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Forum Doctrine Under the First Amendment:
Perils and Pitfalls

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Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls



Government actors have been clamoring to jump on the social media bandwagon ever since Barack Obama tapped the power of social media in his successful bid for the White House.¹ At least one local government, however, recently jumped back off. The city of Redondo Beach decided to close its Facebook page in light of uncertainty over what legal principles cover government sponsored social media.² Apparently, Redondo Beach officials were worried about both public records and open meetings laws as well as whether defamatory or vulgar material would be protected by the First Amendment.

To understand their quandary, at least with regard to the First Amendment issue, consider a simple hypothetical. Suppose the city set up its Facebook page to allow residents to discuss an initiative to reduce energy usage. A heated Facebook discussion ensues about whether global warming is a hoax. The mayor then orders the removal of posts discussing global warming on the grounds that they do not relate to city business. He also orders the removal of all profanity and hate speech directed at Muslim Americans. Are the mayor's actions constitutional?

It ought to be easy to answer this question, but it isn't. The answer requires close examination of public forum doctrine, an area of law that was "virtually impermeable to common sense" even before the internet came along.³ A few propositions can be stated with confidence. A government actor who creates a purely informational Facebook page, such as a "We Love Jonesville" fan page, engages in "government speech" and therefore retains editorial control of the page. At the other end of the spectrum, a government actor who creates a completely open, interactive Facebook page without any explicit statement of purpose probably cedes all but the most limited forms of editorial control over that forum.

Between the extremes of no interactivity and complete interactivity, it is difficult to predict whether courts will label a government sponsored

social media site a public forum or not. But it is precisely "in between" where government actors are likely to wish to engage citizens and where citizens are most likely to benefit from government social media initiatives. The goal of this article, therefore, is to provide guidance to lawyers trying to navigate the morass that is the U.S. Supreme Court's public forum jurisprudence in order to advise government actors wishing to establish social media forums.

The Value of Social Media

First, though, it is worth asking whether the game is worth the candle. Government actors have a variety of incentives to use social media to reach their constituencies. Willie Sutton was reported to have said that he robbed banks because that's where the money is, and governments are turning to social media because that's where the citizens are. Not only can social media deliver large audiences, they can deliver demographically desirable ones. Social media are also cheap and fast tools to reach and mobilize citizens. They provide a forum for citizens to voice their concerns and to volunteer their expertise online using "crowdsourcing" or problem solving.⁴

Government social media use, even when motivated purely by self-interest, usually benefits citizens. Citizens benefit from receiving government information quickly, cheaply and without distortion. More significantly, interactive social media have the potential to foster citizens' First Amendment interests in free speech, free association, and petitioning government for redress of grievances. Interactive social media can serve as virtual public squares, encouraging interactions among citizens who might never meet in a real one. Interactive social media also encourage the exchange of information between governments and the governed, providing the "continuous process of consultation" that democratic theory envisions.⁵ More to the point, social media create pressures for government officials to respond to public demands.

The current state of the law, however, may deter realization of social media's full potential.⁶ Public forum doctrine, which governs the rights of citizens to speak on government property, is a "complex maze of categories and sub-categories" that determine whether government speech restrictions are subject to strict or lax constitutional scrutiny.⁷ The choice of category — whether traditional public forum, designated public forum, limited public forum, nonpublic forum or government speech — often determines the outcome of cases, but the lines between the categories are so blurry that they make it difficult for government actors to know how to establish social media forums without relinquishing all editorial control over abusive, indecent or off-topic speech.

Public Forum Doctrine Categories

The starting point for examining modern public forum doctrine is *Perry Education Association v. Perry Local Educators' Association*.⁸ *Perry* involved a union seeking to communicate with teachers via a school mail system. The school already had granted access to a competing union, but the school contended that it granted access based on that union's status as the exclusive collective bargaining representative of the teachers in the district. The Supreme Court ultimately determined by a 5-4 vote that the school had not designated its internal mail system as a public forum, and it therefore upheld the school's grant of preferential access to the incumbent teachers' union as "reasonable" and viewpoint neutral. Along the way, however, the Court used *Perry* as an opportunity to impose order on public forum doctrine by delineating three forum categories: traditional, designated and nonpublic.

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Traditional Public Forums

The first category is the traditional public forum, which includes government property such as streets or parks that have been devoted to public expressive use “by long tradition or by government fiat.”¹⁰ In the traditional public forum, the state may not impose content-based restrictions on speech there unless they are “necessary to achieve a compelling state interest and ... narrowly drawn to achieve that end.”¹¹ Content-neutral “time, place, and manner” restrictions are permissible, but only if they are “narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.”¹² Though one might assume that social media could become traditional public forums by fiat, the Supreme Court has restricted the category to property “historically” used for public expression, thereby closing it

a university-created “campus free speech zone” open to all speakers or meeting rooms available for use by any member of the public, such as a public library.

In *Perry*, the designated public forum category also included limited public forums. The government may either open a designated forum to the public as a whole, in which case it operates no differently than the traditional public forum and is subject to the same constitutional restraints, or it may establish a designated but “limited” public forum. Although the Supreme Court used three categories of forums — traditional, designated and limited — in its most recent decision on the issue,¹⁵ it never mentions the “non-public forum” discussed in prior decisions such as *Perry*,¹⁶ making it unclear whether this is a separate category or whether it has finally collapsed into the limited public forum.

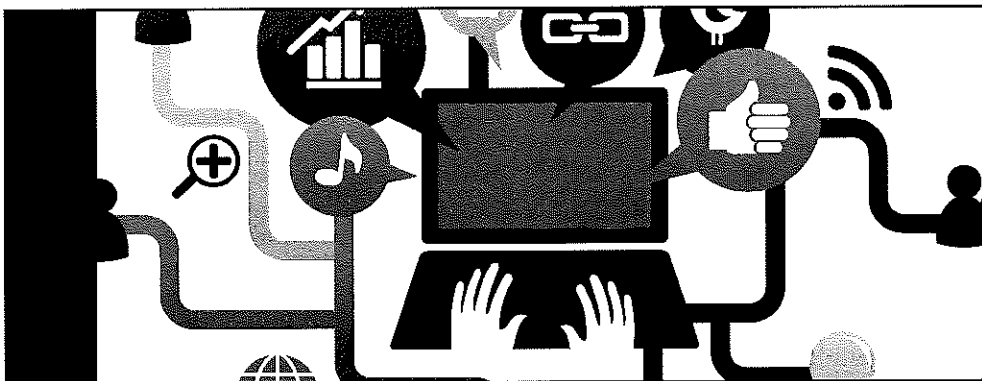
establishment and application of content parameters in the limited public forum must be “reasonable in light of the purposes served by the forum” and viewpoint neutral.²⁰

One might assume that a constitutional standard that demands only reasonableness and viewpoint neutrality gives the government essentially *carte blanche* to exclude speakers based on subject matter. But the Supreme Court has often applied reasonableness with “bite” in the limited public forum.²¹ Moreover, the Supreme Court decisions in this area are almost always decided by 5-4 votes, making it even harder to predict how much leeway governments have to exert editorial control in a limited public forum.

Nonpublic Forums

A nonpublic forum is government property, such as a military base, that “is not by tradition or designation a forum for public communication.”²² Within nonpublic forums, governments may impose time, place and manner restrictions and may exclude speakers as long as exclusion is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²³ In practical effect, a determination that a forum is nonpublic will almost always result in deference to the discretion of the government actor in deciding who may speak and what shall be discussed.

The line between the designated limited public forum and the nonpublic forum is maddeningly slippery — and some would even say nonexistent, notwithstanding their linguistically opposed labels. A distinguishing factor between them seems to be whether the government grants selective access on a case-by-case basis as opposed to holding the property generally open for a limited class of speakers. Nonetheless, the real differences are slight. In both categories, the state must maintain viewpoint neutrality, and application of state-imposed content parameters for the forum will be judged by a reasonableness standard for the most part. One possible difference



to online forums. Thus, a municipal park is a traditional public forum and so is the public square in front of the local courthouse, but a city’s Facebook page cannot be one.

Designated Public Forums

The designated public forum “consists of public property which the state has opened for use by the public as a place for expressive activity.”¹³ Courts will not find a designated public forum absent a clear indication of government intent to open the forum, though such intent can be determined in part based on “policy and practice” and whether the property is of a type compatible with expressive activity.¹⁴ Examples of designated public forums include

Limited Public Forums

The harder category, or subcategory, is the limited public forum. Doctrinally, this is where things start to get messy. Regardless of categorization, the limited public forum is a place or space designated for speech by “certain groups” or for “discussion of certain subjects.”¹⁷ For example, a university can limit a public forum it establishes to use by student groups, and a school district can limit a public forum to the discussion of “school board business.”¹⁸ However, “[i]f the government excludes a *speaker* who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”¹⁹ In other words, the government’s

is as follows: The Supreme Court has said, albeit in dicta, that when the state excludes from entrance to a limited public forum speakers who meet "identity" criteria, strict scrutiny should apply. A more relevant distinction is that the labels are likely to trigger different attitudes of deference in the judges deciding the cases. Arguably, the reasonableness inquiry is more likely to be applied with bite to a limited public forum than to a nonpublic one; but without empirical verification, this is pure speculation. Reading too much into the labels may obfuscate other contextual factors that shape outcomes in public forum cases.

Government Speech Category

The final constitutional category into which government sponsored social media might be slotted is government speech,²⁴ and, indeed, this category clearly applies to tweets and other noninteractive government social media. The heart of government speech doctrine is the realization that governments must speak in order to govern and that governments speak through agents whom they hire, pay, select, facilitate or subsidize.²⁵ Whether online or off, the government is permitted to use media to communicate its views to citizens; and when it does so, it need not include opposing viewpoints.²⁶ Constraints on government speech come not from the First Amendment's free speech clause but rather from the political process, with voters or other political actors ostensibly "checking" government speech (and government actions) with which they disagree.²⁷

Applying the Categories to Interactive, Government Sponsored Social Media

The above categories do not track simply and easily with *interactive* government sponsored social media. Under current doctrine, it is not immediately clear into which of these exclusive categories most government social media sites will fit; and even where a site is clearly a forum of some sort, it is not clear how much or how little discretion

the government actor will have in limiting strong criticism and profane or abusive speech.

As a threshold matter, it's important to understand that government ownership is not a *sine qua non* of public forum status. A social media forum is neither owned nor exclusively controlled by the government actor who establishes it.²⁸ If the mayor of Jonesville establishes a Facebook page, he presumably receives a license from Facebook to use its proprietary software. Once the Facebook page is established, the mayor does not own or control the underlying software. Indeed, the mayor does not even retain complete editorial control of the page because Facebook conditions use of its software on a user's agreement to certain terms and conditions. However, the lack of government ownership or exclusive control of the social media forum it establishes should not preclude a finding of public forum status. Just as the government can rent a building to use as a forum for public debate and discussion, so too can it "rent" a social media page for the promotion of public discussion.

With this issue settled, it remains unclear whether an interactive government sponsored social media site is a public forum or not. A *noninteractive* Facebook page controlled by a government actor is undoubtedly government speech, meaning that private speakers have no First Amendment rights to speak in those forums. But more and more government actors seem to appreciate the fact that social media's primary attraction for citizens is interactivity. Consider the White House's Facebook page.²⁹ The White House clearly identifies the page as an official site subject to the Presidential Records Act, and there is no mistaking that the White House is using it to convey messages and videos to citizens. However, the site is also set up to allow comments from users, although these comments can be "flagged" by other users as abusive. It is not clear what happens to flagged comments. There appears to be no official editorial policy

regarding comments, and there is no indication that an administrator from the White House ever responds to them.

Is this government speech, a designated public forum or a nonpublic forum? If it is government speech, the government need not worry about violating the speech rights of those who post comments even if the result is the creation of an illusion of public consensus by selective editing of criticisms of government policy. But if the site is deemed a limited public forum or nonpublic forum, the government has much less control over citizens who choose to speak on the site.

Unfortunately, current First Amendment doctrine does not contemplate the possibility that the page might involve both government speech and a public forum.³⁰ Instead, it forces a choice between whether the page involves government speech and whether it involves some form of private speech. And yet, the Supreme Court has given little guidance regarding how to determine whether speech is government speech or private speech in a case involving an interactive social media site, which contains elements of both.³¹ In these situations, the government is clearly identifiable as a speaker conveying its own message with regard to its contributions to the site, but it seems just as clear that it is soliciting input from citizens speaking from a variety of different perspectives.³² With regard to the comments portion of the site, then, the government can also be viewed as creating either a designated public forum open to commentary from all users on all topics or a limited public forum for commentary related to the conduct of the government actor establishing the forum. Given that the interactive social media forum is likely to contain elements of government speech and a designated public forum, it makes it hard to predict what label courts will ultimately attach.

Even so, if a government actor is very careful in setting up its social media site, it can usually guarantee that it is either government speech or a nonpublic forum and can therefore

retain maximum control over speech that occurs there. The Supreme Court has made "intent" the key determinant of whether the speech is government speech or whether a forum is public or nonpublic. Recall that in order for a nontraditional public forum to exist, the government must designate it as "opened for use by the public as a place for expressive activity."³³ Moreover, not only has the Court required the decision to open a forum to be intentional, that intent must also be "demonstrably clear."³⁴ The practical effect is the creation of a presumption *against* a finding of public forum status. Thus, if a government actor makes a very clear and concrete statement on its social media page that it does not intend to create a public forum and it reserves the right to eliminate comments entirely or edit them, it can maximize the ability to edit citizen commentary on government sponsored social media. Nonetheless, there are clearly political reasons why government actors might not want to take this course of action, thus making it more likely that courts will be forced to discern intent or purpose from the nature of the site itself.

Probable Category: Limited Public Forum

From this perspective, interactive government social media sites are likely to be categorized as limited public forums. In 2010, the Supreme Court rearticulated the standards governing limited public forums in *Christian Legal Society Chapter of the University of California v. Martinez*.³⁵ The Court held, by a 5-4 vote, that a state law school may condition funding of a student organization on its willingness "to open eligibility for membership and leadership to all students."³⁶ The forum in question was a student-organization program established by Hastings College of the Law, which set the parameters of the forum to include only student organizations that complied with a "nondiscrimination policy."³⁷ The law school interpreted the policy as requiring student organizations to accept "all comers." In other words,

student organizations had to allow any Hastings student to join "or seek leadership positions in the organization, regardless of ... status or beliefs."³⁸ The Christian Legal Society (CLS) restricted membership to students who agreed that they believed in Jesus Christ as Savior and would eschew homosexual conduct.³⁹ Hastings College of the Law therefore denied CLS funding and other privileges. CLS sued, claiming violation of its rights to freedom of association and expression.

On appeal, the Court majority addressed the constitutionality of the all-comers policy as a restriction on forum parameters,⁴⁰ stating that "[a]ny access barrier must be reasonable and viewpoint neutral."⁴¹ Applying this standard, the Court deemed Hastings College of the Law's various justifications for the all-comers policy to be reasonable in light of the educational purposes of the forum. For example, the Court credited the law school's assertion that the policy ensured that the "leadership, educational, and social opportunities afforded by" participation in student organizations were equally available to all students.⁴² The Court also found the all-comers policy to be viewpoint neutral because it required "all student groups to accept all comers."⁴³ Even if the policy had a greater effect on religious student organizations, the target of the all-comers policy was the discriminatory conduct of religious organizations rather than their religious perspective.⁴⁴

Applying Supreme Court jurisprudence, there is little doubt that government sponsored social media sites are forums, at least with regard to the comments portion of the sites. The government designates or sets aside this portion of its social media site for expressive activity by its citizens. Unlike the nonpublic forum, which is characterized by selective access for chosen speakers, the typical government site will be open to any social media user who seeks it out. But unlike the truly open designated public forum, many social media sites are likely to place constraints on the topics of speech

simply by their design and name. Citizens' comments typically are linked to specific "status updates" by the government actor. Like a city council meeting, the discussion that occurs in the social media context is designed to be a "bounded conversation," inherently limited to discussion of the policies and actions of the government actor who sponsors the site. Even if the status label of *limited public forum* can confidently be attached, however, it remains unclear how much the government may regulate comments to preserve relevant and orderly discourse.

Policing Decency and Decorum in Online Public Forums

Similar uncertainty surrounds the question of how much deference government actors will receive in regulating profane or abusive speech in online forums. This question is particularly pressing because computer-mediated communications are more likely than those in the "real world" to become profane or abusive,⁴⁵ particularly when speakers believe that they are anonymous. The government arguably has pressing interests in regulating profane and abusive speech in online contexts simply because the prevalence of such speech may hinder the use of a social media site as a forum for public discourse. To ensure that regulation of profanity is not a cloak for censorship, the government can set up filtering programs that operate neutrally and transparently once put into place. In fact, some social media sites conduct their own monitoring and filtering of profane and abusive speech, thereby largely eliminating the government role in censoring such commentary.

The constitutional limits on the government's ability to preserve orderly and civil discourse within limited public forums are not entirely clear. Although the Supreme Court announced, in the celebrated case of *Cohen v. California*, that the proper remedy for an audience member offended by a profane word on a jacket is to avert his or her eyes,⁴⁶ the Court has never addressed directly

the standard applicable to regulation of profanity or abusive speech in a limited public forum. The Court did address the issue obliquely in *South-eastern Promotions Ltd. v. Conrad*, when two Tennessee municipal theaters refused to allow performances of the musical *Hair* because it involved nudity and obscenity.⁴⁷ However, the facts and procedural posture of the case are such that its holding provides only limited guidance for government actors wishing to control profanity in online public forums.

In *Conrad*, the Court held that the municipality's denial of permission to use the theaters constituted "a prior restraint" issue without "minimal procedural safeguards."⁴⁸ It is unclear whether the municipality could have excluded the musical if it had jumped through the correct procedural hoops, though one suspects the answer is no because the Court emphasized that the case involved neither a captive audience nor a time, place or manner regulation. Still, *Conrad* gives little indication of whether editing profanity after it appears in an online public forum would be acceptable. Presumably, the government's attempts to regulate decorum in the limited public forum should be evaluated as an attempt to preserve the forum for its intended purpose and should therefore be judged by whether they are reasonable and viewpoint neutral. Application of this test, however, should be responsive to the nature or context of the forum, and a municipal theater dedicated to public performances of aesthetic works is hardly analogous to a social media forum.

Lower courts that have addressed the issue in the context of city council and planning commission meetings have struggled to balance the government's interest in preserving civility in the limited public forum with the interests of speakers in addressing government actors in the manner of their choosing.⁴⁹ However, most circuit courts that have addressed the issue have given great deference to government actors attempting to preserve order and decorum. In *Steinburg v. Chesterfield County Planning*

Commission, for example, the Fourth Circuit upheld a county's "content-neutral policy against personal attacks" against a facial challenge because it promoted the "legitimate public interest ... of decorum and order."⁵⁰ *Steinburg* involved a citizen who was stopped from speaking at a planning commission meeting because his remarks were off-topic and contained mild personal attacks against the commissioners. Because the meeting at issue was classified as a limited public forum, the Fourth Circuit evaluated the county commission's policy against personal attacks only for reasonableness and viewpoint neutrality, concluding that the commission was "justified in limiting its meetings to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business."⁵¹ Compare

of how far governments can go in controlling profanity online. The user of the online forum ordinarily must take some kind of affirmative step to seek out comments by fellow users; even once a user decides to read the comments, she can easily scroll past the ones that appear to be offensive. In addition, the abusive speaker in the online forum poses little danger of disrupting a government process or impairing its efficiency. Thus, there is arguably little justification for deferring to government attempts to protect the sensibilities of citizens who visit its social media site.

Conclusion

Regardless of how courts ultimately resolve this issue, one thing should be abundantly clear by this juncture. Public forum doctrine does not foster an optimal level of government engagement in social media. The lack of clarity in public forum

Even if the status label of limited public forum can confidently be attached, it remains unclear how much the government may regulate comments to preserve relevant and orderly discourse.

the Fourth Circuit's deferential tone to that of the Sixth Circuit in *Leonard v. Robinson*, which reversed summary judgment in favor of a police officer who arrested a citizen "solely for uttering 'God damn'" while speaking at a township board meeting.⁵² Citing *Cohen*, the court asserted t

hat prohibiting the speaker from "coupling an expletive to his political speech is clearly unconstitutional."⁵² The Sixth Circuit, unlike its sister circuits, did not find profanity inherently disruptive to the management of public business.

It is not clear whether public discussion on a social media site is sufficiently similar to public discussion in a city council meeting to make the *Steinburg* precedent a good predictor

doctrine may deter government actors from setting up interactive forums in the first place lest they lose control of their sites to hateful and incoherent speakers. However, if government actors actually spend the time to piece through the minutiae of existing public forum doctrine before setting up an interactive social media site, they may be able to preserve a high degree of control over citizens whose speech is perceived to jeopardize order, decency and civility. Either result, however, is not optimal from a First Amendment or public policy perspective because a valuable tool to facilitate interaction between the government and its citizens is weakened. ■

Endnotes

1. The Obama campaign established “presences” on MySpace, LinkedIn, Facebook, Twitter, YouTube, MiGente, BlackPlanet, Asian Avenue, Glee and other social media sites. More than three million people became “fans” of Obama on Facebook.
2. The city of Redondo Beach, California, recently canceled its Facebook page after the city attorney issued cautions about the First Amendment and open meetings law ramifications. See Debra Cassens Weiss, *California Town Abandons Facebook Page Amid Legal Concerns*, ABAJ, Aug. 24, 2010, available at www.abajournal.com/news/article/california-town_abandons_facebook_page_amid_legal_concerns.
3. ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 199 (1995) (noting also that public forum doctrine has received “nearly universal condemnation from commentators”).
4. See, e.g., BETH SIMONE NOVECK, *WIKI GOVERNMENT* 18 (2009) (describing an innovative social media program that enables crowdsourcing of the patent examination process).
5. MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 16 (1983).
6. Government lawyers must worry not just about First Amendment law but about public records and privacy laws as well. I shall leave the latter topics to other authors.
7. MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT*, § 409[d], at 4-70 (2d ed. 1984).
7. 460 U.S. 37 (1983).
8. *Id.* at 50.
9. *Id.* at 45.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (also noting that courts may look to whether the property was “designed for and dedicated to expressive activities”).
14. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010).
15. See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (describing categories as including traditional public forums, designated public forums open to either all or part of the public and nonpublic forums).
16. *Perry*, 460 U.S. at 46 n.7.
17. *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down a school’s exclusion of religious groups from facilities open to all other student groups); and *City of Madison Joint Sch. Dist. v. Wis. Pub. Employment Relations Comm’n*, 429 U.S. 167 (1976)).
18. *Forbes*, at 677 (emphasis added). Presumably, therefore, if a state university opens a forum for students to discuss “environmental issues,” any exclusion of a student who is clearly discussing an environmental issue is subject to strict scrutiny, but exclusion of the student because his topic is not truly an environmental issue is subject to only a reasonableness standard.
19. For an example, see *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 825 (1995), a 5-4 decision in which the Court struck down the university’s exclusion of religious groups from a funding program for student groups that served “educational purposes.” *Id.* The Court gave little deference to the university’s application of forum criteria, instead stretching to find viewpoint discrimination. See *id.* One commentator notes that among lower courts, “[a] common means of avoiding the implications of finding that speech falls within the hazy middle [limited public] forum is for courts to find that exclusion of the speaker from the forum is viewpoint discriminatory.” Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2151 (2009) (citing examples).
20. *Rosenberger*, 515 U.S. at 829.
21. *Perry*, 460 U.S. at 46.
22. *Id.*
23. The government speech doctrine began with *Rust v. Sullivan*, 500 U.S. 173 (1991), though the decision does not use the term *government speech*. For the most recent and fullest articulation, see *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).
24. See, e.g., *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005) (holding, 6-3, that the First Amendment does not prevent the federal government from requiring beef producers to pay for government-directed beef advertising).
25. See *Sutcliffe v. Town of Epping*, 584 F.3d 314 (1st Cir. 2009); *Page v. Lexington County Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008); *Downs v. L.A. Unified Sch. Dist.*, 228 F.2d 1003 (9th Cir. 2000), cert. denied, 532 U.S. 994 (2001). Cf. *Putnam Pit, Inc. v. City of Cookeville (Putnam I)*, 221 F.3d 834 (6th Cir. 2000) (determining city website was nonpublic forum but denying city summary judgment for denying plaintiff’s requirements for hyperlink on website); *Putnam Pit, Inc. v. City of Cookeville (Putnam II)*, 76 F. App’x 607 (6th Cir. 2003) (declining to overturn jury verdict for city because plaintiff did not meet requirements for being allowed a hyperlink).
26. See *Summum*, 129 S. Ct. at 1132. For more on this topic, see Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010).
27. *But cf.* *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (involving a privately owned theater under a long-term lease to the city of Chattanooga, Tennessee).
28. *The White House*, FACEBOOK.COM, www.facebook.com/WhiteHouse?ref=ts&v=wall#!/WhiteHouse?ref=ts (last visited Dec. 31, 2010).
29. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 605 (2008).
30. Lower courts have developed a variety of tests to deal with this issue in the case of specialty license plates. See *id.* at 627 n.118 (citing cases).
31. A crucial determinant of the relevant speech category is government intent, which the Court may discern from circumstantial evidence such as the structure of the program or policy at issue. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995) (finding that the university had created a limited public forum because it had “expended funds to encourage a diversity of views from private speakers”); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (finding that the university had charged students fees “for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students”).
32. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).
33. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).
34. 130 S. Ct. 2971 (2010).
35. *Id.* at 2978.
36. *Id.* at 2979. The eligible organization also had to be noncommercial. *Id.*
37. *Id.*
38. *Id.* at 2980.
39. *Id.* at 2984. The dissent, on the other hand, questioned whether Hastings College of the Law even had an all-comers policy at the time that CLS was denied recognition. *Id.* at 3005 (Alito, J., dissenting).
40. *Id.* at 2984.
41. *Id.* at 2990. The Court also found that CLS has “substantial alternative channels,” some extended by the law school itself, to get its message out. *Id.* at 2991.
42. *Id.* at 2993 (emphasis in original).
43. *Id.* at 2994.
44. See Lyrissa Lidsky & Thomas Cotter, *Authorship, Audience, and Anonymous*

Nevada Open Government Law



Annual Training
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2017

Serving the Citizens of Nevada

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes the law-breaker, it breeds contempt for law; it invites every man to become a law unto himself." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, L., dissenting).

We owe a fiduciary duty to the public. *U.S. v. deVegeter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (public officials inherently owe a fiduciary duty to public to make governmental decisions in the public's best interest); see also NRS 281A.020(1)(a) (public office is public trust held for the sole benefit of the people).

Open Meeting Law (NRS Chapter 241)

"In enacting this chapter, the Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010(1).

"The exceptions provided to this chapter, and electronic communication, must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers." NRS 241.016(4).

The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).

Open Meeting Law (NRS Chapter 241)

Public bodies working on behalf of Nevada citizens must conform to statutory requirements in open meetings under an agenda that provides full notice and disclosure of discussion topics and any possible action. *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003).

Agenda items must be clear and complete; higher degree of specificity for matter of substantial public interest. NRS 241.020.

Deliberation and action must be properly noticed and taken openly. NRS 241.010.

Action is only taken by the body as a whole; members have no individual decision-making powers and may only speak on behalf of the body if authorized to do so during an open meeting.

Law applies to subcommittees/advisory groups given the task of making decisions for or recommendations to a public body.

What is a Meeting?

NRS 241.015 says:

Quorum of members of a public body *gathering* together with: **Deliberation** toward a decision; and/or

Action: which means making a decision, commitment or promise over a matter within the public body's supervision, jurisdiction, control or advisory power.

A quorum is a simple majority of the total body (NRS 241.015(5)); action requires majority vote of members present (NRS 241.015(1)).

A gathering of a quorum at a social function is **not** a meeting **as long as** there is no deliberation or action.

An attorney-client conference on potential and existing litigation is **not** a meeting **as long as** there is no action.

Meeting Notice and Agenda - NRS 241.020

- Time, place and location of meeting
- List of locations posted
- Agenda consisting of a clear and complete statement of the topics scheduled to be considered
- Action items clearly denoted as "for possible action"
- Public comment at beginning/end or before any action item
- Posted at office of the public body *or* location of meeting *and* 3 other separate, prominent places within Nevada
- Posted at public body website *and* at www.notice.nv.gov
- Posted no later than 9AM of the third working day before the meeting

Meeting Notice and Agenda *continued*

- Name and contact information for person the public may request supporting materials from and locations where the supporting material is available
- If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person
- If the public body will consider whether to take administrative action regarding a person, the name of the person
- Notification that items on the agenda may be taken out of order, may be combined for consideration, and may be removed from the agenda or delayed for discussion at any time
- Any restrictions on comments by the general public

Additional Requirements

Supporting materials made available to the public when provided to public body members. NRS 241.020(6).

Public bodies shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).

Notice to persons who have requested notice of meetings pursuant to NRS 241.020(3)(c).

Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 days personal service or 21 days certified mail. NRS 241.033.

An emergency meeting may only be called where the need to act upon a matter is truly unforeseen and circumstances dictate that immediate action is required. NRS 241.020(9).

Minutes and recording of meetings in compliance with NRS 241.035.

Exceptions

Closed sessions may be held by any public body to consider character, alleged misconduct, professional competence, or the physical or mental health of a person, with some exceptions, or to prepare, revise, administer, or grade examinations administered on behalf of the public body, or to consider an appeal by a person of the results of an examination administered on behalf of the public body. NRS 241.030.

Closed sessions may not be held:

- To discuss the appointment of any person to public office or as a member of a public body. NRS 241.030(4)(d); *see also City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989).
- To consider the character, alleged misconduct, or professional competence of an elected member of a public body, or a person who is an appointed public officer or who serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position. NRS 241.031(1).

Public Comment Pitfalls

Restrictions must be reasonable "time, place, and manner" restrictions. NRS 241.020(2)(d)(7). NO

- Halting comment based on viewpoint of speaker;
- Halting comment upon belief defamation is occurring; or
- Halting comment critical of public official.

But comment may be stopped if it strays from the scope of an agenda topic for which comment; or for conduct that is willfully disruptive. See *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990).

The OML does not "[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical." NRS 241.030(4)(a).

Violations

Actions taken in violation of law are void. NRS 241.036.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 2141.040.

When a violation of the OML occurs or is alleged, the OAG recommends that the public body make every effort to promptly correct the apparent violation. NRS 241.0365.

Although it may not completely eliminate a violation, corrective action can mitigate the severity of the violation and further ensure that the business of government is accomplished in the open.

Corrective action is prospective only. NRS 241.0365(4).

Violations

Corrective action requires that the public body engage in an *independent deliberative action* in full compliance with the OML. See, e.g., *Page v. MiraCosta Community College Dist.*, 102 Cal. Rptr. 3rd 902, 930 (Cal. Ct. App. 2009); *Colorado Off-Highway Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1137-8 (Colo. Ct. App. 2012); *Zorc v. City of Vero Beach*, 722 So.2d 891, 902-3 (Fla. Dist. Ct. App. 1998); *Gronberg v. Teton County Housing Authority*, 247 P.3d 35, 42 (Wyo. 2011).

A public body must clearly denote that corrective action may be taken at a meeting by placing the term "for possible corrective action" next to the appropriate agenda item. NRS 241.020(2)(d)(2).

Final Points

TIPS:

- Stick to the agenda - do not wander to related topics.
- Be cautious of electronic communications and social media.
- Staff should blind copy emails to the public body to avoid the risk of inadvertent serial communications.

Quorum of a public body using serial electronic communication to deliberate toward or make a decision violates law. NRS 241.016(4); *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998).

Public Records Law (NRS Chapter 239)

"All public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person." NRS 239.010.

Nevada law does not statutorily define a "public record" -

- Record must be in the "legal custody or control" of a governmental entity - this includes legal control. NRS 239.010(3); see also *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 613 (2015).
- Record of a local government entity includes "information that is created or received pursuant to a law or ordinance, or in connection with the transaction of the official business of any office or department of a local governmental entity . . . regardless of physical form or characteristic." NAC 239.101.

Requirements

Local government entities must dispose of records as provided in NAC 239.155: (1) NSLAPR records retention schedule or (2) NSLAPR Local Government Records Management Program Manual. Process to be approved by ordinance or regulation.

Government agencies must respond to a request for public records within its legal custody or control within 5 business days. NRS 239.0107.

There is a presumption of openness and agencies have the burden of proving by a preponderance of the evidence that any requested record, or a part thereof, is confidential. NRS 239.0113.

Records requested must be identifiable and requests must not be overbroad. See *State ex re. Zidonix v. Columbus State Community College*, 976 N.E.2d 861, 866-7 (Ohio 2012).

Balancing Test

Under the balancing test established by the Nevada Supreme Court, any privacy justifications for nondisclosure must be weighed against the public's interest in access. *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 635, 798 P.2d 144, 147 (1990). See also *PERS v. Reno Newspapers Inc.*, ___ Nev. ___, 313 P.3d 221, 225 (2013); *Reno Newspapers Inc. v. Gibbons*, ___ Nev. ___, 266 P.3d 623, 626-27 (2010); *Reno Newspapers v. Sheriff*, 126 Nev. 211, 217-18, 234 P.3d 922, 926-27 (2010); *DR Partners v. Board of County Commissioners*, 116 Nev. 616, 627, 6 P.3d 465, 472 (2000).

Government agencies and staff must be aware that records created or held on personal electronic devices and personal accounts in the course of performing a state function may be subject to disclosure as public records.

Transacting Business on Personal Devices

The majority of case law from other jurisdictions has held that government-related information created or held on government employees' personal devices and personal accounts is subject to disclosure, usually on the basis that the record was created in the transaction of public business and thus fell within the definition of "public record" under the applicable law. See *Bradford v. Dir. Employment Sec. Dept.*, 128 S.W.3d 20 (Ark. Ct. App. 2003); *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. Ct. 4th Dist. 2013); *Adkisson v. Paxton*, 459 S.W.3d 761 (Tex. Ct. App. 2015); *Nissen v. Pierce County*, 357 P.3d 45 (Wash. 2015). See also 2008 Op. Alaska Atty. Gen. (Aug. 21); Op. Att'y Gen. Fla. 2008-07 (Feb. 26, 2008); Op. Att'y Gen. Ill. 2011-006 (Nov. 15, 2011); 81 Op. Att'y Gen. MD 140,144-45 (May 22, 1996); 2009 OK AG 12; Op. Att'y Gen. Tex. 2003-1890 (Mar. 19, 2003).

Generally these courts have concluded that it is the substance of the communication, rather than the medium by which the communication is created, transmitted, or stored, that matters. "The determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So.2d 149, 154 (Fla. 2003).

The Impact of Social Media

- Use of Social Media by Government Agencies
- Personal Use of Social Media by Public Officials and Employees



Ethics in Government Law (NRS Chapter 281A)

The Commission on Ethics enforces the ethics laws and may issue opinions to public officers or employees seeking guidance. See NRS 281A.440.

Ethics provisions prohibit public officers or employees from soliciting or accepting anything of value if doing so might influence a reasonable person to depart from the faithful and impartial discharge of his or her public duties. NRS 281A.400(1).

You may not use your position in government, or information obtained by virtue of such position, to secure any unwarranted benefit for yourself or another person. NRS 281A.400(2).

You may not participate in the negotiation or execution of a contract between the government and any business entity in which you have a significant pecuniary interest. NRS 281A.400(3).

Disclosure and Abstention

You must not use or suppress insider information, or use government resources, to further a significant pecuniary interest. NRS 281A.400(5-7).

You must disclose any gift or loan, commitment to a private party, or significant pecuniary interest you have in any matter that is to be acted upon by your agency.

Such a disclosure must be made at the time the matter is considered. If you are a member of a public body which makes decisions, you must make the disclosure in public to the chair and other members of the body. Otherwise, you must make the disclosure to the supervisory head of your agency.

You must abstain from involvement only in a clear case where the independence of judgment of a reasonable person in your situation would be materially affected by the conflict of interest disclosed. See NRS 281A.420; see also *Carrigan v. Commission on Ethics*, 131 Nev. 313 P.3d 880 (2013).
