

# Ethics and the Land Use Lawyer



presented to RMLUI by

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March 12 & 13, 2015



**Brownstein Hyatt  
Farber Schreck**

# Today's Main topics

- Focus on *Ex Parte* Communications

- Legal foundation
- Can a violation be “cured”
- Best/example practices



- Social Media

- Free Speech
- Open Meetings/Open Records
- Records Retention
- Litigation Holds and Discovery

# Types of Land Use Decisions

- Legislative
  - Quasi-judicial
  - Administrative
- 
- Not a bright-line distinction.
  - Criteria from case law and CRCP 106(a)(4), not statutory.



# Legislative Actions

- Public policy relating to matters of permanent or general character.
- Of general application.
- Concerns an area usually general by legislation.

*(State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990))*



# Legislative Actions - *continued*

- Generally prospective in nature.
- Usually relates to a matter of public policy.
- No limits on communication with decision makers.
- When governmental entity undertakes legislative action, it is *making law*.



# Legislative Actions - *continued*



- May be challenged only by initiative or referendum
  - Initiative – Citizens power to initiate a new law by proposing it for a vote of the people.
  - Referendum – Citizens power to refer a law passed by the legislative body to a vote of the people.

# Legislative Actions - *continued*



- Governing law
  - Colorado Constitution – Article V, Section 1
  - Colorado State Statutes – C.R.S. Sec. 31-11-101
  - Municipal charter (where applicable)
- Powers of initiative and referendum liberally construed, and any governmental action that has the effect of curtailing the people's fundamental right to legislate is viewed with close scrutiny. *McKee v. City of Louisville, 616 P.2d 969 (Colo. 1980).*



# Quasi-judicial Decisions

- Courts look to three factors to decide whether something is quasi-judicial:
  - State or local law requiring **notice** to the community.
  - State or local law requiring **public hearing** following notice, and **opportunity for citizens to be heard** and present evidence.
  - State or local law requiring the body to make a determination by applying facts of a specific case to certain criteria established by law.
- If these three things are true, it is probably a quasi-judicial type decision.
- Practice pointer: ideally, code should state which types of decisions the municipality considers to be quasi-judicial.





# Quasi-judicial Actions - continued

- Generally involves determination of rights, duties, or obligations of specific individuals by applying existing legal standards to facts developed at a hearing conducted for the purpose of resolving the particular interests in question.
- No “litmus test” for identifying a quasi-judicial action (*Cherry Hills Resort Dev. Colo. V. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988)).
- Generally reactionary, not prospective, and apply to specific individuals, situations, or parcels of land (*Jafay v. Bd. Of County Commissioners of Boulder County*, 848 P.2d 892 (Colo. 1993)).

In a quasi-judicial proceeding, governmental entity is acting like a *judge*.



# Legislative v. Quasi-judicial Land Use Actions

- The following types of decisions have been held to be quasi-judicial in character:
  - Rezoning - *Snyder v. City of Lakewood*, 189 Colo. 421, 541 P.2d 371 (1975);
  - Subdivision applications - *Vick v. Bd. of County Commissioners*, 689 P.2d 699 (Colo. App. 1984) and *Reynolds v. City Council of the City of Longmont*, 680 P.2d 1350 (Colo. App. 1984);
  - Applications for approval of development plans - *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, *supra*;

# Legislative v. Quasi-judicial Land Use Actions

- Variance requests - *Danielson v. Zoning Board of Adjustment*, 807 P.2d 541(Colo. 1990);
- Applications for licenses - *Scott v. City of Englewood*, 672 P.2d 225 (Colo. App.1983);
- Special assessments - *Cline v. City of Boulder*, 35 Colo. App. 349, 532 P.2d 770 (1975);
- Liquor license matters - *Norris v. Grimsley*, 41 Colo. App. 231, 585 P.2d 925 (1978).



# “Hybrid” Actions

- Rezoning, under Colorado law, is always **BOTH** quasi-judicial, for purposes of *ex parte* communications being prohibited, and the ability to challenge under C.R.C.P. 106(a)(4), **AND** legislative, for purposes of challenge by initiative and referendum.

(*Margolis v. District Court*, 638 P.2d 297 (Colo. 1981)).



# Legislative v. Quasi-Judicial

Function	Legislative	Quasi-Judicial
Master plan/general, specific plan	x	
Comprehensive zoning	x	
Zoning text amendments	x	
Piecemeal rezonings	x	x
Special exceptions		x
Variances/conditional use permits		x
Subdivision approvals		x
Zoning or use permit issuance & violations		x

Zoning is BOTH legislative AND quasi-judicial AT THE SAME TIME

# What is an *ex parte* communication?

- Latin:
  - On one side only.
  - *Done by, for, or on the application of one party alone.*
  - “by or for one party.”
- Generally, a communication between the decision maker and an interested party that takes place without public notice and outside the record



## *Ex parte* communications prohibited in quasi-judicial actions



- Why?
  - Decision makers should make decision based only on what's in the record.
  - Potential for real or perceived bias/influence.
  - Compare a court case – would you want to find out the judge spoke privately to the other side?
  - Public perception of fairness; alternatively, that public bodies subject to undue influence.
  - Can invalidate the decision.



# From where does prohibition arise?

- Statute?
  - Colo. Rev. Stat. §§ 24-18-101, et seq.
  - Nev. Rev. Stat. §§ 281A.420.
  - Mont. Code Ann. §§2-2-101 et seq.
  - Utah Code §§ 10-3-1201 et seq.
  - Ariz. Rev. Stat. § 47-1101
  - Wyo. Stat. § 34.1-1-101
- None of these contain an express prohibition on *ex parte* contact.



## But see . . . Or. Rev. Stat §215.422



- (3) No decision or action of a planning commission governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
  - (a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and
  - (b) Has a public announcement of the content of the communication and of the parties right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related

# CO – Independent Ethics Commission

- 2006, Article 29 added to Colorado Constitution
- Creates Independent Ethics Commission
- Purpose:
  - The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;
  - They shall carry out their duties for the benefit of the people of the state;
  - They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated; and
  - Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust.



# Due Process



- General principles of due process require impartial tribunal
- *Ex parte* communications may indicate bias
- Other parties have no opportunity to respond to issues, arguments or facts raised in an *ex parte* communication
- Even if no express prohibition, can call into question the impartiality of the tribunal

- Difficulty for elected officials – conflict between need to listen to and represent constituents, and need to make a fair and impartial decision.





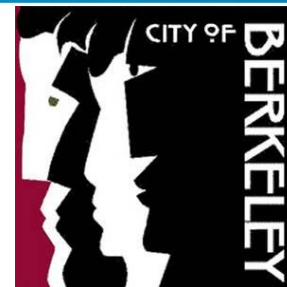
## City Council Should Scrap Ex Parte Rule

*By Antonio Rossmann*

*Tuesday April 20, 2004*

*Tonight (April 20) the City Council has the chance to moderate Berkeley's extreme rule prohibiting any communication between citizens and council members on land-use permitting matters, and bring Berkeley into line with practices that generally prevail throughout California. For many years the council has operated under its self-imposed rule that categorically forbids councilmembers "to discuss with any member of the public the facts of any [land use application] which may probably be the subject of public hearings by the City Council."*

# City of Berkeley Municipal Code



- **2.06.110 Disclosure of *ex parte* contacts.**
- Whenever a Legislative Body holds a public hearing on a zoning, landmarks, subdivision or other adjudicative matter, following any staff presentation, each member of the Legislative Body shall verbally disclose all *ex parte* contacts concerning the subject of the hearing. Members shall also submit a report of such contacts in writing prior to the commencement of the hearing. Such reports shall include a brief statement describing the name, date, place, and content of the contact. Written reports shall be available for public review in the office of the secretary to the Legislative Body prior to the Meeting and placed in a file available for public viewing at the Meeting. (Ord. 7166-NS § 1 (part), 2011)



# Best Practices

- FAQ-type explanation of what constitutes quasi-judicial v. legislative, and when the *ex parte* prohibition attaches on web site
  - See Longmont, Erie, Lakewood for example)
- Specific code provisions with similar effect
- Adopt rules of procedure for decision making board
  - Limits contact regarding procedure and logistics





## Municipal Code

- **Sec. 2-53. - Site inspection/no ex parte contacts.**
  - (d) In order to afford all parties-in-interest a fair opportunity to respond to the information upon which the City Council is to base its decision on appeal, and in order to preserve the impartiality of Councilmembers hearing the appeal, all Councilmembers who intend to participate in hearing the appeal shall, to the extent reasonably possible, avoid communications with parties-in-interest and members of the general public regarding the merits of the appeal prior to the hearing on the appeal.
- Note that this applies only to appeals, where Council is reviewing the decision of a lesser decision maker, not to matters where Council is the decision maker

# Can an improper *ex parte* communication be “cured?”

- **Disclosure of an Outside (Ex Parte Communication)-Members of the Commission and Staff**
  - a. The Exparté Communication Binder is available at the Sign-In and Agenda Station.
- **City Attorney Cross Examination on the Record**
  - Have you received any communications?
  - Please disclose them on the record.
  - Are you confident that you can render a decision tonight based on the evidence in the record including the public hearing?



- **Fill out a form**



- EX PARTE COMMUNICATION RECORD -- Please file this completed form with the information coordinator immediately after receiving an ex parte communication related to the proposed program amendments.
- 1. Your Name: \_\_\_\_\_
- 2. Source of Communication \_\_\_\_\_
- 3. Type of Communication \_\_\_\_\_ Telephone call \_\_\_\_\_ Letter  
\_\_\_\_\_ Other \_\_\_\_\_ In-Person Conversation
- 4. When communication received: \_\_\_\_\_
- 5. Where communication received: \_\_\_\_\_
- 6. Today's date: \_\_\_\_\_
- 7. If the communication was a telephone call or in-person conversation, please attach (or print below) a brief summary of the substance of the communication.

- **Try Again**

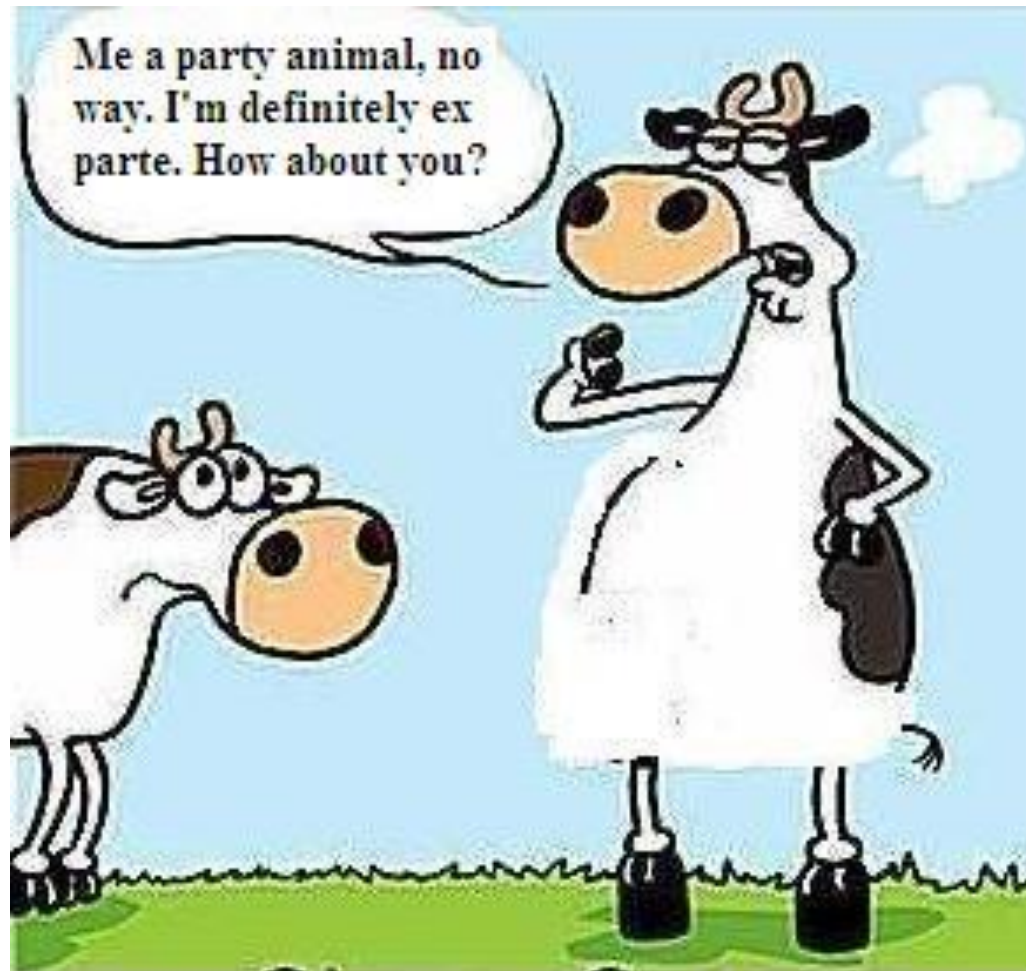
- Remand to allow other stakeholders/parties to respond to issues raised in *ex parte* communication.
  - *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).



# When does the *ex parte* prohibition attach?

- When a formal application is submitted?
- What about “concept review” type applications?
- What about “I’m thinking about developing on this property, but haven’t submitted any drawings yet?”
- When in doubt – contact the city/town/county/authority attorney!
- Prudent course of action is almost always
  - don’t do it
  - don’t counsel or allow your client to do it

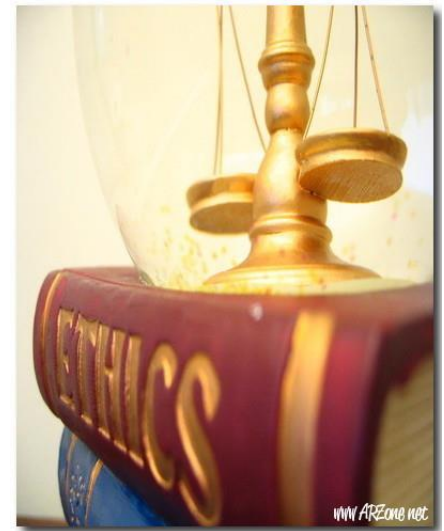






# Issues for Lawyers in *ex parte* contacts

- *Ex parte* contacts violate Rule 3.5(b) of the attorney's Model Rules of Professional Conduct.
  - A lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or communicate *ex parte* with such a person during the proceeding.
- See also:
  - Model Rule 4.2 -- prohibits communication with a person represented by counsel without consent
  - Model Rule 8.4(d) -- provides that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.



# Resources

- Gerald E. Dahl, Advising Quasi-Judges: Bias, Conflicts of Interest, Prejudgment, and *Ex Parte* Contacts, The Colorado Lawyer, Vol. 33, No. 3 [Page 69], March 2004.
- Past RMLUI Presentations:  
<http://www.law.du.edu/index.php/rmlui/publications/by-type>

# Back in my day...

## The Dawn of Social Media

The start of Facebook,  
Flickr, and Digg.

\*\*

MySpace was a toddler  
site and would hit its  
peak in 2006.

\*\*

YouTube was preparing  
to launch.

\*\*

Podcasting began.

The Indian Ocean Tsunami

The Boston Red Sox win the World Series

# 2004

NASA's Mars Rover Lands on Mars

The Superbowl Wardrobe "Malfunction"

Million Dollar Baby wins Best Picture

Google introduces Gmail

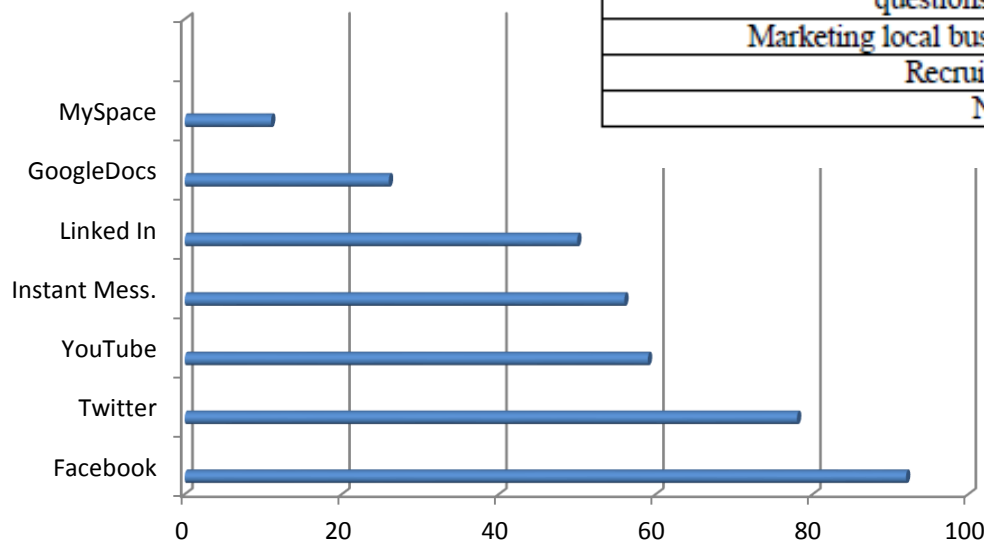
Ronald Reagan dies

# Government Use of Social Media

Table 2.2- Why Governments Pursue Social Media

<i>Social Media Use in Local Public Agencies: A Study of California Cities</i> <i>Questions: What reasons did the city consider when deciding to use social media (check all that apply)?</i>	
<i>Answer Options</i> <i>N=62 Cities</i>	<i>Response Percent:</i> <i>Response Count</i>
Information Sharing	93.5%: 58
Marketing city programs, services, or events	87.1%: 54
Updating constituents during emergencies	50%: 31
Engaging constituents	62.9%:39
Providing an additional method for contacting the city to ask questions and resolve issues	37.1%:23
Marketing local business or commercial interests	14.5%:9
Recruitment and hiring	9.7%:6
Networking	9.7%: 6

## Social Media Use by Local Govt. Agencies (n = 696)



Oliveira, G.H.M., & Welch, E.W., *Social media use in local government: Linkage of technology, task, and organizational context*, *Government Information Quarterly* (2013).

Cardenas, K.A., *Social Media Use In Local Govt. Agencies: An Implementation Guide For Public Officials* Masters Thesis, CSU –Sacramento



## Metropolitan Government of Nashville and Davidson County

February 27 at 11:22am · 🌐

Mayor, Nashville Sounds Announce Parking Plan for First Season at First Tennessee Park

<http://www.nashville.gov/.../Mayor-Nashville-Sounds-Announce-...>



### Nashville | Mayor, Nashville Sounds Announce Parking Plan for First Season at First Tennessee Park

Mayor, Nashville Sounds Announce Parking Plan for First Season at First Tennessee Park

NASHVILLE.GOV | BY NASHVILLE

Like · Comment · Share · 👍 1 💬 1 ➦ 1



## SF Planning

@sfplanning



Follow

The @sfplanning Commission hearing is now streaming on @SFGovTV. Thanks for your patience!

🔙 🔄 ⭐ ...

3:06 PM - 26 Feb 2015



### Dublin Planning and Zoning 11.13.14 Part 1

167 views · 3 months ago



### Dublin Planning and Zoning 11.13.14 Part 2

92 views · 3 months ago



### Dublin City Council - Work Session 10.6.14

3 views · 5 months ago



### Dublin City Council - Bridge Street District Work Session 10.6.14

120 views · 5 months ago



## City of Littleton, Colorado - Government

March 3 at 10:23pm · 🌐

### Littleton News & Announcements: Special Election Results

Acting Littleton City Clerk Colleen Norton has announced the results of the Special Election held today concerning urban renewal:

LITTLETONGOV.ORG

Like · Comment · Share · 👍 8 💬 3



## City of Littleton, Colorado - Government

March 3 at 8:21am · 🌐

Have you voted yet? Today is the last day to vote in Littleton's special election. Drop your ballots off at the Littleton Center tonight until 7 p.m.



Like · Comment · Share · 👍 8 💬 1

Search

Nancy

14

Follow

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Belmont Public W...

© Belmont, CA · www.belmont.gov

The DPW serves the citizens of Belmont by providing quality of life services through improvements to and maintenance of public infrastructure.

10 Boards

91 Pins

3 Likes

18 Followers

8 Following

General Images

Construction Projects

Stormwater

# Legal Issues related to Social Media Use

- Citizen Free speech
- Employee free speech / passwords / privacy
- Open meetings laws
- Open records laws
- Records retention
- Intellectual Property
- Litigation holds and discovery
- Privacy



Artwork courtesy of Sprial16



# U.S. Supreme Court

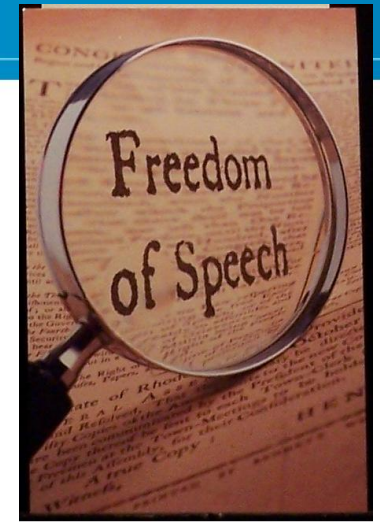
- *Elonis v. United States*
  - First Amendment “True Threat” Case
  - Court’s first case on social media
- Penn. man convicted of Facebook threats directed toward wife, a kindergarten class, FBI agent.
  - Issue was whether he could be prosecuted for his comments; whether his comments were “true threats”
- Both sides of case asked Court to consider the unique qualities of speech on social media.
- But oral arguments indicate that SCOTUS focused on the *what* (content) of the speech as applied to historical free speech case law.
  - They weren’t too concerned about the *how* the speech was communicate or the type of forum at issue





# Free Speech

- Government
  - Government Speech Doctrine
  - Selecting info and material to post on a site
- Citizens
  - Social Media as a Public Forum
    - “A place or channel of communication for use by the public at large.” *Cornelius v. NAACP* (US 1985)
- When First Amendment issues may come up:
  - Objectionable posts, tweets, comments
  - Friend requests/invites

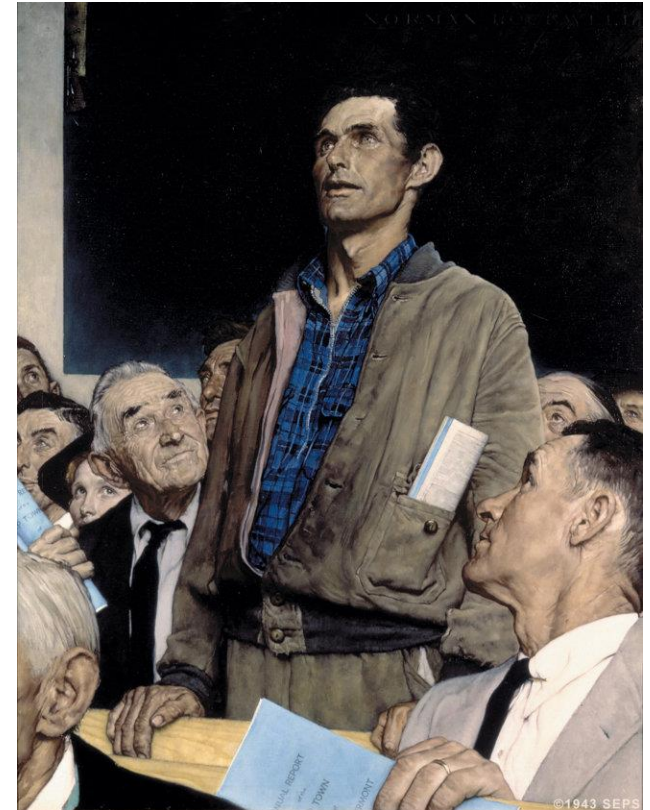


# Free Speech

- Traditional (aka “Open Public”) forum – a place with a long tradition of freedom of expression (park, street corner).
  - Content neutral (time, place, manner) restrictions okay
  - Content restrictions only permissible when the government has a compelling interest to do so.
- Limited Public Forum (aka “Designated Public Forum”) - is a forum set aside by government for expressive activities.
  - Limiting access to certain speakers or subjects is okay
  - Government must still show a “compelling interest” if there is a restriction on content.
- Closed Public Forum – traditionally not open to public expression
  - Jail, military base
  - Restrictions acceptable as long as they are reasonable and not based on a desire to suppress a particular viewpoint.

# Challenges with Free Speech

- Meeting (\*and records) management
  - Protocols
  - Procedures
  - Plans
- Traditional or Limited Forum
  - Content neutral
  - Compelling interest for restrictions
- Consistent Application
- What is and is not speech?
  - Signs? Dress (costumes)? Trinkets?



“Freedom of Speech”  
Normal Rockwell, 1943

# Bland v. Roberts (4th Cir. Va.) Sept., 2013

- A Facebook “like” is speech.
- Sheriff, recently reelected, terminated 6 employees because of their support for his opponent, shown by
  - “likes” on the opponent’s Facebook page,
  - attendance at the opponent’s campaign events (as shown by Facebook pictures), and
  - displaying the opponent’s bumper sticker.
- Court said
  - actions at issue were speech, as well as symbolic expression,
  - the speech was on a matter were of public concern.
- The case was remanded to determine whether the speech was a motivating factor for the terminations.

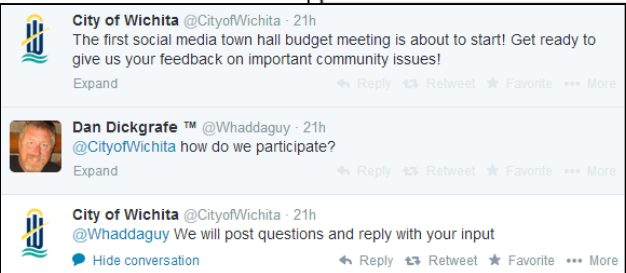


# Open Meetings

- **Colorado:** A "meeting" means "[a]ny kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means or communication."
- **Wyoming:** "Meeting" means an assembly of at least a quorum of the governing body of an agency which has been called by proper authority of the agency for the expressed purpose of discussion, deliberation, presentation of information or taking action regarding public business;
  - "Assembly" means communicating in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously.
- **Utah:** "Meeting" means the convening of a public body or a specified body, with a quorum present, including a workshop or an executive session, whether in person or by means of electronic communications, for the purpose of discussing, receiving comments from the public about, or acting upon a matter over which the public body or specific body has jurisdiction or advisory power.

- **Florida:** "The use of a website, blog or message board to solicit comment from other members of the board or commission by their response on matters that would come before the board would trigger the requirements of the Sunshine Law."
  - Attorney General Opinion 08-07
- **Minnesota:** In 2014, the open meeting law was amended to provide for social media meetings.

- Meetings on social media can work.



The screenshot shows a Twitter thread. The top tweet is from the City of Wichita (@CityofWichita) stating that a virtual budget town hall meeting is about to start and encouraging feedback. Below it is a reply from Dan Dickgraft (@Whaddaguy) asking how to participate. Another tweet from the City of Wichita follows, stating that questions and replies will be posted. The tweets include interaction icons like Reply, Retweet, and Favorite.

DAY/DATE/TIME	HOSTED BY
Tuesday, August 12 6:00 pm	Councilmembers Jerry Allen and Shelle Kadane
Monday, August 18 6:30 pm	Councilmember Dwaine R. Caraway
Tuesday, August 19 6:30 p.m.	Councilmember Lee Kleinman
Wednesday, August 20 6:30 pm	Councilmember Dwaine R. Caraway
	Mayor Pro Tem Tennell Atkins
	Councilmembers Jennifer Gates and Philip T. Kingston
	Councilmember Rick Callahan

For meetings via the web visit [CityNewsroom.com](http://CityNewsroom.com)  
 932 Spanish Translation 1-888-400-9342

# Open Records



- Definition of Records

- **Colorado**: “writings made, maintained, or kept. . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.”
- **Wyoming**: “any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business which is not privileged or confidential by law.”
- **Utah**: “a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics that is prepared, owned, received, or retained by a governmental entity or political subdivision; and where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.”



# Open Records *cont.*



- Many states' definition of "records" specifically includes records that are stored or maintained electronically.
- Be Prepared to treat each comment, post, picture, and list of individuals connected to the social networking site as an open record.
  - Why? "Made, maintained, or kept on file... or that has been received in the course of official business."
    - Florida: Information placed on a city's Facebook page relating to official business is a public record and the city must follow the retention schedules established by law. Op. Att'y Gen. Fla. 09-19 (2009).
- Timely and efficient response is required.



# Records Retention

- Check applicable state archiving policies and adopted local policies
  - *City of Hampton social networking sites are subject to Library of Virginia's (LVA) public records laws. Relevant City of Hampton and (LVA) records retention schedules apply to social networking content.*
  - *Erie, Colorado: The Communications and Information Services Division Manager will retain all posted comments on Town Social Media pages in accordance with CORA and the Town's Records Retention Policy*
- Analyze the issue:
  - “Do we classify social media content as a record?”
  - “What is the best strategy to ensure we retain records we are legally obliged to retain?”

@SeattlePD want the archives of  
Tweets available from Twitter for each  
beat: <https://t.co/QAZsosYfen> @jseattle  
Consider this a PRA req, plz

— lee.c (@sleepylemur) April 29, 2014

# Records Retention

- The System
  - Set up a forwarding system of posts, comments, people who join the site, etc., to organizational email account
  - Periodically save screen shots and archive comments / posts
  - Retain only those records an agency is legally obliged to retain
  - Reference existing records retention policies or e-discovery guidelines in social media policies
    - Existing policies may easily be applied to social media content, just as they apply to emails

## Social media raises open records worries

Story Print Font Size: - +

[Recommend](#) { 3 } [Tweet](#) { 8 } [g+1](#) { 1 } [Share](#) { 1 }

Posted: Wednesday, April 17, 2013 6:11 pm

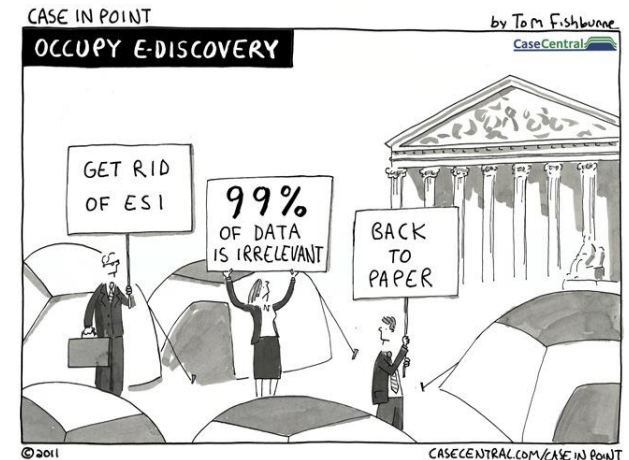
By Andrew Dowd Leader-Telegram staff

Facebook helped a few Eau Claire City Council candidates connect with voters leading up to the April 2 election.

But now that they're serving as public officials, they've gotten into the murky area where open government laws are too slow to keep up with ever-changing social media technology.

# Litigation Holds and Discovery

- One survey of published case law from 2010 and 2011 identified 689 cases involving social media evidence
  - eDiscovery Law and Tech Blog
- Similar to records retention
  - Processes and policies should be put in place to address litigation holds and/or the local government's own litigation discovery needs
  - A lack of policies or inconsistent retention/deletion policies can subject a local government to sanctions in litigation.



October 06, 2014

## City's Faulty Preservation Practices Lead to Sanctions

April 26, 2013

### Adverse Inference Sanction Issued in N.J. Case Involving Spoliation of Facebook Data Is a Lesson on Social Media Disposition

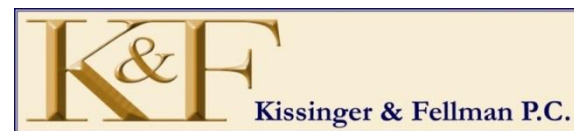
An opinion from March in a personal injury case involving the deletion of a Facebook account is a good lesson for e-discovery professionals about the vulnerability of social media to irretrievable loss. U.S. Magistrate Steven Mannion ordered an adverse inference instruction to the jury after the plaintiff in *Gatto v. United Air Lines* was determined [...] ... [continue reading](#)

*\*an email, not social media case*

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# Questions?



 Brownstein Hyatt  
Farber Schreck

The logo for Brownstein Hyatt Farber Schreck consists of a solid blue vertical bar to the left of the firm's name. The name is written in a black, sans-serif font, with 'Brownstein Hyatt' on the top line and 'Farber Schreck' on the bottom line.