Information Sources 20 Years Ago
The New Daily Information Diet
We Are Addicted to Media!

11+ hours per day watching, reading, listening to or simply interacting with media

We Are Addicted to Our Phones!

• People spend around 6 hours per day consuming digital media

• On average, we check our phones 50 times per day

https://www.axios.com/searching-for-information-nirvana-2248588151.html
Most adults still consume news on the television

Question: “Which of the following would you say you prefer for getting news?”

Age Dictates How Americans Get their News

% of each age group who *often* get news on each platform

California Voters Get Their Political/Election News From a Variety of Sources

"Below is a list of sources from which people get information about politics and elections. For each one, please indicate if you rely on that source a great deal, just some, very little, or not at all."

[Graph showing percentage of voters relying on various sources such as Local TV, CNN, Fox News, MSNBC, Late night talk shows and comedy shows, Newspapers, NPR, National Public Radio, AM Talk Radio, Internet websites, Twitter, Facebook, Instagram, Podcasts.]

[Data points indicating percentages of voters relying on each source, e.g., CNN: 50%, Fox News: 45%, MSNBC: 46%, NPR: 66%, National Public Radio: 53%, Internet websites: 22%.]

(FM3 Poll, October - November 2018)
Americans’ Trust in Mass Media Steadily Declining

Question: “In general, how much trust and confidence do you have in the mass media -- such as newspapers, T.V. and radio -- when it comes to reporting the news fully, accurately, and fairly -- a great deal, a fair amount, not very much, or none at all?”

Source: https://news.gallup.com/poll/243665/media-trust-continues-recover-2016-low.aspx
Facebook Is the Most Used Social Media Platform

% adults who use...

- **Facebook**: 68% (2018), 54% (2012)
- **Linkedin**: 25% (2018), 16% (2012)
- **Instagram**: 35% (2018), 9% (2012)
- **Pinterest**: 29% (2018), 10% (2012)
- **Twitter**: 13% (2018), 24% (2012)

Social Media Use by Demographic Factors

% of U.S. adults who use each social media platform

Age

<table>
<thead>
<tr>
<th>Platform</th>
<th>18-29</th>
<th>30-49</th>
<th>50-64</th>
<th>65+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>81%</td>
<td>64%</td>
<td>21%</td>
<td>10%</td>
</tr>
<tr>
<td>Instagram</td>
<td>78%</td>
<td>40%</td>
<td>24%</td>
<td>9%</td>
</tr>
<tr>
<td>LinkedIn</td>
<td>40%</td>
<td>40%</td>
<td>19%</td>
<td>8%</td>
</tr>
<tr>
<td>Twitter</td>
<td>33%</td>
<td>27%</td>
<td>24%</td>
<td>9%</td>
</tr>
</tbody>
</table>

Gender

<table>
<thead>
<tr>
<th>Platform</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>62%</td>
<td>39%</td>
</tr>
<tr>
<td>Instagram</td>
<td>30%</td>
<td>25%</td>
</tr>
<tr>
<td>LinkedIn</td>
<td>25%</td>
<td>23%</td>
</tr>
<tr>
<td>Twitter</td>
<td>27%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Source: http://www.pewinternet.org/fact-sheet/social-media/
Facebook is also the most popular social media site for news

% of U.S. adults who get news on each social media site:

- Facebook: 43%
- YouTube: 21%
- Twitter: 12%
- Instagram: 8%
- LinkedIn: 6%
- Reddit: 5%
- Snapchat: 5%
- Whatsapp: 2%
- Tumblr: 1%

Question: “How frequently do you watch shows online using a streaming service or app”

- More than once a day: 16%
- Almost every day: 35%
- A few times per week: 34%
- A few times per month: 11%
- A few times per year: 2%
- DK/NA/Refused: 2%

51% Stream Every Day

*How frequently do you watch shows online using a streaming service or app*, (FM3 Poll, November 2018)
Attention Span and Digital Media

Goldfish = 9 Seconds

Human = 8 Seconds

https://www.axios.com/searching-for-information-nirvana-2248588151.html
What Does This Mean for Elected Officials?

• You’re Always “On the Record”

• Treat Your Social Media Page Like an Open Mike – and Living Record of Everything You’ve Ever Said

• Be Transparent and Open – All the Time

• Be Prepared and Have a Plan for When News Breaks About You or Your City

• Use Social Media to Have ‘Public Conversations’ with Your Constituents – and Treat Them Like Everyone is Listening
Social Media Can Be Used to Your Advantage

• Have a direct line to your constituents.
• Tell your story without the media filtering it.
• Target your message to specific constituency groups.
• Engage your constituents in new and personal ways.
• Connect with constituents and groups you might not reach through traditional media.
• BUT, You don’t have to weigh in on everything
How Do You Do It?

OUT

• Long press releases
• Relying only on traditional media to tell your story

IN

• Video
• Photos
• Shareable content
• Directly connecting with your constituents
How Do You Do It?

- Build an audience gradually over time
  - Paid strategies
  - Organic
- Customize your message to your audience
- Be open, transparent
- Develop engaging content focused on issues people care about
Social Media Do’s and Don’ts

Do:
- Engage with your constituents, represent your voters
- Develop shareable information – videos and photos king
- Take a stand, share your position, show your leadership
- Follow normal ‘rules of engagement’ for conversation
- Keep the public informed
- Share news articles, be a source for good city information
- Remember that everything online lives forever

Don’t:
- Argue, provoke, or respond to ‘Trolls’ trying to start a fight
- Remove comments you don’t like, because you don’t like them
- Over-inform
- Take on a reporter – because a good fight sells newspapers
- Post when angry, impaired, or not in a good frame of mind
LEGAL CONCERNS WITH USE OF SOCIAL MEDIA
PRIVACY & THE INTERNET
SOCIAL MEDIA USERS LOVE TO SHARE!

• Birthdate
• Place of Employment
• Relationship Status
• Family Members
• Places Visited
• Home and Email Addresses and Phone Numbers
• Photos
• Schools Attended

• Political, Religious, Social Viewpoints and Causes
• Clubs, Civic Activities, Networking Groups
• Life Events
• How much they Hate Their Boss
• Offensive Costumes and Remarks
• What They Did on the Day They Called in Sick
• How Much They Drank Over the Weekend
• How They Plan To Ruin Their Ex’s Life
USES DURING LITIGATION

01 Impeachment
02 Photographs
03 Solicitation of Class Members
04 Sub Rosa
05 Jury Selection & Voir Dire
06 Juror Misconduct
But, what about privacy settings?

No reasonable person who takes the affirmative act of posting information on a social media website has an expectation of privacy.

State v. Harris (2012)
One has no reasonable expectation of privacy in information intentionally broadcasted to the world on Twitter.

The sharing of personal information is the very nature and purpose of social networking sites, else they would cease to exist.
“A good rule of thumb for any public official is to never put anything on any social network that you wouldn’t be comfortable with appearing on the front page of your local paper...When you put something out there digitally, it’s out there forever.”

Pennsylvania State Representative Michael Schlossberg
FREE SPEECH AND PUBLIC FORUMS
TRADITIONAL WEBSITE

A traditional website pushing out information in one direction—to the public—does not establish a public forum, and that means the entity does not risk violating First Amendment rights when it excludes content.
Perry Education Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983)

PUBLIC FORUM

In a true public forum, speech restrictions are subject to the highest level of scrutiny and must be narrowly drawn to effectuate a compelling government interest.
LIMITED PUBLIC FORUM

In a limited public forum, a public entity has somewhat greater latitude to regulate speech. However, any restrictions still must be reasonable and neutral as to the speaker’s viewpoint.

SOCIAL MEDIA IS PUBLIC FORUM

Social media has become a vital platform for speech of all kinds. Indeed, social media may now be “the most important” modern forum “for the exchange of views.”
TAKE-DOWN LITIGATION

Social media has become a vital platform for speech of all kinds. Indeed, social media may now be “the most important” modern forum “for the exchange of views.”

Hawaii Defense Foundation v. City of Honolulu, (D. Hi. 2014)
TAKE-DOWN LITIGATION

Public entities face litigation for deleting comments and banning users from the page that are critical of the entity.

Hawaii Defense Foundation v. City of Honolulu, (D. Hi. 2014)
TAKE-DOWN LITIGATION

A practice of removing unfavorable comments invites a lawsuit.

Karras v. Gore, (S.D. Cal. 2014)
TAKE-DOWN LITIGATION

Civil rights organizations are now bringing lawsuits on behalf of members of the public who have comments deleted or are blocked/banned from a public entity’s social media page.
FIRST AMENDMENT CONSTRAINTS
Public Agencies Cannot Prohibit

Comments critical of you or your City based on policy issues

Comments based on the viewpoint expressed
# FIRST AMENDMENT CONSTRAINTS

The Gray Areas Include:

<table>
<thead>
<tr>
<th>No.</th>
<th>Constraint</th>
</tr>
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<tbody>
<tr>
<td>01</td>
<td>Profanity</td>
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<tr>
<td>02</td>
<td>“Defamatory” statements</td>
</tr>
<tr>
<td>03</td>
<td>Personal attacks</td>
</tr>
<tr>
<td>04</td>
<td>“Offensive” statements</td>
</tr>
<tr>
<td>05</td>
<td>Implied threats</td>
</tr>
<tr>
<td>06</td>
<td>Off-topic comments</td>
</tr>
</tbody>
</table>
“LIKING” AND THE FIRST AMENDMENT

_Bland v. Roberts_ (4th Cir. 2013)

- Sheriff terminated employees who supported his opponent in an election, allegedly for poor performance
- Many of the employees had only “liked” his opponents Facebook page
- The Court held that “liking” a page was pure speech and symbolic expression, and that the Sheriff’s interests in maintaining effective services to the public were outweighed by the employees’ interest in highly-protected political speech
  - Likened it to the modern-day equivalent of a front yard campaign sign or bumper sticker
  - Court engaged in a detailed analysis of what it means to “like” something on Facebook
USE OF SOCIAL MEDIA BY ELECTED OFFICIALS
IS A PERSONAL PAGE A PUBLIC FORUM?

• The case law is still developing, but possibly YES. Factors to consider:
  – Does the official identify as a government official?
  – Does the official use it to address constituents?
  – Does the official use it to share information of importance to the community?
  – Does the official post photos of community events?
  – Does the official use it to acknowledge their colleagues or City employees?
  – Does the official use it to discuss their work as government official?
  – Are there any links to the City’s website or social media pages?
  – Do the official’s constituents have access to the page?
  – Does the official use any City resources?
Davison v. Loudoun County Board of Supervisors (E.D. Va. 2017) – Local politician temporarily banned a constituent who posted about County corruption on the politician’s “personal” Facebook page. The case proceeded to a bench trial.

• “The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards.”
• “Criticism of official conduct is not just protected speech, but lies at the very heart of the First Amendment.”
• Held, the politician’s Facebook page “operates as a forum for speech under the First Amendment to the Constitution.”
• But, allowing online speakers to hijack or filibuster online conversations would "impinge on the First Amendment rights" of other forum participants.

THIS IS WHY YOU NEED POSTING GUIDELINES!
My use of social media is not Presidential - it’s MODERN DAY PRESIDENTIAL. Make America Great Again!

3:41 PM - 1 Jul 2017

55,437 Retweets 194,865 Likes
(SDNY May 23, 2018; on appeal)

• Donald Trump established @realDonaldTrump in March 2009.
• Before his inauguration, he used it to tweet about a variety of topics, including politics and pop culture.
• Since his inauguration, he has used it to communicate and interact with the public about his administration, and to occasionally communicate about other issues.
• President Trump has not issued any rule or statement purporting to limit (by form or subject matter) the speech of those who reply to his tweets.
• The account has been operated with the assistance of Daniel Scavino, White House Social Media Director and Assistant to the President. It is used multiple times per day, to announce and defend policies, promote his legislative agenda, announce official decisions, engage with foreign leaders, challenge media organizations who he finds unfair, and other matters related to his office.

• The national Archives and Records Administration has advised the White House that the President’s tweets from @realDonaldTrump are official records that must be preserved under the Presidential Records Act.
• Twitter users engage frequently with the President’s tweets, and it is not uncommon for them to receive more than 15,000-20,000 retweets and tens of thousands of replies.
• The 7 individual defendants tweeted a critical message in reply to a tweet. They were each blocked by the President. The government did not dispute that they were blocked because of the content of their tweets.
• Plaintiffs could not view, reply to, or retweet original tweets, but they could still engage via other users’ replies. They could also see the original tweets from a secondary account or when not signed into their blocked account.
BANNING + BLOCKING USERS

*Knight First Amendment Institute at Columbia University, et al v. Donald Trump, et al*

Questions considered by the Court:

- May a public official, consistent with the First Amendment, “block” a person from his Twitter account in response to the political views that person has expressed? **NO**

- Is the analysis different if that public official is the President of the United States? **NO**
BANNING + BLOCKING USERS

Knight First Amendment Institute at Columbia University v. Donald Trump, Sean Spicer and Daniel Scavino (SDNY 2017) – pending

• “We hold that portions of the @realDonaldTrump account – the “interactive space” where Twitter users may directly engage with the content of the President’s tweets -- are properly analyzed under the “public forum” doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment. In so holding, we reject the defendants’ contentions that the First Amendment does not apply in this case and that the President’s personal First Amendment interest supersede those of plaintiffs.”

https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter
Bess Kalb @bessbell

Thank you to the Knight Foundation for legally forcing @realDonaldTrump to take out his sticky little phone, scrunch his nose, open Twitter, search my name, shout “Do I seriously have to fucking do this,” be told yes by Dan Scavino, take a deep breath, and click “Unblock.”
7:47 PM - Aug 28, 2018

J.D. Durkin @jiveDurkey

NEW -- important update to this -- thanks to @KatieFallow and @knightcolumbia, I've been officially UNBLOKCED by @realDonaldTrump after 14 months.

did I miss anything

Donald J. Trump @realDonaldTrump

@realDonaldTrump is blocked

Jules Suzdaltsev @jules_su

First order of business now that I've been #unblocked.
5:15 PM - Aug 28, 2018

472 50 people are talking about this
Electronic records are specifically included. Govt. Code Sec. 6252(e).

PUBLIC RECORDS ACT

“Records” include all communications related to public business “regardless of physical form or characteristics, including any writing, picture, sound, or symbol, whether paper...magnetic or other media.”
IS THE CITY’S SOCIAL MEDIA COVERED?

- Content that has to be produced includes anything that relates to the conduct of government
- Polls, surveys, data collection
- Metadata, which shows how and when a document was created or revised and by whom may also have to be produced
- Retention guidelines are based on content, not medium
- What about comments and deleted content?
WHAT ABOUT COMMUNICATIONS ON
PRIVATE DEVICES?
City of San Jose v. Superior Court

EMAILS & TEXTS
Emails and text messages by public officials are subject to the CPRA regardless of location, including personal accounts and devices.

PRIMARY FOCUS
Primary focus is whether the message is related to public business, based upon context, content, purpose, audience, and role of individual when message was written or received.

AS AN OFFICIAL
You, as an official, may now be required to:
• search your private emails or personal phones for responsive records if you use your private email account or personal phone to communicate with others concerning public business; and
• certify or provide a factual basis as to whether responsive records exist and/or withheld.

COMPLIANCE
Claiming that the records are not on entity email accounts, computers or servers is NOT enough for compliance now.
Is My Personal Social Media Page Covered by the PRA?

- Were public resources used?
- Is there a definable, well-publicized use for the site, i.e., acting as a candidate, purely personal use, or a separate business use?
- Do users visit the site based on your personal or official contacts?
- Is it being used for any official purpose?
SOCIAL MEDIA & THE BROWN ACT

Members of legislative bodies cannot meet to discuss official business unless the meeting complies with the Brown Act.

The Brown Act does not prevent individual members from publishing their own comments and opinions.

Must have public notice and access to the meeting.
SOCIAL MEDIA AND SERIAL MEETINGS

A “Serial Meeting” is a series of communications that individually do not include a quorum but collectively involve a quorum

• California courts have not definitively ruled on the issue of on-line communications between elected officials and the Brown Act
• However, the usual serial meeting rules likely apply
HYPOTHETICAL

A local newspaper writes an on-line article critical of your City’s proposal to build a new community center. Dozens of comments by members of the community are posted on-line in response to the article. One City Council Member reads the article and posts her own comment about the issue. A second Council Member also posts a comment. A third Council Member “Likes” the comments of the first two Council Members.

Has the Brown Act been violated?
WHEN IT ALL COMES TOGETHER...
Politicians use Twitter’s block button, and citizens feel censored
Among them are comedians, veterans, entrepreneurs, journalists, a professional athlete, a mom, staunch liberals and registered Republicans. ...
Angela Greben, a paralegal and activist on matters related to public officials’ use of social media, filed a writ of mandate in April 2017 against the City of San Mateo alleging non-compliance with the CPRA. Specifically, she objected to the maintenance of the Twitter pages maintained by the Police Department and the then-Mayor, David Lim.

She also asserted that her free speech and due process rights and her right to petition the government for a redress of grievances under the US and California constitutions had been violated by Mayor Lim because he muted her on Twitter.
The City and Greben settled in May 2017 on the following terms:

– City will update its social media policy
– City will archive the Police Department’s direct messages on Twitter
– Mayor Lim will unblock his Twitter account
David Lim @SanMateoDavid · 18 May 2017
Unblocked my twitter 2 all so everyone can c important things I do. Like eat this donut. 😊 @smdailyjournal @JonMays

David Lim @SanMateoDavid · Jan 17
Blocked my first account post-City Council. It felt AWESOME. @CityofSanMateo @AngelaGreben

Marilyn K. Geary
@MarilynKGeary2 Follows you
Way ahead o’y’ all.

Block @MarilynKGeary2
@MarilynKGeary2 will no longer be able to follow or message you, and you will not see notifications from @MarilynKGeary2.
Grant Stern, a local radio host and activist, sued the City of Miami and its Mayor, Philip Levine, over access to the list of people Levine has blocked on his Facebook account; audio recordings of “The Mayor,” a Sirius/XM show Levine hosts, and a month’s worth of Levine’s Twitter posts.

Levine identifies himself as the Miami Mayor on his Twitter and Facebook pages, and posts about official city business and political issues.

Levine blocked Stern after Stern responded to a Levine tweet where he was critical of potential pollution into Biscayne Bay by the City’s stormwater system.
STERN V. CITY OF MIAMI

• Miami and the Mayor tried to stop the deposition of Mayor Levine, claiming that the litigation was “being utilized for the purpose of annoying and embarrassing the City.”
• Stern launched a webpage to crowdsourcedeposition questions for the Mayor from citizens and other people who have been blocked.
• Stern was allowed to depose the Mayor.
EMOJIS IN THE LAW
¯\_(ツ)_/¯
HOW FLUENT ARE YOU?
A Delaware judge interpreted a winking emoticon as a menacing signal. When a man secretly bought a plane ticket next to a colleague who clearly did not wish to see him again, “surprised” her on her flight to Paris, then boasted to friends in a text—“Was next to [the woman] on the plane to Paris and she switched seats ;)”—the man claimed that the wink showed he had just been joking around. The judge disagreed, interpreting the wink as a sign that the man “was amused by yet another opportunity to harass” his target.

*In re: Shawe & Elting LLC (Court of Chancery of Delaware 2015)*
In a case before the Supreme Court, the defendant argued before a jury that his threatening post on Facebook was clearly meant in jest because he followed the threat with the "sticking your tongue out" smiley face. The court, for other reasons, vacated his original conviction. *Elonis v. United States*, 135 S. Ct. 2001 (2015). When the case was remanded, the appeals court upheld his conviction because the jury could easily conclude that the inserted smiley face did not dilute the threat created by the powerful vile words that preceded it.

They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P

GHANAM V. JOHN DOES (MICHIGAN 2014)
• Public Works Director sues for defamation over anonymous comments on an internet message board.
• Court held: “This statement on its face cannot be taken seriously as asserting a fact. The use of the ":P" emoticon makes it patently clear that the commenter was making a joke. As noted earlier, a ":P" emoticon is used to represent a face with its tongue sticking out to denote a joke or sarcasm. Thus, a reasonable reader could not view the statement as defamatory.”
In California, the use of laughing emojis or a laughing devil emoji did not prevent a court from concluding that threats in a tweet were a crime.

In Mississippi, an employer was charged with sexual harassment because he sent an applicant "a picture of a tumescent penis," but when the applicant replied with sexual innuendos and emojis of blowing a kiss and three winking emojis, the court held there was insufficient evidence to establish a claim for emotional distress for the recipient. Blowing kisses and excessive winking hardly suggest emotional distress, even in an emoji world.

The following text message was interpreted by a court in Israel to indicate acceptance of a proposed residential lease:

“Good morning 😊 interested in the house just need to discuss the details ... When's a good time for you?”
ANY QUESTIONS?

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