Social Media and the First Amendment

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Presentation Overview

• Background and developing case law

• Implementing a strong social media policy to avoid First Amendment violations
  o Best practices for Township elected officials and employees to maintain private social media accounts
  o Best practices for Townships to maintain official social media pages
The First Amendment and Social Media

- First Amendment free speech rights apply to speech on social media
- Government-run social media sites open for public discourse are limited public forums for speech
- Restricting/removing public comments, or blocking a user, on government-run social media sites may be a First Amendment violation

How is a Limited Public Forum Created?

- Official government social media sites are limited public forums if they are created with the intention of allowing the public to post comments and promoting public discourse
- Elected officials may inadvertently transform personal social media pages into limited public forums
  - Create impression that account is being run in his/her official capacity as an elected official
Developing Case Law

• Elected officials’ personal social media pages are forums for speech, implicating First Amendment rights of users, when they are “governmental in nature”

• Elected officials and public bodies they represent are facing lawsuits alleging violations of constituents’ First Amendment rights when elected officials remove a comment, or block a user’s access, on personal social media sites

Davison v. Loudoun County Board of Supervisors

• Chair of County Board of Supervisors blocked a constituent on her personal Facebook page

• The constituent sued, claiming his First Amendment rights had been violated

• Court conducted a balancing test to determine if the page was a limited public forum for speech (weighed facts indicating page was private versus facts indicating it was governmental in nature)
**Davison v. Loudoun County Board of Supervisors – Private Factors**

- Defendant’s official duties did not include maintenance of a social media site
- Facebook page was not going to revert to the county when the Defendant left office
- Defendant did not use county-issued devices to post on the page
- Defendant’s social media activity took place outside of the office/normal working hours

**Davison v. Loudoun County Board of Supervisors – Governmental Factors**

- Defendant included her official title as Chair of the County Board of Supervisors in her displayed name on the page
- Defendant’s county email and phone number were listed as her contact information
- Page included the official county website’s web address
Davison v. Loudoun County Board of Supervisors – Governmental Factors

- Defendant used the page to hold conversations with constituents
- Defendant promoted attendance at events related to her work as Chair on the page
- Defendant occasionally submitted posts on the page on behalf of the Board as a whole

The impetus for creating the Facebook page appeared to be Defendant’s election to office (created the page the day before she took office)

Defendant’s Chief of Staff helped her maintain the Facebook page
**Davison v. Loudoun County Board of Supervisors**

- Court found the Defendant had created a limited public forum with her Facebook page
- Defendant violated Plaintiff’s First Amendment rights by blocking his access to her Facebook page

**Wilson, et. al. v. Wallace**

- Complaint recently filed in our own backyard against Hamilton Township Trustee, David Wallace Jr.
- Plaintiffs alleged Wallace violated their First Amendment rights by blocking them from his Facebook page
- Complaint lists numerous facts surrounding Wallace’s use of his Facebook to demonstrate it is governmental in nature
Wilson, et. al. v. Wallace

Wallace entered into a consent decree with the plaintiffs:

- Stated he would not block Facebook users from accessing his page in violation of the First Amendment in the future
- Agreed to pay for plaintiffs' court costs and attorney's fees
What’s the Big Deal?

• Elected official and/or Township he/she represents can be on the hook for a prevailing plaintiff’s attorney’s fees and court costs

• A court has discretion to award any additional damages it believes a plaintiff is entitled

• Complaints of this nature are becoming more frequent

Coming soon to a federal court near you!
Ways to Mitigate Your Risk

• A social media policy. You need one.
• The policy should cover 3 main areas:
  1) How elected officials/employees should maintain personal social media pages
  2) How the Township will run its official social media pages
  3) Limitations on the rights of users on official Township social media pages

Best Practices for Elected Officials/Employees to Maintain Personal Sites

• Official titles should not appear in displayed name
• Official township number/email should not be listed as contact information
• Links to official township sites should not be provided
• Content from official township sites should not be shared/reposted
• Branding from official township sites should not be copied on personal sites
Best Practices for Elected Officials to Maintain Personal Sites

• More likely a court would find an elected official’s personal social media site constitutes a limited public forum than an employee’s personal site

• Elected officials should avoid discussing matters of public concern the township is involved in altogether

• If elected officials choose to discuss matters of public concern, they should provide a disclaimer in their bio on the site

Best Practices for Elected Officials to Maintain Personal Sites

• Special concern: Ohio Public Meetings Act rules
  o Requires public officials to deliberate, discuss, and conduct public business in open meetings
  o Advanced notice of these meetings must be given to the public
  o Elected officials should not discuss matters of township business with each other on social media sites, even in their personal capacity – could result in a violation of the Act
Restricting Employees’ Speech on Personal Social Media Pages

- Employees commenting on public matters on personal sites may have stronger First Amendment rights than those of Elected Officials.

- When public employees comment on matters of public concern, courts apply a balancing test to determine if First Amendment rights apply:
  - Balance First Amendment rights of employee v. the state’s interest in promoting the efficient performance of public services.

- Also consider possible benefit to the Township of having more lenient restrictions on employee use of social media than those on elected officials’ social media use:
  - Less likely a court would find an employee’s social media page is governmental – may be in the Township’s favor to permit employees to “re-tweet” and re-post items from official Township social media sites to promote Township events.

Best Practices for Townships to Maintain Social Media Sites

- Decide if you even want to allow public comments.

- If you allow public comments, the site is a limited public forum – users have First Amendment rights.

- Provide a disclaimer on the site stating views expressed in public comments are not those of the Township.
Best Practices for Townships to Maintain Social Media Sites

• Comments cannot be restricted/removed because you do not like the content, but First Amendment rights are not absolute

• Reasonable restrictions may be placed on speech
  - Speech may be restricted to a certain topic addressed by the social media site
  - Unprotected speech may be banned (discriminatory, profane, etc.)
  - If you are unsure if speech is protected, it is wise to check with your law director/outside counsel before removing a comment or blocking a user

Best Practices for Townships to Maintain Social Media Sites

• Designate a person/team to maintain official sites – responsibilities may include:
  - Determining if a comment should be removed/user should be blocked
  - Responding to public comments on behalf of the township
  - Approving all content posted on sites on behalf of the township
Best Practices for Townships to Maintain Social Media Sites

- Townships are bound by Ohio Public Records law – any content posted on behalf of the township may be a public record
- Good practice to have a retention policy for content posted on official social media sites on behalf of the township

Social Media Policy Overview

- Outline how elected officials/employees should maintain personal sites to avoid appearance that they are affiliated with the township
  - Policy for employees may be more lax than policy for elected officials
- Have a clear procedure for maintenance of official township sites
- State rules users of township sites must follow
- Social media policy will not eliminate risk of lawsuits, but provides the township with some protection against liability
Questions

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