



March 24, 2014

MEMORANDUM FOR ALL DEPARTMENT EMPLOYEES

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance on the Personal Use of
Social Media by Department Employees

This memorandum provides guidance to Department employees regarding their responsibilities when using social media. It is critically important that Department employees understand that engaging in internet and electronic communications regarding matters affecting the Department, as with other forms of communication, implicate the Department's core mission of administering justice in a fair, effective, and even-handed manner. Before using social media to communicate about matters affecting the Department, employees should ask themselves at least two common sense questions: "Is there any risk that I am disclosing confidential or non-public information?" "Might my use of social media adversely affect the Department's mission?" The exercise of sound judgment will go a long way towards ensuring that Department employees meet the high standards we have set for them.

While the tools and technologies of social media present new ways to connect with friends, colleagues, and the world, Department employees should remain aware that existing policies apply when communicating about matters affecting the Department. Importantly, Department employees are required to adhere to certain government-wide standards of conduct and rules of professional conduct that apply to online communications at all times, regardless of whether they are at work, outside the office, or using government equipment. Additional guidance is discussed in the attached memorandum, but the following standards, rules, and policies warrant particular attention:

- **Protection of Information:** Department employees must properly safeguard confidential, privileged, classified, privacy-protected and/or sensitive Department information. Attorneys must comply with additional rules of professional conduct that prohibit them from disclosing information learned in the course of representing the United States, including confidential case information related to matters personally handled by the attorney or matters handled by all other Department attorneys or offices.
- **Case-Related Comments or Information:** Department employees are generally restricted from publicly releasing any comments or information that may reasonably be expected to influence the outcome of a pending or future trial, including observations about a defendant's character or about their opinion as to a defendant's guilt.

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- **Comments about Judges:** Department employees should not make false statements or statements in reckless disregard for the truth about a judge's qualifications or integrity.
- **Discrimination or Harassment:** Department employees should not make comments that can be perceived as showing prejudice based on race, gender, sexual orientation or any other protected basis.
- **Attempts at Anonymous Communications:** Department employees must recognize that attempts to post, comment, or share information without revealing their names or identities often are unsuccessful. Employees must take care not to engage in activity anonymously (or using a pseudonym) that they otherwise would not be permitted to engage in if their identities were known.
- **Use of Department Computers and Official Time:** Employees using Departmental computer systems and electronic devices are subject to certain guidelines, including restrictions on the use of Department computers and prohibitions on tools that hide the user's identity.

All supervisors should ensure that Department employees receive this guidance, and fully understand these important standards, rules, and policies. If employees have questions or concerns, please contact human resources, a designated ethics or professional responsibility officer, or a supervisor.

Attachment

GUIDANCE ON THE PERSONAL USE OF SOCIAL MEDIA BY DEPARTMENT EMPLOYEES

Introduction

As the internet and electronic communications take an ever increasing role in our work and personal lives, we must always be mindful of our responsibilities as Department of Justice employees. More specifically, various forms of social media¹ give employees the opportunity to interact with friends and colleagues, but as with other forms of communication, employees need to be aware of the potential for pitfalls. The line between public and private, personal and professional, is often blurred, especially when an employee using social media includes his or her Department affiliation or title, or comments on matters related to his or her work, or the work of the Department.

As a result, when using social media, Department employees should use caution and, as in everything they do, exhibit sound judgment and common sense. Before using social media to communicate about matters affecting the Department, employees should ask themselves: “Is there any risk that I am disclosing confidential or non-public information?” “Might my use of social media adversely affect the Department’s mission?” “Are there Department policies and procedures governing my conduct such that I should consult a supervisor or ethics officer prior to posting, commenting, or blogging online?” By resolving these and other issues discussed more fully below, Department employees will go a long way to assuring that they conduct themselves in a manner consistent with the high standards we have set for Department employees.²

Two types of social media commenting merit special attention and should cause Department employees to exercise extreme care: comments that can be perceived as showing prejudice based on race, gender, sexual orientation, or any other protected basis; and comments on the work of the Department, including cases and investigations. It is critically important that Department employees act, and are perceived to act by the public we serve, in a fair, just, and unbiased manner. Online comments by Department employees exhibiting animus based on any protected basis, including race, gender, or sexual orientation, that adversely affect our ability to

¹ For the purposes of this memorandum, “social media” covers tools and technologies that allow an employee to share communications, postings or information, or participate in social networking, including but not limited to: blogs (*e.g.* Twitter, Tumblr), social networks (*e.g.*, Facebook, LinkedIn, Google+), video and photo sharing websites (*e.g.* Instagram, Flickr), on-line forums and discussion boards (including commenting on-line using media websites), and automated data feeds. “Social media” does not include non-public tools and technologies, such as Departmental intranet sites.

² Based on particular operational concerns, agencies and components may retain existing policies or promulgate additional guidelines on the use of social media so long as they are consistent with the guidance provided in this memorandum.

carry out our important mission will not be tolerated, as explained in this policy. Likewise, Department employees should not post or comment about Department cases or investigations when their comments could reveal non-public information, influence the outcome of an investigation or proceeding, or adversely affect the subject of an investigation, a defendant, party, or witness in a case.

In addition, Department employees must recognize that attempts to post, comment, or share information without revealing their names or identities often are unsuccessful. Employees therefore must take care not to engage in activity anonymously, or using a pseudonym, that they otherwise would not be permitted to engage in if their identities were known. The applicable rules and standards of conduct apply equally whether an employee uses social media anonymously (or using a pseudonym) or while properly identified.

Standards Governing Communications by Department Employees

Department employees should remain aware that, even though there are new ways to connect with the world, existing policies, rules, and standards are still implicated when communicating about matters affecting the Department. Attorneys should also recognize that they have additional responsibilities under the applicable local court rules and rules of professional conduct, and should consult those rules when considering a particular communication.

It is important to note that while vastly accelerating the speed of communication and greatly broadening the size of the audience, the advent of social media neither restricts nor expands the existing limitations on Department employee speech.³ Department employees do not surrender their First Amendment rights as a result of their employment; however, the Supreme Court and lower courts have held that the Government may restrict the speech of its employees when employees are not speaking as private citizens on matters of public concern or when the Government's interest in the efficient provision of public services outweighs its employees' interest in the speech. This memorandum is intended to educate and remind Department employees about the limitations in their communications that derive from their status as government employees.⁴ To that end, this memorandum on the personal use of social media:

³ While the focus of this memorandum is to provide guidance for communications made on social media, Department employees should recognize that the standards and rules of appropriate professional conduct stated in this guidance are not limited to internet or electronic communications, but rather apply to any public communication, whether written or oral.

⁴ The memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

- (1) reinforces the relevant government-wide standards of conduct that apply to all employees' online communications, including when an employee is not at work and not using government equipment;
- (2) reiterates the relevant attorney rules of professional conduct that apply to Department attorneys' online communications, including when an attorney is not at work and not using government equipment;
- (3) reminds employees of the rules regarding their use of Department computers and equipment and use of official time; and
- (4) provides guidelines for personal social media activities that may impact employees' official work for the Department.

This memorandum is not intended to limit or restrict strictly personal social media activities that do not affect the Department and involve the use of personal computers or other devices.⁵ Finally, this memorandum is not intended to cover the use of social media by employees in the course of their officially sanctioned work for the Department.

I. Government-Wide Standards of Conduct

All Department employees are required to adhere to certain government-wide standards of conduct that apply to online communications at all times. In general, the restrictions on Department employee communications are contained in statute and the Code of Federal Regulations (C.F.R.). While not exhaustive, the following restrictions apply to all employees, and violations may be cause for disciplinary action by the Department:

- **Ethical standards:** Employees shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government. 5 C.F.R. § 735.203.
- **Misuse of Position:** Employees shall not use their public office for private gain, for the endorsement of any product, service, or enterprise, or for the private gain of friends, relatives, or other acquaintances. Also, employees shall not use or permit the use of their Government position or title or any authority associated with their public office in a manner that is intended to coerce or induce another person to provide any benefit, financial or otherwise, to themselves or to friends, relatives, or persons with whom the

⁵ This memorandum is consistent with and does not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to: (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this memorandum and are controlling. 5 U.S.C. § 2302(b)(13).

employees are affiliated in a nongovernmental capacity. Finally, with limited exceptions,⁶ employees shall not use their Government position or title in a manner that could reasonably be construed to imply that the Government endorses or sanctions their personal activities or those of another. 5 C.F.R. § 2635.702.

- **Use of Non-Public Information:** Employees shall not allow the improper use of non-public information to further their own private interest or that of another, whether by engaging in financial transactions using such information, through advice or recommendation, or by knowing unauthorized disclosure. Non-public information is information that the employee gains by reason of Federal employment and that he or she knows or reasonably should know has not been made available to the general public. 5 C.F.R. § 2635.703.
- **Political Activity:** Certain restrictions on political activity by Department employees apply regardless of whether they are on duty or on their personal time. Hatch Act (5 U.S.C. §§ 7321-7326). For example, no employee may solicit, accept, or receive political contributions, at any time or in any forum. *Id.* § 7323(a)(2). Other restrictions are discussed further below and in the footnoted memoranda.⁷
- **Discrimination and Harassment:** All employees are responsible for treating fellow employees with basic respect and dignity, and must not harass or discriminate against fellow employees based on race, color, religion, national origin, sex, gender identity, age, disability (physical or mental), genetic information, status as a parent, sexual orientation, marital status, political affiliation, or any other non-merit factor. *See* 5 U.S.C. §§ 2301-2302 (prohibited personnel practices); DOJ Order 1200.1, Chapter 4-1, Equal Employment Opportunity Program; Attorney General Memorandum, Prevention of Harassment in the Workplace (Dec. 14, 1998); *see also* American Bar Association Model Rules of Professional Conduct (“Model Rules”) Rule 8.4(d) & 8.4 cmt. [3].
- **Case-Related Comments or Information:** Subject to limited exceptions, all Department employees are restricted from publicly releasing any comments or information that “may reasonably be expected to influence the outcome of a pending or

⁶ *See* 5 C.F.R. § 2635.702(b), (c).

⁷ These restrictions are set forth in two memoranda, one for career employees, <http://www.justice.gov/jmd/ethics/docs/pol-activ-dag-career-employees.pdf>, and one for non-career appointees, <http://www.justice.gov/jmd/ethics/docs/pol-activ-dag-noncareer-employees.pdf>. Additional information is available on the Department’s ethics website, <http://www.justice.gov/jmd/ethics/politic.html> and the U.S. Office of Special Counsel web site, “Frequently Asked Questions Regarding Social Media and the Hatch Act,” U.S. Office of Special Counsel (April 4, 2012) at: <http://www.osc.gov/documents/hatchact/federal/Social%20Media%20and%20the%20Hatch%20Act%202012.pdf>.

future trial.” 28 C.F.R. § 50.2 (b)(2) & § 50.2 (c) (restrictions on extrajudicial speech).⁸ In particular, Department employees shall not communicate with non-Department individuals concerning their observations about a defendant’s character or about their opinion as to a defendant’s guilt. *Id.* § 50.2(b)(6)(iv).

II. Rules of Professional Conduct

Department attorneys are required to adhere to applicable rules of professional conduct in their communications, regardless of whether they are at work or outside the office, the medium of communication, the forum in which they are communicating, whether they are using government equipment, and whether they communicate anonymously or pseudonymously. These rules apply to Department attorneys who engage in all types of Department work, including litigation, investigation, and providing legal advice. Moreover, the rules require attorneys to make reasonable efforts to ensure that non-lawyers working with the attorney conduct themselves in a manner that is compatible with the rules. *See* Model Rule 5.3. The Department may discipline attorneys for violations of applicable rules of professional conduct. The following professional conduct principles are contained in the American Bar Association Model Rules of Professional Conduct;⁹ although this list is not exhaustive, it highlights rules that attorneys should be particularly mindful of when using social media:

- **Protection of Information:** Department attorneys are required to safeguard and are prohibited from disclosing confidential Department information relating to the representation of the United States (or other clients (*e.g.*, *Bivens* defendants)). *See* Model Rule 1.6(a). The relevant Model Rules also prohibit a Department attorney from disclosing information learned in the course of representing the United States, including confidential case information related to matters personally handled by the attorney or matters handled by all other Department attorneys or offices. *See* Model Rule 1.6 & cmt. [2], [3], [4], [5], [20]; Model Rule 1.10 & cmt. [2]. Confidential information is broadly defined and applies to “all information relating to [a] representation whatever its source,” as well as information that reasonably could lead to the discovery of confidential information. Model Rule 1.6 cmt. [3] & [4]. This includes, but is not limited to, information deemed privileged, classified, privacy protected and/or sensitive.

⁸ *See* 28 C.F.R. § 50.2 (b)(3) & § 50.2 (c) (discussing limited information that may be released to the public).

⁹ The Model Rules are cited because most jurisdictions’ versions of the professional responsibility rules are based on the Model Rules. A Department lawyer, when confronting an issue of professional conduct, should consider the rules that apply to that particular situation because, in most instances, a specific jurisdiction’s rules will govern, rather than (or in some cases, in addition to) the Model Rules.

- **False or Misleading Statements:** Department attorneys should not make a false statement of material fact or law regarding their representation of a client to a third person or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. *See* Model Rules 4.1 & 8.4(c).
- **Comments about Judges:** Attorneys should not make false statements or statements in reckless disregard for the truth about a judge’s qualifications or integrity. Model Rule 8.2.
- **Conflict of Interest:** Attorneys should not make statements that would result in the Department attorney being materially limited or impaired in representing the United States, such as by posting personal opinions contrary to those that the attorney is advocating on behalf of the United States, comments that can be perceived as showing prejudice based on race, gender, sexual orientation or any other protected basis, or comments that may cause the attorney to be called as a witness. *See* Model Rule 1.7(a)(2); Model Rule 8.4(d) & cmt. [3]; Model Rule 3.7(a).¹⁰
- **Trial Publicity:** Attorneys should not make statements they know or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding, or that are likely to heighten condemnation of an accused in a prosecution being handled by the Department.¹¹ Model Rules 3.6 & 3.8(f); *see also* USAM §§ 1-7.000 et. seq. (establishing specific guidelines restricting the release of information relating to criminal and civil cases by Department attorneys).

III. Use of Department Computers and Official Time

All employees have a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes. 5 C.F.R. § 2635.704. Further, employees shall use official time in an honest effort to perform official duties. 5 C.F.R. §2635.705. Use of Departmental computer systems, including Blackberries and all electronic devices, is subject to the same restrictions on use as are other government-furnished resources provided for the use of employees. While Departmental computer systems are provided for

¹⁰ Although the Department may be able to consent to an attorney’s continued representation of the United States notwithstanding the conflict of interest created by such comments, the decision whether to consent may involve a time-consuming investigation and assessment of the extent to which the conflict might impair the Department attorney’s ability to effectively represent the United States in a particular matter or at all. In addition, the attorney may need to consider whether his or her statements are required to be disclosed subject to the Government’s discovery obligations. *See, e.g.,* Deputy Attorney General Memorandum, Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases (March 30, 2011).

¹¹ The local court rules implemented by courts also govern attorneys’ conduct and frequently contain restrictions on attorney speech related to matters pending before the court.

official use, some personal use of government computer systems is permitted in accordance with existing policy on personal use of government property, where there is negligible cost to the government and no interference with official business. *See* 28 C.F.R. § 45.4; DOJ Order 2740.1A.

Employees must keep the following restrictions and guidelines in mind when using Department computers and computer systems during working hours or nonworking hours. Note that unauthorized or improper use of Department computers and equipment could result in loss of use or limitations on the use of equipment, disciplinary or adverse actions, and/or criminal penalties:

- **Limited expectation of privacy:** Employees should not expect privacy in the use of Department computers or computer systems except in very limited circumstances when the Department has specifically authorized them to engage in attorney-client communications *with private clients*, for example, employees sued in their individual capacity or approved pro bono clients. *See* 28 C.F.R. § 50.15; DOJ Policy Statement on Pro Bono Legal and Volunteer Services. System administrators and others with access privileges may receive authorization from Department senior management officials to review an employee's computer activity, including email communications and internet activity, when there is a legitimate government purpose to do so. DOJ Order 2740.1A, §3(e), (f).
- **Prohibited Uses of Department Computers:** Non-official use of Department computers that could cause congestion, delay, or disruption of service is prohibited.¹² Additional prohibitions include the unauthorized use of internet sites that cause additional charges to the Department, viewing or downloading sexually explicit material, and use for commercial purposes or in support of outside employment or business activities. A list of other prohibited activities on Department computers can be found in DOJ Order 2740.1A, § 3(c).
- **Political Activity:** While on duty, in a Federal facility, using Federal property such as a computer, or while representing the Department, employees are prohibited from engaging in activity directed toward the success or failure of a political party, a candidate for partisan political office, or a partisan political group. Hatch Act (5 U.S.C. §§ 7321-7326).
- **Attempts at Anonymity/Pseudonymity:** Employees must remember that internet activity and posts made from Department computers can be traced back to the Department through the Internet Protocol (IP) address. Note that employees are

¹² For example, electronic greeting cards, video, sound or other large file attachments can degrade the performance of the entire network, and should not be viewed or sent on Department computers. Accessing continuous data streams (such as viewing streaming video or listening to streaming audio/radio on a media website) could also degrade the performance of the entire network and is inappropriate when not for official purposes.

prohibited from using anonymizer sites or similar tools that hide the user's identity on Department computers (sites that attempt to hide the user's identity from the internet sites being visited). DOJ Order 2740.1A, § 3(c)(2)(e).

IV. Personal Social Media Activity Guidelines

The following guidelines apply to employees' personal social media activities:

- **Department computers:** Only on a limited basis, where there is negligible expense to the Department and no interference with official business, may personal social media activities be conducted on Department computers, telecommunications devices, and networks, provided such activity does not interfere with the conduct of Department business and does not violate the computer and equipment usage restrictions discussed above in DOJ Order 2740.1A and 28 C.F.R. § 45.4.
- **Use of title and email address:** Employees may use their official title and Department affiliation on their personal social media page for professional identification or biographic data as long as they do not create an impression that they are speaking in an official capacity. Employees should not use their government email addresses when setting up personal social media accounts.
- **Communicating in personal capacity:** Employees must avoid stating, implying, or creating the impression that they are communicating in an official capacity on behalf of the Department in their personal social media activities.¹³ To the extent that there may be confusion about whether an employee is communicating in an official or personal capacity, the employee must include a disclaimer indicating that the employee is communicating in a personal capacity.¹⁴
- **Work or Department-related posts:** Employees may post, comment, or share public information on matters related to their work or the work of the Department provided such communications fully comport with the restrictions set forth in this guidance. As discussed above, Department employees must properly safeguard privileged, confidential, classified, privacy-protected and/or sensitive Department information. Attorneys must also comply with the applicable jurisdiction's Rules of Professional

¹³ Implying that one is communicating in an official capacity on behalf of the Department may, for attorneys, also constitute dishonesty, fraud, deceit or misrepresentation, which is prohibited by Model Rule 8.4(c).

¹⁴ For example, DOJ Order 2740.1A provides that "[o]ne acceptable disclaimer is 'The contents of this message are mine personally and do not reflect any position of the Government or my agency.'" DOJ Order 2740.1A, § 3(d).

Conduct. Finally, absent express supervisory approval, employees should not engage in official Department business on personal social media pages.¹⁵

- **Engaging with colleagues:** Employees are permitted to engage with colleagues, including superiors and subordinates, on their personal social media sites. That said, care must be exercised to ensure that other rules are not inadvertently violated. For example, supervisors who “friend” their subordinates on their social media pages should ensure that they do not solicit contributions for personal causes on their pages in a way that could violate the regulation that prohibits fundraising from subordinates. *See* 5 C.F.R. §2635.808(c).
- **Political activity:** While most employees can engage in certain political activities while away from the workplace on their own time, including on their social media pages, some prohibitions exist, such as the prohibition on fundraising described above. Employees must understand the prohibitions that apply to their positions and be mindful of them as they engage in personal social media activities. *See* Hatch Act (5 U.S.C. §§ 7321-7326) and other restrictions discussed above in footnote 7 and the associated text.
- **Discrimination and harassment:** As with Department communications, employees may be subject to discipline if they use social media to engage in harassing or discriminatory conduct toward other employees (or individuals or groups) based on their race, color, religion, national origin, sex, gender identity, age, disability (physical or mental), genetic information, status as a parent, sexual orientation, marital status, political affiliation, or any other protected status.
- **Anonymous and pseudonymous postings:** As indicated previously, employees should recognize that attempts to post anonymously or pseudonymously are often unsuccessful, and therefore should take care not to engage in activity that they otherwise would not be permitted to engage in if their identity was known. The applicable rules and standards of conduct apply equally whether an employee uses social media anonymously (or using a pseudonym) or while properly identified.

The exercise of sound judgment and an awareness of applicable rules will go a long way towards avoiding problems that may result in violations of the Standards of Conduct, Rules of Professional Conduct, or Department policy, or potential disruptions to the efficiency of the Department. If you have questions or concerns about the above guidance, or are unsure how it may apply to you, please contact human resources, a designated ethics or professional responsibility officer, or your supervisor.

¹⁵ As discussed above, attorneys should also recognize that online communications may need to be reviewed and potentially disclosed in accordance with applicable statutes, the United States Constitution, or Department policies.