



(Legal) Do's* and Don'ts for Municipal Websites

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* Using AP Style. Could also be “Dos” following Chicago Manual of Style

Housekeeping items

- DO: interrupt me and ask questions!
- Don't: be offended if I repeatedly refer to towns (omnibus term for municipalities)
- DO: take my card if you want a copy of the presentation emailed (I will definitely lose yours, and it's easier to find me)



What are website do's and don'ts?

- Don't: Forget about the 1st Amendment
- Do: Know what you're required to post
- Don't: Fly by the seat of your pants (aka DO make a policy)
- Don't: Forget about records management
- Do: Make your site ADA compliant



Don't: Forget about the 1st Amendment



Don't: Forget about the 1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



Don't: Forget about the 1st Amendment

1. Does 1st Amendment apply to form of speech?
2. Is speech in question protected by 1st Amendment Free Speech clause?
3. If yes, what type of forum are we in?
4. Did government action violate standards applicable to that forum type?



Does the 1st Amendment apply?

- 1st Amendment's Free Speech Clause limits government regulation of private speech, doesn't apply when gov't speaks for itself
- Gov't has own rights as speaker / can have own ideas /viewpoints without being subject to 1st Amendment free speech claims
 - Aka gov't can CHOOSE content it wants to post so long as
 - Doesn't violate other laws (e.g. Establishment Clause)
 - Have to comply with laws mandating certain info posted on site



Government Speech

Pleasant Grove v. Summum, 555 U.S. 460 (2009)

- City park in Utah had permanent monument of 10 Commandments that had been donated
- A religious organization, Summum, wanted to donate another permanent monument around same size displaying “Seven Aphorisms of Summum”
- City denied request, Summum sued saying park was a public forum and city violated 1st Amendment / discriminated based on viewpoint by not allowing other monument



Government Speech

Pleasant Grove v. Summum, 555 U.S. 460 (2009)

- Supreme Court said:
 - Of course parks are public forums and obviously gov't can't discriminate based on viewpoint BUT
 - Public forum analysis doesn't apply here and there's no viewpoint discrimination because "Permanent monuments displayed on public property typically represent government speech"



Government Speech

Pleasant Grove v. Summum, 555 U.S. 460 (2009)

- AKA permanent monuments are a way for the gov't to speak, and 1st Amendment doesn't apply to gov speech
- Court made clear distinction between forms of private speech in public parks, like rallies, temporary holiday displays (Christmas trees and menorahs), and the government speech represented by **permanent** monuments.
- Alito, writing majority opinion, said even “long winded speakers eventually go home with their leaflets, and holiday displays are taken down; but, permanent monuments endure, and are obviously associated with their owners”



Types of Speech **Not** Protected by 1st Amendment

Obscenities

- The average person, applying contemporary standards, would find the work appeals to a “prurient interest”
- A work, taken as a whole, lacks serious literary, artistic, political, or scientific value

Fighting Words

- Likely to “incite immediate violence”
- Court continues to limit scope (hard to use)



Types of Speech **Not** Protected by 1st Amendment

Defamation

- False statements that damage another person's reputation
- Public figures have higher standard, must establish by clear and convincing evidence that defendant acted with malice (aka knew it was false or acting with reckless disregard as to veracity of statement)

Advocacy of illegal action

- Speech not protected when it is "intended to incite or produce imminent lawless action" and is "likely to incite or produce such action"

Can municipality regulate speech at all?

Time/Place/Manner restrictions

- Lower level of 1st Amendment scrutiny
- Must be
 - Content neutral
 - Narrowly tailored to a significant gov't interest
 - Rationally related to gov't interest
 - Leave open ample alternative channels
- Applicability in cyber context given that we're not dealing with a physical space????



Can municipality regulate speech at all?

Content Based Restrictions

- Highest level of scrutiny
- Least restrictive means advancing a compelling government interest
- Strict in scrutiny, fatal in fact
- **DON'T HAVE CONTENT BASED REGULATIONS**



What type of forum are we in?

- Forum analysis used for speech on government property
- 3 different types of forums
 1. Traditional Public Forum
 - 2a. Designated Public Forum
 - 2b. Limited Public Forum (type of designated public forum)
 3. Nonpublic forum
- Regardless of type of forum type, cannot discriminate based on viewpoint



Traditional Public Forum

- Places traditionally associated with expression / places of assembly (parks, sidewalks, streets)
- Strongest 1st Amendment protections of 3 forums
- Can have time / place / manner restrictions. Remember:
 - Content neutral
 - Narrowly tailored to serve significant gov interest
 - Rationally related to interest
 - Alternative channels of communication open



Designated / Limited Public Forums

- Designated Public Forum
 - Area not traditionally associated with expressive activity, but gov't **intentionally** designates it as a public forum
- Limited Public Forum
 - Type of designated forum
 - Gov opens up public space for an intended purpose
 - Can restrict expressive activity so long as viewpoint neutral and reasonable in light of intended purpose of forum
 - Restrict classes of speakers or types of speech
 - Think town hall / rules of procedure on speakers at public meetings



Nonpublic Forum

- Government space that “is not by tradition or designation a forum for public communication.”
- Restrictions on speech need only be reasonable and viewpoint neutral



Forums

- Public forum → highest level of forum scrutiny
- Limited public forum → reasonable restrictions, viewpoint neutral, related to intended purpose
 - Nonpublic forum → reasonable, viewpoint neutral



Application of 1st Amendment to the Interweb Sites

- Municipal Websites
- Municipal Social Media Sites
- Public Official Social Media Sites



Application of 1st Amendment to Municipal Websites

- Greatest amount of control
 - Content, design
 - Don't forget to post what's required by statute (get to that later)
- 1st Amendment caselaw on municipal websites generally involve hyperlinks (introduces interactive element to site)



Application of 1st Amendment to Municipal Websites

Putnam Pit v City of Cookeville, 221 F3d 834 (2000)

- City had website with hyperlinks to various businesses
- Didn't have policy
- Local newspaper wanted hyperlink to their site on city page
- City employee said newspaper “too controversial”, informally decided only to post links to nonprofits
- City formally changed policy to only include links “promoting economic welfare, industry, or tourism of city”
- Still refuses to post hyperlink to newspaper



Application of 1st Amendment to Municipal Websites

Putnam Pit v City of Cookeville, 221 F3d 834 (2000)

- Plaintiff sues, says city website is a public forum and, even if it's a nonpublic forum, not posting hyperlink is unconstitutional viewpoint discrimination
- Court says website is nonpublic forum and restrictions on speech reasonable; **HOWEVER**, gave too much discretion to city / standards for links weren't clear so potential for viewpoint discrimination



Application of 1st Amendment to Municipal Websites

Sutcliffe vs Epping School District, 584 F.3d 314 (1 Cir. 2009)

- Town in NH had municipal website
- Group advocating for reduced gov spending wanted a hyperlink to its site on town website
- Town said no, but had link to another organization that supported town's spending
- Plaintiff said 1st Amendment violation – viewpoint discrimination in a designated public forum
- Court didn't even get into forum analysis
- Website constituted gov't speech



Application of 1st Amendment to Municipal Websites

Takeaways:

- Maybe don't allow for any hyperlinks
- Have policy articulating clear standards for hyperlinks
 - Maybe limit to class / type of business
- Don't allow advertisements
 - Not allowed under federal law if using .gov
 - Opens up whole other can of worms
- Absent comment section, probably not going to be considered a public forum



Application of 1st Amendment to Municipal Social Media Sites

- Less control than own site
- Muddling of gov speech and public expression (comments, “likes” etc.)
- Developing area of caselaw

Application of 1st Amendment to Municipal Social Media Sites

Blackwell v City of Inkstar, 596 F. Supp. 3d, 906 (2022)

- City police dept had FB page, anyone could see it and post comments. Said purpose was to “provide an avenue to communicate between the public and police”
- Local activist prolifically posted accusing mayor and police of corruption; comments got deleted and user blocked
- Dept had policy stating it reserved right, at sole discretion, to block user or remove comments “if the content posted promotes private business, political affiliations, ideologies or positions, or any other third-party advertisements, sales, or promotions”
- Plaintiff said site was public forum and, deleting comments and getting blocked viewpoint discrimination, City said page just gov’t speech

Application of 1st Amendment to Municipal Social Media Sites

Blackwell v City of Inkstar, 596 F. Supp. 3d, 906 (2022)

- Court decided plaintiff sufficiently pled facts alleging city created public forum and page wasn't just conduit for gov speech
- **THEY INVITED COMMENTS!**
- Also decided plaintiff sufficiently alleged viewpoint discrimination



Application of 1st Amendment to Municipal Social Media Sites

Takeaways

- Disabling comments / any form of feedback altogether isn't the worst idea...
- Craft very specific policy if allowing comments
 - Again, think of public comment period during board meetings
 - Don't leave too much up to discretion / clear standards for comments
 - Have procedure to determine if blocking someone
 - Ask yourself the purpose behind not allowing certain types of comments
- Don't invite comments then claim you didn't create a forum!

Hypothetical!

Town of Opha Springs has a Facebook page. It's stated purpose is to disseminate information easily and update residents on the goings on about town. Posts usually relate to the time and place of board meetings, street closings, parking bans, and water main breaks, with the occasional post about an employee retiring, or Supervisor Matilda attending a local business opening. It reserves the right to delete advertisements or comments that don't relate to the post itself. Henry Moore, local agitator, ferreter of the nefarious, and kind of weird cat, posts the following:

- “Supervisor Matilda is a pedophile”
- “Wanna make \$12,000 in 2 days?...”
- “Supervisor Matilda looks like a fat b*#@#% in that picture”
- “It's a waste of taxpayer dollars for Superloser Matilda to go to business openings”
- “My retirement plan is to sell cocaine”



Public Official Social Media Pages

- Is banning / blocking someone from account or deleting comments considered a “state action” / acting under “color of state law” for 1983 claim / 1st Amendment purposes
- Can also think of it as acting in official capacity vs personal capacity
- Very fact specific!!!

Public Official Social Media Pages

- 2nd Circuit – Yes (Knigh t v Trump, 928 F3d 226 [2019] BUT vacated by Supreme Court)
- 4th Circuit – Yes (Davison v Randall, 912 F3d 666 [2019])
- 6th Circuit – No (Lindke v Freed, 37 F4th 1199 [2022])
- 8th Circuit – No (Campbell v Reisch, 986 F3d 822 [2021])
- 9th Circuit – Yes (Garnier v O’Conner-Ratcliff, 41 F4th 1158 [2022])

Public Official Social Media Pages

Knight v Trump, 928 F3d 226 (2019)

- Then President Trump used Twitter for public discussion and policy announcements
- Had gov't employees help run Twitter account
- Official White House page had link to Twitter account
- Eventually Twitter deactivated account
- No question or argument about acting in official capacity
- Question was is the account a public forum?

Public Official Social Media Pages

- 2nd Circuit said yes
 - Look to “policy and practice of the government” and “the nature of the property and its compatibility with expressive activity”
 - Said President repeatedly used account of official vehicle for governance and made interactive features accessible without limitation
 - blocking people who disagreed with tweets / policy constituted viewpoint discrimination

Public Official Social Media Pages

- Supreme Court vacated judgment and remanded to 2nd Circuit with instructions to dismiss as moot since Trump no longer president as of 2020
- Justice Thomas filed concurring opinion saying he didn't think Twitter account was a public forum bc Twitter had a lot of control and can shut down account entirely
- “We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms”

Public Official Social Media Pages

Campbell v Reisch, 986 F3d 822 (2021) – 8th Circuit

- State rep, created Twitter account announcing candidacy in 2015
- Elected in 2016 and tweeted about work as state rep
- “Used Twitter to engage in political discourse and indicate her position”
- Court said not acting under color of state law, account used to promote herself and was “akin to a campaign newsletter”
- Look at totality of page / posts as a whole

Public Official Social Media Pages

Garnier v O'Conner-Ratcliff, 41 F4th 1158 (2022)

- 2 school district trustees created FB and Twitter pages announcing campaigns for office
- After election used pages to promote school board business
- Plaintiffs posted lengthy, repetitive comments
- Trustees deleted comments, eventually blocked Garniers
- Used “word filter” on FB that precluded comments with certain words. Effect was no comments got posted, but could still react with “likes” or “dislikes” etc.

Public Official Social Media Pages

Garnier v O’Conner-Ratcliff, 41 F4th 1158 (2022)

- Trustees argued that they closed public forum by using word filter and blocking not ”state action”
- Test court applied was if conduct, even if “seemingly private”, sufficiently related to performance of duties to create a “close nexus” between gov’t and conduct
- Court said trustees didn’t really promote themselves / campaign
- Prominently listed themselves as officials and content geared toward providing info

Public Official Social Media Pages

Garnier v O'Conner-Ratcliff, 41 F4th 1158 (2022)

- Word filter on FB did not create closed forum because people could still "like" or "dislike" posts, also not applicable to Twitter account
- Also could not rely on past practice / "unspoken policy" of deleting repetitive comments to create a limited public forum. Standards for inclusion / exclusion must be "unambiguous and definite"

Public Official Social Media Pages

Takeaways

- Not the worst idea to prohibit comments altogether
- Campaign speech is decidedly private
- Most courts will look to posts as a whole
- Simply posting about your kid's birthday does not turn an official page into a private one
- Creating page before you enter office does automatically make it private / campaign page
- Have clear, unambiguous, viewpoint neutral standards if planning on deleting comments / blocking

Do: Know what you're required to
post on your site

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Public Officers Law § 106 (3): Minutes on municipal websites

- If town/village/city/county maintains a regularly and routinely updated website and utilizes a high speed internet connection then...
- Minutes must be posted on website within two weeks of meeting OR one week from executive session
- Unabridged video or audio recordings or unabridged written transcripts can be considered minutes for purposes of this section



Do: Know what you're required to post on your site

Public Officers Law §103 (e)

- Records that will be discussed at an upcoming meeting available to the public upon request at least 24 hours before the meeting to the extent practicable; and
- Post records to the municipal website (if the muni has one) at least 24 hours in advance to the extent practicable

***Municipality **not** required to spend additional money to implement the website requirement



Do: Know what you're required to post on your site

Public Officers Law § 103-a

- Allows board member to videoconference in from undisclosed location under extraordinary circumstances
- Boards that opt-in have to adopt local law and provide guidelines that constitute extraordinary circumstances
- Municipality **MUST** have a website if they opt in to videoconference under extraordinary circumstances
- Meetings must be recorded and posted on website within five days and retained for five years
- Videoconferencing policy must be posted on website

Do: Know what you're required to post on your site

General Municipal Law §30 (7) Financial Reports

To the extent practicable, each municipality shall make accessible to the public via its official internet web site documentation pertaining to:

- its most recent annual financial reports
- current year budget
- most recent independent audit report and
- most recent fiscal performance plan or multiyear financial plan required pursuant State Finance Law Section 54(10)(g)



Do: Know what you're required to post on your site

- **General Municipal Law § 99-w (2)**
Changing Location of a military memorial or monument – post notice for public hearing on website
- **General Municipal Law § 704 (1)** - Notice of hearing on petition or joint resolution to initiate annexation of territory
- **General Municipal Law Article 17-a** – various plans / agreements / notices related to consolidation or dissolution



Don't: Fly by the seat of your pants
(aka DO make a policy)



Policy Considerations

Do: Specifically designate specific site / social media page as official

- Community pages can be conflated (sometimes on purpose)
- Talk to department heads / know what websites out there
 - Sometimes highway or clerk's office might set up own social media page to relay information



Policy Considerations

Do: Specifically designate specific site / social media page as official

- Adopt a resolution codifying list of municipal pages
- Note on page itself that it's the municipality's / department's official page
- Routinely search for imposter pages



Policy Considerations

Don't: Assume the clerk will take care of the website or social medial account

- designate a position in the policy
- talk to the person beforehand!

Do: Codify clear, unambiguous guidelines for deleting comments on social media sites

Do: Keep record of passwords

Do: Have rules / guidelines on what to post

Do: Have records retention strategy



Don't: Forget about records retention!



Records Retention

LGS Records Retention Schedule

- How frequently is content posted?
- How much content is being posted?
- Are posts original copy or a duplicate?
 - Records retention only requires keep original
 - Is website / social media site only place you can find that info?
- What strategy is employed to manage the records (screen captures? Cloud based service?)
- Review programs available for extracting the information from social media sites (does it include comments?)



Do: Comply with the ADA

Examples of Website Accessibility Barriers

- **Poor color contrast.** People with limited vision or color blindness cannot read text if there is not enough contrast between the text and background
- **Use of color alone to give information.** For example, using red text alone to show which fields are required on a form.
- **No captions on videos.** People with hearing disabilities may not be able to understand information communicated in a video if the video does not have captions.

Do: Comply with the ADA

Examples of making website more accessible:

- **Color contrast in text.** Helps people with limited vision or color blindness read text that uses color.
- **Text cues when using color in text.** When using text color to provide information (such as red text to indicate required form fields), including text cues is important for people who cannot perceive the color. For example, include the word “required” in addition to red text for required form fields.
- **Video captions**
- **Text size and zoom capability.**



Do: Comply with the ADA

- Existing technical standards provide helpful guidance on how to ensure website accessibility of website features.
- Web Content Accessibility Guidelines (WCAG)
- Section 508 Standards (used by fed gov't)



Questions?

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