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SOCIAL MEDIA & PEACE OFFICERS IN THE PANDEMIC ERA

In the world before COVID-19, the use of social media by probation peace officers and other public employees in California already carried many risks. The last few years have seen the Legislature, courts and probation departments 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, with so many employees idle or working from home in a time of societal turmoil, social media presents an even greater temptation to violate agency rules by posting political or social commentary for all to see.

Several recent cases around the country involving peace officers who have been fired for inappropriate 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 probation 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 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.

- **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.

However, any off-duty speech cannot impair working relationships or adversely affect the mission of the public agency. Thus, probation peace officers should not post de-

-rogatory comments about the work done by the Probation Department, vent about working conditions or the probationers they supervise, criticize individual employees, or spread gossip on social media sites.

A Nashville, Tennessee, police officer recently 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 the officer's termination, the court acknowledged his free speech rights but emphasized the officer's department had a legitimate interest in controlling his speech.

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.

Current political trends in California are decidedly anti-law enforcement. In the last three years, the state has enacted laws restricting the use of deadly force, limiting room confinement and other disciplinary actions in juvenile halls, and exposing to public scrutiny some categories of formerly confidential peace officer personnel records. Any significant use of private social media for public commentary or communication is likely to draw Legislative attention and result in yet another bill targeting peace officers statewide.

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 probation peace officer, your employment by a particular county or Probation Department, not to mention your controversial 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 probation peace officer has been accused of making disparaging remarks on social media about clients, minors, the management, a recent promotion exam, or frustration with the work or the work environment. In one case, a probation peace officer off work on an injury claim posted pictures of himself at the beach and bragged about defrauding the workers' compensation system. Social media has dramatically reduced the face-to-face, private communication co-workers used to rely on to "vent" with each other. Posting negative comments about the work and the workplace, or disclosing names of probationers and fellow employees, 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 Probation Departments have requested or authorized employees to use personal devices to facilitate working from home. The Department should be providing to the employee a release that warns the employee 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.

A recent comment on – where else? – the Internet sums up the dangers of social media for probation 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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