

Keeping it Legal on Social Media

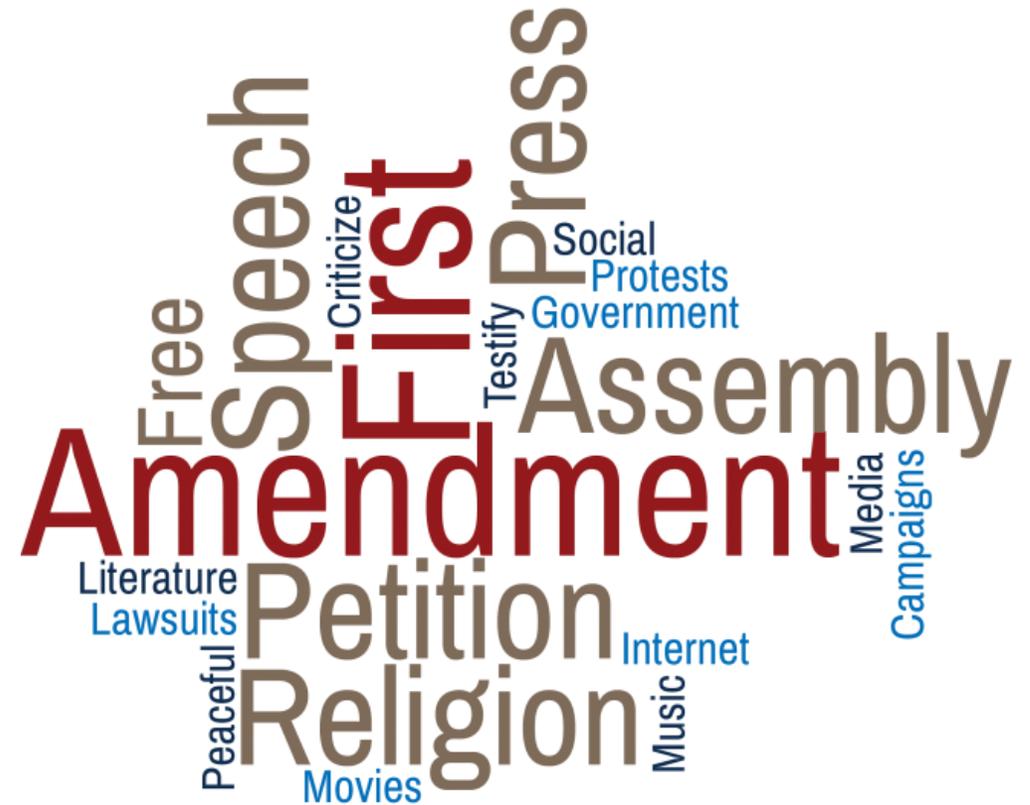
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First Amendment

- U.S. Supreme Court says *government* social media activities or government regulation of social media is subject to First Amendment



Applicability of First Amendment

What it DOES apply to

- First Amendment applies to government regulation of private persons activities and social media platforms
- It also applies to government social media accounts and activities

What it does NOT apply to

- The First Amendment does not apply to social media activities or accounts of private persons
- It also does not apply to Facebook, Twitter, etc.

Recent Laws Prohibiting Censorship

Last year, the Texas legislature adopted Texas H.B. 20 to regulate social media platforms such as Facebook, Instagram, Twitter, etc.

The law requires platforms to adopt content moderation policies and provide notice and an appeal process when the platform removes content

The law also prohibits social media platforms from censoring users content based on viewpoint or geographic location

The U.S. Supreme Court recently “stayed” the law while the current litigation challenging the law as a violation of the First Amendment moves forward

A similar law in Florida has also been challenged and “stayed” by a federal court pending a ruling on the constitutionality of the law

So, what is protected?

According to the U.S. Supreme Court, a government social media page/account is a public forum.

The protected space on a government social media site is the “interactive space” where users interact with the government (i.e., comments section)

The government should not engage in censorship or viewpoint discrimination in this interactive space

U.S. Supreme Court says that the First Amendment right of free speech means citizens have a right to disagree with the government and express their opinions without fear of censorship

When the government opens a “forum” on social media, it invites speech, including criticism

What do comments have to do with the First Amendment?

Be careful NOT to ban protected speech

1. Inappropriate comments
2. Inflammatory posts
3. Colorful language (i.e., profanity)
4. Hate speech
5. Content that might defame someone
6. Posts that hold an individual up to public ridicule, derision, or embarrassment
7. Negative or critical comments about the government or any official or employee

Be careful of overbroad profanity filter

Arkansas State Police selected Facebook's strongest profanity filter setting

State Police added additional words to the profanity filter, such as pig and pigs, copper, jerk, among others

Court held that the State Police's use of Facebook's "strong" filter setting and addition of other "bad words" constituted viewpoint discrimination in violation of the First Amendment

Comment moderation: what NOT to do

- Don't delete protected speech (including negative or critical comments)
- Also, be cautious with the "hide" or "mute" features – these can create the same legal issues as deleting a comment
- Be careful in banning or blocking users unless pursuant to a lawful comment policy

Case examples of comment moderation

Honolulu Police Department was sued for removing all critical negative comments from the PD's Facebook page



Settled lawsuit for \$31,000

Case examples of comment moderation

South Pittsburg was sued after it adopted a social media policy that prohibited any negative comments about the town or any of its officials or employees on social media



Settled lawsuit and rewrote policy

Case examples of comment moderation

Virginia PD
social media
policy banned
the following:

- Posts that tend to discredit or reflect unfavorably on the department
- Negative comments on internal operations of the department
- Discussions about specific conduct of supervisors or coworkers

Case examples of comment moderation

- Sheriff department deleted critical posts on its official page, including one that referred to a police officer as:

"a terrorist pig with a shiny badge"

- Page only allowed "positive comments" about the department and officers
- Court held that government cannot discriminate based on viewpoint

You CAN adopt a comment policy

- Adopt and enforce a neutral comment policy/TOS
 - The policy should identify the type of content that is not allowed and will be subject to removal
 - The policy can prohibit and remove non-protected speech and ban or block people who repeatedly violate the policy

You CAN regulate non-protected speech

1. Obscene, sexual, or pornographic content and/or language
2. Content that promotes discrimination on the basis of race, age, religion, gender
3. Content that violates a legal ownership interest (copyright or trademark)
4. Threats to any person
5. Conduct that violates any federal, state, or local law or encourages illegal activity
6. Promotion of any commercial activities
7. Spam, links, or malware/viruses
8. Posts that advocate for or against a candidate, referendum, or campaign (in some states)

Public Officials on Social Media



Public officials – case study #1

- Lawsuit filed after users were blocked from President Trump's @realDonaldTrump account, including one who tweeted:
"To be fair, you didn't win the WH, Russia won it for you."
- Court of appeals held account was a "designated forum" and blocking violated First Amendment
- US Supreme Court refused to hear former President Trump's appeal



Donald J. Trump 
@realDonaldTrump

@realDonaldTrump blocked you

You are blocked from following
@realDonaldTrump and viewing
@realDonaldTrump's Tweets.

Public officials – case study #2

- Loudoun County, Va Commissioner sued after she blocked people from her personal Facebook page
- Court found her page a public forum subject to First Amendment because:
 1. She used it to inform constituents of county business
 2. She used county staff to post on the page
 3. The county promoted the page in its newsletter
 4. Facebook page linked to county website

Public officials – case study #3:

School district sued after school board members deleted parent posts and blocked them from their social media pages



Court held that board members used their social media pages as “tools of governance” and their blocking of hundreds of comments for a 3 year period was unconstitutional

Public officials – case study #4

Sheriff blocked two Black Lives Matters leaders from his FB page because of critical comments

Court found Sheriff's page to be a public forum and his deleting users and blocking negative comments was unconstitutional viewpoint discrimination

Public officials – case study #5

California Mayor blocked user from her FB page because of the user's critical comments towards the Mayor

Court determined that:

- the Mayor used her FB page for government purposes and the interactive portion of FB page (comments) is a government forum and
- the Mayor's blocking of user was based on the user's critical comments (viewpoint)

Public officials – private vs. government factors

Private factors

Government does not maintain site or moderate content

Site would not revert back to government when official left office

Official did not use staff to post on official's behalf

Activities take place outside of normal working hours

Government factors

Official included title/position on the site

Official's contact information listed on site

Site linked to official government website

Official conducted government business on site

Saving public officials from themselves...



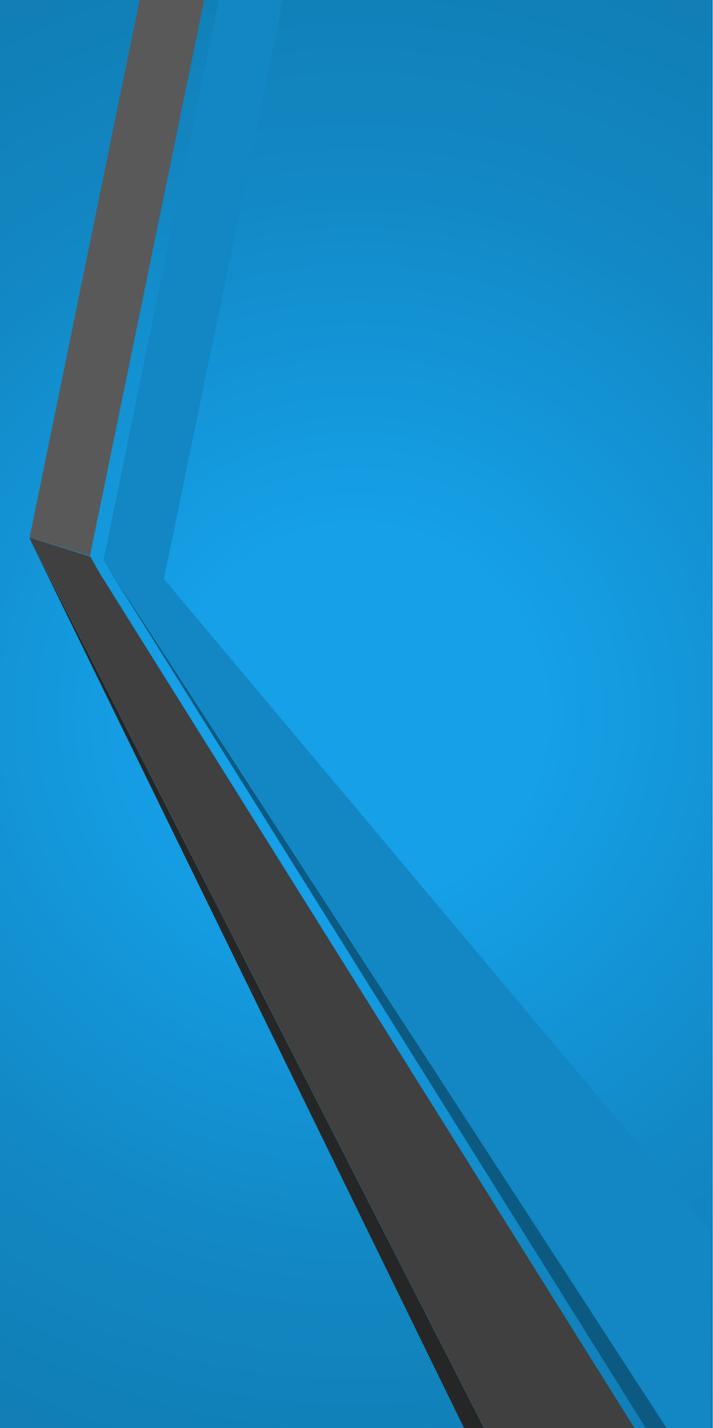
Enact a social media policy for public officials



Explain that their personal social media activities, if tied to their governmental duties, could be a “public forum” subject to the First Amendment and could also implicate open records and meetings laws



Best practice? Keep professional and personal activities separate (and campaigns, for that matter)



Employees on Social Media

Protected social media activities – don't discipline employees

- Discussion of matters of public concern such as:
 - Reports of unlawful conduct (whistleblower speech, discrimination)
 - Political issues and elections
 - Social justice issues
- Discussion of working conditions (salary, union activities)

Campaign “like” = political speech

- Deputies reinstated after sheriff fired them for “liking” his opponent’s Facebook campaign page.
- A “like” can be speech, and political speech is protected.



Activities that are not protected – can discipline employees

- Excessive use of social media at work
- Individual gripes about job or boss, even on personal sites
- Illegal (or improper) personal social media activities
- Posts that violate employer's social media policy

Teacher fired for Twitter post to remove immigrants from school

Anything you can do to remove the illegals from Fort Worth would be greatly appreciated

- A Texas school fired a teacher who tweeted the above to former President via Twitter
- The school determined that she had violated the school board's social media policy

Bad timing?

*Mandatory 2 hour sexual harassment training. And they aren't even gonna show me the proper way to grab a woman's a**...*

- Shortly after a government agency sent around a notice to employees of mandatory sexual harassment training, an employee posted this on Snapchat
- Employee was fired by his boss, a state senator

Threats can get you fired

After a television reporter and cameraman were killed by a former employee of the station, a former employee posted the following on Facebook:

"To be a journalist isn't an easy Job but when u [sic] have bullies in your workplace can be so crazy. That's why people need to push a movement to condemn bully [sic] at work."

"Sometimes workplaces push you to the edge to do violent crazy things the bullying in workplaces and toxic environments [sic]."

"They should behave well and don't bully."

- He was terminated and sued claiming he was discriminated against.
- A Texas court ruled that his employer had a legitimate, non-discriminatory reason for terminating him given his threatening posts and attacks on the TV station via social media in violation of the station's policies.

And, so can bad choices...

- An employee obtained permission from her employer for a two-week FMLA absence. Her employer later discovered she had posted pictures on social media that were taken during a Caribbean cruise ship, as well as a running account of the good times she had on vacation.
- Another employee used a social media site to blog about how much she hated her supervisor and her job. Although she used a pseudonym, she posted enough identifying information about herself, her boss, and her company so it became clear who she was.
- Another employee posted pictures on his social media page of himself and some non-employee buddies having a drunken good time in the employer's office, after hours, when the store was supposed to be closed.

Another example

- After a mass shooting at a country music concert in Las Vegas, an employee posted that she had
“no sympathy for the victims because country music fans are often republican gun toters.”
- She was fired and did not have any legal recourse for wrongful termination

Matter of public concern or disgruntled employee?

A board of clueless idiots making the decisions that affect many including the very employees that actually do the job

- A fire captain was fired by his employer for this Facebook comment about the fire district board. He claimed his comment was made as a private citizen on a “matter of public concern” and protected by First Amendment
- The court disagreed, finding he was speaking as an employee disgruntled by a recent disciplinary hearing
- Since his speech was not protected, his termination was upheld

Importance of a social media policy & training



Put the public on notice on what comments will not be tolerated on government social media sites (TOS)



Inform employees of social media activities (on and off duty) that could subject them to discipline



Address public officials' social media activities to avoid First Amendment claims and violations of open meetings and records laws



Train your administrators on the legal issues with government social media use – don't put the intern in charge

QUESTIONS?

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