



Everyday Ethics for Local Officials

Taking the Bite Out of Blogs: Ethics in Cyberspace

www.ca-ilg.org/blogs

April 2008



Related Resources from the Institute

The Institute's website offers the following additional resources relating to technology, social media, and transparency:

- "Local Agency Website Transparency Opportunities" available at: www.ca-ilg.org/WebsiteTransparency
- "Meetings and Technology: Finding the Right Balance" available at: www.ca-ilg.org/technology-and-meetings
- "Legal Issues Associated with Social Media" available at: www.ca-ilg.org/SocialMediaLegalIssues

QUESTION

We are having an issue in our community with blogs. One in particular is publishing misinformation and half-truths about what is happening in local government in our area. Many of the posts are anonymous or under pseudonyms. Is there anything that can be done about this issue? Does the fact that this is on the Internet mean that somehow ethical principles go out the window?

ANSWER

First, let's define some terms. The term "blog" is short for the phrase "web log." A blog is a form of website or portion of a website. What makes these websites distinctive is that the person who creates the blog (known as a "blogger") presents the website content in the form of a journal. Many blogs allow visitors to make comments or ask questions (called "posts" or "postings") in response to the blogger's comments.

In 2007, the *Los Angeles Times* did a story on the growing impact of blogging on local government, noting that blogs provide an opportunity for the public to weigh in on community issues. However, blogs can also present misinformation, prompting the *Times* to observe that some blogs "are scurrilous and, on occasion, possibly libelous."

The growth of blogs comes at a time when traditional media are facing a number of challenges -- including competition from the Internet. Newspapers, for example, are cutting back in various ways, including local news gathering. This means that blogs can become, for better or worse, an important source of information about what is going on in an area.

There Oughta Be a Law

When faced with misinformation that detracts from the public debate on an issue, local officials typically turn to their agency attorney to see if the law provides a remedy. The short answer is usually not.

Blogs are a form of speech typically protected by the First Amendment. As a result, the courts are reluctant to step in and limit free speech. As the U.S. Supreme Court observed in a case involving a local official's claim that he had been defamed by a newspaper ad, there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."¹ According to the court, this "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

As a result, the court ruled that public officials cannot successfully sue for defamation unless the officials can prove "actual malice," which means that the blogger made the statement knowing it was false or with reckless disregard of whether the statement was true or false.² The test is stringent: A public figure must be able to prove by *clear and convincing evidence* that the blogger purposefully avoided the truth or deliberately decided not to acquire knowledge of facts that might confirm the probable falsity of charges.³ Failure to investigate the accuracy of a statement, even when a reasonable person would have done so, is not enough.⁴

Proving this is especially difficult if the poster is anonymous. In Delaware, the state Supreme Court rebuffed a council member's effort to learn the identity of a blogger who had posted comments about his mental state and sexual orientation.⁵ The court determined that no reasonable person could interpret the statements as a statement of fact as opposed to an expression of the blogger's opinion (a necessary element for defamation).⁶ Because this defeated the council member's defamation claim, the court concluded that there was no legal purpose to be served by disclosing the identity of the individual.

In short, as often is the case, the law does not provide a remedy against bad behavior, including bad blogging behavior. So what's a person to do?

The Remedy for Inaccurate Speech Is Accurate Speech

If you were to ask the courts, the remedy for *inaccurate* speech is accurate speech; this is because the preferred First Amendment remedy is "more speech, not enforced silence."⁷ Some officials have taken this approach by creating their own blogs. Fontana Mayor Mark Nuaimi has done this (online at www.zimbio.com/Mayor+Mark+Nuaimi), as has Yolo County Supervisor and former Woodland Mayor Matt Rexroad (online at www.rexroad.com). In fact, Mayor Nuaimi wrote a piece about public official blogging on www.californiacitynews.org ("Blog: It Isn't Really a Four-Letter Word").⁸ A number of city managers also have incorporated blogs on city web pages too.

A Note About Blogging and Social Networking Sites

Decision-makers who are covered by open meeting laws must avoid situations where the majority of a legislative body uses the Internet to communicate among each other about a matter of agency business. For this reason, decision-makers must take care when responding to each other's blogs, posts on social networking sites (such as Facebook) or e-mails.

The so-called "Web 2.0" creates opportunities for people to present information on websites in the form of a journal. These sites also allow visitors to make comments or ask questions (called "posts" or "postings") in response to the others' comments.

For many decision-makers, blogging offers an effective way to share information with and communicate with constituents. For example, rather than having to field 10 e-mails asking the same question, an official can post a response on his or her blog and refer folks to the answer. Blogging can also a good way to keep the public informed, especially as fewer people turn to newspapers for information.

The open meeting laws do not stop one-way communications from members of legislative bodies to others. But a majority of decision-makers participating in a blog or other web-based conversation could constitute a "meeting" within the meaning of the open meeting laws. This means that the meeting must be held in accordance with all open meeting requirements, in an appropriate (ADA accessible) location, with prior notice and an agenda.

What is the theory underlying these restrictions? One is that the general public has a right to know that decision-making on a particular issue may occur. There is also an underlying concept of decision-makers facing their constituents as they deliberate on issues, as well as the obligation to hear the thoughts of the full range of constituents (not just those on the Internet) should constituents choose to offer them.

The Ethics of Blogging

Back to those inaccurate bloggers: Even if posting misleading and false information is not illegal, it is important to acknowledge that it *is* unethical - the medium in which false and misleading words are published or expressed doesn't matter. Deliberately disseminating inaccurate information is inconsistent with the ethical values of fairness and trustworthiness. The same analysis applies for information of uncertain accuracy; bloggers have a responsibility (another core ethical value) to investigate statements they post as fact on a blog or at least note any uncertainty about the accuracy of statements.⁹

Calls for a Blogging Code of Ethics

There is growing recognition in the blogosphere that ethics has a role to play in blogging, just as it does with any other human endeavor. Accuracy and civility are key themes running throughout the online discussions on blogging ethics. For example, here are excerpts from the Code of Ethics published on CyberJournalist.net (www.cyberjournalist.net) on honesty and fairness:

Bloggers should be honest and fair in gathering, reporting and interpreting information. Bloggers should:

- Identify and link to sources whenever feasible. The public is entitled to as much information as possible on sources' reliability.
- Make certain that web log entries, quotations, headlines, photos and all other content do not misrepresent. They should not oversimplify or highlight incidents out of context.
- Never publish information they know is inaccurate -- and if publishing questionable information, make it clear it's in doubt.
- Distinguish between advocacy, commentary and factual information. Even advocacy writing and commentary should not misrepresent fact or context.

The code also has sections on minimizing harm and being accountable. This particular proposed code is an adaptation of the Society of Professional Journalists Code of Ethics (www.spj.org/ethics_code.asp).

The Issue of Anonymous Postings

What about anonymous postings? Posting anonymously or under a pseudonym does not in and of itself present an ethical issue. What *does* present an ethical issue is when the poster uses anonymity to avoid being held accountable for the accuracy or civility of his or her postings.

Because of this, proponents of local government online issues forums recommend against allowing anonymous postings. E-Democracy.org (www.e-democracy.org), which promotes online discussions of local issues in the United Kingdom and elsewhere, recommends five rules to guide online public issues discussion forums:

1. All posts must be signed by the author's full and actual name;
2. Two posts per person per day;
3. No personal attacks;
4. Issues discussed must be local issues; and
5. The forum manager has the duty to warn and remove members who fail to comply with forum rules.¹⁰

E-Democracy.org notes that requiring people to sign each post encourages people to be more thoughtful in their writing because they must take responsibility for its content. According to E-Democracy, research has shown that "anonymity" online is one of the biggest contributors to the harsh dialogue and "flame wars" that can be typical of some forms of on line discussion.

The "no personal attacks" rule is consistent with general principles of civility in public discourse where the goal is to discuss the merits of the *idea*, not the *person* with the idea.

The Positive Use of Online Forums

A number of agencies are offering online forums where residents can offer their perspectives and engage in dialogue on important issues facing the community. Agencies use these forums for input on decisions or they may simply promote the sharing of views and general knowledge-building.

Online forums can complement face-to-face public engagement in local communities. These provide further opportunities for participation, particularly for people whose schedules do not allow participation in face-to-face engagement efforts.

Opportunities include using an agency website to display visualizations of building designs and layouts and allowing the public to register their relative approval of each option. Budget suggestion pages can ask residents about the services they value most. And agencies are increasingly offering video and podcast downloads of their meetings.

Questions to consider include how to:

- Maintain these avenues for feedback and deliberation once established;
- Invite participation of non-English-speaking residents;
- Ensure (when appropriate) that decision-makers are using the acquired public knowledge; and
- Let participants know that their voices are heard.

"Ignore the Trolls"

It's important to acknowledge that some bloggers are not interested in earnest and authentic exchanges about significant community issues -- they are interested in starting a fight or attracting attention to themselves. Many articles address the "bloodsport" that exists on the Internet, where some people deliberately change their persona online and do things they wouldn't dare in more direct, person-to-person interactions.

As a result, one technology site, radar.oreilly.com, (www.radar.oreilly.com) proposes that blogs self-identify their philosophies with graphics that state "Civility Enforced" or "Anything Goes." An advantage of this approach is that visitors will also know when reading material on an "Anything Goes" site that the content is likely to be more heat than light and to take what is posted with a healthy dose of skepticism.

So, back to the original question: What can be done about irresponsible blogs and postings? Our best advice is for local agencies and individual officials to seriously consider creating alternative, constructive electronic forums for the public. Given the increasing popularity of blogs, it makes little sense in terms of an agency's communications and transparency strategies to cede this mode of communicating to a local agency's critics. Furthermore, if local newspapers don't have the resources to provide information on local issues, local agencies have little choice but to create their own communication media, whether newsletters, e-mail or blogs.

There are limits to the advice on encouraging local officials to blog and respond to misinformation in blogs. If you have the sense that someone is just trying to pick a fight with their postings, there's an argument for not responding. Radar.oreilly.com notes that "feeding the trolls only encourages them" and cites the adage, "Never wrestle with a pig. You both get dirty, but the pig likes it."¹¹ In other words, some blog posts are so outlandish that they don't warrant a response.

Some city blogs have comment policies (see "City of Santa Paula's Blog Comment Policy," page 48) that prohibit personal attacks, including those against individual council members. The comment policies can also avoid other potential legal issues by prohibiting campaign-related postings, including those related to ballot measures. It's also important to keep in mind that, as with any area of free expression, it is important not to discriminate against speech because one disagrees with the content.

Finally, one seasoned blogger advises, "When things get heated, sometimes it can be helpful to change the subject to something safe for awhile. It can be the cyber-equivalent of allowing people to step back and take a deep breath."

Making the Time to Communicate

Local officials' lives are already crowded with family, work, civic and public service commitments. Suggesting that busy public officials squeeze one more activity in is likely to

seem impractical to some if not most officials. There are, however, some efficiencies associated with blogging, as Mayor Nuaimi notes in his thought piece on public officials blogging:

Rather than having to field 10 e-mails asking the same question, you can post on the blog a topic of interest and refer folks to the answer. In my community, this feature was utilized extensively as we battled rate increases from our private water company. Having the information online and then allowing "Mayor Mark" to expand on the information, we were able to get residents engaged in the battle and it demonstrated to my constituents that I was fighting for them.

This is one of the reasons Mayor Nuaimi has been an active participant in his community over the last several years.

A number of cities, like Santa Paula, have staff blogs. Santa Paula City Manager Wally Bobkiewicz notes, "It has become very easy for me to post information that is already being distributed via press releases and e-mails. I don't have to generate that much 'new' material just for the blog." He further advises, "A blog can have multiple staff members posting information, so if you include your police chief, parks and recreation director, public information officer, city clerk, etc., and even if they post only once or twice a month, you still have multiple posts going out on the blog each month and the posts are not just the responsibility of one person." Finally, according to Wally, "Just the plain public information side of blogging is great because people are turning less and less to newspapers for information. While cities may distribute the same information to local newspapers, people often see it only on the blog or several days before they might see it in the newspaper. There is definitely an advantage to timeliness."

Conclusion

In short, blogging ethics is no different than any other area of ethics. There is no silver bullet to make people behave better.

Encouraging people to think in terms of ethical values and the kind of community they want to be a part of is hard work. But as Winston Churchill noted, "The pessimist sees difficulty in every opportunity. The optimist sees opportunity in every difficulty." The blogosphere offers both difficulties and opportunities; the question is which aspect you want to focus your energy and resources on.

City of Santa Paula's Blog Comment Policy

At the request of his council, Santa Paula city manager Wally Bobkiewicz launched his blog in November 2004 (www.ci.santa-paula.ca.us/blog/). The city's goal is to provide information and a place for residents to share their opinions.

The city manager reviews each comment before it is posted. He explains in the city's blogging comment policy (www.ci.santa-paula.ca.us/blogcomments.htm):

. . . This is a City sponsored enterprise and I feel as such an obligation to make sure the discussion is civil allowing a diversity of opinion. At first, I tried to be fairly liberal in what comments get posted. This many times has gotten me in trouble with folks and has lowered the level of the dialogue. I try to try to enforce these rules fairly and encourage you to tell me when I don't.

However, there are some comments that will never get posted:

1. Personal attacks. Say if you like or don't like an issue or a specific comment made, but you cannot directly attack a specific person.
2. Profanity and racial slurs.
3. Specific support or opposition of an elected official(s). Commenters are welcome to support or oppose "The Council," but not individuals or specific groups of individuals on the Council.
4. Campaigning. I will not post comments that directly urge a Yes or No vote on ballot initiatives or directly endorse or oppose a Councilmember or candidate.
5. Comments unrelated to the initial blog post. Please keep comments on the subject of the post.

Thanks again for making this Blog such a vital part of dialogue about Santa Paula. Feel free to contact me directly if you have questions or issues with this policy.

About the Institute for Local Government

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities.

ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/trust.

The Institute welcomes feedback on this resource:

- *Email:* ethicsmailbox@ca-ilg.org Subject: *Taking the Bite Out of Blog's: Ethics in Cyberspace*
- *Mail:* 1400 K Street, Suite 205 ▪ Sacramento, CA ▪ 95814

G:\INSTITUTE\Ethics\Ethics Column\2008\Formatted\Everyday Ethics April08_11012013

This piece originally ran in *Western City Magazine* and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit www.ca-ilg.org/trust.

ILG thanks the following individuals for their contributions to this article: Wally Bobkiewicz, city manager, Santa Paula; Roy A. Hanley, Hanley & Fleishman, LLP (city attorney for the cities of Solvang and King City); Michael Martello, city attorney, Mountain View; Ariel Calonne, city attorney, Ventura; Dave Fleishman, Hanley & Fleishman, LLP (city attorney for the cities of Pismo Beach and Guadalupe).

References and Resources for Further Information:

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration)

¹ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1962).

² *See New York Times v. Sullivan*, 376 U.S. at 265-292.

³ *See McGarry v. University of San Diego*, 154 Cal. App. 4th 97, 114, 64 Cal. Rptr. 3d 467, 480 (4th Dist., 2007).

⁴ *Id.*

⁵ *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

⁶ *Id* at 467 ("Read in the context of an internet blog, these statements did not imply any assertions of underlying objective facts. Accordingly, we hold that as a matter of law a reasonable person would not interpret Doe's statements as stating facts about Cahill. The statements are, therefore, incapable of a defamatory meaning. Because Cahill has failed to plead an essential element of his claim, he *ipso facto* cannot produce *prima facie* proof of that first element of a libel claim, and thus, cannot satisfy the summary judgment standard we announce today. Doe's statements simply are not sufficient to give rise to a *prima facie* case for defamation liability." [footnote omitted]); see generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260, 228 Cal. Rptr. 206 (1986) .

⁷ See *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

⁸ <http://californiacitynews.typepad.com/californiacitynewsorg/2007/08/blog-it-really-.html>

⁹ See for example, the statement of blogging ethics on http://www.rebeccablood.net/handbook/excerpts/weblog_ethics.html :

1. Publish as fact only that which you believe to be true. If your statement is speculation, say so. If you have reason to believe that something is not true, either don't post it, or note your reservations. When you make an assertion, do so in good faith; state it as fact only if, to the best of your knowledge, it is so.

The author is also the author of *The Weblog Handbook: Practical Advice on Creating and Maintaining Your Blog* .

¹⁰ E-Democracy.Org, *Local Issues Forum Guidebook* (15 March 2005) available at <http://e-democracy.org/if/guide.pdf> (see pages 21-22).

¹¹ Draft Bloggers' Code of Conduct: http://radar.oreilly.com/archives/2007/04/draft_bloggers_1.html