



CHAPTER 9

SOCIAL MEDIA USE BY ELECTED OFFICIALS

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Social media engagement has become a regular part of life. Daily, we check our emails and texts, and then probably go on to check our favorite social media sites, such as Facebook, Instagram, Twitter, and others. Local governments and their constituents are also mutually interested in connecting via social media, whether to conveniently transact business or provide timely information about everything from street closures to street festivals. So it's no wonder that elected officials, too, have integrated social media into their public lives. But if you're 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 chapter explores a few of them.

Open Meetings Law

While Chapter 5 outlines the basics of the Colorado open meetings law (COML), it's worth examining more specifically how its requirements can extend to your social media use. Consider this scenario: You have a Facebook page for yourself under the category of "Politician." You post information about city happenings and resources, and welcome others to post there as well. One day, you post on a controversial topic that the council will be tackling at its next meeting, and two of your fellow councilmembers get wind. All three of you go back and forth posting about your respective views and how you intend to vote on the topic.

Is this a "meeting" within the meaning of the open meetings law? Well, it seems at least arguable that it is! Remember, a "meeting" under the law includes a gathering convened electronically to discuss public business. When there are three or more members of the local public body (or a quorum, whichever is less) participating in such a gathering, that can trigger the notice and "open to the public" requirements of the law. If triggered in this type of social media discussion, how do you comply with the 24-hour "timely" posting requirement in the COML when you're posting on Facebook? How do you meet the "open to the public" requirement? These are questions for which there are not clear answers, 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.

Constitutional Concerns

A scenario: You post about the upcoming agenda item on your 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, including some hateful attacks from the citizen you defeated in the last election, and some uncalled-for memes and photos. You decide the hateful attacks aren't helpful to the discussion—keep it positive, people!—and so you “block” your prior campaign rival from posting and you start deleting some of the particularly disagreeable comments. A few days later you ultimately decide that the better part of valor is to just delete the whole darn post.

Did your act of “blocking” your rival raise free speech concerns? It may well have! Remember, the constitution provides strong protections for free speech and generally prohibits the government from censoring speech that occurs within those venues established for the open exchange of ideas on matters of public concern. These principles have raised the question of whether a public official's Facebook page or Twitter account is a public forum such that commenters cannot be blocked, or their comments removed, based on their content.

While the law in this area is still developing, a few courts have concluded that if a public official has a social media page or feed that essentially “walks and talks” like a governmental forum, then the medium is a public forum subject to the principles regulating free speech. So, for example, where an elected official designates the page as their official page as a member of an elected body, uses the page to communicate with constituents as an elected official about government events, and invites followers to use that page for discussion of any topics relating to the government, the official cannot block persons who post critical content. The takeaway? A social media site can be a great way to communicate with constituents but if that's how you use your accounts, don't block people from posting.

Also in the above scenario, if you've decided to 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. And public records are open for public inspection and copying. 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 isn't a clear answer...but you see the point! If there's 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 reasonable and defensible posting rules in place so that everyone knows up front your expectations for your page.

Quasi-Judicial Rules of Engagement

A further word of caution on social media concerns your duties as a decision-maker in quasi-judicial matters. Consider this 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're worried that it's 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're 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 7:00 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've certainly stated that you're "taking no position" at this time, right? 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, but, all I'm 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. With a post like this you can see how, even if your intentions may have been honorable, doubts can be cast on your impartiality and neutrality. Those doubts increase if your involvement goes beyond this scenario—say, for example, that you are also posting or responding to comments about the merits of the application.

When it comes to social media buzz around quasi-judicial matters, remember that due process requires you to be impartial and base your decision upon evidence presented at your public hearing. Remember also that defensible quasi-judicial decisions are about good process. As part of that process you will ultimately hear the case and have the power to make the decision—at the time that it's ripe for your body's decision! Avoid the temptation to leap into the social media fray, as that will protect your ability to serve as a quasi-judge, and protect your governing body's decision.

Some Suggestions

Social media use by elected officials implicates new and evolving legal issues, and this chapter 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’s 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 like “Town Halls,” re-posts of City newsletters, links to articles that tout your great city, and the like. If you’re careful about what you post, you’re not going to have to confront the uncertainties of COML, CORA, and other laws. If you stick with helpful but non-controversial posts, then there won’t be much of a need to delete posts.
- 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’ve 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 don’t use the official city/town logo, to avoid any implication that yours is an “official” city/town page.