



FREEMAN MATHIS & GARY, LLP
Client-centered. Results-driven. SM

*“Cities and
Social Media”*



Government Law

www.fmglaw.com

Outline of Topics

- What is social media?
- City social media pages
 - First Amendment
 - Open Record
 - Open Meetings
- Employee use of social media
 - First Amendment
 - Potential liability issues
- Drafting social media policies

Social Media Landscape



Benefits for Cities

- More efficient communication
 - Emergency information
 - Publicity of events
- Improved work product
 - Questions and answers
 - Feedback from citizens
- Credibility and open government
- It's fun!

Challenges to Cities

- Lost benefits of interactivity or accept risks of public comments on website
- Complying with open records requirements
- Challenges from an employer's perspective
 - Discrimination
 - Privacy
 - Vicarious liability
 - Misuse of work time

City Social Media Websites

- First Amendment
- Open Records
- Open Meetings
- Drafting policies

First Amendment Issues

- Interactive vs. information only
- Information only (no comments)
 - “A government entity has the right to ‘speak for itself.’” *Pleasant Grove City v. Summum*, ___ U.S. ___, 129 S. Ct. 1125 (2009).
 - Hyperlink cases – choosing which hyperlinks to post on city website is government speech
 - No obligation to open up social media site to public comments merely because that feature is available

First Amendment Issues cont.

- Criticism of information-only sites
 - Does not gain benefit of social media
 - Loses interaction with citizens
 - Less likely to attract visitors
- Interactivity (turning on comments)
 - Accept possibility of user comments
 - No case law exists on this topic
 - Requires analysis of public forum doctrine

First Amendment Issues cont.

- Types of public forums
 - Traditional public forum
 - Designated public forum
 - Limited designated forum
 - Nonpublic forum
- Levels of scrutiny
 - Public forums: strict scrutiny
 - Limited and nonpublic: content neutral restrictions to certain groups and topics

First Amendment Issues

- *Rowe v. City of Cocoa*, 358 F.3d 800 (11th Cir. 2004) - city council meetings are limited public forums that permit reasonable, content-neutral restrictions
- Goal should be to establish city social media websites as limited designated forums
 - Establish policy that limits comments to certain groups and topics
 - Establish content-neutral restrictions on what may be posted on the website

Open Records and Social Media

- Currently no Georgia law directly on point
- 1989 Ga. Op. Atty. Gen. 72 –
 - “The intent of [the Open Records Act] appears to include all data received, generated or maintained by a public agency regardless of its forms.”
- *Smith v. DeKalb Co.*, 288 Ga. App. 574 (2008) –
 - Electronic records are open
 - But traditional exemptions apply
 - Not required to create new records

Open Records cont...

- Washington Secretary of State
 - If posts are made or received in connection with public businesses, they are public records
 - All posts need to be retained for the same time as letters or e-mails minimally
- Florida Attorney General Opinion
 - Assuming social media was used for public purpose, then inherently all content is public record
 - User content posted on website also public record, but city should publish notice

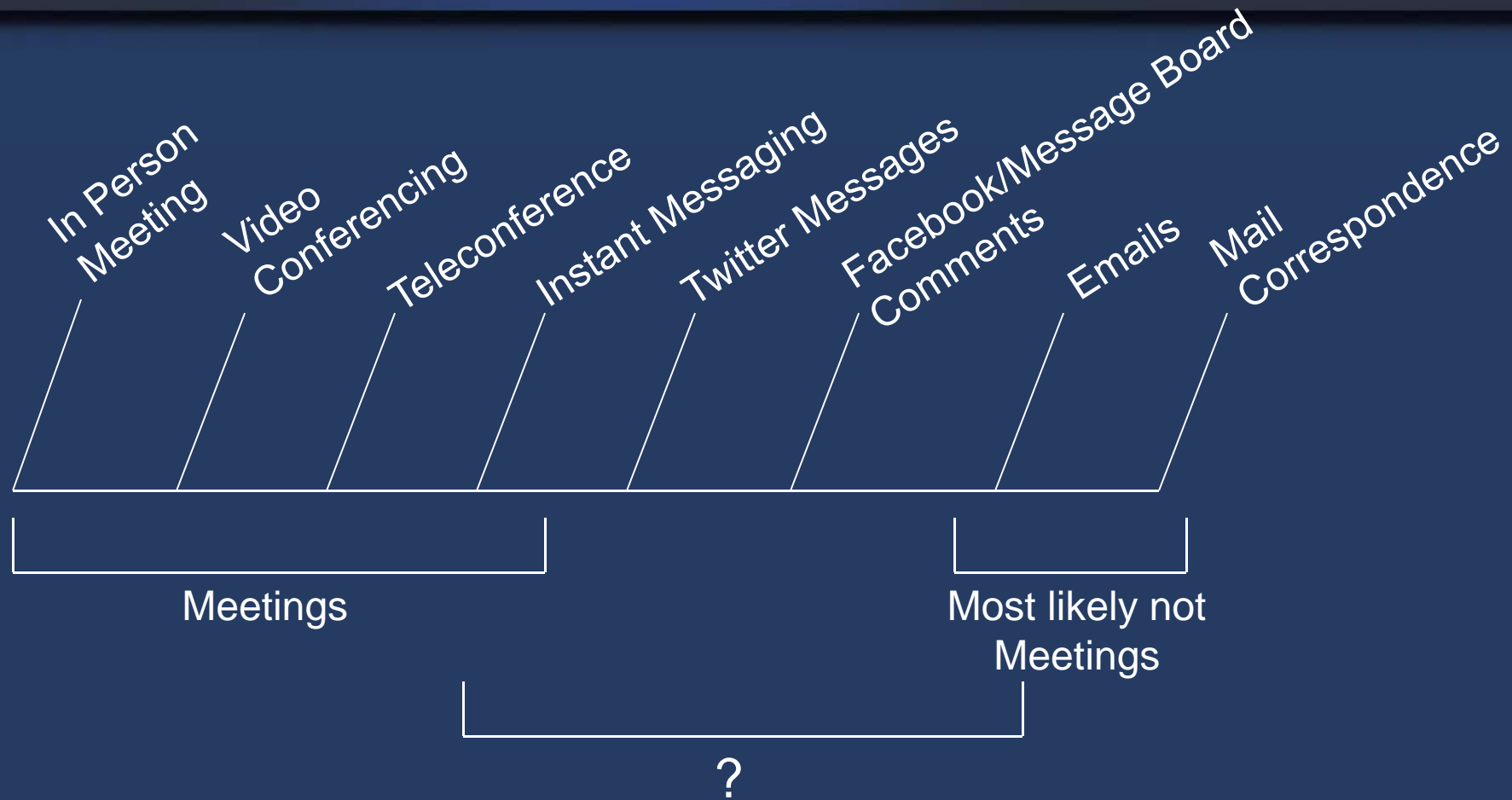
Open Records Cont...

- Retain social media content in same manner as other public records by applying *Retention Schedules for Local Governments, Paper and Electronic Records*
 - No specific category for social media
 - Emails are to be preserved not based on their character, but based on their content
 - Determine which category should apply based on the nature of the content posted

Open Meetings and Social Media

- Elements to a 'meeting':
 - Quorum
 - Designated time and place
 - City business
- *Claxton Enterprises v. Evans County*, 249 Ga. App. 870, 549 S.E. 2d 830 (2001) –
 - “A ‘meeting’ within the definition of the Act, may be conducted by written, telephonic, electronic, wireless, or other virtual means. . . (presence may be actual or constructive).”

Open Meetings Continuum



Drafting City Social Media Policies

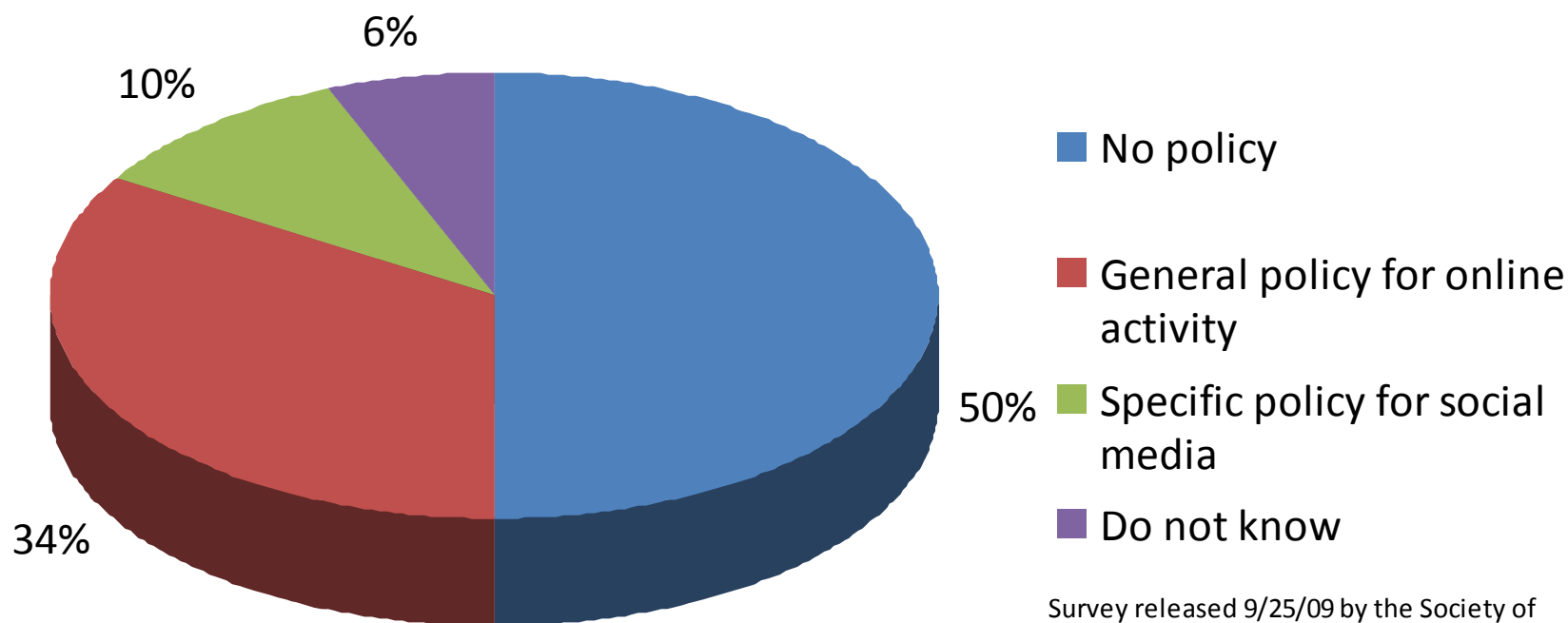
- Clearly state purpose of the site
- Make city website the “official” site and have social media refer back whenever possible
- Decide if comments will be allowed
- If allowed, limit topics to city business first posted by the city on the website
- Establish policy for retention of records
- Notify users of policies and public records by providing a hyperlink to city website

Social Media from an Employer's Perspective

- Employee use of social media
 - Negligence issues
 - Vicarious liability
 - Misuse of work time
- Monitoring employee activity
 - Time and cost
 - Morale
 - Legal issues

What Are Employers Doing?

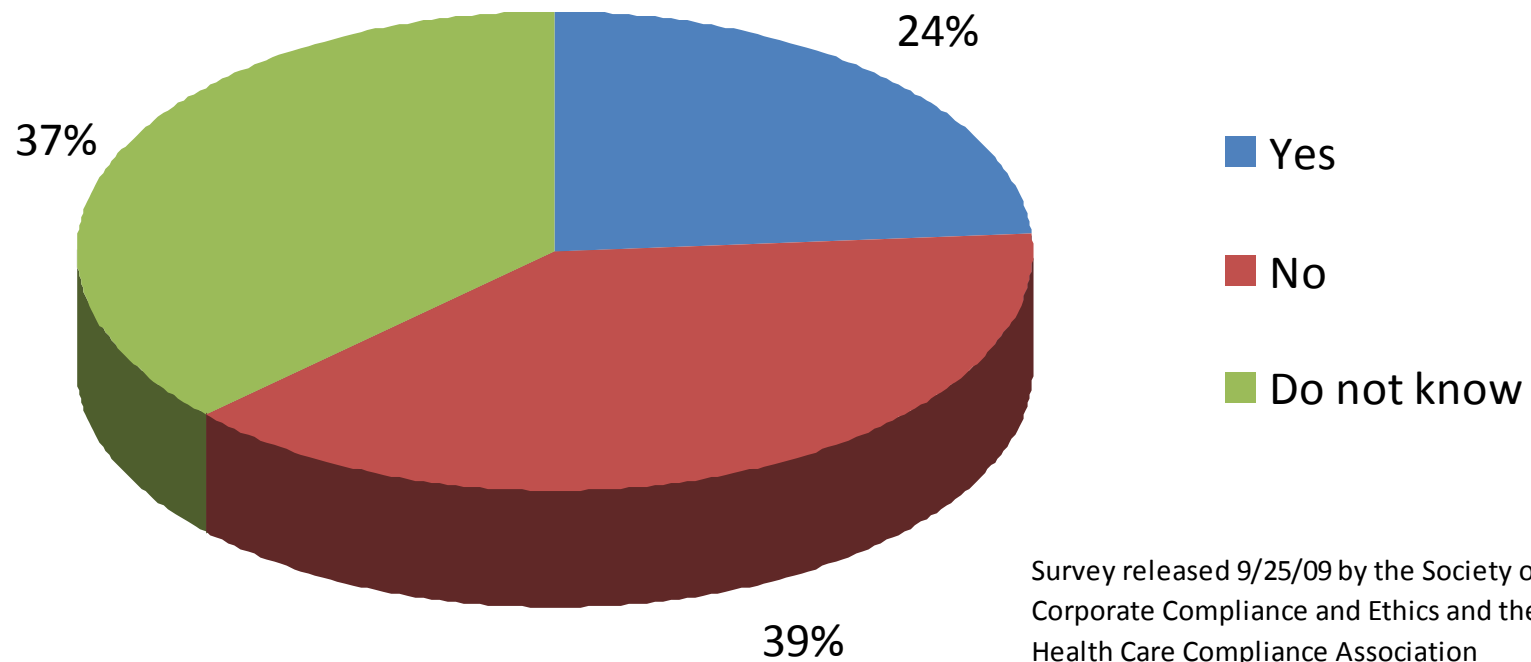
Does your company have a social media policy?



Survey released 9/25/09 by the Society of Corporate Compliance and Ethics and the Health Care Compliance Association

What Are Employers Doing?

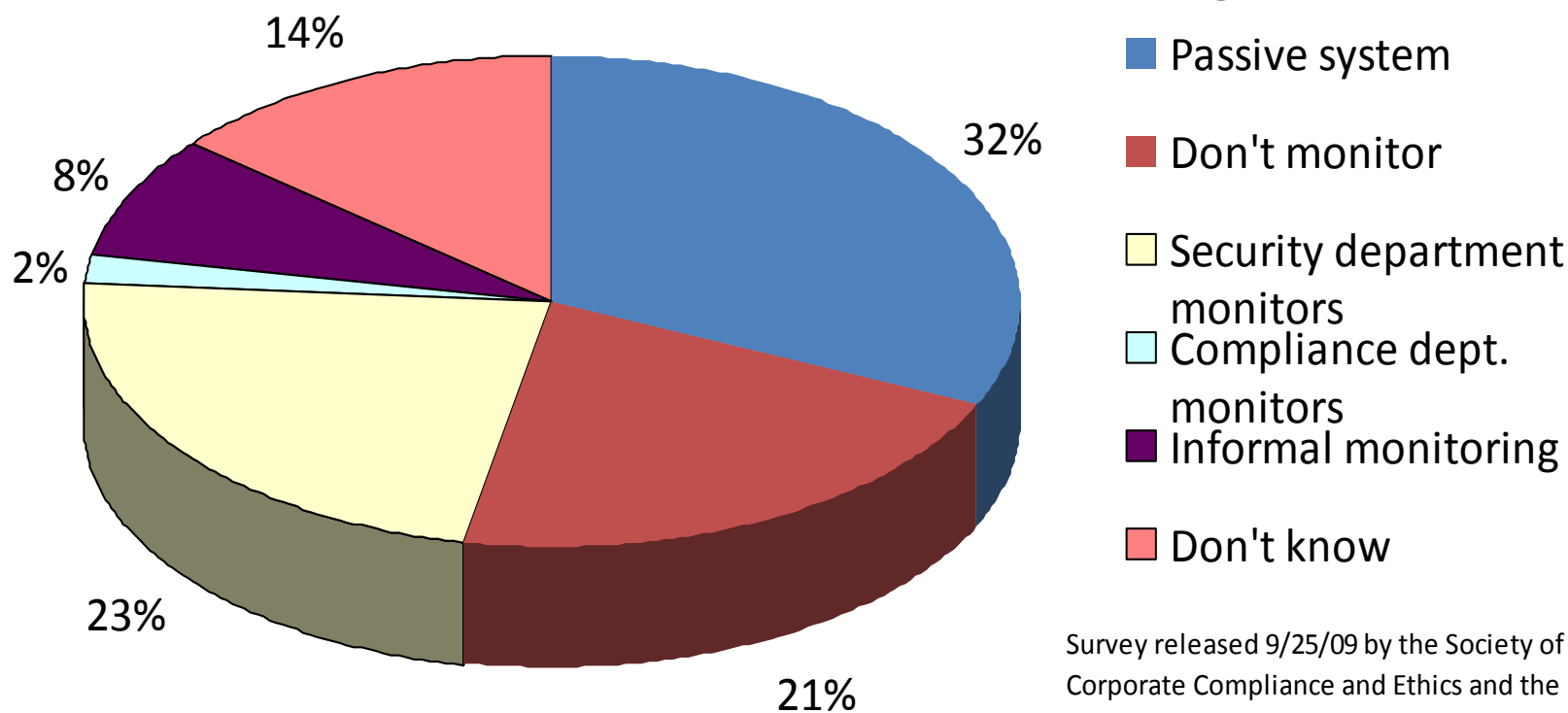
Have you disciplined an employee for activity on Facebook, Twitter, or LinkedIn?



Survey released 9/25/09 by the Society of Corporate Compliance and Ethics and the Health Care Compliance Association

What Are Employers Doing?

How is employee activity monitored on Facebook, Twitter, LinkedIn and other social networking sites?



Survey released 9/25/09 by the Society of Corporate Compliance and Ethics and the Health Care Compliance Association

Vicarious Liability

- Defamation
- Disclosure of confidential information
- Standard for liability:
 - Authorized act before it happened
 - Ratified act after it was committed
 - Act committed within scope of agency (in connection with and in furtherance of company business)

Negligence Issues for Employers

- EE criminal activity via your network
 - Did the company know about it?
 - Did it do enough to prevent it or detect it?
 - How did the company respond
- EE complaints about workplace issues
 - Negligent hiring, retention, supervision
 - Did the company know or have reason to know?
 - What did it do in response?
- May create new duties for yourself based on information found online

Discrimination Issues

- Online profiles are full of insightful content
 - Lying about credentials
 - Unprofessional behavior/appearance
 - Reference to prior employment
- But they also may contain prohibited information at the hiring stage:
 - Religious beliefs
 - Age
 - Disability
 - Criminal record

Retaliation Issues

- “Complaints” about discrimination or harassment
 - Arguably could be protected activity
 - Same anti-retaliation rules apply as in the workplace
- First Amendment speech:
 - Matter of public concern
 - Substantial or motivating factor in discipline
 - Would not have made decision in absence of speech

Invasion of Privacy

- *City of Ontario v. Quon*
- Two step analysis:
 - Reasonable expectation of privacy
 - If so, search must be reasonable
- Court did not address privacy issue
 - “A broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted.”

Stored Communications Privacy Act

- Prohibits third parties from accessing electronically stored communications “without authorization” or “exceeding an authorization”
- Case examples:
 - Coercing employee to give password
 - Using computer monitoring to detect password

Employee Social Media Policies

- Do not monitor during application stage
- No expectation of privacy on city equipment
- Address all forms of technology in policy
- Do not coerce employee passwords
- Do not gain access by surreptitious means
- Be aware of First Amendment when taking action based on social media speech
- City's EEO Policy applies to online activities