released if a demand is made.16

Notably, Salkin & Tappendorf also address incidental discrimination that may occur through a government’s overreliance on social media. If traditional means of communication are disregarded, local governments may inadvertently disadvantage

11 See Salkin & Tappendorf, supra note 1, at 50.
12 See Salkin & Tappendorf, supra note 1, at 52.
13 See Salkin & Tappendorf, supra note 1, at 56.
14 See Salkin & Tappendorf, supra note 1, at 60.
15 See Salkin & Tappendorf, supra note 1, at 64.
16 See Salkin & Tappendorf, supra note 1, at 65.
segments of the community that may not use social media, such as the poor and the blind.\footnote{See Salkin & Tappendorf, supra note 1, at 67-69.} Lastly, the authors address the potential copyright infringements that may arise from posting or reposting an article, picture or publication.\footnote{See Salkin & Tappendorf, supra note 1, at 71.} Salkin & Tappendorf counsel government agencies to not overly rely on the Fair Use Doctrine without consulting an attorney.\footnote{See Salkin & Tappendorf, supra note 1, at 74.}

In Chapter IV, the authors switch gears to address public employees’ use of social media. Salkin & Tappendorf provide an overview of the \textit{Pickering}\footnote{See Pickering v. Board of Education of Township High School District, Will County, 391 U.S. 563, 568 (1968) (setting forth two-step analysis for determining whether the speech of public employees is protected by the First Amendment).} balancing test that the Supreme Court employs to determine whether the First Amendment protects the speech of public employees. The two-step analysis considers whether the employee speaks on “matters of public concern,” and if so, whether the government was justified for treating the employee’s speech differently from that of the public.\footnote{See id.} Salkin & Tappendorf also address the hot topic of making employment decisions based off a candidate’s social media use, including the issue of public and private employers requesting an applicant’s passwords to her social media accounts.

Chapter V provides insight into the ethical rules municipal officials and planners must consider as they navigate social media. Municipal officials must be wary of conflicts of interests, and planners should comport with the American Institute of Certified Planners (AICP) Code of Ethics and Professional Conduct.\footnote{See Salkin & Tappendorf, supra note 1, at 112-14.} Generally, Salkin & Tappendorf advise municipal officers and planners to consult the applicable local
ordinances, state laws and attorney general opinions to ensure they do not find themselves in violation of ethical rules.\textsuperscript{23}

Lastly, in Chapter VI, the authors consider the ethical rules for government attorneys and their own use of social media. Salkin & Tappendorf alert attorneys to be careful of advice that they provide through social media platforms because not only may such advice create an attorney-client relationship, but attorneys may also unintentionally violate the Model Rules of Professional Conduct\textsuperscript{24} by practicing law in a jurisdiction where they are not licensed.\textsuperscript{25} Likewise, as the law takes shape, Salkin & Tappendorf advise attorneys to remain vigilant about the ethical rules in their jurisdiction and how the rules may be interpreted when applied to advertising and ex parte communications on social media.\textsuperscript{26}

The authors’ expertise in municipal law, local governments and social media is evident in their writing. Through an analysis of more currently widespread technology, where the law is better developed, Salkin & Tappendorf offer insight into the possible legal issues government officials and attorneys may encounter when using this new resource. For example, the authors highlighted that a Tennessee appellate court found e-mail communications among city counselors, which discussed proposed zoning changes, to be a violation of an open meeting statute.\textsuperscript{27} Although an open meeting law violation via social media has yet to be decided, the authors warn readers to be wary of the courts’ liberal interpretation of law in favor of public access to legislative bodies. Here, the

\textsuperscript{23} See Salkin & Tappendorf, \textit{supra} note 1, at 109.
\textsuperscript{24} MODEL RULES OF PROF’L CONDUCT R. 5.5.
\textsuperscript{25} See Salkin & Tappendorf, \textit{supra} note 1, at 119-20.
\textsuperscript{26} See Salkin & Tappendorf, \textit{supra} note 1, at 121-29.
authors’ subject matter knowledge granted them the opportunity to aptly synthesize various judgments and offer guidance in a murky area of law. They caution that simultaneous use and contemporaneous interaction on a social media platform will likely constitute a violation of open meeting statutes, while passive use and lack of simultaneous interaction will likely not.

The authors also thrived in capturing the importance for local governments and attorneys to adapt to the digital age. Through concrete domestic and international examples, Salkin & Tappendorf contextualized legal issues that may have otherwise appeared insubstantial. Given the novelty of local governments’ use of social media, the authors made a strong argument to encourage all government agencies that use any form of web-based communication to develop and implement a social media policy.

The most suitable audience for this book is municipal officials, city planners and government attorneys. Social Media and Local Governments: Navigating the New Public Square is also appropriate for any attorney or law student practicing or intending to practice law in the digital age. Many of the issues in the book are applicable to other industries and all attorneys should be aware of the unsettled law surrounding social media to protect both themselves and their clients. I would certainly recommend reading this book.