

## **Memorandum**

To: Texas Supreme Court Advisory Committee

From: Social Media Subcommittee (TEX. R. CIV. P. 216-299a)  
Professor Elaine A. Carlson, Chair  
Judge David Peeples, Vice-Chair  
Alistair Dawson  
Bobby Meadows  
Tom Riney  
Kent Sullivan  
Kennon Wooten

### **REVISED PROPOSAL RE JUDICIAL USE OF SOCIAL MEDIA**

In his letter of December 21, 2016, Chief Justice Hecht asked the SCAC to draft amendments to the Code of Judicial Conduct that give guidance on permissible social media use by judges. The Committee discussed the initial proposal at its August 11, 2017 meeting. In light of comments and suggestions made at that meeting, the Subcommittee presents the following new subsection to Canon 4 of the Texas Code of Judicial Conduct and a new comment regarding the use of social media by members of the judiciary. The Social Media Subcommittee also notes that the proposed new subsection and comment might necessitate changes to Canon 3B(10).

<b>New Subsection J and New Comment to Canon 4</b>
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#### **J. Judicial Use of Social Media**

The provisions of this Code that govern a judge's communications in person, on paper, and by electronic methods also govern a judge's use of social media.

## COMMENT

Social media has become a powerful communication device for persons holding public office, including judges.<sup>1</sup> The same features that make social media politically useful to judges, however, may threaten ethical standards that govern judges. The provisions of this Code that govern a judge's use of social media, along with the following guidelines, are intended to strike a constitutionally permissible balance between judges' First Amendment rights and the State's interest in safeguarding both the right to a fair trial<sup>2</sup> and public confidence in the integrity and impartiality of the judiciary.<sup>3</sup>

As provided in Canon 4J, the provisions of this Code that govern a judge's communications in person, on paper, and by electronic methods also govern a judge's use of social media. In all communications, including communications on social media, a judge shall<sup>4</sup> avoid conduct that undermines the judge's independence, integrity, impartiality, or the appearance of impartiality or that constitutes an *ex parte* communication. Judges should be cautious when posting or communicating on social media and should understand that their communications will likely be scrutinized by others.

Social media differs from traditional in-person and written communications. A statement, photograph, video, or other content can be disseminated to

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<sup>1</sup> Throughout this comment, the term "social media" refers to "the wide array of Internet-based tools and platforms that increase and enhance the sharing of information," the "common goal [being] to maximize user accessibility and self-publication through a variety of different formats." *See Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States, Administrative Office of the United States Courts, April 2010, at 9, available at <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct>.

<sup>2</sup> *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.").

<sup>3</sup> *See Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) ("We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (internal quotation marks omitted)); *see also Republican Party of Minnesota v. White*, 536 U.S. 765, 775–77 (2002) (addressing judicial impartiality—as the lack of bias for or against either party to a proceeding—as a compelling state interest).

<sup>4</sup> While the subcommittee prefers the use of "must" instead of "shall", Canon 8B defines "shall" and does not define "must".

large audiences quickly and easily on social media, sometimes without the consent or knowledge of the person who posted the content (or any person mentioned or depicted in that content). Postings can also invite response and discussion, over which the original poster may have little or no control. Seemingly private remarks can quickly be taken out of context and broadcast in much wider circles than the original poster intended. Content on social media can lie dormant and then be recirculated long after the original posting. A judge using social media should be familiar with privacy settings and mindful of the extent public access is allowed. If public access is unrestricted, a judge shall use reasonable efforts to monitor the judge's social media. In all cases, a judge should take appropriate corrective action if others communicate improperly on the judge's social media.<sup>5</sup>

Social media also creates new and unique relationships, such as “friends” and “followers”. Simple designation as a social-media connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person and is not, in and of itself, determinative of whether a judge's impartiality might reasonably be questioned. Social-media connections and any other communications on social media, however, may be a factor that can be considered in gauging the judge's relationship with a party, witness, or lawyer and whether recusal is mandated by Rule 18(b) of the Texas Rules of Civil Procedure. Moreover, if a social-media connection includes current and frequent communication, the judge shall carefully consider whether that connection shall be disclosed and whether recusal is appropriate. When a judge knows that a party, witness, or lawyer appearing before the judge has a social-media connection with the judge, the judge shall be mindful that such connection may give rise to a relationship, or the perception of a relationship, that requires disclosure or recusal. Careless statements may also be the basis for recusal motions or referral to the State Commission on Judicial Conduct and undermine public confidence in the judiciary.

Posts can be “liked” in an instant on social media, without pause for reflection or thought. “Liking” a post is tantamount to an endorsement [of any communication contained within the posting]. Similarly, “sharing”, retweeting, and even selecting emoji responses to a post may suggest an endorsement. A judge should be mindful of this Code's prohibitions any time the judge makes a public endorsement on social media. The misuse of

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<sup>5</sup> *Youkers v. State of Texas*, 400 S.W.3d 200, 205 (Tex. App.—Dallas 2013, no pet.),

social media can undermine public perceptions of judicial dignity, integrity, and impartiality.

Judges shall also take care that their use of social media satisfies this Code's prohibition of inappropriate political activity. When a judge or a judicial candidate uses social media as part of an election campaign, best practices suggest that a separate public social-media site be used. That site may be operated by the judge's or the judicial candidate's campaign committee. The judge and judicial candidate shall take care to ensure that any posting on their public site or any site operated by their campaign committee conforms to the restrictions of political activity and campaign conduct as outlined in this Code.

A judge shall use extreme caution in using social media to avoid statements, comments, and interactions that may be interpreted as *ex parte* communications concerning pending or impending proceedings in violation of Canon 3B(8), and avoid using social media to obtain information regarding a proceeding before the judge in violation of Canon 3B(8). Indeed, when communicating on social media, a judge should avoid comment about a pending or impending proceeding to comply with Canon 3B(10)<sup>6</sup> and take care not to offer legal advice in violation of Canon 4G.

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<sup>6</sup> John G. Browning & Justice Don Willett, "Rules of Engagement," 79 Tex. Bar. J. 100, 102 (2016); *In re Slaughter*, 480 S.W.3d 842, 849 (Special Court of Review 2015).