

Social Media & Townships

Keeping it Legal

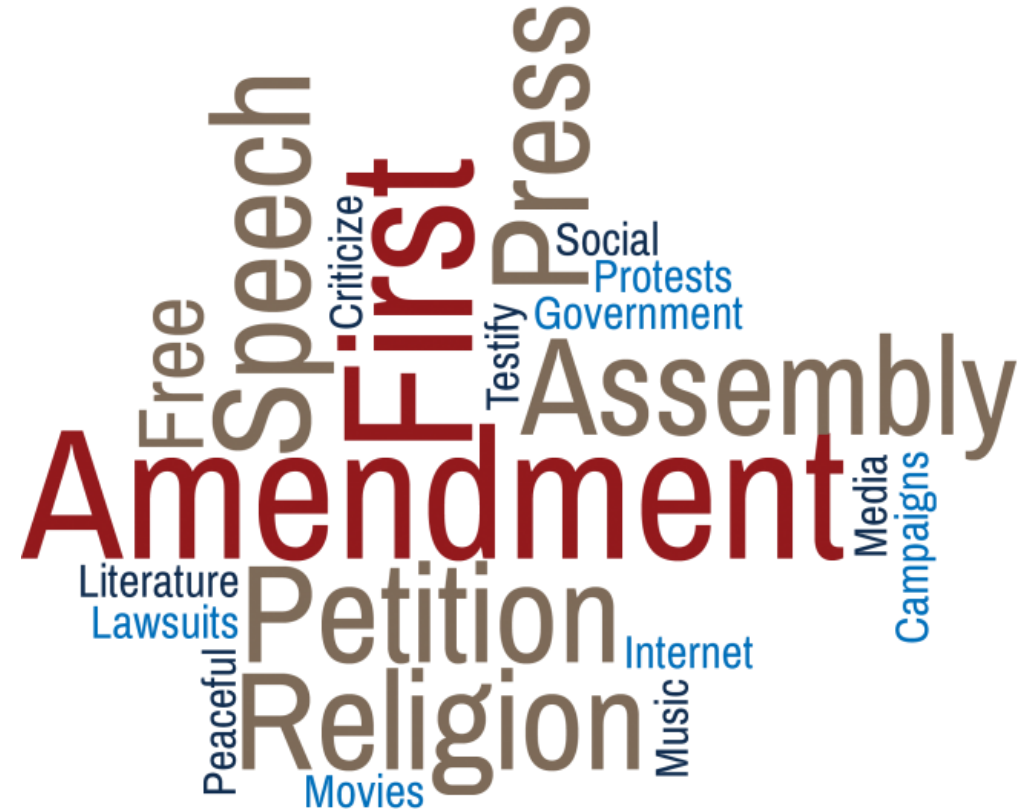
Julie Tappendorf, Equity Partner

Ancel Glink P.C., Chicago



First Amendment

- U.S. Supreme Court says *government* social media is subject to First Amendment
- First Amendment does not apply to private persons or to Facebook, Twitter, etc.



U.S. Supreme Court says that the First Amendment right of free speech means citizens have a right to disagree with the government and express their opinions without fear of censorship

When the government opens a “forum” on social media, it invites speech, including criticism

What do
comments have to
do with the First
Amendment?

Comment moderation: what NOT to do

- Be cautious with the “hide” button – it could create the same problems as deleting a comment



Comment
moderation:
what NOT to do



Comment moderation: what NOT to do

Honolulu Police Department was sued for removing all critical negative comments from the PD's Facebook page



Settled lawsuit for \$31,000

Comment
moderation:
what NOT to do

South Pittsburg was sued after it adopted a social media policy that prohibited any negative comments about the town or any of its officials or employees on social media



Settled lawsuit and rewrote policy

Comment moderation: what NOT to do

- Virginia PD social media policy banned the following:
 - Posts that tend to discredit or reflect unfavorably on the department
 - Negative comments on internal operations of the department
 - Discussions about specific conduct of supervisors or coworkers

Comment moderation: what you CAN do

- Adopt and enforce a neutral comment policy/TOS
 - The policy should identify the type of content that is not allowed and will be subject to removal
 - The policy can prohibit and remove non-protected speech

Be careful not to ban protected speech

- A. Inappropriate comments
- B. Inflammatory posts
- C. Colorful language
- D. Hate speech
- E. Content that might defame someone
- F. Posts that hold an individual up to public ridicule, derision, or embarrassment
- G. Negative or critical comments about the government or any official or employee

You can regulate non-protected speech

1. Obscene, sexual, or pornographic content and/or language
2. Content that promotes discrimination on the basis of race, age, religion, gender
3. Content that violates a legal ownership interest (copyright or trademark)
4. Threats to any person
5. Conduct that violates any federal, state, or local law or encourages illegal activity
6. Promotion of any commercial activities
7. Spam, links, or malware/viruses
8. Posts that advocate for or against a candidate, referendum, or campaign

Elected Officials on Social Media

Oh my...



Elected officials – case study #1

- *Knight Foundation v. Donald Trump*
 - Persons sued after being blocked from President Trump's Twitter account @realDonaldTrump account, including one who tweeted:
 - *"To be fair, you didn't win the WH, Russia won it for you."*
 - Court of appeals held account was a "designated forum" and blocking violated First Amendment
 - US Supreme Court refused to hear former President Trump's appeal



Donald J. Trump 
@realDonaldTrump

@realDonaldTrump blocked you

You are blocked from following
@realDonaldTrump and viewing
@realDonaldTrump's Tweets.

Elected officials – case study #2

- *Davison v. Randall* (4th Cir. Court of Appeals)
 - Loudoun County, Va Commissioner sued after she blocked people from her personal Facebook page
 - Court found her page a public forum subject to First Amendment because:
 1. She used it to inform constituents of county business
 2. She used county staff to post on the page
 3. The county promoted the page in its newsletter
 4. Facebook page linked to county website

Elected officials – private vs. government factors

Private factors

- Government does not maintain site or moderate posts or comments
- Site would not revert back to government when official left office
- Official did not use staff to post on official's behalf
- Activities take place outside of normal working hours

Government factors

- Official included title/position on the site
- Official's contact information listed on site
- Site linked to official government website
- Official conducted official business via site
- Official interacted with constituents on government business on site

Saving elected officials from themselves...



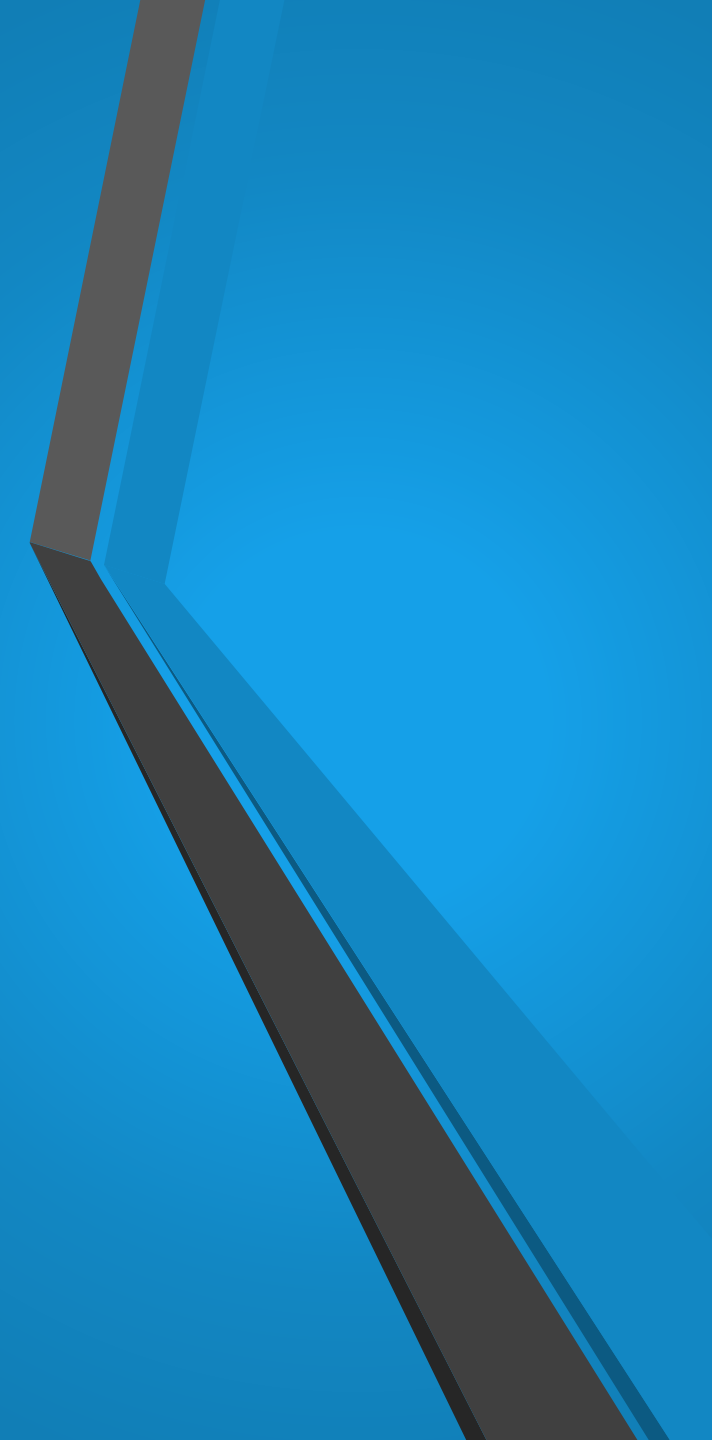
Enact a social media policy for elected officials



Explain to them that their personal social media activities, if tied to their governmental duties, could be a “public forum” subject to the First Amendment and could also implicate open records and meetings laws



Best practice? Keep professional and personal activities separate (and campaigns, for that matter)



Employees on Social Media

Oh my again...

The Rules – What Can You Do?

Employers can discipline employees for:

- Excessive use of social media at work
- Individual gripes about job or boss, even on personal sites
- Illegal (or improper) personal social media activities
- Violating employer's social media policy

The Rules – What Not To Do

Employers should be careful not to discipline for:

- Matters of public concern
- Political or other protected speech
- Protected concerted activities among co-workers

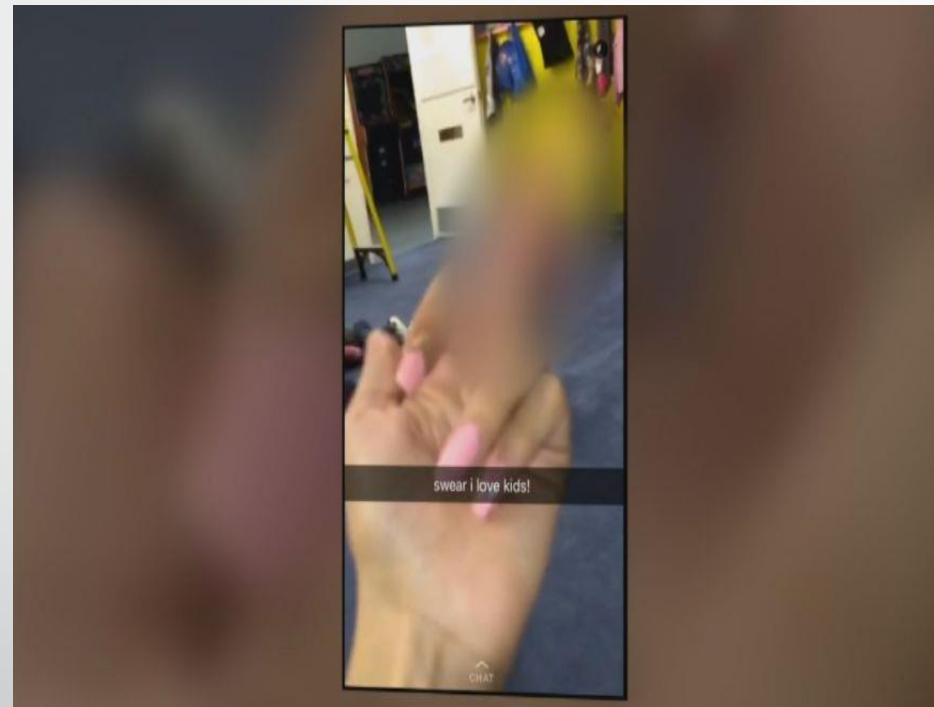
“I wish I could get fired...”

I start my new job today, but I absolutely hate working at day care.



Yep, her employer was a day care center.

swear, i love kids!



credit:
snapchat

Bad teacher



[Carly Crunk Bear](#)

Naked. Wet. Stoned.

3 days ago Reply Retweet Favorite

credit: [@CarlyCrunkBear](#) on Twitter

Bad timing?

- Shortly after a government agency sent around a notice to employees of mandatory training, an employee posted this on Snapchat:

*Mandatory 2 hour sexual harassment training. And they aren't even gonna show me the proper way to grab a woman's a**...*

- Employee was fired by his boss, a state senator

Not a good look...

- Illinois Governor candidate fired campaign staffer for posting “blackface” photos on Instagram



Campaign “like” = political speech

- Deputies reinstated after sheriff fired them for “liking” his opponent’s Facebook campaign page.
- A “like” can be speech, and political speech is protected.



Importance of a social media policy



Put the public on notice on what comments will not be tolerated on government social media sites



Inform employees of social media activities (on and off duty) that could subject them to discipline



Address elected officials' social media activities to avoid First Amendment claims and violations of open meetings and records laws



Train your administrators on the legal issues with government social media use – don't put the intern in charge

QUESTIONS?

Julie A. Tappendorf
Ancel Glink, P.C., Chicago, IL

jtappendorf@ancelglink.com

(312) 782-7606

Visit Julie's blog, Municipal Minute

<http://municipalminute.ancelglink.com>

Visit Ancel Glink's website: www.ancelglink.com