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### Session Overview

- Part I: Elected Officials Use of Social Media**
  - Is your social media platform public or private?
    - What are the legal standards courts are using to determine this?
    - What difference does it make?
  - Are your comments/tweets/posts public records?
  - Does elected official discourse on social media violate the open meetings law?
- Part II: Employees Use of Social Media**
  - Free speech or actionable behavior?

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### Part I: Elected Officials' Use of Social Media

**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*

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## Social Media: Legal Concerns

- Can we delete comments?
- Can we restrict employees, candidates from commenting?
- Is everything a public record?
- Must we archive comments, twitter posts, blog posts?

## Is Your Social Media Platform a Public Forum for Free Speech?

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



## Free Speech "Forum" Analysis



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

## The Very Basic Concepts

- Parks 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 discourse.



## 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.



## Statutorily Mandated Forums



- Public Hearings
- Quasi-Judicial Hearings
- Public Comment Period (Local Governments)
- Note: Open Meetings Law *does not* allow the public to speak at an official meeting.

[Blog Post on Comment Period Policies: What's Legal](#)



## 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



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## Are your comments/tweets/posts public records?

- NC Law: records made or receive in the transaction of public public business.
- Can exist on private devises and accounts.
- Can exist 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)



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## Does elected official discourse on social media violate the open meetings law?

- Official meetings under the open meetings law require a majority of member of public bodies, gathering simultaneously to transact public business.
- Members of public bodies should avoid engaging in a near real time conversations with each other on social media.



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## Part II

### Employee free speech



## The legal test

Three questions the court will ask when a government employee makes a free speech claim.



## The legal test—three questions

1. Part of job duties?



2. Touch on matter of public concern?



3. Balance of interests



## A real world example

College hits financial trouble

President announces plan that will eliminate 50 jobs

Professor McGettigan sends email to all students:

President thinks you students are losers

Believes educational resources are wasted on you

This is “the onslaught of a merciless enemy”

College takes away email privileges and cancels  
scheduled sabbatical

McGettigan sues



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## The legal test—three questions

Part of job duties?

Touch on a matter of public concern?

Balance of interests

College claims fear of violence

Court: inadequate grounds to fear violence

Professor’s case survives

McGettigan v. Di Mare, 173 F. Supp.3d 1114 (D. Colo. 2016)



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## An example closer to home

North Carolina town has fire, police, EMS, and  
water rescue combined

Chief is quoted saying all but two officers are fully  
certified in all four

Officers begin a group text message exchange



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## An example closer to home

Maybe she is going to Colorado for a math class,  
or maybe they are all just complete liars



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## The legal test—three questions

1. Part of job duties?



2. Touch on matter of public concern?



3. Balance of interests



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## The legal test—three questions

Balance of interests:

"This Court has recognized on several occasions  
that 'police officials are entitled to impose more  
restrictions on speech than other public  
employers because a police force is a  
paramilitary—discipline is demanded, and  
freedom must be correspondingly denied.'"

Cannon v. Village of Baldwin Head Island, 891 F.3d 489 (4th Cir. 2018)



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## A question over the phone

County EMT on Facebook:

"I'm back working at this God-forsaken place. Nothing has changed except for the worse. I can't take any more of the hospital folks."



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## A question over the phone

"If you want good quality care, go to [another county's] hospital where the good folks will help you! We had great service there. Not like [our county] hospital, where you lay for hours and never get treated."



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## The legal test—three questions

1. Part of job duties?



2. Touch on matter of public concern?



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