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CLIENT BULLETIN

SOCIAL MEDIA & PEACE OFFICERS IN THE PANDEMIC ERA

In the world before COVID-19, the use of social media by peace officers and other public employees in California already carried many risks. The last few years have seen the Legislature, courts and law enforcement agencies impose new conditions on employee use of websites, apps, and e-mail for social networking and work-related communications while at the same time increasing the likelihood of public exposure of employee communications and misconduct. Now, in a time of profound societal turmoil and irrational anti-police rhetoric, social media presents an even greater temptation to violate agency rules and common sense by posting political or social commentary for all to see.

Several recent cases around the country involving peace officers who have been fired for social media posts are a reminder that public employees have limited free speech rights. Here are the key "DO'S & DON'TS" of social media use for peace officers:

DO

- **Set secure privacy settings on Facebook & other platforms**

If you use Facebook, LinkedIn, Twitter, Instagram, Snapchat or any other social networking platform, you should set your privacy settings to prevent any persons you don't know or don't trust from accessing your personal information. There are Internet bloggers and hackers whose mission is to obtain and post personal information about peace officers, including names, addresses, family photographs, and the like. There are even groups dedicated to finding and re-posting offensive tweets, posts and online comments by police officers.

- **Limit off-duty comments to matters of public concern**

Employees who identify themselves as such while off duty are free to express opinions as private citizens on matters of public concern. A schoolteacher, for example, cannot be prohibited from blogging about the school district's budget. A police union president can post comments about contract negotiations or management incompetence.

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However, any off-duty speech cannot impair working relationships or adversely affect the mission of the public agency. Thus, peace officers should not post derogatory comments about the work done by their department, vent online about working conditions or the public or criminals, criticize other employees, or spread gossip on social media sites.

There are dozens of examples every year of officers being suspended, demoted and terminated over social media posts. Recently, a Nashville, Tennessee, police officer was fired for posting on Facebook several comments about an officer-involved shooting in another state. The comments were derogatory toward the suspect as well as the authors of posts criticizing the shooting; e.g., the officer wrote, "Stop bitching about the people who protect you" and "Yeah, I would have done 5" in response to a comment the suspect had been shot four times. The officer was off-duty when he made the posts and never identified himself as a Nashville police officer; nonetheless, he was fired after some participants in the conversation recognized his name and complained to his department. In upholding termination, the court acknowledged the officer's free speech rights but emphasized his department had a legitimate interest in controlling his speech.

Other examples:

- A Massachusetts police captain was demoted two ranks to sergeant after using his department's Twitter account to make derogatory remarks about the Black Lives Matter movement
- A police officer in Cedar Falls, Iowa posted videos of himself in uniform while music with sexually explicit lyrics played in the background
- In Georgia, a police officer was fired after complaints from the public about a meme on her personal Facebook page that read, "Have you ever noticed that the police leave you alone if you're not doing anything illegal?"

The U.S. Supreme Court ruled long ago that the First Amendment protects a public employee's right to speak on matters of public concern but does not protect speech the public employer can show adversely affects the agency's operations. In too many cases around the country, peace officers have tested this rule with social media posts that are racially, culturally or politically insensitive and have lost their jobs.

- **Assume all of your communications will become public**

In *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, the California Supreme Court held text messages, e-mails, and records of telephone calls by public employees using nongovernmental accounts or devices are nonetheless public records that agencies can order employees to disclose. The court noted the widespread use of personal devices

has expanded the workplace outside of normal working hours and has blurred the lines between official and private communications.

The court held records created by a public employee using a personal account are still “public records” that belong to the employee’s agency, not to the employee. For public employees, this means e-mails, texts and telephone calls made on any device about work-related matters could be subject to disclosure in response to a public records act request. The decision is an emphatic reminder that public employees should avoid using personal devices and personal accounts for any work-related purpose.

DON'T

- **Disclose information about your employer or profession on social media sites**

By posting information or photographs on a social media site about your profession as a peace officer or your employment by a particular city, county or department, not to mention your hobbies, opinions or beliefs, you are putting yourself, your family members and your residence at greater risk. For a few dollars, an identity thief can obtain information over the Internet that is derived, in part, from what you post. For the same few dollars, you may want to take steps to protect your identity through one of the many identity protection programs available.

- **Discuss your work, your clients, your boss, your frustration, or your co-workers on social media sites**

I have handled innumerable discipline cases where a peace officer has been accused of making disparaging remarks on social media about department management, a recent promotion exam, frustration with work and co-workers, or the latest controversial political issue. Social media and the COVID-19 pandemic have dramatically reduced the face-to-face, private communication co-workers used to rely on to “vent” with each other. Posting negative comments about work, fellow employees, the public and the latest crisis can cause you to be severely disciplined and even fired.

- **Use work devices for personal stuff**

Whether you are shopping for a new house, running a personal business, or surfing pornography, the personal use of work computers, phones and tablets is prohibited. Work devices belong to the employer and can be accessed at any time, even without notice to the employee. Employees who are issued a work phone or laptop to work from home should not use those devices for personal communications, other than incidental or emergency calls or texts. Remember, such communications can be accessed in a public records act request.

During the pandemic, some agencies have authorized employees to use personal devices to facilitate working from home. The employer should be providing the employee with a release that warns the employee any documents created on the personal device may be subject to disclosure in a public records act request. Employees should be careful to keep separate personal and work e-mail accounts on a personal device and may want to consider using an external hard drive or flash drive for all work-related material created on the device. Above all, do not use your personal devices for social media during the time you are scheduled to be working at home.

Current political trends in California, not to mention nationwide, are decidedly anti-law enforcement. In the last three years, California has enacted laws regulating body cameras, restricting the use of deadly force, and exposing to public scrutiny some categories of formerly confidential peace officer personnel records, not to mention many other efforts at constraining law enforcement. Any significant use of private social media for public commentary or communication is likely to draw the Legislature's attention and result in yet another bill targeting peace officers statewide.

A recent comment on – where else? – the Internet sums up the dangers of social media for peace officers: "Don't post anything on social media that you wouldn't want to see plastered on a billboard with your face on it!"

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