

To Tweet Or Not To Tweet: Social Media Pitfalls



Presented by Mike Hoover, Senate Counsel,
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For The Council of State Governments

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myspace™

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Brief Biography & Contact Info



Mike Hoover serves as Senate Counsel and has worked for the Washington State Senate since 1998. Prior to working in Olympia, he was in private practice in Seattle and worked for the California Assembly and Governor Deukmejian before settling in Washington. Mike received a B.A. in government from the California State University at Sacramento and his J.D. from the University of California's Hastings College of the Law. His Senate career spans two millennia.

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Social Networking Media:

What is it?

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- Let's begin with a little honesty:

I'm not 100% sure, I think it has something to do with computers, maybe? It makes me sound sophisticated and hip to use these terms, though, don't you think?

- Still, we've got to say something here, so, for our purposes, let's go with:

Use of an Internet-based service that enables almost instantaneous communication with potentially limitless people. The communication may be text, pictures, videos, sound, or just about any other content.



Social Networking Media:

Why so popular?

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Many possible reasons, including:

- **It's free!** Usually, there is little or no cost to use these services.
- **It's easy!** You can usually be up and running very quickly, regardless of your level of comfort with computers and technology.
- **It's universal/unlimited!** Almost anyone with an internet connection can access these services.
- **It's fast!** Information can be disseminated almost instantly, in real time.
- **It's hip!** All the cool kids are doing it! E-mail is *so* 1990s!



Social Networking Media:

It's here to stay!

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- ***The New York Times*** (12/17/2008): "...Nielsen Online reports that 65 percent of people watch online videos Monday through Friday between 9 a.m. and 5 p.m. Fifty-one percent of online viewers use that same time period on weekends to watch videos...."
- **PCWorld.com** (6/03/2009): "...Nielsen Online released a study that shows that from this time in 2008 until now, the time people spent on social networking sites has increased by 700 percent. Nielsen also reveals that sites like MySpace and Facebook along with Twitter hold people's interest longer than even personal email. The greatest growth for an age group on Facebook was from the 35-49 year olds..."
- **Nielsen Online** (3/18/2009): "Twitter.com continues to grow in popularity and importance in both the consumer and corporate worlds...Unique visitors to Twitter increased 1,382 percent year-over-year, from 475,000 unique visitors in February 2008 to 7 million in February 2009..."
- ***Time Magazine*** (2/11/2009): "...For [Congressional] Representatives used to having their messages and contacts heavily filtered, Twitter offers a real-time connection with constituents and the media, for better or worse..."
- ***The Washington Post*** (6/17/2009): "...The State Department asked social-networking site Twitter to delay scheduled maintenance earlier this week to avoid disrupting communications among tech-savvy Iranian citizens as they took to the streets to protest Friday's reelection of President Mahmoud Ahmadinejad..."

Social Networking Media:

Posing new challenges...

- **CNN.com** (7/15/2008): "...But [members of Congress] are now grappling with how to regulate new digital communication methods in light of long-standing rules on congressional interaction with constituents...the virtual world is very complicated. The existing franking rules covering Web sites prohibit advertising and political advocacy on lawmakers' official House Web sites. But outside of the www.house.gov domain in the most popular social networking Web sites, advertising thrives..."
- **CNBC.com** (8/17/2009): "...Less than one in ten tweets have any real 'pass-along' value and more than 40 percent of tweets are 'pointless babble,' a study by the research firm [Pear Analytics] showed..."
- **Yahoo News** (1/10/2009): "...One of the State Department's main electronic communications systems was nearly knocked out when numerous diplomats hit "reply to all" to an errant message. Now American diplomats could face disciplinary action for sending mass responses..."
- ***The Washington Times*** (6/20/2009): "Iran prepared to track dissent on social networks...The Iranian government has high-tech equipment that will enable it to trace thousands of activists who have encouraged the recent demonstrations and spread news about them by using Twitter, cell phones and other Web-based social networks."

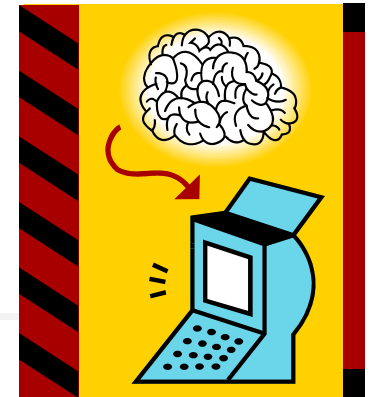
Starting Point:

Same Laws & Ethics Codes Apply



- Theoretically, the same legal and ethical limitations that apply to other forms of communication apply to social networking media as well. So, this should be a very short presentation, right?
- *Not necessarily!* First, I have been described as longwinded. Second, theory and practice don't always go together as nicely as we would like. With this in mind, I hope to provide discussion of both some practical and some legal issues to think about when considering using certain social networking media in a government context.
- Obviously, laws will differ from state to state, but the issues presented and the questions raised should help you start your analysis.

Practical Problem: No Filters



- The very nature of some forms of instant media means that there is very little oversight or input from others at the time the communication is created. As a practical matter, this can lead to:
 - Mistakes, ranging from inconsequential typos to dramatic misstatements or factual errors;
 - Anger, in tone or tenor (real or perceived);
 - "Access Amnesia," meaning that the creator forgets just who (the answer is always, "EVERYBODY!") can access the communication; and
 - *Forever is a long, long, long time.* It can be almost impossible to remove materials from circulation.
 - **Example:** *The Everett Herald* (6/18/2009): "'Tweets' bring possibly illegal meeting to light." City council members who met for food and drink to "debrief" after a public meeting may have violated the state's open meetings law. It came to light when one of the members sent a "Tweet" about the dinner.

Practical Problem: Two-Way Street

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- It is important to understand that, unlike many other traditional forms of communication, social networking often allows immediate and very public feedback!
 - Everyone can see what was written on your Facebook Wall.
 - Everyone can see who your “friends” are (and their friends, and theirs...).
 - Everyone can see who “follows” your Tweet.
- *Many of these tools can be used against you!*
 - “Cutting and pasting,” as well as various network equivalents of “reply to all,” allow for disaffected or angry viewers to “gang up” on a legislator almost effortlessly.
 - Responding to “rumors” or trying to set the record straight can take *incredible* amounts of time!



Practical Problem:

"Everyone" & "No One"

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- *"Everyone" is a lot of people!* Think of it this way: You want to have a polite discussion of eminent domain legislation. You will get some thoughtful constituents and public interest group participation. You may also get that partisan oddball (you know, the one who always sends letters to the paper?) who lives in his parents' basement and has *lots* of time to comment on what a moronic fascist you are.
- *"No One" presents challenges, too.* The Internet lends itself to anonymity and aliases. Being called names is bad; being called names by someone who won't identify himself is worse.

Control: Losing It?



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(Did you ever
really have it?)
Follow the
interdia

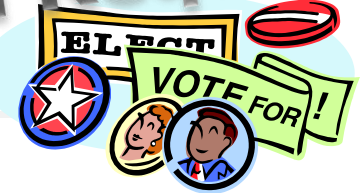
■ Check out the Terms of Service:

- **YouTube:** "...[Y]ou hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website ...You also hereby grant each user of the YouTube Website a non-exclusive license to access your User Submissions through the Website, and to use, reproduce, distribute, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service..."
- **MySpace:** "...[Y]ou hereby grant to MySpace a limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce, and distribute such Content solely on, through or in connection with the MySpace Services, including, without limitation, through the MySpace Services..."
- **Yahoo!:** "...[Y]ou grant Yahoo! the following worldwide, royalty-free and non-exclusive license(s), as applicable..."
- *I'm not picking on these providers! Their policies are remarkably fair and generous, especially given that they are free services!*
- Nonetheless, remember this children's rhyme: *Just a couple of clicks/And forever it sticks!*

Getting More Than Was Bargained For (1/3)



Friend Request



- When you post, upload, embed, tag, import, hogtie, hornswaggle, Shanghai, or wrestle materials into, onto, through, or behind the Internet...

- You may be bringing with you unwanted:
 - Advertising, commercial and campaign.
 - Links
 - Commercial
 - Personal
 - "Adult"
 - Comments and postings
 - "Friend" requests from non-friends.
 - What are the perils of not being friends?

COMMENTS

SpongeBob16 8:53

I like saying offensive things with lots of expletives!

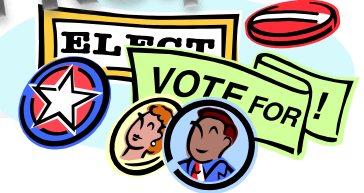
Misterclown 8:47

WHEN WILL THOSE FOOLS IN THE CAPITAL LEARN?!? IT IS TIME FOR WE THE PEOPLE TO TAKE A STAND AND MAKE OUR

Getting More Than Was Bargained For (2/3)



Friend Request



■ Again, check out the Terms of Service:

- **YouTube:** "...The YouTube Website may contain links to third party websites that are not owned or controlled by YouTube. YouTube has no control over, and assumes no responsibility for, the content, privacy policies, or practices of any third party websites. In addition, YouTube will not and cannot censor or edit the content of any third-party site..."
- **MySpace:** "...[Y]ou agree and acknowledge that MySpace may send messages including, but not limited to, notifications, special offers, promotions, commercial advertisements, and marketing materials ..."
- **Yahoo!:** "...You also understand and agree that the Yahoo! Services may include advertisements..."
- *And, again, I'm not picking on these providers! Their policies are remarkably fair and generous, especially given that they are free services!*
- *I am, however, pointing out that you have some "legalese" to consider, most of which usually boils down to your agreement to let things go everywhere, to everyone (at least while you have an active account) and your tacit consent to allow some degree of input or communication from everyone on everything.*



Another Consideration: "Public" v. "Private"

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Consider "public" v. "private" in at least three different contexts:

- First, use of public (government) resources for social networking media probably means that most of the usual ethics or policy constraints are applicable (more on this to come), even if the site/tool is private ("private" in this sense meaning non-governmental).
- Second, can public figures ever really have purely private sites?
 - In other words, can a Senator ever stop being a Senator in the eyes of the public, even if s/he claims to be acting purely privately?
 - *For example, compare www.whitehouse.gov with www.barackobama.com. Very similar! Does the public differentiate?*
 - What is the role (or ability, or authority) of administration with respect to monitoring "private" sites?
- Third, can private content be made public depending on how it is used? *Short answer: Yes.*

Ethics Concerns



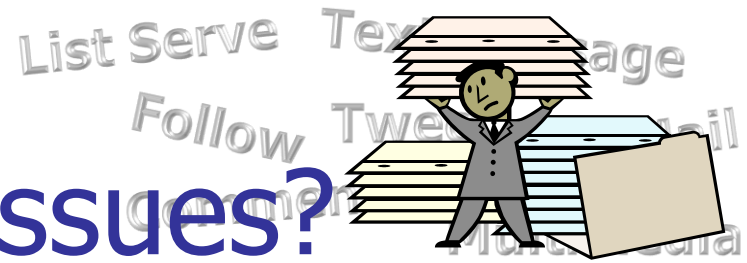
- The Good News:

My experience has been that most governmental ethics policies— whether set forth in statute, or adopted as internal guidelines— can usually be made to fit most social networking situations with some careful thought and perhaps a bit of flexibility.

- The Bad News:

Sometimes, various people want to make use of third-party social networking *because of their perception* that they can cast off the unfair burden of ethics mandates (that is, you may be the boss of the Senate, but you ain't the boss of MySpace!)

Public Records Issues?

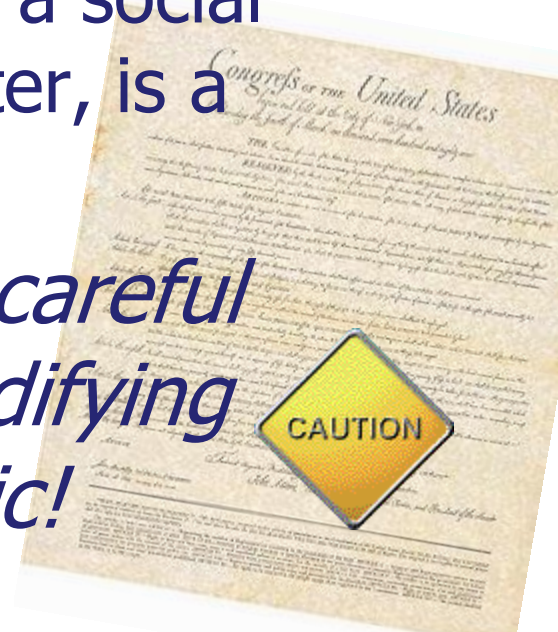


- Are those things posted– and, in some cases, created– outside of government facilities “public records”?
 - If they are, must they be produced? How?
 - Do they need to be stored or archived? How?
 - What about things (like instant messages) that automatically “disappear” after viewing/use?
- For example, the Florida Attorney General has issued an opinion (AGO 2009-19) that a city’s use of Facebook would mean that those materials on Facebook are public records.

“Censorship?” (1/3)

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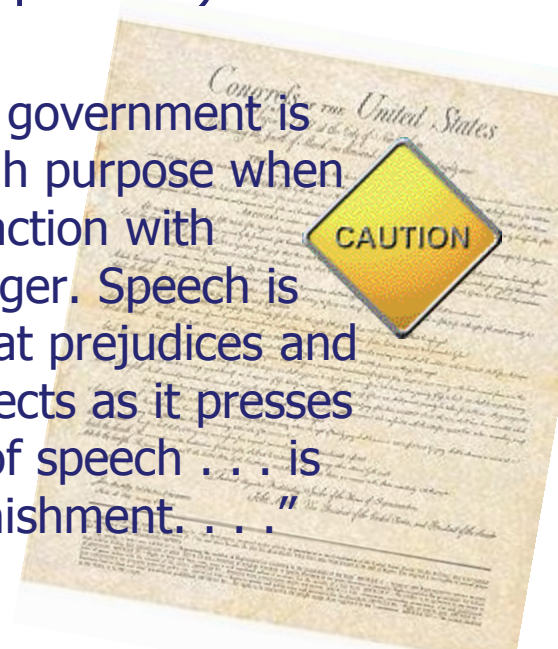
- Typically, comes up in one of two ways, when there is “objectionable” content:
 - In a comment on a webpage; or
 - When someone “follows” you on a social networking site (follows on Twitter, is a friend, is linked-in, etc.)
- *Government needs to be very careful with removing, deleting or modifying content submitted by the public!*



"Censorship?" (2/3)

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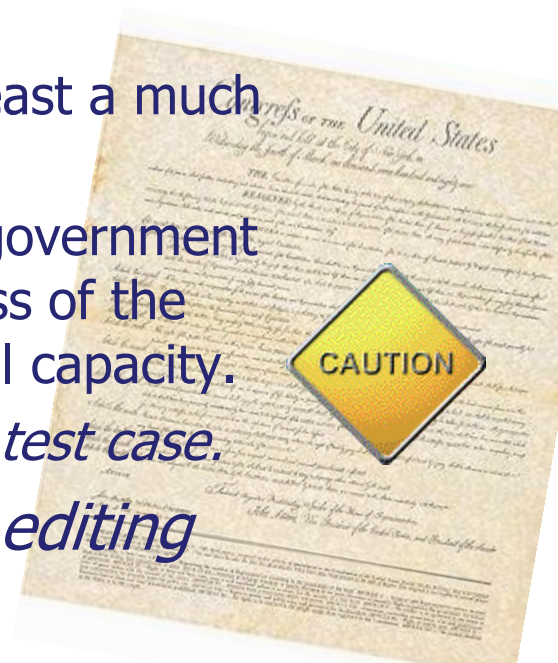
- Why can't government freely delete or modify content added by the public to its sites or social networking media?
 - To the extent these are "public forums," government cannot prefer or exclude different forms of speech (or speakers) under the First Amendment.
 - "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment. . . ."
Terminiello v. Chicago, 337 U.S. 1, 4 (1949).



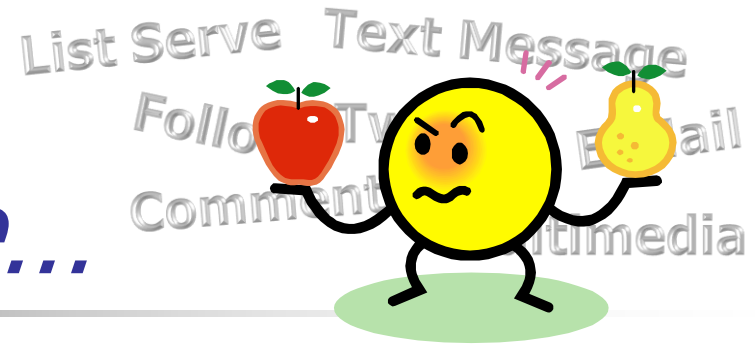
"Censorship?" (3/3)

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- "But," I can hear you saying, "this isn't speech or a public forum! It's just our YouTube Channel!"
- "Possibly," I answer back, masterfully hiding my displeasure that you have interrupted a stunning presentation, "but consider this:"
 - That's a law review article debate (or at least a much longer PowerPoint)!
 - In a nutshell, it may be difficult to argue government officials using government time— regardless of the network— are not acting in a governmental capacity.
 - Practical advice: *Let someone else be the test case.*
- *And, consider public or press reaction to editing comments or removing "friends!"*



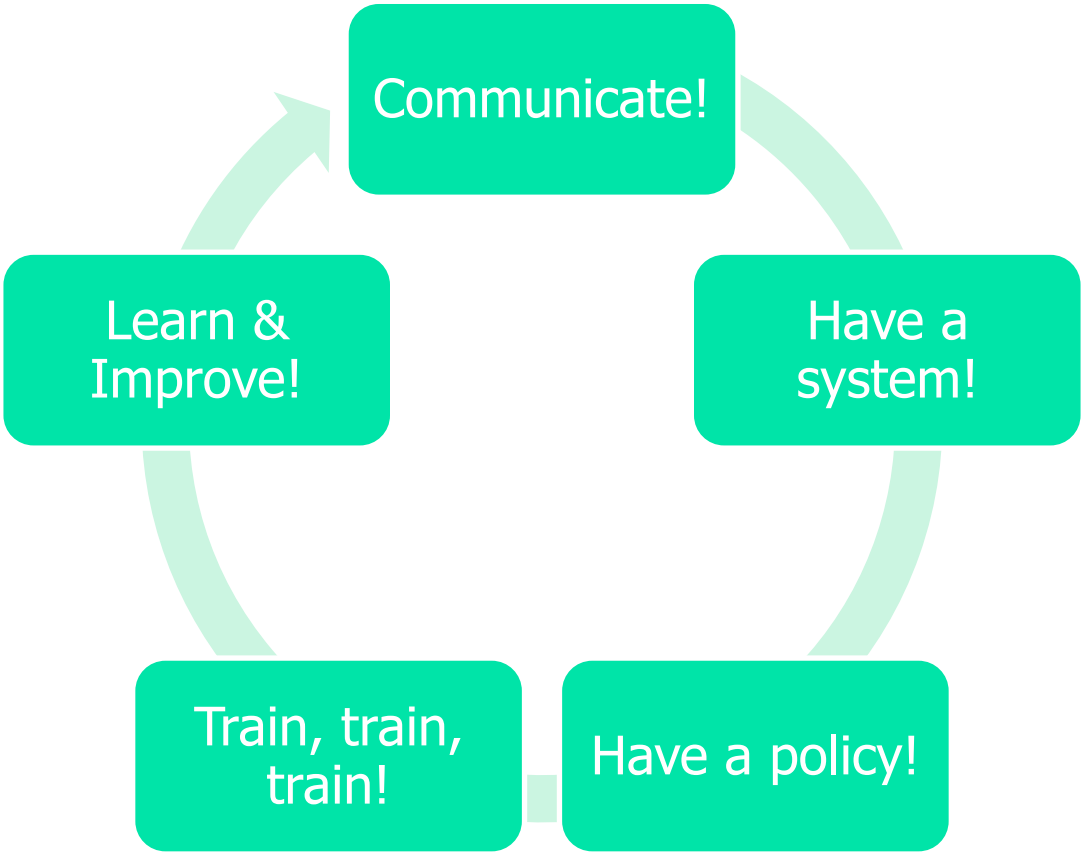
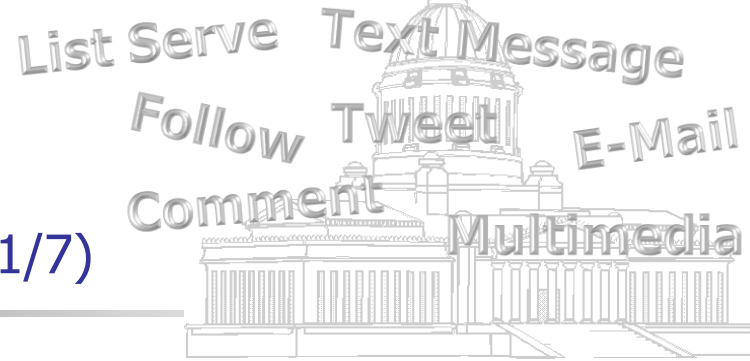
A tough choice...



- New technologies and services will almost assuredly outpace the law's ability to keep up. So, there is a choice:
 - You can take a "wait and see" approach, and implement social networking media only as courts or statutes set forth guidance.
 - On the plus side, you aren't likely to get it wrong.
 - On the minus side, you may be forever lagging behind much of the rest of the world, perhaps trying to play 8-track tapes in an iPod.
 - You can go forward with implementing social networking media even before there is clear legal guidance on their uses and limits.
 - On the plus side, you will be on the cutting edge.
 - On the minus side, the cutting edge is where most cuts occur.

Help!

Have a plan... (1/7)



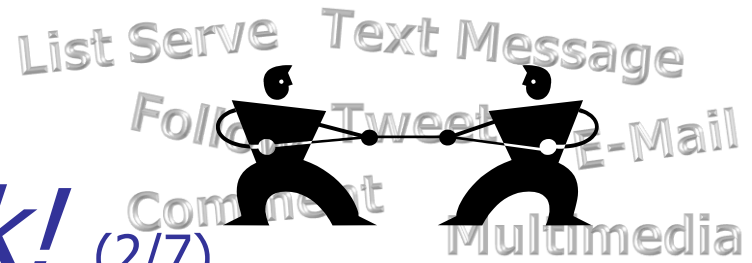
Social networking tools change so quickly that it is difficult to have a policy in place that covers every evolving use. If you have a plan in place, however, you will be able to meet these challenges quickly.

It really comes down to having a core group of people who can talk through these issues openly and candidly, without political gaming.



Help!

Talk, Talk, Talk! (2/7)



- **Communicate!** *This is the most important part for the rest of the tips to work!* Ironically, my experience is that lots of effort is made to communicate with the public, but very little is spent communicating *within the institution*.

- There is likely to be an on-going tug-of-war between administration and users.
 - On the one side, there is a desire to make sure all legal, ethical, and policy guidelines are followed.
 - On the other side, there is a desire to communicate with the public right now! Now! NOW! with the latest and best tools available.
- Communication by and among members and staff— across work groups— is incredibly beneficial. *Leave politics at the door!*
 - Be candid and open throughout. Start with a stated goal of “getting to yes” on using as many social networking tools as possible.
 - Anticipate problems and be ready with solutions! If you have worked through issues with Facebook, you’re probably in pretty good shape to deal with My Space.



Help!

Have a method... (3/7)

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- **Have a system!** This means having a procedure, including people with some decision-making authority, to handle new technologies and tools, or deal with new applications of existing ones.
 - In other words, get someone to ask (or blame)!
 - Seriously, this helps you take advantage of change without unreasonable delay.
- You probably need a group that includes:
 - Users, possibly writers, or members or their staff, to discuss what they want to do;
 - Technical people, to discuss the means and limits of what is possible with available resources; and
 - Administrative and legal staff, to go over the potential limits and hazards of using any new social networking media.



Help!

Draft a policy...(4/7)

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- **Have a policy!** New technologies and services may outpace the law, but, if you have a reasonable policy adopted, you may at least invite a reviewing authority (judge) to defer to your policy. You also avoid charges that you are being arbitrary or capricious.
 - Put another way, an adopted policy always looks better than “Rudy just looks it over and deletes things he thinks are bad.”
- **What should it address?** Probably:
 - How and by whom various social networking tools may be used.
 - Legal concerns (if any)— copyright, public records (including storage and retention), First Amendment (“censorship”), and ethics issues.
 - Institutional limitations, such as decorum or resource (budget) limitations.





Help!

Sample policy... (5a/7)



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- **Do I have some overly-cumbersome extra-wordy sample language I could share?**

Yes!: The Senate recognizes that technology, particularly in the area of computer and Internet applications, is advancing at a phenomenal pace that makes it difficult for any written policy to keep up with the latest emerging trends and capabilities. The Senate recognizes that such technology should be made available to both its members and the public, and opportunities for public communication through emerging media should be explored and utilized. With this in mind, the Senate generally recognizes that the technology or medium being utilized for communications should not be the sole controlling factor in determining the propriety of a communication; instead, the nature and content of the communication, itself, should be used to determine whether it is appropriate under applicable ethics and Senate guidelines. Nonetheless, certain media and technology can present challenges and potential problems that are unique. As a result, the Secretary may approve certain technology and media communication on a case-by-case basis or pilot program to ensure that this new methodology meets ethics and Senate guidelines. The Secretary shall keep the Facilities & Operations Committee informed of such programs, communications, and technology changes.

Help!

Sample policy... (5b/7)



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■ Got any more legalese?

Yes!: The Senate recognizes that the Internet is constantly evolving and desires to make its materials available to as many members of the public as possible. In recognition of the changing nature in which many people get information from the Internet, members of the Senate may post, upload, or otherwise share Senate-created multimedia on common public multimedia share networks such as YouTube, flickr, Yahoo!, or Google. All applicable ethics restrictions and Senate policies remain in effect with respect to such sharing, and the Senate assumes no responsibility for subsequent use or modification of any such materials shared on a non-Senate site.

Or:

The Senate recognizes that social networking tools such as Twitter are a valuable but ever-changing means of communicating with colleagues and the public. Regardless of the ultimate format or means of distribution, any content created with state resources on behalf of the Senate or a Senator shall conform to all applicable laws and Senate policies, including but not limited to ethics, copyright, public records, and decorum mandates.

Help!

Training... (6/7)



- **Educate, Train, or Scare!** It is very important that officials and staff understand both the tools available and the policies that affect their use. There are three goals to accomplish:
 - First, and probably easiest, how to actually (technically) use social networking tools.
 - Second, and often harder, explain what legal and policy limitations apply.
 - Third and probably hardest, **dispel misconceptions**, such as:
 - "Because it's not on a government computer, it's not a public record." (*Probably wrong!*)
 - "Ethics and campaign restrictions don't apply to my Facebook page." (*Maybe!*)
 - "I can delete any comment that I don't like." (*Not necessarily!*)



Help!

Learn & regroup... (7/7)



Obviously, the presenter is perfect and drafted their policies to cover every situation that could arise without fail, but you are likely fallible and unable to achieve this level of perfection. That being the case...

■ Learn and Improve!

- This is why having a solid core group of people who talk openly and often is so important.
- Share stories— what worked, what didn't work? What happened that no one anticipated?

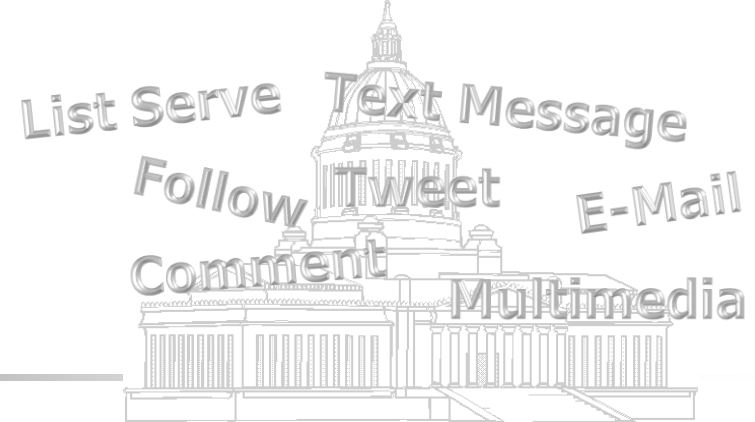
■ Be open about the fact that this is a learning process for everyone, and no one expects to get it 100% straight away.

- Remember e-mail and the internet and how they changed things? No? Well, they did! And, while there were some challenges with their initial use, now they are commonplace tools in most workplaces. Over time, many social networking tools will integrate seamlessly into use, too!





In Sum...



- In a cruel and ironic twist, some of the very things that make social networking so attractive carry some legal or practical risks. Consider:
 - Free and instant communication means the usual “checks” on content are absent.
 - *“Never send a letter written while angry!” is harder advice to remember in our click and send world!*
 - “Two-way” communication means that legislators are open to instant and universal disagreement, criticism, or disparagement in ways that sending a newsletter by mail never invited!
- Legal mandates usually flow from the user and the content’s connection to government, not the actual medium or nature of the tool! *Put another way, the same policies probably apply equally to a government Tweet or a traditional e-mail.*

Conclusion & Your Questions...

Final word:

Like it or not, social networking is here to stay, and the ways in which members and the public expect to communicate are increasingly based solely in cyberspace. It is difficult to anticipate every conceivable new twist in networking, but it is remarkably easy to put together a process for meeting the challenges each new iteration of technology brings.

