

**97th CML Annual Conference**  
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**Social Media: Legal Issues for Municipalities**  
June 20, 2019 1:45 pm to 3:00 pm  
City of Colorado Springs  
Marc Smith, Corporate Division Chief & Legislative Counsel  
Tracy Lessig, Employment Division Chief  
Frederick Stein, Senior Corporate Attorney  
Rebecca Greenberg, Senior Corporate Attorney



Contents of this presentation reflects the view of the presenter, not of CML.

### Introductions

- Marc Smith, Corporate Division Chief & Legislative Counsel
- Tracy Lessig, Employment Division Chief
- Frederick Stein, Senior Corporate Attorney
- Rebecca Greenberg, Senior Corporate Attorney

### What is Social Media?

- Know it when I see it?
- Twitter, Facebook, LinkedIn, YouTube, Snapchat, etc.
- Changes on a daily basis

### Legal Definition

- Difficult to define in legislation and policy
- Colorado Revised Statutes § 18-7-108 (6)(e):
- “Social Media” means *any electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content, including but not limited to videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail, or internet web site profiles. (emphasis added).*

### Impact of Social Media on Our Lives

- 135 minutes a day for the average global user  
<https://www.forbes.com/sites/tomward/2018/06/08/how-much-social-media-is-too-much/#703ff57e60e6>
- A new, less personal way to maintain interactive communication

### Impact on Government

- Easier interaction with the public
- Ability to provide essential information more quickly
- Impersonal
- Easy to violate your own rules

## Major Issues

- Employment related issues
- What constitutes “government ownership” of a social media account? Can a policy help?
- Elected officials

## Public Employee Free Speech and Social Media

### First Amendment Free Speech

- Public employees have limited free speech rights
- First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen on matters of public concern



## Public Employee Free Speech and Social Media

### First Amendment Retaliation Five-Part Test:

1. Was the speech made pursuant to the employee’s official duties (If yes – no protection);
2. Was the speech on a matter of public concern (If no – no protection);
3. Do the government’s interests outweigh the employee’s free speech interests (If yes – no protection);



## Public Employee Free Speech and Social Media

### First Amendment Retaliation Five-Part Test:

4. Was the protected speech a motivating factor in the adverse employment action (If no – no violation); and
5. Would the employer have made the same decision in the absence of the speech (If yes – no violation).



## Public Employee Free Speech and Social Media

1. Was the speech made pursuant to the employee’s official duties (If yes – no protection)

*Garcetti v. Ceballos*, 547 U.S. 410 (2006)

- District Attorney prepared memo disagreeing with prosecution of a case and testified on behalf of the defense
- DA alleged retaliation by being reassigned, transferred and denied a promotion



## Public Employee Free Speech and Social Media

*Garcetti v. Ceballos*, 547 U.S. 410 (2006) (cont.)

Court held - not protected speech because it was made “pursuant to his job duties”




“My client is totally innocent of a few of the charges.”

### Public Employee Free Speech and Social Media

2. Was the speech on a matter of public concern (If no - no protection)

- o Matters of interest to the community (i.e., social or political issues)
- o *Graziosi v. City of Greenville*, 775 F.3d 731 (5th Cir. 2015)
  - Police sergeant terminated for posting comments critical of Chief
  - Court held she was not speaking pursuant to her job duties and her speech was not on a matter of public concern



### Public Employee Free Speech and Social Media

3. Do the government's interests outweigh the employee's free speech interests (If yes - no protection)

*Baker v. Howard Cnty.*, 2015 WL 3456750 & 2015 WL 3456757 (D. Md. 2015)

- Fire Battalion Chief and volunteer both terminated after Facebook postings derogatory to liberal individuals
- Court held the postings related to a matter of public concern
- Upheld BC's termination - department's interests outweighed the BC's free speech interests
- Summary judgment denied for volunteer's claim

### Brief Overview of First Amendment Law

<p><b>Traditional Public Forum</b></p> <ul style="list-style-type: none"> <li>• Where people have traditionally been able to express their ideas: town square, park, public street</li> </ul> 	<p><b>Non-Public Forum</b></p> <ul style="list-style-type: none"> <li>• Government property traditionally not open to the free exchange of ideas: courthouse lobby, prison, military base</li> </ul> 
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### Public Forum Restrictions

<p><b>Content Neutral</b></p> <ul style="list-style-type: none"> <li>• <b>Reasonable</b> time, place and manner</li> <li>• Must be <b>narrowly-tailored</b> to serve a significant government interest</li> <li>• Leaves open <b>alternative channels</b> of communication</li> </ul>	<p><b>Content Based</b></p> <ul style="list-style-type: none"> <li>• Subject to <b>strict scrutiny</b></li> <li>• Must be the <b>least restrictive means</b> to achieve a compelling government interest</li> <li>• Generally <b>presumptively invalid</b></li> </ul>
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Level of Scrutiny Depends on Forum

### Non-Public Forum Restrictions

Most Lenient Test

Restrictions

**Must be Reasonable & Viewpoint Neutral**

### Designated Public Forum

Designated Public Forum

• Government intentionally opens non-traditional areas for First Amendment activity



Same strict review as public forum

- Municipal auditorium dedicated to expressive activity
- Interior of city hall - when city opens building to display art but does not consistently enforce restrictions

### Limited Public Forum

*Limited Public Forum*

➔

*Same review as non-public forum*


- Non-public forum opened to First Amendment activity but limited to certain groups, topics

- Community Rooms in Public Buildings
- Public School Property

### How Courts Determine Classification

Designation of public or limited public forum depends on terms of use

More consistently enforced and objective restrictions



More likely forum deemed a *limited* public forum

### Government Speech

- Forum analysis only applies to limits on private speech
- If the government “is speaking on its own behalf,” it is not subject to forum analysis or the usual limits on viewpoint discrimination
- Vanity license plates are government speech; however most social media platforms are unlikely to qualify as government speech

### Government-Operated Social Media Platforms

- Are they a traditional public forum?
- Is social media the modern public square for discourse of ideas?
- Is it more akin to a bulletin board where only designated topics can be discussed?
- Do you need to be concerned with elected officials’ social media platforms?



### What Should Municipalities Do?

Carefully consider if a municipality wants social media platforms to serve as town halls for public comment and expression

IF YES - Courts **unlikely to tolerate** most restrictions of the speech that occurs



### Adopting A Social Media Policy Tips & Suggestions

- Content Limitations
- Consequences for Violations
- Removal and Documentation
- Due Process – Appeals
- Legal Disclaimers
- Revisions to the Policy
- Acceptance of Terms

### Content Limitations

- Clearly off-topic comments made on a specific topic, thread, or post
- Obscene, pornographic, racist, or explicit language
- Threaten violence or promote illegal activity
- Solicitation of commerce, including advertisements
- Violation of privacy of another individual (eg., posting personal information)
- Comments that could compromise an ongoing criminal investigation
- Information that compromises safety or security of the public or public information systems
- Content that violates intellectual property rights

### Consequences For Violations

In addition to defining what content is inappropriate, a social media policy should also explain what remedial action the municipality may take in response to a violation.

This may include:

- Blocking the individual who posted the content
- Deleting the content at issue
- Reporting the content to the site administrator

A policy may provide for warnings to be issued, or that these actions may be taken without prior warning to the individual.

### Removal and Documentation of Violations

The policy may allow moderators to remove comments or ban posters that violate the content limitations

- Document the post and all comments via screenshot or other method
- The moderator should provide a standard or tailored response message to the poster explaining the post was removed for violating the social media post/comment policy
- Retain documentation as provided by retention policies (these will be subject to CORA)

### Due Process - Appeals

A policy that permits banning or blocking actions against a poster should provide either the moderator's contact information (ideally an email address) or a link to a forum which allows the poster to appeal the action

This narrow avenue of due process may help stave off legal challenges for specific cases, and create a paper trail in the event that blocking an individual or deleting a comment must be defended in court

### Legal Disclaimers

Social media pages will inevitably receive legitimate comments that reflect views with which a municipality does not want to be associated

### Legal Disclaimers

Policies should state:

- Users' comments do not reflect the views of the Municipality
- Municipality is not responsible for the content nor endorses any site that has a link from this page
- Municipality assumes no liability for damages incurred directly or indirectly as a result of errors, omissions or discrepancies for posted information
- Comments do not constitute legal notice against the Municipality
- Comments do not constitute valid requests for public records, such requests should be made via proper channels

## Amending the Social Media Policy

The unsettled legal landscape on the First Amendment and the Internet means that any policy adopted today likely will be amended to account for new developments.

Policies should state:

- Social media policies may be revised at any time
- Revisions become effective upon being posted

## Social Media Policy Accepting Its Terms

Finally, policies should provide that use of the site constitutes acceptance of the applicable social media policy terms in effect at that time.

## Social Media and Elected Officials

Social media may now be the most important modern forum for the exchange of views<sup>1</sup>; the First Amendment applies to speech on social media with no less force than in other types of forums<sup>2</sup>.

1. *Packingham v. North Carolina*, 137 S.Ct.1730  
 2. *Bland v. Roberts*, 730 F.3d. 368 (4<sup>th</sup> Cir, 2013)



## Social Media and Elected Officials

- Cases nationwide. Developing area of law
  - Davison v. Loudoun County Board of Supervisors (Virginia)
  - Leuthy v. LePage (Maine)
  - Knight First Amendment Institute at Columbia University v. Trump (New York)
  - Colorado cases
- Potential Steps to protect your governmental entity

## Davison v. Loudoun County Board of Supervisors

267 F.Supp.3d 702 (US District Court VA, 2017)

- FACTS:
  - Plaintiff posted comment including allegations of corruption on the part of Loudoun County School Board.
  - Chair of County Board of Supervisors deleted post and banned a user from Facebook page for 12 hours.
    - Can read and share content on/from the page but cannot comment on or send private messages.
- Plaintiff brought a 42 U.S.C. §1983 action against official alleging the chair violated his 1<sup>st</sup> Amendment and due process rights, seeking injunctive and declaratory relief.



## Davison v. Loudoun County Board of Supervisors

- State action occurs where apparently private actions have a sufficiently close nexus with the state to be fairly treated as the actions of the state itself.
  - Court looked to the totality of the circumstances to determine what constitutes a sufficient nexus with the state to be fairly treated as the actions of the state itself.

## Davison v. Loudoun County Board of Supervisors

- Some factors considered by the Court:
  - Whether the defendant opened a forum for speech by creating her Facebook page
    - What type of forum (traditional, limited or non-public)
    - Viewpoint discrimination is prohibited in all forums
  - Defendant created the Facebook page “Chair Phyllis J. Randall” to communicate with constituents
  - Defendant, and occasionally her Chief of Staff, ran the Facebook page
    - Her chief of staff paid by County was a County resource
  - Did not use County devices to post or update the page
  - Created the page outside the County official channels so as to not be constrained by County social media policies
  - Generally, Defendant entirely responsible for posting to the page
  - Defendant didn’t ban Plaintiff pursuant to any neutral policy or practice applied evenhandedly
  - Speech may not be disfavored by the government simply because it offends
    - The type of speech here – criticism of County government – is exactly the type of speech 1<sup>st</sup> amendment protects

## Davison v. Loudoun County Board of Supervisors

- When is the governmental entity liable for an individual elected official’s actions?

When the claim is against an individual in their official capacity it is not truly against the individual, but against the governmental entity s/he represents



## Davison v. Loudoun County Board of Supervisors



### • Holdings

- **Injunction** not appropriate - Plaintiff’s ability to - communicate on the Facebook page had been restored after 12 hours
- **Declaratory Judgment** – granted
  1. Defendant acted under color of state law in maintaining her “Chair Phyllis J. Randall” Facebook page
  2. Defendant’s “Chair Phyllis J. Randall” page operated as a forum for speech
  3. Engaging in viewpoint discrimination in the administration of that forum violates the 1<sup>st</sup> Amendment to the U.S. Constitution and the Virginia Constitution

## Leuthy v. LePage

U.S. District Court, D. Maine

2018 WL 4134628

- **FACTS:**
  - 2 Maine residents brought lawsuit against LePage, Governor of Maine, in his individual and official capacity
  - Comments posted questioned why the Governor was intentionally misleading the press, intentionally avoiding the press, and blocking users from his page
  - Defendant deleted and blocked two users from his “Paul LePage, Maine’s Governor” Facebook page

## Leuthy v. LePage

- Action brought pursuant to 42 U.S.C. §1983
- Motion to Dismiss was filed by Defendant



## Leuthy v. LePage

- Considerations/determinations by Court:
  - Page used official title
  - Citizens control the content and timing of their posts
  - The page acts as a passive conduit for the posts
  - Deleting posts does not constitute government speech (government speech immune to 1<sup>st</sup> amendment scrutiny)
  - Considered that the Plaintiffs had alternative means to contact and petition the government
- Motion to Dismiss Denied (8/29/2018)

### Knight First Amendment Institute at Columbia University v. Trump



- Plaintiffs –
  - multiple individual Twitter users who were blocked; and
  - Knight Institute – Plaintiff who Court determined had standing because “the infringement of its desire ‘to read comments that otherwise would have been posted by the blocked plaintiffs...in direct reply to @realDonaldTrump tweets”
- Defendants –
  - President – blocked individual Plaintiffs who criticized the President or his policies
  - White House Social Media Director – had ability to block and unblock users from the President’s @realDonaldTrump account
    - Account registered to: Donald J. Trump, 45<sup>th</sup> President of the United States of America, Washington D.C.

### Knight First Amendment Institute at Columbia University v. Trump

- Blocking on Twitter
  - blocked users have the ability to view and reply to replies to @realDonaldTrump, they cannot see the original @realDonaldTrump tweets themselves when signed in to their blocked accounts and it can be difficult to understand the replies without the context of the original tweet



### Knight First Amendment Institute at Columbia University v. Trump

- Remedies
  - Injunctive Relief:
    - The Court did not issue an Injunction. Presumed the Defendants would remedy the situation with the issuance of a Declaratory Order.
  - Declaratory Order:
 

“Turning to the merits of plaintiffs’ First Amendment claim, we hold that the speech in which they seek to engage is protected by the First Amendment and that the President and Scavino exert governmental control over certain aspects of the @realDonaldTrump account, including the interactive space of the tweets sent from the account. That interactive space is susceptible to analysis under the Supreme Court’s forum doctrines, and is properly characterized as a designated public forum. The viewpoint-based exclusion of the individual plaintiffs from that designated public forum is proscribed by the First Amendment and cannot be justified by the President’s personal First Amendment interests.”

Case is being appealed.

### Colorado Cases

- **Landman v. Scott** (CO State Senator, Grand Junction) – complaint filed May 13, 2019
- **Armijo v. Garcia** (CO Senate President)(April 2019)
  - Deleting and blocking from Facebook page
  - Settlement of \$25,000 (judgment and costs)
- **Willmeng v. City of Lafayette, CO and Berg** (Mayor) (March 2019)
  - Blocking Plaintiff from Facebook page in retaliation for critical comments in 2017
  - Settlement of \$20,372.90 (attorney’s fees, costs and \$5,000 judgment)
- **Willmeng and Asher v. City of Thornton, CO and Kullman** (Mayor Pro Tem and City Councilperson) (October 2018)
  - Deleted comments and banned Plaintiffs from posting
  - Stipulated to a permanent injunction and monetary element

\* This list may not be exhaustive but these cases are becoming more prevalent in Colorado. Elected Officials and Municipalities should beware\*

### Lobbying & Quasi-Judicial Items

- Legislative Item—social media contacts permissible
- Quasi-judicial Items—minefield
- Can be considered *ex parte* contacts
- Is the elected official interacting or merely receiving information that can be disclosed to the entire body?

### Considerations for Municipalities

- Social Media Policy
  - Extend to elected officials
  - Create policy for elected officials
- City control over social media
- Limitations on social media use

Potentially protect the municipality from liability



