


# Social Media and Local Governments: Issues for Elected Officials and Policy Issues for Local Governments Own Use

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# Session Overview

- Part I: Summary of Legal Issues Raised by Elected Officials' Use of Social Media
- Part II: Real-World Cases/Forum Analysis
- Part III: Social Media Policies



# Legal Issues With Elected Officials' Use of Social Media

- Is the social media platform public or private?
  - What are the legal standards courts are using to determine this?
  - What difference does it make?
- Is the platform a forum for public expression?
- Is the content government speech?
- Are officials' comments/tweets/posts public records?
- Does elected official discourse on social media violate the open meetings law?

# Is a Public Official's Social Media Platform a Public Forum for Free Speech?

- Types of Platforms:
  - Official Government
  - Individual Official
  - Candidate/Campaign
  - Personal friends and family









# Definition of Social Media

Forms of electronic communication (such as websites for social networking and microblogging) through which ***users create online communities to share information, ideas, personal messages, and other content*** (such as videos). *Merriam-Webster*

# Free Speech Forum Analysis



What free speech rights do people have in government places, programs, and social media sites?

# The Very Basic Concepts

- Parks and streets are just about the only things that are always open to public expression.
- A government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public expression.
- The “social” aspect of social media likely constitutes some type of limited or designated forum.

# Government Speech

- When the government speaks, or when the government adopts private messages as its own, that's "government speech" and public forum analysis does not apply.






# Public Comment/Hearings



- Designated or limited forum

# A forum can have multiple parts

- Board Meeting





- Twitter Account



# Emerging social media case law

- Courts look to the content to determine whether it is governmental
  - @realDonaldTrump Twitter account held to be governmental because the President uses it to conduct public business. *Knight First Amendment Institute v. Donald J. Trump, 302 F. Supp. 3d 541 (2018)*
  - Board Member used Facebook page "as tool of governance" and used public resources to support the site. *Davison v. Loudoun County Board of Supervisors, 267 F. Supp. 3 702 (2017)*

# Factors Courts Consider

- The policy and practice of the government
  - Social Media Comment Policies can be used to set parameters for the forum
  - Blocking comments because of their content may be viewpoint discrimination, a violation of the constitution regardless of the type of forum.
- The nature of the property and its compatibility with expressive activity

# Other Factors

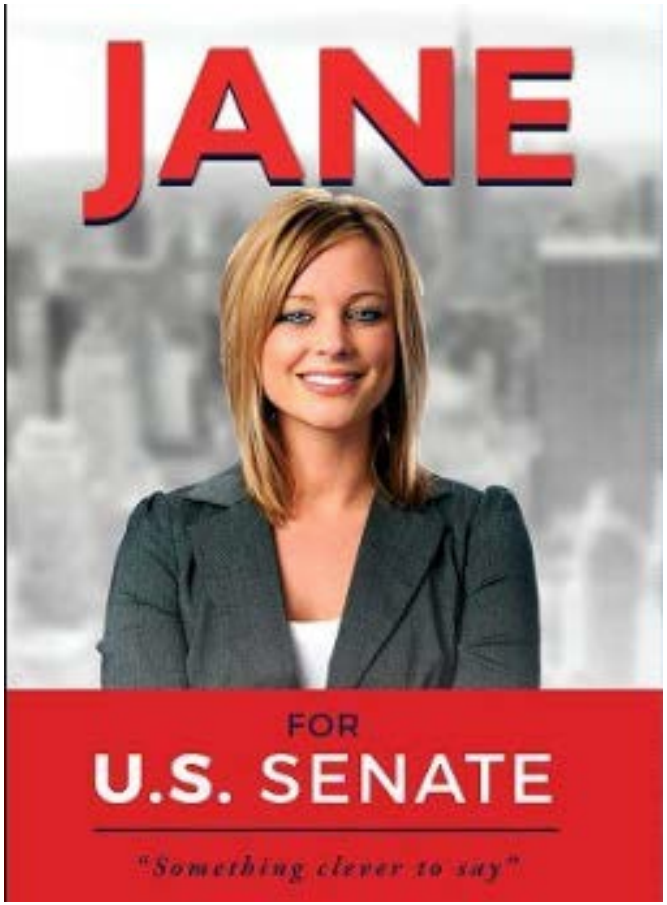
- The central purpose of the program in which the speech in question occurs
- The degree of editorial control exercised by the government or private entities over the content of the speech
- The identity of the literal speaker
- Whether the government or the private entity bears the ultimate responsibility for the content of the speech

# Are elected official comments/tweets/posts public records?

- Law varies by state: Based on content
- Public records can exist on private devices and accounts and on private social media sites.
- Posts are public records

  "…if the posts relate to the conduct of government and are prepared within a public official's scope of employment or official capacity." *West v Puyallup, 410 P.3d 1197 (2018)*

# Constituent Communications or Transacting Public Business?



# Do elected officials' posts on social media violate the open meetings law?

- Law varies by state: Based on content
- Has a majority gathered together?
- Is it a walking quorum?
- Is the social media platform an intermediary for deliberation or decision-making?

# Things to Avoid




- Viewpoint-based discrimination.
- Majorities engaging in near real time conversations on social media.
- Conducting public business on personal or political social platforms.