




NEW HAMPSHIRE MUNICIPAL ASSOCIATION



Municipal Social Media Policies and the First Amendment

- Thomas M. Closson, Attorney, Jackson Lewis P.C.
- Stephen C. Buckley, Legal Services Counsel, NHMA



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Our Presenters:


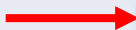


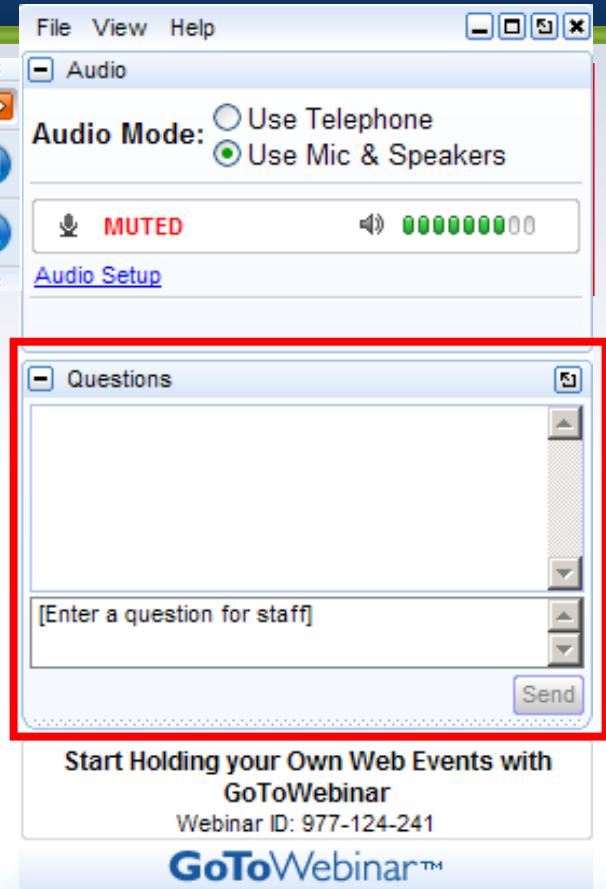
Thomas M. Closson
Jackson Lewis P.C.



Stephen C. Buckley
NHMA Legal Counsel

How to Participate Today

- Open and close your Panel 
- Submit text questions 
- Q&A addressed at the end of today's session
- Couple of poll questions for entertainment



The screenshot shows the GoToWebinar interface with two panels highlighted. The top panel is the 'Audio' control panel, which includes options for 'Audio Mode' (Use Telephone or Use Mic & Speakers), a 'MUTED' status indicator, and a volume slider. The bottom panel is the 'Questions' panel, which features a text input field with the placeholder text '[Enter a question for staff]' and a 'Send' button. A red box highlights the Questions panel, and red arrows point from the list items to the corresponding icons in the sidebar.

File View Help

Audio

Audio Mode: Use Telephone Use Mic & Speakers

MUTED

Audio Setup

Questions

[Enter a question for staff]

Send

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Why Are Public Sector Employees Different?

When the State is also considered the employer, certain provisions of the United States Constitution and the New Hampshire Constitution that regulate the conduct of the State extend directly into the workplace.

STATE = EMPLOYER = CONSTITUTIONAL PROTECTIONS



Constitutional Protections Afforded To Free Speech

- 1st Amendment to the Constitution of the United States of America:

Congress shall make no law...abridging the freedom of speech...

- Article 22 of the New Hampshire Constitution:

Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.



Free Speech And Public Sector Employees

- The United States Supreme Court has construed the 1st Amendment as guaranteeing government employees certain workplace protections related to their speech.



Free Speech And Public Sector Employees

Cornerstones of the United States Supreme Court's jurisprudence on public sector employee speech:

1. Speech must address matters of public concern to be protected (Connick);
2. Balance then needs to be struck between employee rights and legitimate interests of government acting as employer (Pickering);
3. Employee statements made in course of official duties generally are not protected.

Public Concern?

My boss is stealing from the Town.

VS.

My boss is a jerk.



Pop Quiz



Are the following statements, True or False?

1. In any given month, approximately 1.28 billion people are active on Facebook – roughly equivalent to the entire population of India
2. 30% of Americans get all of their news exclusively from Facebook
3. Almost one-quarter (23%) of Facebook users check the site FIVE TIMES or more per day
4. Only 25% of Facebook users bother to check or adjust their privacy settings



Public Concern?

The Town is violating applicable wage and hour regulations.

vs.

I don't like having to work weekends.



Pickering Balancing Test

- Government's right to manage the workplace has to be weighed.
 - Protect confidential information.
 - Prevent harassment in the workplace.
 - Insure productivity.
 - Maintain order/discipline.



Public Sector Employee Speech In New Hampshire

- Through the enactment of *NH RSA 98-E*, New Hampshire has gone (far?) beyond the United States Supreme Court in protecting the speech of public sector employees.



NH RSA 98-E

98-E:1 Freedom of Expression. – Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.



NH RSA 98-E

98-E:1-a Definition. – In this chapter, "public employee" includes any person employed by the state or any subdivision thereof, including, but not limited to counties, cities, towns, precincts, water districts, school districts, and school administrative units.



NH RSA 98-E

98-E:2 Interference Prohibited. – No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee.



NH RSA 98-E

98-E:4 Employees' Remedies.

I. A public employee may seek injunctive relief or maintain a civil action, or both, to recover damages for violation of this chapter in any court of competent jurisdiction by bench or jury trial.

II. If the public employee prevails, in addition to damages the court may allow the costs of the action and such attorney's fees as it finds to be reasonable to be paid by the defendant employer.

III. This chapter shall not alter or impair the rights of any person under a collective bargaining agreement or affect any other right or remedy provided in law.





Pop Quiz



What year was Facebook founded?

1. 1991
2. 1997
3. 1999
4. 2004
5. 2007



Scope Of NH RSA 98-E

No Pickering balancing test under NH RSA 98-E – only “...legitimate confidential records, communications and proceedings...” explicitly carved out from coverage.

- Personnel files
- Non-public information
- HIPAA
- FERPA



Scope Of NH RSA 98-E

- NH RSA 98-E - “...as an individual...”
- Lines up with 1st Amendment general exclusion for employee speech in official capacity.



Scope Of NH RSA 98-E

- What about the “matter of public concern” requirement?
 - Language in NH RSA 98-E:2 is very broad.
 - Although NH RSA 98-E:1 opens with recognition of the right to speak on “...all matters...” the same sentence is further limited by the additional language “...concerning any government entity and its policies.”
 - Is this more broad or more narrow than 1st Amendment?



Best Practices - Disciplining For Speech

- Think long and hard (and probably call your attorney) before trying to discipline a public sector employee for his/her speech.



Best Practices - Disciplining For Speech

- Did employee speak as “an individual”?
- Is there confidential information involved?
- Did speech touch on a matter of public concern/matters concerning government entity or any of its policies?



Best Practices - Speech-Related Policies

Social Media Policies

- Social media is speech
- Subject to 1st Amendment and NH RSA 98-E



Best Practices - Speech-Related Policies

- Social Media Policies
 - Can limit speech in official capacity
 - Can limit disclosure of confidential information
 - - HIPAA
 - - FERPA
 - - NH RSA 91-A



Best Practices - Speech-Related Policies

- Social Media Policies
 - What about defamatory comments?
 - What about sexually (racially, etc.) harassing comments?



Best Practices - Speech-Related Policies

- Social Media Policies
 - What about trying to prohibit “...all comments about Town and/or its employees and elected officials...”?
 - What about trying to prohibit “...all negative (derogatory, disrespectful, offensive, upsetting, mean, unhappy, angry, unpleasant, etc.) comments about the Town and/or its employees and elected officials...”?



Best Practices - Speech-Related Policies

- Social Media Policies
 - **Narrow = better.**
 - Focused only on legitimate areas of concern.
 - Content based restrictions are almost always a problem.

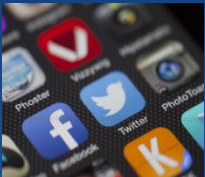




jackson | lewis
all we do is work



A Few Words About Government Speech





Pleasant Grove City v. Sumnum

- Religious Group sought permission to erect stone monument along side 15 other monuments.
- The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.
- Permanent monuments displayed on public property typically represent government speech
- Denial by city to erect the monument was not infringement of free speech.

Walker v. Tex. Div., Sons of Confederate Veterans

- Texas authorized specialty plates.
- Sons of Confederate Veterans sought plate with Confederate battle flag.
- Texas was permitted to choose whether to display the message conveyed by the Confederate flag.
- The plate's message amounted to government speech the State had the power to control



Town of Epping, New Hampshire

Town of Epping, New Hampshire
Established 1741

157 Main St.
Epping, NH 03042
603-678-5441

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Welcome to Epping New Hampshire's Official Home on the Web

Video Tour of the TOWN OF EPPING

[Welcome](#)
[Quality of Life](#)
[Recreation](#)
[Community Organizations](#)

2017 TAX RATE - \$25.94

School \$17.36, Town \$5.09, State \$2.34 and County \$1.15

Town Hall closed for the following holidays in 2018
January 19, February 19, May 28, July 4, September 3, October 8, November 12, November 22 & 23, December 25, and January 1, 2019

2017 TOWN REPORTS ARE AT THE TOWN HALL, or: [click here](#)

Sample Ballot to be voted on at the March 13th elections, MH Gym 8am-7pm: [click here](#)

Liberty Utilities Presentation: [click here](#)

Unifi Natural Gas Presentation: [click here](#)

There are 3 openings on the local "River Management Advisory Committee". If any Epping resident is interested in serving on this committee please send a letter of interest to the Board of Selectmen, 157 Main Street, Epping, NH 03042 or administrator@townofeppping.com.

There is an opening on the Conservation Commission. Please put a note in the Town mailbox regarding interest.

"The Epping Conservation Commission is in need of volunteers to monitor Town conservation lands, help maintain trails, etc. Put a note in the Commission mailbox if interested."

The outside water ban has been lifted, please continue to conserve water whenever possible.

Information to serve on Boards, Commissions and Committees: [click here](#)

Sutcliffe v. Epping School District

- Town website content determined by the Select Board
- Hyperlinks must be from governmental agencies or sponsored by the Town.
- Refusal of Town to permit hyperlink by protest group not Free Speech violation.
- Controlling Town website content was governmental speech.



Thank You!



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PROD.

COMING ATTRACTIONS

May 11

**Controlling Junk: Junkyard
Enforcement 101**

VENUE

www.nhmunicipal.org



2018 Local Officials Workshops

9:00 am - 4:00 pm
Registration at 8:30 am



Free workshops for seasoned and new municipal officials and employees of NHMA member municipalities.

Presented by NHMA's Legal Services attorneys, these workshops provide municipal officials with tools and information to effectively serve their communities. Topics will include the Right-to-Know Law, ethics and conflicts, town governance, municipal roads, and more. Ample time allowed for questions, answers, and discussion.

DATES AND LOCATIONS

Monday, April 9 - Grantham Town Hall, Grantham

Monday, April 16 - Peterborough Community Center, Peterborough

Tuesday, May 8 - Kent Auditorium, Town Hall, Newington

Tuesday, May 15 - Moultonborough Safety Complex, Moultonborough

Tuesday, May 22 - The Meeting House, Sugar Hill

Saturday, June 2 - NHMA Offices, 25 Triangle Park Drive, Concord

Continental breakfast will be provided. Lunch is on your own and time will be provided for attendees to get lunch.

REGISTER TODAY!



Stranger Streets: A *New* Hard Road to Travel Workshop!



If a Class VI road is washed out, can the town really do nothing?

Can public works cut trees on a scenic road?

Do there really need to be summer cottages on a "highway to summer cottages"?

Join NHMA Attorneys Stephen Buckley and Margaret Byrnes for the answers to these questions—and many more! The attorneys will discuss the "stranger" side of municipal road law, including bridges, municipal trails, sidewalk maintenance, scenic roads, highways to summer cottages, and winter roads. Ample time will also be spent on Class VI and private roads, including what municipalities—and residents—can and cannot do on these roads.

Friday, April 27, 2018

9:00 a.m. — 12:30 p.m.

Registration and Breakfast at 8:30 a.m.

NHMA Offices

25 Triangle Park Drive

Concord NH

Cost: \$60.00



Register online at www.nhmunicipal.org under Calendar of Events

Online pre-registration required one week prior. Space is limited.

Questions? Call 800.852.3358, ext. 3350,

or email NHMAregistrations@nhmunicipal.org



NHMA RELEASES NEW PUBLICATION ON NEW HAMPSHIRE'S RIGHT-TO KNOW LAW

Check out our new "go-to" resource for public officials when confronted with the numerous legal issues surrounding New Hampshire's Right-to-Know Law.



Order
Today

Only \$55 for Members
\$95 for Non-members

The Right-to-Know Law (RSA Chapter 91-A) affects every aspect of local government in our state. Every board, committee, commission, and sub-committee in every town, city and village district in New Hampshire must comply with this law. As a result, all local officials and employees must understand the law and their responsibilities regarding both public meetings and governmental records.

Join Legal Services Counsel Stephen Buckley, Government Affairs Counsel Cordell Johnston, and Staff Attorney Margaret Byrnes for a full day workshop on Thursday, September 14 on the Right-to-Know Law. They will address some of the most difficult issues under the law, including confidential information, electronic records and communication, procedures for nonpublic sessions, and communications outside a meeting. There will be ample time for questions and answers on all aspects of the law.

Go to NHMA's online store at www.nhmunicipal.org/shop
to order your new book today!



Learn more about the Right-to-Know Law at a full-day workshop on Thursday, September 14 at NHMA Offices in Concord. \$90 includes workshop, meals and new book! Check our website for registration details.

