

The Knowledge Now series features practical research on timely topics from the Colorado Municipal League.

CHALLENGES FOR ELECTED OFFICIALS ON SOCIAL MEDIA

By Debbie Wilmot, Lafayette public information officer

TRANSPARENCY, CITIZEN engagement, freedom of speech, and elected officials. Can they all exist harmoniously on social media? The short answer is yes, but the devil is in the detail.

Elected officials are voyaging through uncharted waters in this age of social media. Facebook and Twitter have colored our world of public engagement rules with subtle gray undertones. While some legal clarity is beginning to surface, case law is still evolving. When feeling uncertain on how to proceed on social media, a good rule of thumb is to treat these platforms as you would a public meeting.

Separate your accounts: If you follow no other guidance, this advice will prevent many hours of attorney anxiety. Create a separate account for your “official elected position” and use that profile to discuss your city or town business. Refrain from engaging in any municipal business on your personal/private social platforms. Current court cases involving elected officials typically stem from their assumption that a private account is private. However, when you introduce

official business into a private Facebook or Twitter account, it no longer passes the straight face test.

First amendment protection: If a citizen expresses an opinion you disagree with during public comment, you do not cut them off and eject them from council chambers. The same holds true for your social media platforms. Do not block followers or delete opposing comments from your “elected official” account as the courts have determined these platforms are designated public forums that protect free speech. You can define posting policies on your page and notify participants that obscene, racist, or off-topic comments will not be tolerated. Just know these categories can be subjective, and are not a fail-proof cover to allow you to remove comments you deem offensive.

Open meetings law: The lines of elected official participation in public forums can become a little blurred. You would never meet with more than one of your fellow councilmembers or trustees to discuss city or town business, so it follows that you should not post on a conversation thread

where other councilmembers are participating. The unanswered question in this example is whether you are already party to that conversation simply by watching it occur. Avoid open forums where you are not a primary administrator or moderator. In other words, converse on your “elected official” Facebook feed, but do not risk a potential infraction by joining an open discussion forum where your fellow elected officials may also be commenting.

In a 60-second time period, 973,000 users log into Facebook and 481,000 tweets are sent. As elected officials continue to embrace these growing communication tools, it is important for cities and towns to adopt social media policies to support transparency and safeguard from unintended legal issues.

The following articles provide more legal and practical recommendations through example scenarios, engagement protocol tools, and other valuable suggestions for effectively handling your social media.



SOCIAL MEDIA USE BY ELECTED OFFICIALS: SOME LEGAL ISSUES

By Tami Tanoue, CIRSA executive director

SOCIAL MEDIA ENGAGEMENT HAS become a regular part of life. On a daily basis, we check our emails and texts, and then probably go on to check our favorite social media sites, such as Facebook, Instagram, Snapchat, Twitter, and others. So it is no wonder that elected officials, too, have integrated social media into their public lives. But if you are an elected official, you should know that, because of the powers and responsibilities conferred on you by virtue of your position, your social media use has some legal dimensions that may not apply to the rest of us. This article explores a few of them.

Open Meetings Law

A scenario: You have a Facebook page for yourself under the category of "Politician." You post information about city or town happenings and resources, and welcome others to post there as well. One day, you post on a controversial topic that the council will soon be tackling, and two of your fellow councilmembers get wind. All three of you go back and forth on the post about your respective views.

Is this a "meeting" within the meaning of the Colorado Open Meetings Law (COML)? Well, it seems at least

arguable that it is! "Meeting" is defined in C.R.S. Section 24-6-402(1)(b) as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." Three or more members of the local public body (or a quorum, whichever is less) in such a gathering will trigger the notice and "open to the public" requirements of the COML.

How do you comply with the 24-hour "timely" posting requirement in the COML when you are posting on Facebook? How do you meet the "open to the public" requirement? Why does this article raise a lot of questions for which there is not a clear answer? But you see the point — discussions of public business by the requisite number of governing body members can certainly take place in an electronic forum, and then these questions (and others) may come into play.

Open Records Act

A scenario: You post about an upcoming agenda item on the Facebook page featured in the previous scenario. For some reason, the discussion on the post starts to go completely sideways, with lots of negative comments, and some uncalled-for memes and

photos. You start deleting some of the particularly disagreeable comments, and ultimately decide that the better part of valor is to just delete the whole darn post.

Are the post, and the comments, considered "public records" within the meaning of the Colorado Open Records Act (CORA)? Again, it seems at least arguable that they are! The term "public records" is defined to include "the correspondence of elected officials," subject to certain exceptions, under C.R.S. Section 24-72-202(6). Public records are open for public inspection and copying under C.R.S. Section 24-72-203. Your municipality has most likely adopted a records retention and destruction schedule that governs how long various documents, including electronic documents, must be maintained prior to destruction.

So, could someone request a copy of a post that was on your Facebook page under CORA? What if you deleted the post? Is there a record retention schedule that applied? Was that schedule violated when you deleted the post? More of those infernal questions for which there is not a clear answer, but you get the point! If there is a chance that the posts are subject to CORA, then it



might be smart to tolerate the replies you get on your post. Alternatively, make sure you have some posting rules in place so that everyone knows up front your expectations for your page. Perhaps something along these lines could be included in the "About" section of your page:

This is a page where ideas and information about our community are welcome, but they should be shared in a respectful manner. Comments that contain vulgar language, personal attacks of any kind, or offensive comments that disparage or discriminate on the basis of protected classes such as race, color, age, ancestry, religion, national origin, gender, military status, sexual orientation, or disability, will be deleted. Comments will also be deleted if they are:

- (i) spam or include links to other sites not relevant to our community;*
- (ii) clearly off topic; (iii) advocate illegal activity; (iv) promote particular services or products;*
- (v) infringe on copyrights or trademarks (vi) contain nudity in profile pictures, or (vii) are violative of any local, state, or federal laws and/or are otherwise unlawful.*

Multiple violations of this policy may result in a ban from this page.

Let's alter the situation a bit to further confound the situation. Let's say that, when you set up your Facebook page, you chose the "government organization" category rather than the "politician" category. Furthermore, you decided to "borrow" the city or town's official logo to use as your profile picture. Is it possible that these choices would strengthen the argument that the posts on the page are subject to laws like CORA? It is possible! So check and see how you have set up your page. If you are an individual elected official, it seems inaccurate to use the "government organization" category. And do not "borrow" the city or town logo for your own purposes!

Quasi-judicial Rules of Engagement

A scenario: A site-specific land use application is scheduled to be considered by the planning commission on an upcoming agenda, with the commission's recommendation to be referred to the council for final action at a later date. You consider the proposed use to be an extremely controversial one. But you are worried that it is a bit "under the radar," what with summer vacations, holidays, and all. Of course, proper notice has been given by the planning department, but you are still concerned that the proposal may get a favorable recommendation from the commission without any citizen testimony. You decide to post this on your Facebook page: "Citizens, please read this IMPORTANT NOTICE! You need to know that the planning commission is going to be considering a proposal for _____ at its upcoming meeting on _____ at 7 p.m. As a councilmember, I am taking no position on the proposal at this time. But if you care about our community's future, then you will want to attend this very important hearing before the planning commission."

See any problems here? You have certainly stated that you are "taking no position" at this time, but it may appear to others, particularly the applicant, that you are opposed to the proposal and are trying to "gin up" opposition to it. Is that congruent with the "neutral decision-maker" role that you will need to take on once this quasi-judicial proposal goes up to the council? Could the applicant take the position that it looks like you made up your mind, without evidence, long before the council hearing, and therefore, you should be recused from participation?

"But, all I am doing is making sure the public knows about this proposal," you protest. Well, do you do that with every proposal that comes before the

planning commission, or did you just happen to pick out this one for the Facebook spotlight? The essence of procedural "due process" rights that attach to a quasi-judicial matter is notice and a fair hearing before neutral, impartial decision-makers. You can see how, even if your intentions may have been honorable, you can easily cast doubts on your impartiality and neutrality with a post like this.

Let's confound ourselves a little more. After you post this "important notice," citizens start commenting. The flavor of the comments is captured by:

Councilmember, THANK YOU! I am outraged by this proposal, and cannot believe that the planning commission is even considering it!!! There is one of these developments in the town next door. It has become nothing but a haven for criminals. If the yahoos on the planning commission recommend approval, then I sure hope I can count on you to do the right thing on the council and VOTE NO!!!!

Carried away in the moment, you reply: "You can count on me!"

Uh-oh! Did you just reveal that you are not exactly going to be a neutral decision-maker on this topic? Moreover, did you just leave a breadcrumb trail that you have had an "ex parte" or "outside the hearing" contact on this matter? And, maybe, did you reveal that your vote is going to be based on factors other than the criteria that your land use code will require you to consider? Yes, indeed, this scenario could be a winning trifecta of quasi-judicial "don'ts." You can bet that someone is taking a screenshot of the thread and saving it for future use against you!

And let's say all of your colleagues on the council saw similar posts on their respective pages. A majority votes "no" on the proposal on the basis of the potential for criminal activity (and several of you say so when you "explain your vote"). But there was absolutely no evidence about this in the record of the hearing before the

council. It is certainly possible that the decision would be vulnerable to being overturned, upon judicial review, because there is no evidentiary support for the basis of your decision.

Or maybe you did not “explain your vote” after the hearing. But afterwards, you write a scathing post criticizing the idiots who voted “yes”:

A couple of my so-called colleagues seem to be siding with the criminal element in our community. Citizens need to know that Councilmembers Smith and Jones voted “yes” on the proposal. In fact, they had the nerve to note that there was no evidence of criminal activity being associated with this development. Are you kidding me???”

Social media “snipes” at your colleagues only make you look bad. Let your vote speak for itself, do not try to explain lest you reveal an improper basis for your decision, and certainly do not bad-mouth the votes of your colleagues.

And what about the poor planning commissioners who may have wandered into your post? Are they going to read it and wonder why you seem to be jumping into the matter early and nullifying their responsibilities? It certainly may look that way to them. There is a time and place when your body, the city or town council, will take up the matter. Jumping in front of the planning commission makes it look like you trust neither the commission nor the process that your own land use code has established.

Conclusion

Social media use by elected officials implicates new and evolving legal issues, and this article only touches upon a few of them. The uncertainty is real! But you can avoid uncertainty and stay on solid ground if you follow these suggestions:

- Consider whether you really need to be on social media in your elected official capacity. If only 23 people “like” your page, it may not be worth the hassle. And keep in

mind that only a fraction of those 23 people may even be seeing your posts.

- If you feel that the use of social media is a net plus and/or a service to your constituents, be extremely careful about what is posted! Stay away from discussions of items that will be or could be on your governing body’s agenda. There is a time and place for discussion of those items, and it’s most likely not social media. Stick to public service announcements, photos and posts about things you did (“It was great to meet so many of you when I volunteered at City Cleanup Day last week”), upcoming events such as “Town Halls,” re-posts of municipal newsletters, links to articles that tout your great city or town, and the like. If you are careful about what you post, you are not going to have to confront the uncertainties of COML, CORA, and other laws.
- If you stick with helpful but noncontroversial posts, then there will not be much of a need to delete posts. But it is still prudent to have a posting policy on your “about” page along the lines of the example above.
- Be particularly careful to stay away from commenting on a pending quasi-judicial matter. This is where the stakes are highest! In a worst case scenario, an imprudent post could require your recusal from participating in the matter on the basis that you have revealed your non-neutrality, buttress someone’s constitutional claim, serve as a basis to attack the body’s decision, or all of the above.
- Check to make sure you created your page under the right category. “Politician” is more accurate than “Governmental Organization.” And do not use the official city or town logo, to avoid any implication that yours is an “official” municipal page.

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THE RIGHT WAY FOR ELECTED OFFICIALS TO DO SOCIAL MEDIA

By Webb Strategic Communications

IF YOU PAY MUCH ATTENTION TO the flood of tweets and ongoing dialogue on the national scene, you will understand that we currently are watching a live case study of how elected officials should not engage on social media. Maybe that has ignited some concern about what you should do to engage and inform constituents. You understand that social media are effective tools for providing convenient, immediate communication to residents, and for civically engaging younger residents. On the other hand, you are short on staff and time and know that social media can unintentionally lead to a communication firestorm. If concerns such as these leave you feeling petrified, here are some tips to get you moving again:

Listen

It is not always possible to hear from constituents through traditional outreach, such as town halls or direct calls. However, through social media, you have the special ability to listen-in on what really matters to your residents.

Dedicate time each week to following conversations on Facebook and Twitter that are relevant to your municipality. Research and monitor relevant hashtags for your municipality and your neighbors as well as for special issues that impact Colorado governments (for example: #Ouray, #MontroseCounty, #WesternSlope, #boxcanyon, #RedMtPass, and #ButtermilkFire).

Engagement Protocols

Social media afford constituents the opportunity to gripe with minimal consequences, and certainly anonymously. Yet it is your responsibility to maintain a positive outlook. Ask your municipality's clerk or public information officer (PIO) about your municipality's policies regarding social media response. If a policy does not already exist, the following are engagement protocols suggested by Webb Strategic:

Respond: Messages asking a pertinent question that if answered would provide helpful information to others; comments that are critical but polite; comments that contain outright mistruths and inaccurate information; positive or constructive comments (optional).

Let Stand: Positive or constructive comments (optional); comments that are critical but do not seek an answer (venting); follow-up questions/messages from a specific user who has recently been engaged.

Delete/block: Messages containing profanity, threats, or inappropriate content.

Curate Credible Sources

No one wants to perpetuate misinformation, yet it happens on a regular basis because when you are in a time crunch — you forget to reference sources or verify information. One way to reduce the possibility of reposting false content is by curating a list of credible sources before you post. Use the following

instructions to create lists of preferred sources on Facebook and Twitter:

- On Facebook, go to the page of the credible source you want to add to your list. Find the "Follow" button under the cover image and click; a drop-down menu will appear. Check the "Follow First" option. When you return to your newsfeed, any content that this sources post will appear first, making it easy to share and add comments.
- On Twitter, create a "List." First, go to the page of the credible source and click the "Follow" button on the top right-hand side. Next to the follow button, click on the three dots for the drop-down menu and select "Add or remove from lists ..." Select "Create List" and title it "Credible Sources." Webb recommends making this list private. To access this list later, click on your "Profile and Settings" button. (This is the round image of your profile picture on the top right-hand side of the Twitter browser.) In the dropdown menu, select "Lists" then select your "Credible Sources" list. This will curate an individualized feed of content to Retweet.
- Bonus tip: Mistakes are inevitable on social media. When you do post wrong information, it is best to quickly admit to your mistake and correct the information just as quickly. When you follow this best practice, people are likely to move on.





Repost Official Communications from Your Municipality’s Page

When you are creating “Credible Sources” lists, be sure to add your municipality’s pages. Any post regarding your municipality’s official stance on an issue should be reposted directly from that page. Your clerk or PIO has worked diligently to draft strategic language. It is important that you do not add your own flair to the message! Repost official communication without additional commentary.

Pin Contact Information

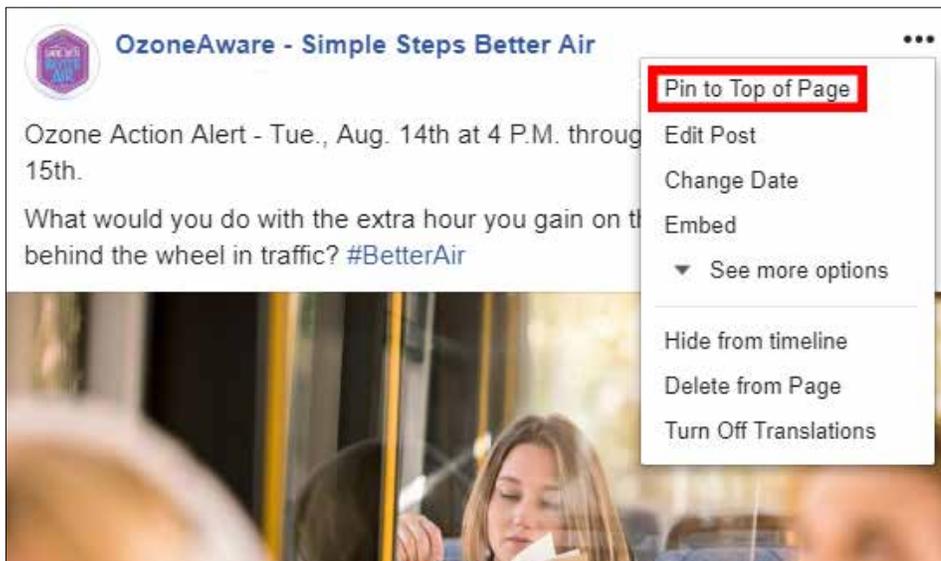
Constituents expect to get immediate help when they make a request via social media. If you do not have the time or resources to monitor your social media channels regularly, 365 days a year, make sure constituents

know where they can get immediate help. “Pin” a post containing your municipality’s help line phone number or email address and let residents know that if they need immediate help, they should direct their inquiries to these communication channels. To “pin” content, select the menu button on the top right-hand side of the post (This looks like three dots on Facebook and a downward facing carrot on Twitter) and select the “pin post” option.

You can borrow the following language from Webb Strategic for your post:

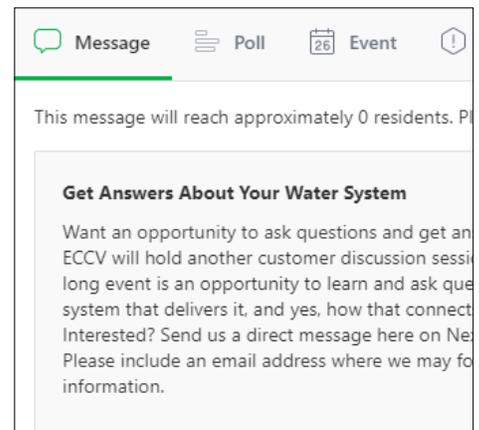
If you need immediate assistance, please direct your concerns to one of the following constituent help channels:

- (Phone)
- (Email)



Cautionary Tale of Nextdoor

As valuable as Nextdoor may be in communicating with neighborhoods, postings by residents can lead to an enormous drain on your time. Like all social media, Nextdoor provides an opportunity for the “pile on” effect: A post about one topic can quickly veer into a seemingly endless chain of questions and critiques about all manner of things. Misinformed or just plain untruthful comments stir up readers and prompt even more responses. Thoughtfully addressing each reply or comment can require more effort and time than you can reasonably give, and for every answer provided, there will likely be additional questions posed. Including an email and/or phone contact in your post, and then closing the discussion can direct constituents to the intake points your municipality already has in place. Responding quickly and affirmatively to erroneous Nextdoor postings is the best practice.



Webb Strategic Communications, located in Denver, has been offering communication support to government entities for 30 years and specializes in media relations, social marketing, digital, crisis, and Latino communications.