

TOWN ATTORNEY OPINIONS CONCERNING PETITIONED WARRANT ARTICLE 22  
ON THE 2021 BALLOT

For several reasons, petitioned Article 22 on the 2021 Town ballot (text below) is purely advisory and not binding on the Board of Selectmen.

First, Town meetings have only that authority that State law gives them. N.H. RSA 31:39-a enables the Town meeting to adopt an ordinance defining and regulating “conflicts of interest” for local officials and employees, whether elected or appointed.

However, this petitioned Article does not purport to be exercising the authority to adopt a regulation under RSA 31:39-a. Rather, it seeks to “update” the Code of Ethics that was adopted back in 2007 by the Board of Selectmen. That Code of Ethics was not adopted pursuant to RSA 31:39-a, but rather was adopted by the Selectmen as a voluntary, non-binding resolution, which is aspirational.

Second, addressing the content of “social media” is not the same as addressing “conflicts of interest” under RSA 31:39-a.

Third, there are no provisions in Article 22 as to the what the “social media” policy’s terms are to include, other than having a committee set up to perform certain functions.

Fourth, I do not feel that a Town can, without substantial risk of liability for civil rights violations, get into regulating or responding to the content of a Selectman’s speech via social media. Regulations that purport to govern the content of speech have been struck down repeatedly by the courts as notwithstanding strict scrutiny or from overreaching into an area of fundamental rights. See, for instance, the United States Supreme Court’s opinion to Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).

At the Deliberative Session, I suggested that this Article 22 might be salvaged within its subject matter if it were amended to require that proposed changes to the Code of Ethics be studied. No such amendment was offered.

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Article 22

We the undersigned registered voters of the town of Hampton request for you to insert in the town warrant for 2021 town meeting the following article:

To see if the town will vote to update the code of ethics for the board of selectmen to include a social media policy and create an ethics committee which will have an appointed representative and an alternate representative from the select board, planning board, budget committee and the trustees of the library each of these representatives will be appointed by these elected bodies first thing after the annual town meeting to serve one year term in the committee.

The purposes of the committee should be as follows:

1. Space to agent key complaints and make recommendations concerning violations of the code of ethics.
2. To disseminate the code of ethics and educate the public officials and the public about the code.
3. To review annually proposals for revising the code of ethics.