

The background features a blue-to-teal gradient with white circuit-like lines on the left. Various social media icons are scattered throughout, including LinkedIn, YouTube, a thumbs-up, a speech bubble, a camera, a speech bubble with a plus sign, and a speech bubble with an equals sign. The main title is centered in large, bold, white letters.

# **BALANCING ENGAGEMENT AND LEGAL RISK**

**SOCIAL MEDIA FOR COUNTY OFFICIALS**

# PRESENTED BY: CAROL S. PETITT



**Vaughn Petitt Legal Group, PLLC**  
7500 W. Highway 146  
Pewee Valley, Kentucky 40056  
(502) 243-9797

# SOCIAL MEDIA: A TOOL FOR CIVIC ENGAGEMENT



<https://cwpwp2.betterthanpaper.com/wp-content/uploads/2019/05/social-media-marketing.png>

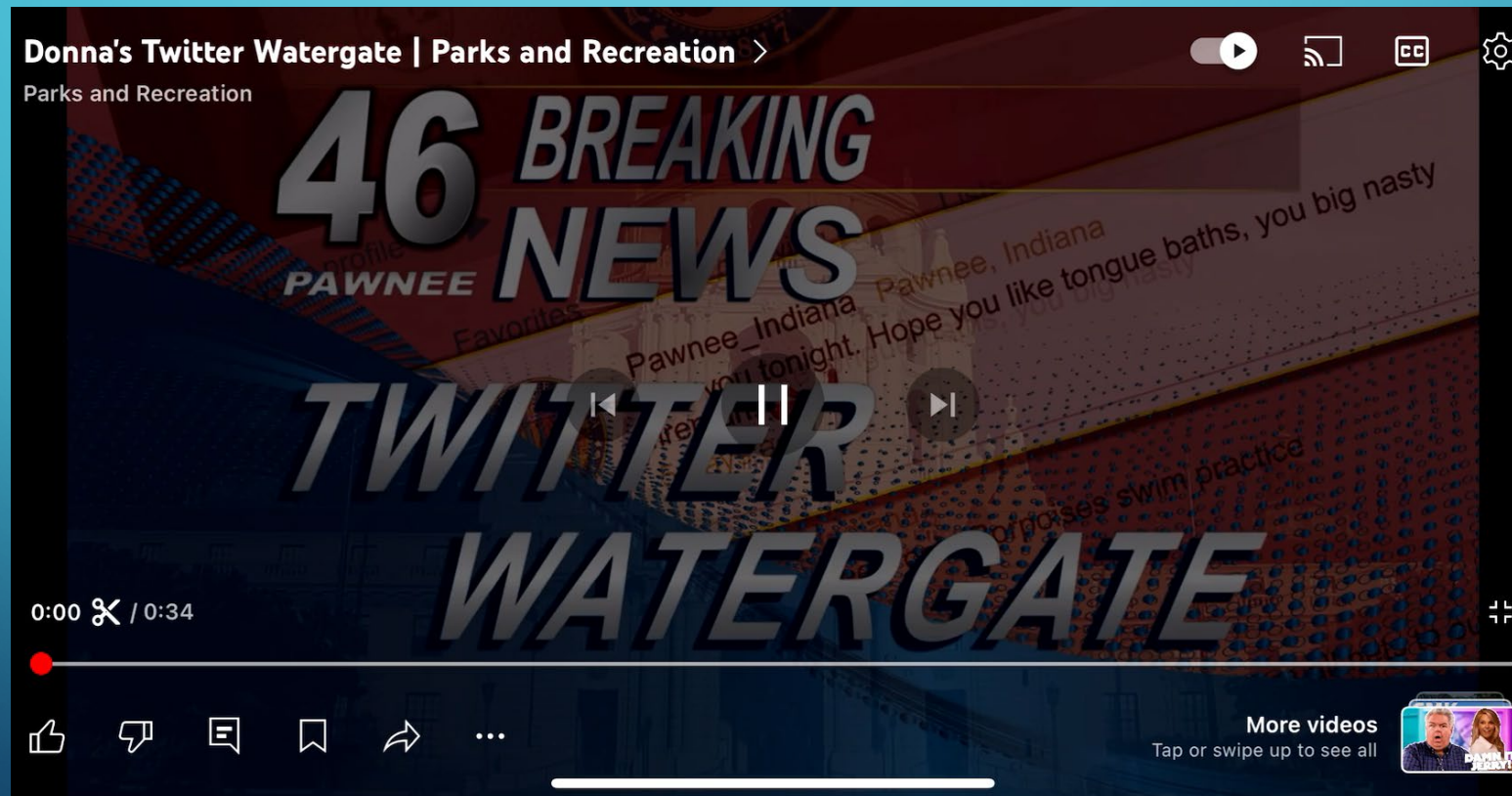
# SOCIAL MEDIA AS A TOOL

- Social Media is an important tool for elected officials to communicate with their constituents. It can be used to...
  - Advertise community events and initiatives
  - Share helpful information and emergency updates
  - Engage the community with humor



# BUT SOCIAL MEDIA CAN ALSO PRESENT CHALLENGES FOR ELECTED OFFICIALS...

If you're not careful, you can find yourself in a situation like this one.



|| 19:51

# SOCIAL MEDIA PITFALLS

Uninformed  
Government  
Official

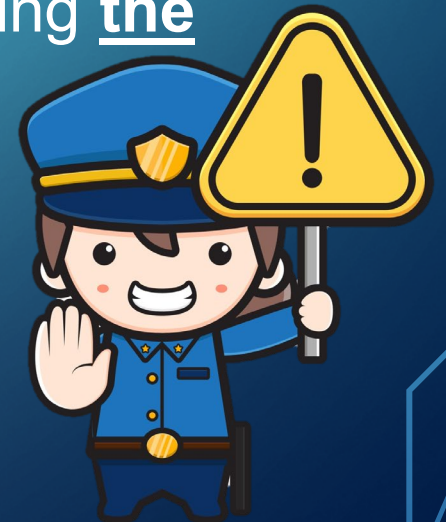


Legal  
Liability



# THE DARK SIDE OF OFFICIAL SOCIAL MEDIA

- When using social media as an elected official, it is important to make sure you are compliant with the law.
- Public social media accounts (or personal accounts used for public purposes) are subject to various legal considerations, including the First Amendment and Open Records Requests.



# THE FIRST AMENDMENT

- The Supreme Court has characterized social media as “the modern public square.” *Packingham v. North Carolina*, 582 U.S. 98 (2017).
- This means that government officials are bound by the First Amendment when they use social media to perform their official duties.
- When you use official social media, any of the following actions could land you in legal hot water:
  - Limiting what people can post
  - Blocking or banning people who disagree with you
  - Deleting comments



This Photo by Unknown Author is licensed under [CC BY-NC](#)



# THE FIRST AMENDMENT: RECENT DECISIONS

- *Davison v. Randall*, 912 F.3d 666 (4<sup>th</sup> Cir. 2019)
- *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2<sup>nd</sup> Cir. 2019) (remanded and instructed to dismiss as moot by the U.S. Supreme Court, 141 S.Ct. 1220 (2021))
- *Lindke v. Freed*, 601 U.S. 1987 (2024)

# OPEN RECORDS REQUESTS

- In an unpublished 2023 decision, the Kentucky Court of Appeals held that personal cell phones used for official business could be subject to Open Records Requests.
  - *Kentucky Open Government Coalition, Inc. v. Kentucky Department of Fish and Wildlife Resources Commission*, No. 2022-CA-0170-MR, No. 2022-CA-0192-MR, 2023 WL 7095744 (Ky. Ct. App. October 27, 2023).
- This decision could mean that private social media accounts, possibly including private messages and non-public posts, which are used for official business are subject to Open Records Requests.

# WHAT DOES THAT MEAN?

- County Judge Executive Jane Doe has a personal social media account where every Tuesday she posts a reminder about the Fiscal Court meeting and regularly “shares” posts made by county agencies about county initiatives and news. She also occasionally responds to messages from her constituents asking about County business. However, she also uses the account to post about personal events and send personal messages to family and friends.
- John Smith, a Kentucky County citizen, suspects that CJE Doe is embezzling money and submits an Open Records Request for “all messages from Jane Doe’s social media account.”
- **Because CJE Doe uses her social media for official purposes, her personal account might be considered public record, meaning she may be required by the Attorney General or a Court to produce her messages even though she considers the account to be her personal account.**
  - NOTE: Some of her truly personal messages may be exempt from production under the Open Records Act, depending on the recipient and content.



# HOW TO MAKE SOCIAL MEDIA USE SAFER FOR OFFICIALS



# IF YOU WANT YOUR ACCOUNT TO REMAIN PERSONAL, DO NOT USE IT FOR OFFICIAL PURPOSES

- Using a personal account for official purposes could subject the account to...
  - First Amendment restrictions
  - Open Records Requests
  - Discovery requests in litigation (that is, lawsuits against the county or against the official in their official capacity)
- If you must use a personal account, **make sure to follow all the same rules for official social media accounts.**
  - Be careful to avoid making “exclusive” public announcements— don’t post public announcements on a “private” social media page, and make sure the public can access your page to view official content.

# A SPECIAL CASE: CAMPAIGN ACCOUNTS

- Campaign accounts used solely for campaigning purposes are not official accounts
  - UNLESS you use them for official purposes, or “convert” them to official accounts once you are elected
- Likewise, campaign posts on a personal account do not make that account an official account.

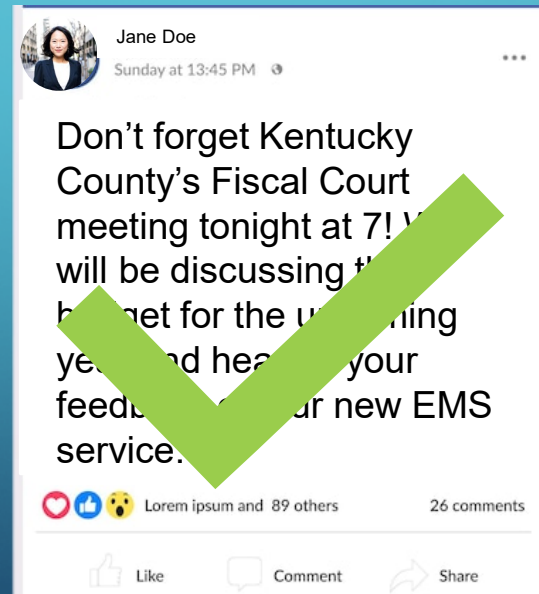


## PRACTICAL TIP:

- The personal vs. official dilemma applies to emails, text messages, and other cell phone activities as well.
- Consider looking into whether your county is able to provide officials with county cell phones, to avoid intermingling.
- If county cell phones are not possible, have a policy in place for use of personal cell phones to conduct county business (including social media, emails, text messages, and calls).
  - Best practice (if you cannot provide a county cell phone) is to have employees use county email accounts, download an app such Google Voice for text and calls, and to take other steps to avoid intermingling and keep public and private separate.
  - **Consult with an attorney if you are unsure whether your policy complies with state and federal law.**

# POP QUIZ

Which of these posts would likely turn a private account into an official account?



Disclaimer: All posts are fictional.



# DO NOT BLOCK USERS OR DELETE COMMENTS JUST BECAUSE THEY CRITICIZE YOU

- This could lead to liability under the First Amendment.
- If a user is being especially harassing or is making threats or other obscene activity, you should consult with an attorney about steps you can take to deal with it.
  - This is an instance where having a strong social media policy could help.





# HAVE A SOCIAL MEDIA POLICY, MAKE IT PUBLIC, AND FOLLOW IT

- Having a policy can help you manage your account and allow you to moderate the content posted by others
  - This does not automatically mean all policies are permitted by the First Amendment!
  - We will discuss these considerations on the next slide.
- Your policy should explain...
  - The general purposes you hope the account will serve;
  - Any limitations on what users may post in the comment threads; and
  - How you will address violations of these limitations.

# IF YOU LIMIT WHAT YOUR FOLLOWERS CAN POST, THE LIMITS SHOULD BE REASONABLE, VIEWPOINT-NEUTRAL, AND ENFORCED CONSISTENTLY

- As a public official, your page will likely attract both fans and critics.
  - The critics may post things that are cruel, uncalled for, rude, and offensive.
  - But the First Amendment protects speech regardless of whether it is rude or mean.
- However, this does not mean you cannot limit posting or comments at all! You can use reasonable, viewpoint-neutral, and consistently enforced guidelines to help moderate comments and posts.
- Make sure these guidelines are publicly posted on your page!



This Photo by Unknown Author is licensed under [CC BY-SA-NC](#)



# SOCIAL MEDIA POLICY

- You can disallow content that is **not** protected by the First Amendment
  - For example, “true threats” and “obscenity”
  - Note that some categories, such as “abusive speech,” are too broad to be compliant with the First Amendment
- You can impose viewpoint neutral limitations on the topics to be discussed
  - For example, “no advertising” or “no solicitation of commercial products or services”
- You may be able to limit who can speak in the forum
  - For example, if you can reliably differentiate constituents from others you may be able to restrict the forum to constituents only
- **CAUTION:**
  - A social media policy does **not** override the First Amendment. You **cannot** use a policy to prohibit protected speech.
  - The First Amendment is **complicated!** When in doubt, consult with an attorney to ensure your policy and its enforcement are compliant!

# WHAT IS A “TRUE THREAT”?


- The Constitutional definition of “threat” is narrower than our day-to-day definition.
- “True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).
- “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.*
- So, a threat needs to be specific enough to show an intent to harm another.
  - “I wish you would die.” – Not a true threat
  - “Someone should kill you.” – Not a true threat
  - “I am going to come shoot you in the head.” – A true threat





# POP QUIZ

Which of the following comments could be restricted?


447 Comments | Moderation Tool Sort by Top ▾


 @KentuckyCountyJudgeExecutive I hope you have good locks on your house, this new policy is so ridiculous I have half a mind to bring my good friends Smith and Wesson by and try to get it through your head that you can't ruin people's lives like this!


Also post on Facebook  Post




447 Comments | Moderation Tool Sort by Top ▾


 I think Kentucky County would be better off if our Judge Executive and Fiscal Court weren't so stupid. These assholes don't know how to run a county, and I hope they all get theirs someday!


Also post on Facebook  Post



447 Comments | Moderation Tool Sort by Top ▾

 Does your lawn look sad? Buy my new lawn fertilizer using code KentuckyCountySaves and get 50% off your first order over \$70!

Also post on Facebook  Post



Disclaimer: All comments are fictional.

# IF YOU MODERATE SPEECH ON YOUR ACCOUNT, DO NOT FORGET DUE PROCESS

- You should make it clear in your publicly posted social media policy that you will notify users of violations.
- When you do provide notice, you should...
  - Specify the provision of your policy you believe the user has violated;
  - Include a copy of the content you believe violated the policy;
  - If it isn't readily apparent, explain why the content violated the provisions you've cited;
  - Explain what measures you've taken, or will take, in response to the violation; and
  - Explain how the user can challenge your decision.

# TIPS FOR USING SOCIAL MEDIA AS AN OFFICIAL

- Commenting on county/city events, official posts, or other matters which could relate to your position could cause trouble.
- Avoid posts which could be considered offensive/discriminatory to various protected classes.
- Be mindful of who you have on your personal private social media
  - This is both a safety concern and a matter of keeping your personal life personal.
  - You don't want to make a personal post to a large audience of people who are barely acquaintances and result in the post being shared more widely than intended.
- When in doubt, silence is usually a safe bet
  - If you aren't sure whether that post or comment could cause trouble, avoid hitting the post button.
- **This goes for both original posts and reposts!**



# POP QUIZ

- Which of these posts/comments could cause trouble for the official?
  - Assume all posts/comments are from his private, personal account



Disclaimer: All posts are fictional.

# A NOTE ON NON-ELECTED EMPLOYEES/SUPERVISORS

- Many of these same rules could also apply to non-elected employees/supervisors.
  - It depends on 1) the content being posted/moderated and 2) the role/job description of the employee.
- Generally, it is best practice to create a social media policy for all county employees which sets guidelines for posting online and interacting with members of the public.
  - Make sure your policy balances the interests of the county with the employees' First Amendment rights!
- **A Special Note:** the rules about personal vs. official accounts for Open Records purposes may apply to non-elected employees as well as elected officials; make sure employees know to keep their personal accounts personal and to only post official business from official accounts (when authorized to do so).

# GUIDELINES FOR NON-ELECTED EMPLOYEES

- You can place reasonable restrictions on social media use. For example, the Department of the Interior implements the following restrictions:
  - Don't use personal social media during the workday
  - Don't give the impression you are posting in an official capacity
  - Don't violate the Hatch Act (a federal law restricting federal employees from endorsing a partisan candidate or group while on duty or at work)
  - Don't share non-public information
- Keep in mind your ability to restrict official, on-duty, at work social media use is stronger than your ability to restrict their at-home, personal social media use.
  - For instance, if an employee makes an offensive post while on the job, about a coworker, or about work in general, this is more subject to restriction than if an employee makes a generally offensive post unrelated to work.
  - When in doubt, ask a lawyer!

# QUESTIONS?



# SOURCES AND ADDITIONAL RESOURCES

- [Social Media for Public Officials 101 | Knight First Amendment Institute \(knightcolumbia.org\)](#)
- [Social Media Use for Public Officials – An Explainer Based on Lindke V. Freed and O’Connor-Ratcliff V. Garnier \(californiapolicycenter.org\)](#)
- [GD-Smarsh-2019-Public-Sector-Guide-to-Social-Media-Strategy-and-Policy.pdf](#)