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February 24, 2011

CONFIDENTIAL
ATTORNEY CLIENT COMMUNICATION

Jeff Briltz, City Manager
City of Lemoore
119 Fox Street
Lemoore, CA 93245

Re: Opinion re use of Facebook by a Lemoore City Council member

Dear Mr. Briltz:

The City Council has requested a legal opinion on the use of Facebook by Council member Siegel. The Facebook page was the subject of an article in the Hanford Sentinel on February 19, 2011.

The Facebook page states the "Lemoore City Council is on Facebook" and under this description is the statement:

"All comments posted by 'Lemoore City Council' are written by Councilman Billy Siegel unless otherwise noted."

Alongside Council member Siegel's photograph is the following statement as of Wednesday, February 23, 2011:

"Lemoore City Council. Please direct your concerns directly to me or any of the other council members that you can easily reach. We understand that this is a government of the People. We direct our efforts to protect and serve our community and remind everyone that the Council and our staff is here to serve. We look forward to hearing from you! – Billy Siegel"

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On the official City of Lemoore website, www.lemoore.com, which is not on Facebook, the City Council is described, in part, as follows:

“The City Council is responsible for approving all legislation and formulating City policies. The Council’s objectives are broad and include translating public attitudes and service requirements into policies and programs, so that desired levels of service can be provided efficiently and economically.”

It is clear that the City Council is an elected body which, for the City of Lemoore, consists of five elected City Council members. In general, the Mayor is the spokesperson for the Council. Individual Council members may be authorized to speak for the Council in given situations.

There appears to be no authorization by the Lemoore City Council for any City Council member, whether on Facebook or by any other means, to represent that a Council member is the “Lemoore City Council.” The statement that the “Lemoore City Council is on Facebook” does not appear to be accurate and could be regarded as misleading information. There is a disclaimer by Councilman Siegel that “All comments posted by ‘Lemoore City Council’ are written by Councilman Billy Siegel unless otherwise noted.”

However laudatory may be a city council member’s use of social media such as Facebook, the law of agency (agent is defined in section 1 of the Municipal Code) has created a body of law that may bind the principal to representations made by an agent. An ostensible agency is one that is ratified by inaction by a principal who fails to state that the ostensible agent does not act for him.

Ostensible agency was developed in the business sector to impose liability where affirmative action is not taken by another person, identified in law as a principal, which gives the appearance that the ostensible agent has the authority to act for the principal. As noted in one definition’s caveat, “Businesses should be careful not to allow such situations in which an ostensible agent could bind the business on a contract or make the apparent employer responsible for damages.”¹

The concept of business liability, by analogy, could be used to impose liability in other contexts such as in the public sector. Council member Siegel’s Facebook conveys conflicting information. On the one hand, there is a statement that the Lemoore City Council is on Facebook which is not true. On the other hand, the Council member states he is the Lemoore City Council, apparently as a disclaimer, so that no one could believe he is, in fact, the City Council. But the use of the title, Lemoore City Council, necessarily creates the risk that his comments and opinions may be interpreted as the positions or opinions of a majority of the members of the City Council. Also, the capacity of an individual to administer his own social page could be used to delete comments undesirable by that individual which conveys the impression that a city council has a particular bias or philosophy which dictates its decisionmaking. Such editing could not occur at the public comment portion of a public agency

¹ <http://legal-dictionary.thefreedictionary.com/ostensible+agent>

meeting. There is certainly nothing wrong with an individual city council member stating his or her positions, philosophy and opinions as long as he or she is not conveying the impression that it is the positions, philosophies or opinions of other elected council members or a city council as a whole. While a Facebook page can be created by a municipality, Facebook itself recognizes the concept of an ostensible agency in its statement that “Pages can only be created to represent a real organization, business, celebrity, or band, and may only be created by an official representative of that entity.” Facebook, Help Center, Facebook Pages. The City Council of Lemoore has not authorized the creation of a Facebook page.

By inaction, other members of the City Council, once they become aware of a situation such as ostensible agency, could be held accountable for inaccurate or misleading statements made on a social network page such as Facebook which gives the impression that one Council member has been authorized to speak for other Council members as the “Lemoore City Council.”

Despite all due care that a particular council member may engage in regarding postings or writings, there is a risk of liability, such as libel, which needs to be affirmatively addressed by the Lemoore City Council and which liability may not be covered under the City’s memorandum of coverage for individual council members using social networks easily accessible by the public. A Facebook page is not a public forum like a council meeting and does not afford the legal protections of statements made by the public and council members at council meetings. An example of liability is where persons post wall comments libeling another person, whether a private person or a public official. Although the comment may be deleted, libel only requires one publication for liability. Even if the Facebook page was not officially authorized by the City Council, failure of the City Council to take affirmative steps could be viewed as ratification of the content on the Facebook pages purporting to be approved by the Lemoore City Council. The rules of Facebook (“Statement of Rights and Responsibilities”) recognize and give individuals the right to lodge a complaint so that users of Facebook shall not “create an account for anyone other than yourself without permission” which is the concept of agency of one person representing another without permission.

Another risk of using “Lemoore City Council” on a Facebook, or other social media pages, is the special prohibitions under the Brown Act regarding meetings which must be accessible to the public. An illegal meeting under the Brown Act is the “. . . use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body” by a majority of its members. Although the majority of the Lemoore City Council has indicated that there is no active use of Facebook or other social networks, postings on a Facebook page by another Council member or members, or the use of Facebook material through other indirect means such as intermediaries, emails, or texting run the risk of a Brown Act violation however inadvertent. Council members of any city council are cautioned not to use Facebook and other social networking pages which could very easily slip into a violation of the Brown Act. The use of the word “we” such as “We look forward to hearing from you” creates the unfortunate impression that Facebook postings are being separately shared and commented upon by other council members even where this is not true. The postings on this Facebook page already show two Council members and their pictures. It would only take one other Council member involvement

for an accusation to be made that there has been a discussion in violation of the Brown Act. A discussion does not necessarily have to occur among a majority of Council members on the Facebook pages themselves. Other discussions through other means could be used to connect the dots of a serial discussion leading to a violation of the open meeting laws of the Brown Act.

The minutes of the Redondo Beach City Council of August 17, 2010 describe a debate and a decision not to continue with the City's pilot Facebook page. The City Attorney, quoting from the minutes, stated ". . . from a legal point of view, Facebook has too many complications and said there are enough other alternatives to consider." He cited concerns regarding the open meeting laws (Brown Act), unauthorized disclosure of records which are not public records, and comments which may not be protected by the First Amendment. He also noted that certain language could be inappropriate such as the inadvertent endorsement of profanity.² See also Administrative report: <http://laserweb.redondo.org/weblink/0/doc/215837/Electronic.aspx>.

Liability arising from a city council approved Facebook may not be covered by the current memorandum of coverage since Facebook liability issues are relatively new. Also, allowing use of the title Lemoore City Council on a Facebook not authorized by the City Council may not be covered at all, which would expose the City, and potentially individual Council members, to liability and defense costs paid from the City's general fund or, depending on the circumstances such as intentional conduct, to individual liability.

The following are options for Council consideration at this time in view of the foregoing analysis:

1. Request, in an open session, that Council member Siegel, if he has not already done so, remove the references to "Lemoore City Council is on Facebook" and to representing his Facebook as the "Lemoore City Council." He can certainly state that he is a Council member of the Lemoore City Council and post any views, opinions, comments, etc. in the exercise of his First Amendment Rights; and/or
2. Direct the City Manager, in an open session, per Council action that a complaint be made to Facebook, on behalf of the City Council of Lemoore, that Council member Siegel has created an account conveying the impression that it is the Facebook page of the City of Lemoore without the permission of the City Council.

If these measures prove unsuccessful, consideration of a court remedy may be necessary.

² Although Council member Siegel does not condone profanity (he deleted a posting by a "Bill"), another commentator, "Marc", stated, in connection with an Arizona law, "Give me a fucking break you jackasses!"

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Although this opinion is being provided to you and the City Council under the attorney-client privilege, the privilege may be waived by a majority of the Council, in which event this opinion will be a matter of public record.

Sincerely,

LOZANO SMITH

A handwritten signature in cursive script, appearing to read "Jerome M. Behrens".

Jerome M. Behrens

JMB/kjo