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- Overview of Adrian Herbst and The Baller Herbst Law Group

OUTLINE OF TODAY'S PRESENTATION

Part I: Recent Technological
Developments

Part II: Legal Considerations for
Creating and Operating a
Government Website

Part II: Practical Advice for Creating a
Government Website

PART I: RECENT TECHNOLOGICAL DEVELOPMENTS

- Broadband
- Internet -- high speed modem
- Internet telephone
- Internet video
- Wi-Fi
- Fiber to the curb

PART II: LEGAL CONSIDERATIONS

As a means for providing government information, communicating more directly with citizens, and for providing efficient government services, municipal websites hold great promise. However, government entities that do so should be aware that this new tool for citizen interaction carries with it the potential for legal entanglement on several fronts.

The First Amendment and the Public Forum Doctrine

- An initial question is whether or not a public forum exists.
 - The answer affects links from the government website to external websites.
 - The inclusion of local business/attractions information on the public webpage.

- Advertising policy.
- Public bulletin boards, “talk back features” and other citizen interactivity efforts.
- Copyright.

In simple terms, if analogous to a public park, it will be difficult to exert any sort of control over speech expressed on the website or to withstand a challenge by dissatisfied party.

If more akin to a government publication with significantly restricted or no outside content at all, a court will likely not treat the website as a public forum and First Amendment challenges to the website will be much more difficult to maintain.

- Non-public forum -- government maintains nearly complete control over communications or only allowing government communications.
- Putnam Pit, Inc. v. City of Cookeville, Tennessee -- a case providing a good review of what is and what is not a public forum to guide in the development of local website policies.

- Conclusion -- to minimize First Amendment problems, government website operators should adopt specific policies governing links to external website advertising, and other non-governmental uses of the public website, using the lessons of the public forum analysis and relevant caselaw.

E-Government Considerations

The government entity is providing a means for persons to interactively “do business with” or otherwise exchange information with the government via the website -- electronic filings of all types, electronic permit applications, and providing citizens and businesses access to official records and individual records.

Access control is needed. Further, considerable legal evaluation relating to e-government is essential, including in particular, the federal Privacy Act:

- Disclosing records require the permission of the individual to whom the record pertains.

Open Records Act

Determine information that is subject to the Open Records Act. The Act and what is or is not a public record and how requests are handled are a matter of state law. Virtually all states hold that electronic information or documents are to be treated no differently than paper documents for purposes of open records requests.

Copyright

- Because there may be exposure to copyright infringement, website policies regarding disclaimers, copyright policy and other similar matters are essential.
- Cities should execute ASCAP/BMI blanket license agreements if they intend to broadcast music (IMLA has model agreement for use).

- Consider obtaining broadcast/copyright infringement insurance and verify coverage by current liability provider.
- Important to separate non-public from public on the website to separate the public forum from private communications.

Policy on Collection of Personal Information

The drafting and publication of a policy (external linking, advertising, etc.) is essential. A government website must include a well-thought-out statement of its treatment of personally identifiable information. Website officials must also be mindful of their special obligations with regard to children's personally identifiable information.

Website Accessibility Requirements

In addition to First Amendment and Open Records Act obligations, government websites (unlike private websites) must also make themselves accessible to persons with disabilities. This obligation is embodied generally in the federal Americans with Disabilities Act, and more specifically in state acts that mirror Section 508 of the federal Rehabilitation Act of 1973.

PART III: PRACTICAL ADVICE FOR CREATING A GOVERNMENT WEBSITE

The following are guidelines for website planning. This includes the following:

- A compliance audit
- Identify requirements for the website and e-government.

- Select legal and technical assistance.
- Select a webmaster(s).
- Register a domain name.
- Determine what you want the website to provide.
 - ❖ Government information.
 - ❖ Non-government information.
 - ❖ Interactivity.
- Hosting/ownership issues.

- Create necessary policies.
 - ❖ Website purpose policy.
 - ❖ Linking policy.
 - ❖ Advertising policy.
 - ❖ Privacy policy/use of personal information.
 - ❖ Copyright.
- Insurance.
- Ongoing oversight.

- Evaluate e-government benefits and identify services.
- Create a plan for administration and oversight.
- Obtain legal and technical assistance.

ADDITIONAL CONSIDERATIONS

Communities may want to consider coordinating or working together to share costs, including professional assistance in the development, oversight, and ongoing administration of a government website.