



# Facebook vs. the First Amendment: Student Free Speech in the Digital Age

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Social media<sup>1</sup> and other online forums provide virtually limitless mediums for student speech. Websites like Facebook, Twitter, and Rate My Professors offer instant, public, and wide-reaching outlets for students to evaluate and comment on their University environment, administration, faculty, policies, and any other imaginable topic. Though University students do not have an unfettered right to freedom of speech, a student's controversial online speech—like its offline counterpart— involves complicated legal protections. As with any inappropriate student behavior, however, the University can respond to online speech, although the specific response may vary depending upon the type of speech encountered. The purpose of this article is to (1) summarize the fundamental legal principles governing the freedom of speech in the University context, and (2) provide some guidance for University administrators, faculty, and staff when dealing with issues resulting from student social media use.

## Fundamentals of Free Speech in the University Context

**Speech may be Offensive, but Protected.** The First Amendment to the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech.” This constitutional prohibition against governmental infringement of free speech extends to the actions of the University as a public institution, including the University's ability to regulate inappropriate student speech on social media.<sup>2</sup> The Supreme Court's opinions as recently as last year continue to demonstrate that the freedom of speech is inviolable even in the face of utmost efforts to offend.

**Limited Categories of Unprotected Speech.** Certain classes of speech do not receive protection in the law and may be regulated by the University. As a result, the University may prohibit and discipline “fighting words,” speech inciting imminent lawless action, unlawful harassment,<sup>3</sup> obscenity, and defamation. In addition, the Constitution permits the University to prohibit “true threats,” which “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.”<sup>4</sup> While restriction of these categories of speech is constitutionally permissible, determining the type of speech at issue requires detailed legal analysis best performed by University Counsel.

**No Restrictions based on Content and Viewpoint.** Content-based restrictions on speech (that is, restrictions on speech because of its message, its ideas, or its subject matter) receive the highest scrutiny by the courts. Likewise, viewpoint discrimination (that is, when a university attempts to regulate student speech on the basis of the motivating ideology or the opinion or perspective of the speaker) is “an egregious form of content discrimination,” and is almost never permitted under the Constitution. As noted above, some categories of speech are not protected, like a student's threat of violence against a member of the University community. However, University administration, faculty, and staff should be wary when online speech appears controversial or inappropriate but does not fall into one of the categories of unprotected speech; for example, a student's political opinion, or criticism of the decisions made by campus leadership, or the head football coach. University responses to this kind of speech must be carefully designed to avoid impermissible viewpoint discrimination.

**Special Rule for Student Speech at a Public University.** Generally, a public university cannot sanction a student for otherwise protected speech unless it can demonstrate the speech does or will “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” The practical applications of this principle, however, are complex, particularly as they relate to students' online speech. Much speech that might be characterized as inappropriate, controversial, or contentious will not rise to the level of material and substantial disruption and will be protected by the First Amendment. Though courts have yet to construe the “material and substantial disruption” standard in the higher education context, the following types of online speech or expressive conduct have failed to create the requisite disruption in the K-12 setting:

- Student created a fake MySpace profile of the school's principal, which described him as a pedophile and a sex addict, and included a message purporting to solicit young children for sexual acts.



- Student started a Facebook page entitled, “Ms. Sarah Phelps is the worst teacher I’ve ever met.”
- Students posted a YouTube video of themselves ridiculing another student.

Furthermore, courts have repeatedly pointed out that college and university campuses are “peculiarly the ‘marketplace[s] of ideas’” and that the “mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” Therefore, University administrators must assess the on-campus impact of a student’s cyber speech and measure whether it rises to, or has the potential to rise to, a material and substantial disruption.

**University sponsored Websites as Limited Public Forums.** Some University-sponsored websites—such as the Facebook page created and operated by the President’s Office or the CU-Boulder Athletics Department—allow for commentary from members of the public. These websites, therefore, likely create a “limited public forum,” which means that the University may be justified in limiting the forum to certain groups or to the discussion of certain topics, as long as the restrictions are reasonable in light of the purpose of the forum and not an effort to suppress speech merely because the University does not like the speaker’s view. Thus, “if a public school were to voluntarily open its website only to students—and that limitation were reasonable in light of the website’s purpose—it would not have to provide access to adults.”<sup>5</sup> Similarly, certain expressive conduct posted online (like unsolicited advertisements or spam) may be excluded because it is incompatible with the forum’s purpose, and reasonable subject matter restrictions may narrow the topic of speech to the purpose of the website (for example, CU Football). Of course, all such restrictions must be viewpoint neutral.

**University has more Authority in Online Classrooms.** The virtual classroom, like the physical classroom, is most likely a non-public forum and is therefore subject to reasonable speech regulation. In a non-public forum, students do not have a right to insist that a class be viewpoint neutral. For instance, students may be required to write papers expressing a particular point of view with which they may not agree as long as the assignment promotes legitimate pedagogical interests. Furthermore, faculty may put standards in place requiring that the online speech be respectful and collegial.

Also, as noted above, student behavior that materially disrupts class work or the classroom environment or invades others’ rights is not protected by the First Amendment. Faculty are in charge of their classrooms and can expect students to act in a manner consistent with a healthy learning environment. If a student continues to engage in disruptive behavior after fair warning, it may be necessary to involve the Office of Student Conduct to pursue possible discipline.<sup>6</sup>

## General Guidance for Members of the University Community

The law applicable to online student speech is complicated and depends on the particular facts of the situation. University Counsel should be consulted when questions arise. The following guidelines, however, may be used when trying to determine whether particular conduct is appropriate in the University setting.

### Guiding legal principles

- Offensive speech is often protected speech. Freedom of speech is closely guarded by the courts, particularly when the nature of the speaker’s message is controversial. Students have the right as private citizens to the freedom of expression, which includes the right to publicize their beliefs about the University—including its administration and faculty—online.
- Most types of offensive or inappropriate student speech occurring off-campus on non-university sponsored webpages are protected, including student posts on sites like Facebook, Twitter, Rate My Professor, and others.
- Some speech—such as harassment, obscenity, defamation, and “true threats”—is unprotected and can be prohibited and sanctioned by the University. Determining whether speech falls into one of these categories, however, requires complex legal analysis and input from University Counsel.
- Online speech that is likely to cause a material and substantial disruption at the University may be prohibited and sanctioned, though this standard is challenging to prove and requires detailed information about how the student’s online speech materially and substantially impacted University operations.



- Restricting speech based on the viewpoint of the speaker is rarely permissible.

### ***Practical Guidance for dealing with inappropriate speech***

- As the saying goes, “the solution to bad speech is more speech.” The University can work with its students to create a campus community that discourages offensive or harmful online speech. Though students may not be punished for inappropriate but constitutionally protected online speech, campus Student Affairs offices may be able to intervene and educate the parties to reach a workable solution. Furthermore, inappropriate or offensive material posted on sites like Facebook is often drowned out by more reasonable voices. Regardless, University faculty and staff should not remove or punish online speech based upon disagreement with the speaker’s point of view.
- Contact University Counsel to determine the type of speech or type of forum at issue, whether it’s a University sponsored social media website or an online class. This determination requires legal expertise and often defines the University’s ability to respond, and University Counsel is in the best position to perform the extensive legal research required to make such a determination.
- Contact the Office of Student Conduct. The University may look to student conduct codes to respond to speech that promotes or produces an unlawful end, promotes the imminent prospect of actual violence or harm, or that meets the judicial standards of harassment, defamation, and obscenity. Even where speech does not meet these standards, the Office of Student Conduct may provide alternative dispute resolution.
- Contact the police if online speech indicates a threat of violence against a member of the University community.
- If you are considering whether to create a University sponsored social media page, keep in mind that opening the page to public comment means that you have created a limited public forum for speech and attendant legal protections. Consider the utility of creating such a page in the first place, or whether closing the page to public commentary would still allow you to achieve the purpose of the page. If the page already exists, remember it is almost never permissible to remove comments based on the viewpoint of the speaker.

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<sup>1</sup> “Social media” is defined by Merriam-Webster as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content.” See <http://www.merriam-webster.com/dictionary/social%20media>. Some of the more popular examples of this technology include blogging (Blogspot, Xanga), microblogging (Twitter), social networking (Facebook, LinkedIn), wikis (Wikipedia), multimedia (YouTube), and other chat rooms, listservs, and bulletin boards. Given the pace of technology, this list is not all inclusive and is likely to change quickly.

<sup>2</sup> The First Amendment governs many aspects of the interactions between University students, faculty, administrators, and staff. This article does not offer a comprehensive overview of the First Amendment or each contour of academic freedom in classroom activities, but provides some basic principles that explain how the University may respond to online student speech.

<sup>3</sup> Colorado law prohibits harassment by electronic means, which occurs when a person “[i]nitiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner *intended to harass* or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that *is obscene*.” C.R.S. § 18-9-111(1)(e) (emphasis added).

<sup>4</sup> See *Virginia v. Black*, 538 U.S. 343, 360 (2003).

<sup>5</sup> David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. Rev. 1981, 2001 (2010).

<sup>6</sup> See, for example, campus classroom behavior policies. Boulder’s *Student Classroom and Course-Related Behavior* is available at <http://www.colorado.edu/policies/classbehavior.html>. The Colorado Springs’ policy is located at <http://www.uccs.edu/oja/Student-Conduct/Student-Classroom-Behavior-Policy.html>.



# Recent Updates to Colorado's Sunshine Laws

by Nike Fleming, Assistant Counsel, System

The Colorado Supreme Court and Court of Appeals have recently issued three opinions interpreting the open meetings and open records laws. This article summarizes recent developments in Colorado's Sunshine laws.

## ***Denver Post v. Ritter***

In June 2011, the Colorado Supreme Court held that Governor Ritter's personal cell phone bills are not public documents because they were not "kept" within the Colorado Open Records Act's definition of that term. The Denver Post sued Governor Ritter under the Colorado Open Records Act (CORA) for refusing to release the billing records for his personal cell phone, which he admittedly used to conduct official business. Although the court sided with Governor Ritter, the holding in this case is limited. The personal documents of public officials, including personal cell phone bills, can still be subject to public inspection under CORA in certain circumstances.

"Public records" subject to inspection under CORA are defined as "all writings made, maintained, or kept . . . for use in the exercise of functions required or authorized by law or involving the receipt or expenditure of public funds." When a requested record is held by an individual who is a government official, the record must have been made, maintained, or kept by the individual in his or her official capacity or to carry out an official function in order to be considered a public record. The Denver Post argued that Governor Ritter's personal cell phone bills qualified as "public documents" because he had no conceivable reason to keep itemized phone bills once he had paid them unless he ever faced allegations of misconduct and needed them as evidence. The court concluded the Denver Post did not sufficiently allege that Governor Ritter kept the bills "for use in the exercise of functions required or authorized by law." The parties agreed that Governor Ritter only ever used the billing statements to pay his balances. Ritter never stored them at his office, provided copies to any other public employee, or used them in any other way in his official capacity. The court held that the Denver Post's pure speculation that Ritter kept the bills with a potential future official use in mind did not provide a sufficient basis for a claim.

Importantly, while this case clarified the pleading standards for a CORA claim, it did not change the underlying law. A document may still qualify as "public" even if no one has ever used it to carry out a public function. The court instructed that "CORA's definition of public records creates a question of intent" and that the "inquiry is case specific." If a plaintiff can provide a factual basis for an assertion that a public official used or intended to use a document in an official capacity, it may be held to be a public record under CORA. While relevant, the fact that a document is personal still does not automatically shield it from public inspection under CORA.

## ***Land Owners United v. Colorado Board of Real Estate Appraisers***

The other recent case comes from the Colorado Court of Appeals. It held that neither the investigatory files nor the deliberative process exemptions applied to documents held by the Colorado Board of Real Estate Appraisers. In connection with an investigation into alleged abuse of a statewide program permitting tax credits for conservation easements, the Board suspended the licenses of two appraisers. Parties affected by the investigation requested certain documents from the Board, and the Board refused to disclose a number of them under the investigatory files and deliberative process exemptions to CORA.

CORA provides an exemption to disclosure for "[a]ny records of the investigations conducted by any sheriff, prosecuting attorney, or police department, any records of the intelligence information or security procedures of any sheriff, prosecuting attorney, or police department, or any investigatory files compiled for any other law enforcement purpose." The Board asserted that the withheld documents were files "compiled for any other law enforcement purpose," but the district court held that this exemption only applies to criminal investigations. The Court of Appeals found that the language was ambiguous and determined that it must construe any exemptions to CORA narrowly. It held that the investigatory file exemption only applies to files compiled for criminal law enforcement purposes.





The court noted the Supreme Court's recent statement in the Ritter case that if the General Assembly wants to expand the applicability of CORA, it is free to do so. Interestingly, there has been legislation introduced this session purporting to do just that.

Also in this case, the court interpreted CORA's deliberative process exemption, which protects records "if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government, unless the privilege has been waived." It further directs courts to "weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." The privilege only protects material that is predecisional and deliberative. Here, the court found that the public has a strong interest in disclosure of the reasons behind action that was taken against the licenses of the two appraisers. The court recognized that the public has only marginal interest in the reasons behind policies or decisions that are rejected, but that when predecisional material is incorporated into governmental policy or action, it can lose its protected status. In addition, because the Board in this case publicly announced its investigation into the program and promised to release details of suspect transactions, the public interest outweighed the Board's interest in protecting the documents.

This case narrows the investigatory files exemption to a degree that makes it unlikely it could be used on the University's behalf (unless new legislation is adopted). This case also serves as a reminder that predecisional or deliberative materials can lose their protected status if they become incorporated into a final policy or action.

## *Henderson v. Fort Morgan*

Finally, in a case brought against the City of Fort Morgan, the Court of Appeals held that Colorado's Open Meetings Law (COML) does not prohibit the use of secret ballots during public meetings. A resident of Fort Morgan alleged that the Fort Morgan City Council's use of anonymous written ballots to fill two council vacancies and appoint a municipal judge were in violation of COML. The two meetings at issue were public meetings. At one meeting, the council heard presentations from applicants for the council vacancies and the public had a chance to speak about the applicants. At the second, the council conducted interviews of each of the municipal judge applicants. At each meeting, the council members voted by written ballot. The city clerk collected and tabulated the ballots and announced the appointees. The written ballots did not identify the council member who cast the vote, nor was identifying information otherwise available or recorded.

COML provides: "All meetings of a quorum of three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." The plaintiff argued that this provision should be interpreted to prohibit anonymous ballot voting, while Fort Morgan argued that neither this section—nor any other section of COML—imposes specific voting procedures on local public bodies, as long as the public has access to meetings and can observe the decision-making process. The court agreed with Fort Morgan, holding that if the legislature had intended to create a voting procedure (whether prohibiting secret balloting or not), it could have done so. The court held that it is "not at liberty to read additional terms into, or to modify, the plain language of a statute. . . . Because the legislature has not provided for a particular voting procedure in the COML, we will not imply one."

In the latest legislative session, the legislature took the court up on its offer to clarify the COML. House Bill 12-1169 was signed into law on March 24, 2012 and states that neither a state nor a local public body may adopt any policy, position, rule, or regulation or take formal action by secret ballot. The bill provides an exception for when a state or local public body elects leadership of its own body (such as a board chair or vice-chair) and when a state or local public body chooses the members of a search committee.

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