Social [Distance] Media: Communicating with Constituents During a Crisis

In the “before times,” communicating community messages to residents was routine and frequently even mundane. Cities and villages often distribute newsletters and regularly update bulletin boards, websites, and social media pages. But the arrival of the novel Coronavirus, the global health crisis, and the State and nationwide stay-at-home orders that followed have shed new light on the importance of municipal messaging and how such information should be conveyed to the public. Moreover, the current climate has highlighted the need to provide constituents with concise, accurate information as quickly and regularly as possible.

As most residents continue to work from home and limit their nonessential travel, the use of social media platforms to deliver messages and communicate with the public has newfound relevance. This article provides central lessons for local governments to inform their use of social media and ensure effective communication with residents during times of crisis.

**Lesson #1: Don’t Reinvent the Wheel (Follow What the Pros Do)**

When presenting information and guidance to the public, the most successful speakers use language that is clear, direct, and illustrative. Legal writers look at Supreme Court Justice Elena Kagan’s writing as the standard for communicating complex material in a discernable manner. In an interview with the Dean of Harvard Law School, Dean John Manning remarked that Justice Kagan’s opinions are very distinctive because of their conversational tone and the way in which readers absorb the material as if a friend were telling them a story. Kagan responded by stating, “I try to make it conversational but not completely informal. I try to have some sense of the importance of what we’re doing.”
In writing majority opinions, Kagan believes she has an obligation not only to acknowledge the reverence of the work being accomplished by the Supreme Court, but to also recognize the audience to whom she is addressing. Kagan’s audience “is a set of really smart people…but not necessarily people who know a lot about the subject matter.” Consequently, Kagan focuses on how to convey ideas through understandable language and using analogies or examples that make the listener or reader “see things in a certain way.”1 Similarly, local officials know and can relate to their constituents much better than other governmental actors and should address the public with that relationship and understanding in mind. Like Justice Kagan, local officials should strive to communicate during times of crisis in a way that represents the significance and seriousness of the circumstances, but also in a way that is clear and empathetic.

Unlike the lengthy prose of a Supreme Court decision, social media platforms allow cities and villages to incorporate images and visual cues to create a more dynamic experience for the reader. When addressing the State, Governor Andrew Cuomo invariably uses pictures, charts, and graphs to amplify his message. While more optically stimulating than a Court decision, Governor Cuomo’s presentations, like Justice Kagan’s opinions, are focused and persuasive. Communication coach and speaker, Carmine Gallo, recently praised Cuomo’s effective use of PowerPoint in his daily briefings as a way “to engage visual learners by creating graphical visualizations of data.”2 Gallo also applauds the Governor’s use of photographs to add emotion to his message and the use of single words to reinforce important themes. For example, when admonishing the public for gathering too closely in New York City parks, the slide accompanying Cuomo’s statements displayed a large group of people with the word “mistake” across the picture.3

Posting messages to social platforms allows local officials to employ the same techniques used by the Governor. Facebook, Instagram, and Twitter permit users to post pictures and text when communicating to followers. Additionally, a compelling picture or graph displayed on users’ social media feeds may encourage them to read the entire post rather than to simply scroll past a lengthy written message.

Lesson #2: Social Media Accounts Create Virtual Public Squares (Don’t Forget About First Amendment)

Cities and villages should be cognizant of the ways in which the First Amendment is implicated when posting information and guidance to the local government’s social media accounts. Traditional public forums, such as public parks, streets, and sidewalks, are public spaces that play an essential role in fostering the free flow of ideas and expression in a democratic society. As a result, regulations limiting speech in these areas are subject to the highest level of legal scrutiny. Local governments cannot uniformly prohibit access to such traditional public forums, nor may they regulate the content of the speech in such locations, except in very limited, narrow circumstances.

Designated, or limited, public forums are places and locations that are not broadly available for public gatherings, but the government nonetheless controls the space.4 The inside of municipal buildings, public university classrooms, and other publicly-owned spaces are all types of designated public forums. While local governments may impose reasonable time, place, and manner restrictions on speech, the content or viewpoint of the speech is generally not subject to limitation, irrespective of the type of public forum in which the communication occurs.

The interactive spaces of social media accounts created and operated by governmental entities have been categorized as designated public forums because they are accessible to the public but controlled by the governmental agency.5 In those electronic spaces, users may respond to the government’s posts, engage directly with the government account, and communicate with other users. Consequently, content-based restrictions, burdens, or proscriptions of speech occurring in virtual public forums are likely to violate the First Amendment.6

Using social media accounts to transmit messages to the public creates a public forum when the account enables followers to comment on or reply to government posts.7 Deleting disagreeable or politically charged responses is tantamount to content-based discrimination and could violate the Constitution. Blocking users from accessing government accounts has a similar result that also runs afoul of the First Amendment.8

Unfettered access to a government’s social media account does not mean that the government must permit posting or enable the interactive commentary tools. Disabling the comments entirely may be an effective way to
manage followers’ remarks. While the First Amendment does not protect harassing speech and threats of violence, deciphering which statements constitute abuse and may be regulated from the comments that are protected by the Constitution is often very difficult. Instead, restricting all users’ ability to comment and reply to government posts may help mitigate unsavory speech.

**Lesson #3: Be Careful When Posting as a Private Citizen**

First Amendment forum analysis may also be implicated when a governmental actor or public official creates or controls an account that is used to conduct government business and deliver public messages. While an account held by a public official does not automatically create a public forum, the way in which the account is used by an official, made available to the public, and the regard and treatment given to the account by individuals, agencies, and other governmental officials, all speak to the public nature of the interactive space. Therefore, when a governmental actor uses an account as a public forum, the First Amendment prohibits the exclusion of speech on the basis of the viewpoint.

Often, social media users will “re-post” or “re-tweet” messages that originally appeared on another account. Local officials may engage in this same practice to amplify a message that initially appeared on the municipal account by sharing the post on their personal pages. However, utilizing a personal account to transmit an official municipal message, even during times of crisis, may transform the personal page into a public forum in which the First Amendment will apply. Ultimately, using a personal account to deliver public messages and conduct public business will hinder the official’s ability to restrict the content of the comment section and prevent the official from blocking access to the personal account. The exception to this may occur when the official’s account is “private” and therefore the content posted to the personal account is shared only with the limited number of followers approved by the public officer.

**Lesson #4: Avoid Posting Pitfalls**

Increasing a local government’s or public official’s presence on social media helps ensure that critical information and public safety guidance is accessible throughout the community and to individuals who may not visit the municipal website frequently. However, ensuring that both the local government and the public use social media pages properly requires the adoption of a social media use policy. The policy should be posted on the municipal website and, to the extent practicable, made accessible on each of the social media accounts used by the local government. Ensuring social media use policies are readily available to the public will not only foster compliance, but also keep social media users on notice that such regulations are in place.

While all local governments should adopt a social media use policy, there is no “one-size-fits-all” strategy. However, managing who posts content on behalf of the municipality should be clearly defined. Additionally, the social media policy should determine when and who will be responsible for reviewing the government’s posts and comments. According to the National League of Cities (NLC), a centralized approach to social media maintenance “establishes authority and accountability and reduces the chances of a deviation from policy that results in liability.” Centralizing who manages a local government’s social media pages does not mean that only one person may have access to the accounts. Larger cities and villages may prefer to authorize each department to manage its own account.

The social media use policy should also articulate the rules of conduct for public comment on the government’s official social media pages. As noted previously, reasonable time, place, and manner restrictions may be imposed on speech. The policy must also identify viewpoint neutral criteria that the local government will use to determine when a post will be removed. These criteria may include comments that are not germane to the original government post, are obscene or pornographic, defamatory, criminal, or violate the intellectual property rights of others. Additionally, local governments must regularly and routinely inspect the comments to ensure that the social media use policy is followed and must make certain that the policy is enforced in a non-discriminatory manner. Stated differently, the policy must be enforced in the same way for all posts, regardless of what the post says and who makes the comment, to avoid content-based or speaker-based restrictions.

**Lesson #5: What’s Posted on the Internet Lives Forever**

The use of social media pages also involves the creation and preservation of public records. All city and village records are subject to Article 57-A of Arts and Cultural Affairs Law, which forms the basis for the Records Retention and Disposition Schedule, often termed the MU-1 Retention Schedule. The Schedule establishes the minimum retention periods for records based on the subject matter of the material. The MU-1 Retention Schedule does not address “social media posts” collectively to establish a specific length of time that posts or comments must be preserved. Therefore, depending on the content of a
given post, different retention schedules may apply.

Posts that are removed for violating the local government’s social media use policy, or for any other reason, are still government records that must be preserved in accordance with the Retention Schedule. Local governments may require that the individuals who are responsible for managing the social media accounts periodically save material generated on the sites. The municipality’s record management officer may then dispose the records after the necessary time has lapsed.

Conclusion
During this time of physical isolation due to the Coronavirus pandemic, transmitting information and guidance throughout a community is critically important, and local governments with a robust and active social media presence may be better situated to communicate with their constituencies. While some localities may have avoided the use of social media because of the challenges it involves, hopefully this article has shown that with careful planning and attention, cities and villages may use social media as a tool to deliver potentially lifesaving information and advice to their residents.

For more information relating to the use of social media or to obtain copies of the references cited herein, please contact NYCOM Counsel Rebecca Ruscito at (518) 463-1185 or by email at rebecca@nycom.org.

Endnotes

3. Id. around 19:00.
5. Id.
8. Knight First Amendment Institute v. Trump, 928 F.3d 226 (2d Cir. 2019), hereinafter Knight II.
10. See, Knight I, supra note 7.
11. Watts v. United States, 394 U.S. 705 (1969). However, threatening language that a reasonable person would understand as obvious hyperbole may be not be punished.
12. Knight I, supra note 7, at 566.
13. Knight II, supra note 8, at 237.
15. Id.

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As you look to return to “normal” business operations, the wellbeing of your employees and their families, clients and vendors remains of paramount concern. Coupled with the myriad of local, state and federal regulations regarding reoccupancy, the task becomes daunting.

C.T. Male offers a number of services that relate closely to changes, regulations and policies that will inevitably be instituted post-pandemic. There are several immediate needs everyone will be looking for, as well as long term facility assessments, planning and alterations you may wish to consider. Please contact us if there is anything we can do to help your business return to work. Some of the services you may need include:

1. Prepare COVID-19 health and safety plans and reoccupation plans
2. Develop construction site policy and health and safety plans
3. Train key facility personnel on the implementation of these plans
4. Assess and recommend modifications to workplace setup to assist with social distancing protocols and concepts
5. Industrial Hygienist, Environmental Engineers, Mechanical/HVAC Engineers and a Certified Safety Specialist on staff

Questions?
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