Navigating Social Media
A GUIDE FOR LOCAL AGENCY OFFICIALS
Joan is an municipal lawyer who represents public agencies throughout California including various special districts. She is general counsel for Olivehurst Public Utility District. She has litigated workplace misconduct matters, and advises public agencies on various workplace issues including social media, the Public Records Act, prevention of harassment, and the Brown Act.
What Happens In An Internet Minute?
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!

- Americans check their phones **58** times a day

Sources: https://blog.rescuetime.com/screen-time-stats-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/267047/americans-trust-mass-media-edges-down.aspx
Facebook is the Most Used Social Platform

% adults who use…

- Facebook: 69% (2019), 54% (2012)
- Twitter: 22% (2019), 13% (2012)
- Snapchat: 24% (2019), 9% (2012)
- Linkedin: 27% (2019), 16% (2012)
- Instagram: 37% (2019), 9% (2012)
- Pinterest: 28% (2019), 10% (2012)

Source: http://www.pewinternet.org/fact-sheet/social-media/
TWITTER STATISTICS

- **Active Twitter Users**: 320 million
- **Daily Active Users**: 100 million
- **Unique Monthly Visitors**: 120 million

- Average of 350 billion tweets per day; 46% of Twitter users tweet at least once a day
- 700 YouTube links shared on Twitter every minute
- Average users spend 170 minutes on Twitter per month
FACEBOOK STATISTICS

1,650,000,000 active users worldwide (15% increase from 2015)
83 million are fake

1,090,000,000 users logon daily (16% increase from 2015)

5 profiles are created every second

4,500,000,000 “likes” per day

10,000,000 Facebook apps available

- Facebook accounts for 1 in 5 page views on the Internet in the U.S.
- 23% of users check account more than 5 times a day; average time per visit = 20 minutes
- 72% of Americans are active on Facebook – 91% of millennials
PRIVACY CONCERNS
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
BUT, I HAVE PRIVACY SETTINGS!

Moreno v. Hanford Stentinel, Inc. (CA 2009)
No reasonable person who takes the affirmative act of posting information on a social media website has an expectation of privacy.

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

Romano v. Steelcase, Inc. (NY 2010)
The sharing of personal information is the very nature and purpose of social networking sites, else they would cease to exist.
What Does this Mean for Elected Officials?

• You’re always “on the record”
• Privacy **does not** exist
• Be transparent and open – all the time
• Use social media to have ‘public conversations’ with your constituents – and treat them like everyone is listening
• Remember that everything online lives forever
BE CAREFUL
THIS MACHINE HAS NO BRAIN
USE YOUR OWN
WHY DO IT?

• Your peeps are there
• Educate your constituents
  • Control the message
• Target your message to specific groups
• Connect with residents you might not otherwise reach
  • Show off your successes
  • Engage in personal ways
DOING IT RIGHT

- Distribute information
- Embrace and get creative
- Online community groups have power
  - Listen to constituents
- Short video segments (10 seconds or less)
  - Generate engagement
    - Be relatable
SOCIAL MEDIA IS AWESOME, BUT

• The Internet never forgets
  • Perception IS reality
• Your critics will be your closest followers
• Anything you say can and will be held against you
  • Once you say it, you can’t take it back
  • Mistakes are magnified
• Line between public and private is often blurred
  • Raises a number of legal issues
Social Media Don’ts:

• Argue, provoke, or respond to ‘trolls’ trying to start a fight
• Remove comments you don’t like, because you don’t like them
• Post when angry, impaired, or not in a good frame of mind
• Take on a reporter – because a good fight sells newspapers
• Post over informing, long press releases
• Weigh in on everything
INTANGIBLE COSTS OF BAD JUDGMENT

Reputational Damage: 1,650,000,000

Unfavorable media coverage and scrutiny

Distraction and disruption

Polarization

Litigation
CRITICIZING GOVERNMENT

A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people. #ByeFelicia
KEYBOARD COURAGE

- Obvious hyperbole
- Personal attacks
- Lack of knowledge of Agency procedures or Governing Body’s actions
  - Anonymity
- Criticizing the government is not new - social media is just a new platform
DON’T FEED THE TROLLS

• Not everyone will love you. Get over it.
• Emerging legal issues regarding banning and blocking users.
  • Ignore them.
• Use caution when responding with “humor.” Or, just don’t.
• If you MUST respond, stick to the facts – never personal attacks.
  • Move the conversation offline.
RESPONDING TO COMMENTS

- Don’t argue
- Be factual
- Provide links
- Encourage off-line communication
- Correct the record, then get out
Conflicts & Bias

01 Duty to make decisions motivated by the public good, not personal interests

02 Duty of loyalty

03 Duty to treat all members of the public in a fair & unbiased manner:

04 Disclosure of “ex parte” communications when item is on Agenda for discussion or action
FAIR & IMPARTIAL

• The public is entitled to have matters heard by body whose members are not motivated by unconstitutional bias
  – Discrimination based on race, religion, gender, economic standing
• Expressed personal animosity against applicant is sufficient to demonstrate bias
Social media in the public sector raises numerous First Amendment issues:

- Establishment of a public forum
- Take down policies
- Banning/blocking users
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.

_Vargas v. City of Salinas_  
(Cal. 2009) 46 Cal.4th 1
Social media has become a vital platform for speech of all kinds. Social media may now be “the most important” modern forum “for the exchange of views.”

Packingham v. North Carolina,
137 S. Ct. 1730 (2017)
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.

*Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983)
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.

SPEECH RESTRICTIONS

PUBLIC FORUMS
- Highest level of scrutiny
- Narrowly tailored to achieve compelling government interest.

LIMITED PUBLIC FORUMS
- Restrictions must be reasonable and viewpoint neutral
• Political speech and advocacy are at the core of the First Amendment
  • Online speech is the same as the town square
  • Offensive, obnoxious and even hateful speech and hyperbole are protected
    • Anonymous speech is protected
  • Criticism of government and public officials is protected
    • Prior restraints are not permitted
IS MY “PERSONAL” PAGE A PUBLIC FORUM?

Do you...
...identify as a government official?
...use it to address constituents?
...use it to share information of importance to the community?
...post photos of community events?
...use it to acknowledge your colleagues or Agency employees?
...use it to discuss your work as an official?
...use any Agency resources?
...link to the Agency’s website or social media pages?
...provide access to constituents?
PUBLIC AGENCIES (AND OFFICIALS) CANNOT PROHIBIT

- Comments based on the viewpoint expressed
- Comments critical of the Official or Agency based on policy, management, and other political issues
GRAY AREAS OF PROHIBITED CONTENT

- Profanity
- "Defamatory" Statements
- Personal attacks
- "Offensive" statements
- Implied threats
- Off-topic comments
WHAT YOU CAN LIKELY PROHIBIT

- Obscenity
- True threats
- Public safety
- Incitement of violence
- Commercial speech
- Confidential information
THE RIGHT TO FREE TWEET
Public entities face litigation for deleting comments and banning users who are critical of the entity.

Hawaii Defense Foundation v. City of Honolulu (D. Hi. 2014)
A practice of removing unfavorable comments invites a lawsuit.

Karras v. Gore (S.D. Cal. 2014)
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 page.

ACLU v. City of Beech Grove (S.D. Ind. 2016)
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
Donald Trump established @realDonaldTrump in March 2009, which he has used since his inauguration to communicate with the public about his administration.

The 7 individual defendants tweeted a critical message in reply to a tweet, and were 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.
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

Knight First Amendment Institute v. Trump et al. (2nd Cir. 2019)
“The First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open dialogue because they expressed views with which the official disagrees.”

Knight First Amendment Institute v. Trump et al. (2nd Cir. 2019)
• The account was private before he was elected, and may become private again when he is out of office
• He was using the account to communicate with an interact with the public about his administration
• He has not sought to limit who can follow the account
He has not sought to limit the kind of speech users can post in reply to his tweets.

- It “bears all the trappings of an official, state-run account.”
- He and his staff have referred to his tweets as “official statements.”
- The interactive space associated with each tweet is a public forum.
@realDonaldTrump is blocked

Jules Suzdaltselv
@jules_su

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

J.D. Durkin
@jiveDurkey

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

did I miss anything
Davison v. Randall et al. (4th Cir. 2019)

- Chair of county board of supervisors temporarily banned a resident who posted about County corruption on the Chair’s Facebook page.
- Chair acted under color of state law in maintaining a government official Facebook page and in banning resident from the page.
- The “interactive component” of the Chair’s Facebook page qualified as a public forum under the First Amendment.
- Chair engaged in unlawful viewpoint discrimination by banning resident.

- School Board candidates operated Facebook and Twitter campaign pages that later were changed to reflect their positions as elected officials and District email addresses, and they used pages to communicate about District activities
- Board members blocked parents who were critical of the District and its officials
- Post –Trump: No qualified immunity for elected officials who blocked parents
- MSJ denied
PUBLIC RECORDS & BROWN ACT
Electronic records are specifically included. Govt. Code Sec. 6252(e).

“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 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 RECORDS ON PRIVATE DEVICES?

**EMAILS & TEXTS**
Emails and text messages 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.

**EMPLOYEES + OFFICIALS**
May now be required to search personal emails or phones for responsive records if account or phone is used to communicate with others concerning public business, and to provide such responsive records.

**COMPLIANCE**
Claiming that the records are not on entity email accounts, computers or servers is NOT enough for compliance now.

*City of San Jose v. Superior Court*
IS MY PERSONAL SOCIAL MEDIA PAGE COVERED?

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 personal or official contacts?

Is it being used for any official purpose?
SOCIAL MEDIA & BROWN ACT

Cannot meet to discuss official business unless meeting complies with Brown Act

Must have public notice and access to the meeting

Does not prevent individual members from publishing their own comments and opinions
SOCIAL MEDIA & 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 online communications between elected officials and the Brown Act. However, the usual serial meeting rules likely apply.
A local newspaper writes an online 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 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?
Do not discuss specific business as a quorum

Individual posts are OK

Do not respond directly to posts of other officials

“Discuss” does not include emojis or “Likes”

“Participation” means publicizing information, ideas, or opinions
FREE SPEECH & EMPLOYEE DISCIPLINE
COMMON FACT PATTERNS

• Employee misuse of sick and protected leaves of absence
• Disparaging remarks about supervisors, co-workers, vendors, clients, etc.
• Harassment by co-workers
• Inappropriate comments or content that implicate the workplace
• Breach of confidentiality and other employer policies
A Nashville, Tennessee, police officer was fired in February after an investigation into a Facebook comment he made about how he would have shot motorist Philando Castile five times instead of four. Castile died last July after a St. Paul, Minnesota, officer shot him four times during a traffic stop.

A fire captain in Austin, Texas, was suspended in November after posting inflammatory political opinions regarding Hillary Clinton and President Barack Obama on Facebook.

A Mount Vernon, New York, fire lieutenant was suspended last August for an Instagram post expressing support for Micah Johnson, who killed five Dallas police officers and wounded seven others in a sniper attack.

A New Rochelle, New York, police sergeant was suspended because of a Facebook post criticizing the Black Lives Matter movement and protesters.
Some Other High-Profile Terminations

01 An employee in Northern Virginia was fired shortly after she flipped off the Trump motorcade as it passed her on her morning bicycle route. She is now suing the government contractor who fired her, which claims it feared retaliation from the current administration if it did not fire her.

02 Roseanne TV show cancelled in response to public outcry following Roseanne’s insensitive Tweet about Valerie Jarrett, which followed her insensitive Tweet about Parkland shooting survivor David Hogg.

03 CBS summarily fired its VP/Senior Counsel for questionable Facebook commentary on Las Vegas shooting: “I’m actually not even sympathetic bc country music fans are often republican gun toters.”

04 Google fired an engineer who claimed in an internal online forum that biological differences were behind gender inequality in the tech industry. He is now suing in a proposed class action claiming he was discriminated against as a white male who supports Trump.
Public Employee Free Speech Legal Analysis

01. Was the employee speaking as a private citizen on a matter of public concern?

02. Did the employee’s free speech interest outweigh the employer’s efficiency interests?

03. Did the speech impair discipline or harmony among co-workers?

04. Did the speech have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary?

05. Did the speech interfere with the normal operation of the employer’s business?
Discipline may be appropriate if the speech “impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes performance, or interferes with operations.”
Police officer’s online selling of sexually explicit videos made while in uniform was not protected under the First Amendment.

City of San Diego v. Roe (2004) 125 S. Ct. 521
Social worker’s critical Facebook posts about community members she served was not protected.
A police officer who got drunk while working security at a concert was placed on leave was properly fired for posting on Facebook:

“Some people’s hunting season has already started. Not mine. I have some loose ends to tie up. But soon! There’s no revenge like a beast scorned.”
District Attorney spokeswoman who posted on Facebook accusing police officers of “sanctioning homicide” and shared a link to an article criticizing law enforcement was properly terminated.
Fire Department’s interest in managing its internal affairs outweighs a fire captain’s right to post “offensive” online statements.

Grutzmacher v. Howard County (4th Cir. March 20, 2017)
KNOW YOUR POLICIES!
BAD POLICY, BAD RESULTS

- The Honolulu Police Department operated a Facebook page described as “a forum open to the public” and encouraged users to “share your experiences with us, either good or bad”
- The page administrator deleted comments and banned two users from further posts because of comments critical of the Department
- The two users sued for First Amendment retaliation in federal court

Hawaii Defense Foundation v. City & County of Honolulu (D. Hi. 2014)
OK POLICY, BAD RESULTS

• The San Diego Sheriff’s Department operated a Facebook page inviting users to post comments, but requesting they remain “civil, respectful, and on-topic”

• Despite the Department’s posting guidelines indicating that it was not opposed to “dissenting opinions,” it had a practice of removing unfavorable comments

• In litigation, hundreds of posted comments in favor of free speech were deleted, and the Department shut down the entire page

Karras v. Gore (S.D. Cal. 2014)
USER GUIDELINES

• Prohibit only unprotected speech
• Post in obvious and accessible place on each social media page
  • Retain what you delete or remove
  • Seek legal guidance before removing content
Know what you’re allowed to do on the City’s social media sites in your elected capacity
You might not be allowed to share content, even if it’s positive
West Hollywood takes a strict approach:

• “3.7. City social media sites shall be managed consistent with the Brown Act. Members of the City Council, Commissions and/or Boards shall not respond to, ‘like’, ‘share’, retweet or otherwise participate in any published postings, or use the site or any form of electronic communication to respond to, blog or engage in serial meetings, or otherwise discuss, deliberate, or express opinions on any issue within the subject matter jurisdiction of the body.”
POLICY LANGUAGE FOR OFFICIALS

• “It is recommended that the content and tenor of online comments and information posts should model the same decorum displayed during Council, Board, and Community meetings…”

• “City social media sites shall be managed consistent with the Brown Act. Officials shall not respond to, "like", "share", “retweet” or otherwise participate in any published postings, respond to, blog or engage in serial meetings, or otherwise discuss, deliberate, or express opinions on any issue within the subject matter jurisdiction of the body.”
“LIKING” AND EMOJIS
“Liking” is pure speech and symbolic expression fully protected by the First Amendment.

Bland v. Roberts (4th Cir. 2013)
The use of emojis can establish a party’s intent or context and can be used as evidence in litigation and other proceedings.

United States v. Elonis (3rd Cir. 2016)
They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets 🙄
HOW FLUENT ARE YOU?
EMOJI EVIDENCE
A criminal 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.

*United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016)
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 sued 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.”
QUESTIONS?
All that Glitters is Not Gold: MANAGING SOCIAL MEDIA IN THE PUBLIC WORKPLACE