



LEGAL ISSUES  
RELATING TO COUNTY GOVERNMENT

# Think Before You Post!

## Social Media Use By County Board Members

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County board members are an extension of the government inside and outside the confines of the boardroom. As a reflection of the citizens who elected them and the governmental units they represent, county board members have a responsibility to temper their words with dignity. Over the last 20 years, that responsibility has extended to Internet and social media communications in increasingly important ways, raising important freedom of speech concerns that affect citizens and elected officials alike. This article examines three important legal considerations bearing on county board member social media use: (1) First Amendment (freedom of speech) concerns; (2) Public Records Law concerns; and (3) Open Meetings Law concerns.

### ► First Amendment concerns

Both the First Amendment to the U.S. Constitution and Article I, Section 3 of the Wisconsin Constitution prohibit government actors and elected officials acting in an official capacity from abridging a person's freedom of speech.<sup>1</sup> This is especially true in the context of "political speech," i.e., speech that includes discussions of political candidates, the form or functioning of government, or any other discussion of the political process. Political speech is the most protected form of speech under the First Amendment. It therefore warrants the highest level of scrutiny against laws and actions of the government that aim to regulate it.<sup>2</sup> County board members often partake in political speech,

but the proliferation of social media has blurred the lines between when official county business is taking place and when board members are conversing privately.

It is well established that social media posts are considered "speech." But not all speech is protected under the First Amendment. The level of government regulation allowed under the First Amendment depends on the context in which the speech occurs. Courts have identified three main contexts where protected speech may occur: (1) traditional public forums; (2) designated public forums; and (3) non-public forums. The rule is relatively straightforward: If posts on social media pertain directly to county or governmental business, board members generally cannot regulate the speech of others in relation to the post. That is, when a board member opens a page to the public, the board member is limited in their regulation of the page. "Regulation" of a social media page includes, but is not necessarily limited to, deleting or removing negative comments, "blocking" individuals from "liking" the page, and disallowing certain users to participate in political discourse. All such conduct may be seen as unlawful regulation of free speech under the First Amendment depending on which of the following "forums" the speech occurs in.

### ► Traditional public forums

A "traditional public forum" is the most protected forum of free speech. The U.S. Supreme Court has stated that public forums are those places which "by long tradition or by

government fiat have been devoted to assembly and debate.”<sup>3</sup> Examples traditionally include streets, sidewalks, parks, and other communally accessible public places. Any restriction or abridgement of speech in these areas is subject to strict scrutiny, meaning the government’s action to restrict the speech must be narrowly tailored to further a compelling governmental interest.<sup>4</sup> However, the government may impose reasonable restrictions on the time, place and manner of protected speech as long as any restriction is: (1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) acquiescent to ample alternative channels for communicating.<sup>5</sup>

The U.S. Supreme Court has not yet resolved whether elected officials’ (such as county board members) official social media accounts are public forums, and, if so, which type. Nevertheless, the court in *Packingham v. North Carolina* commented that the increasing pervasiveness of social media could one day result in its recognition as a “traditional public forum.”<sup>6</sup> If and when such a case is considered by the Supreme Court, the First Amendment protections afforded to social media activity will likely become much more robust. For now, county boards should monitor what they and their members post but should not operate as unreasonable obstacles to free expression on social media.<sup>7</sup>

### ► Designated public forums

A “designated public forum” is a communication channel or location that the government has intentionally created for the public with the purpose of promoting politically expressive activity.<sup>8</sup> A county’s official website, Instagram, or Facebook page would likely fall under this heading. The same strict scrutiny approach as used for traditional public forums applies here, except the government and government officials can limit the channel’s scope and purpose (e.g., only posting certain county-approved content to the county Facebook page). County board members must be cognizant that a negative comment or post that would typically sanction a “block” in one’s private life requires more leeway in the context of a government official’s social media account.

This concept was illustrated by the 2019 case of

*Davison v. Randall*, where the Fourth Circuit became the first federal appellate court in the country to address whether public officials’ social media accounts can be considered “public forums” under the First Amendment.<sup>9</sup> In the *Davison* case, Virginia resident Brian Davison was temporarily blocked from the official Facebook page of Phyllis J. Randall, the chair of the board of supervisors for Loudoun County, Virginia, after Davison posted a number of comments criticizing a recent round of county spending.<sup>10</sup>

Davison, an outspoken commentator on local politics, brought a civil action against Randall alleging that her Facebook page was a “public forum” under the First Amendment and that she may not exclude people from it based on a difference in views.<sup>11</sup> Citing the “interactive component” of a local government official’s Facebook page, the Fourth Circuit unanimously held that the page constituted a public forum and that Randall engaged in unconstitutional viewpoint discrimination by banning Davison from that forum.<sup>12</sup>

The *Davison* case is an important reminder of the need for county officials to consider the actions they take on social media and temper their reactions to negative posts in accordance with free speech principles. If the county board member cannot point to a compelling county reason to block or delete a post or comment on an official county page, best practices would be to err on the side of acquiescence as opposed to limiting public engagement.

### ► Non-public forums

Finally, a “non-public forum” is a setting in which public speech is not traditionally invited and where the government has not expressed any intention of inviting speech.<sup>13</sup> Public property is considered a non-public forum when its purpose is to conduct or facilitate government business, rather than to provide a forum for public expression.<sup>14</sup> Tangible examples include the offices of government employees, the interior of polling places, the mailboxes of public school teachers, and lobby areas of government buildings. Courts generally uphold government regulation of speech in non-public forums if the regulation is “reasonable,” that is, if the government

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can point to some legitimate governmental interest for the regulation.<sup>15</sup> However, in a social media context, the non-public forum analysis is much less common because the analysis generally focuses on tangible spaces.

### ► Public Records Law concerns

Generally, all social media content related to governmental business, whether public-facing or private, constitutes a public record.<sup>16</sup> As such, it is required that counties retain all records of governmental business, including, but not limited to, budget discussions, personnel changes, policy initiatives, committee objectives, appointments, board complaints, and vote deliberations. In accordance with Chapter 19 of the Wisconsin Statutes, board members must cooperate in the preservation and disclosure of public records in adherence to the stated public policy that “all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”<sup>17</sup> Social media posts containing records of government affairs and information likewise need to be preserved, and county boards are well advised to enact processes to effectuate that purpose.

### ► Open Meetings Law concerns

Under the Open Meetings Law, a “meeting” occurs when both of the following elements exist: (1) a purpose to engage in governmental business (the purpose requirement); and (2) the number of members of the governmental body present is sufficient to determine the body’s course of action (the numbers requirement).<sup>18</sup> It can be relatively simple to inadvertently create “walking quorums” among board members who group together on social media. A “walking quorum” is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.<sup>19</sup>

County boards must remain cognizant of the potential for social media groups, pages and accounts of various

board members to develop into “walking quorums,” which can covertly affect the proper, transparent functioning of county government.

### ► Conclusion

Social media is a quick and effective way to reach a large number of people in a short period of time. But there are legal risks associated with a county board member’s use of social media on matters relating, directly or indirectly, to county business. It is critical that county officials work with their corporation counsel to understand the risks and, if necessary, implement rules relating to the use of social media. If you have any questions surrounding legal considerations bearing on county board member social media use as it pertains to First Amendment (freedom of speech), Public Records Law or Open Meetings Law concerns, please contact the WCA or the authors. ■

*Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.*

1. U.S. Const., amend. I (“Congress shall make no law ... abridging the freedom of speech”); Wis. Const., art. I, s. 3 (“Every person may freely speak ... on all subjects ... and no laws shall be passed to restrain or abridge the liberty of speech ...”).
2. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).
3. *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983).
4. *United States v. Carolene Products Company*, 304 U.S. 144, n.4 (1938).
5. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
6. *Packingham v. North Carolina*, 582 U.S. 98 (2017).
7. We note, however, that a few narrow categories of speech are not protected by the First Amendment, including “fighting words,” “true threats,” and speech likely to cause imminent lawless action. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *State v. Perkins*, 2001 WI 46.
8. *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).
9. *Id.*
10. *Id.* at 666, 675.
11. *Id.* at 676.
12. *Id.* at 682.
13. *Perry Education Assn.*, 460 U.S. 37, 45. (1989).
14. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 796 (1985).
15. *Id.* at 788, 808.
16. Wisconsin Statutes § 19.31. (Public Records Law).
17. *Id.*
18. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77 (1987).
19. *Id.*