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RULES OF ENGAGEMENT
Exploring Judicial Use of Social Media

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We live in a wired world where Twitter processes more than one billion tweets every 48 hours. Harnessing technology has helped courts be more transparent than ever; witness, for example, the Texas Supreme Court's webcasting and archiving of oral arguments, providing free online access to court records, and, of course, enabling Texans to file documents electronically. Judges continue to use social networking in their personal and professional lives to greater extents than before, as they seek to not only stay connected to the community they serve but also to reap the practical benefits of raising funds and voter awareness in judicial elections.

Yet, not surprisingly, more judges using such platforms often translates to more judges using social media badly, despite the guidance available from judicial ethics opinions in 15 states, a 2013 American Bar Association formal ethics opinion that green-lighted judicial use of social media, and, for federal judges, Opinion 112 issued in 2014 by the Judicial Conference of the United States Committee on Codes of Conduct. For some jurists, the problems arise in the context of election campaigns, such as when District Judge Jan Satterfield of Kansas liked the Facebook page of a candidate for sheriff, which was viewed by the Kansas Commission on Judicial Qualifications as an impermissible endorsement.[1] For others, the problem is the unfortunate overlap between personal lives and professional personas, such as the resignation of Dianna Bennington, a former city court judge in Indiana whose personal Facebook posts during an acrimonious child support dispute with her children's father led to a finding of "injudicious behavior."[2]

Other judges have courted criticism and faced recusal motions and disciplinary actions for using social media sites in their judicial capacities. For example, in July 2015, Galveston County District Court Judge Michelle Slaughter faced a trial before a special court of review after appealing a public admonition from the State Commission on Judicial Conduct. The charges centered on Facebook posts she had made referencing cases pending in her court, including a criminal trial dubbed the "boy in the box" case by local media. The commission claimed that Slaughter's posts were inconsistent with her duties as a judge, cast doubt on her impartiality, and undermined public confidence in the judiciary. She maintained that her brief, factual statements (such as the post that a "big criminal trial" was starting) did not comment on the evidence or witnesses and did not indicate any learning toward one side or the other. Moreover, she argued that her Facebook posts were simply part of her fulfillment of a campaign promise to be transparent and to keep the public informed about the cases being tried in her court.

In a per curiam opinion issued September 30, 2015, the Special Court of Review of Texas dismissed the public admonition and found Slaughter not guilty of all charges.[3] Noting social media's "transformative effect on society" as well as the fact that "no rule, canon of ethics, or judicial ***101** ethics opinion in Texas prohibits Texas judges from using social media outlets like Facebook," the court found no evidence that Slaughter's online comments "would suggest to a reasonable person the judge's probable decision on any particular case or that would cause reasonable doubt on the judge's capacity to act impartially as a judge."[4] The court also rejected the notion that her postings or the fact that she was recused from the underlying case amounted to any misuse of her office or a violation of the Canons of the Code of Judicial Conduct, although it did caution that "comments made by judges about pending proceedings" may "detract from the public trust and confidence in the administration of justice."[5]

Recent episodes involving judges who went beyond innocuous factual statements illustrate the validity of the Texas Court of Special Review's concerns. In November 2015, Senior Judge Edward Bearse was publicly reprimanded by the Minnesota Board on Judicial Standards for his Facebook posts about cases he was presiding over--including one that resulted in a vacated verdict.[6] Bearse (who had served on the bench for 32 years, retired in 2006, and was sitting statewide by appointment) referred to Hennepin County District Court in one post as "a zoo."[7] In another, he reflected on a case in which the defense counsel had to be taken away by an ambulance mid-trial, likely to result "in chaos because defendant has to hire a new lawyer who will most likely want to start over and a very vulnerable woman will have to spend another day on the witness stand. ..."[8] During *State v. Weaver*, a sex trafficking trial, Bearse posted the following:

> Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do.[9]

After a guilty verdict, the prosecutor discovered Bearse's Facebook post and disclosed it to the defense, who successfully moved for a new trial because of the prejudgment implied by the post. Bearse explained that he was new to Facebook, was unaware of privacy settings, and didn't realize his posts were publicly viewable. The board concluded that he had put his "personal communication preferences above his judicial responsibilities," given at least the appearance of a lack of impartiality, and had engaged in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[10]

In Kentucky, Circuit Court Judge Olu Stevens ignited a firestorm of controversy with his Facebook posts. Early in 2015, Stevens went on Facebook to vent his frustration with a victim impact statement made by the mother of a white child who had witnessed a home invasion by two black men and was supposedly "in constant fear of black men." In his post, Stevens--who is African-American--condemned the statements and accused the mother of attributing "her own views to her child as a manner of sanitizing them."[11] And after he dismissed a nearly all-white jury panel--upon request from the public defender--in a case with an African-American defendant, Stevens posted about it on Facebook, prompting prosecutors to seek his recusal from all pending criminal cases. The situation reached the Kentucky Supreme Court, with Stevens's posts also denouncing Commonwealth's Attorney Thomas Wine for alleged racism and including the comment, "Going to the Kentucky Supreme Court to protect the right to impanel alt-white juries is not where we need to be in 2015. Do not sit silently. Stand up. Speak up."[12] Wine demanded Stevens's disqualification due to the "inflammatory" Facebook posts.[13]

Kentucky Supreme Court Chief Justice John D. Minton Jr. ordered the parties to mediate their differences. And although an agreement was reached in December, just days later Wine claimed that Stevens had violated the accord with yet another Facebook post in which he asserted that his critics' goal was "taking my position in order to silence me."[14]

Venturing onto Twitter can also be problematic for judges who neglect to diligently self-censor. The 9th Circuit is currently weighing a challenge to a ruling by U.S. District Court Judge William B. Shubb in the case of *U.S. v. Sierra Pacific Industries*.[15] The case arose out of a 2007 wildfire that devastated nearly 65,000 acres in California. The federal government, which blamed lumber producer Sierra Pacific, reached a settlement that the lumber company sought to vacate. Shubb denied Sierra Pacific's motion. In its appeal, the company pointed out that not only was Shubb a Twitter follower of the federal prosecutors on the case--and had purportedly received tweets about the merits of the case from the Eastern District of California's Twitter handle (@EDCAnews)--but also that he himself had tweeted about the case from his then-public Twitter account (@Nostalgist1). Shubb allegedly tweeted, "Sierra Pacific still liable for Moonlight Fire damages," and also linked to a news article about the case--all while the case was still pending.[16] As Sierra Pacific's lawyers pointed out, the tweet was inaccurate (no finding of liability was ever made) and it also increased the appearance of bias and "prejudices Sierra Pacific and all Defendants in the pending state court appeal regarding the Moonlight Fire."[17]

With judges elected in 39 states (including Texas), social media is a fruitful way to engage with the community as well as an invaluable means of raising visibility, building awareness, and leveraging the support of key influencers and opinion leaders. Texas--along with many courts and judicial ethics authorities across the country--has rejected the notion that a person's mere status as a Facebook "friend" or other social networking connection with a judge is enough to convey the appearance of a special relationship or position of influence with that judge.[18]

However, judges need to be mindful of the power, specific features, and limitations of sites like Facebook and Twitter. "Judge" need not be synonymous with humorless fuddy-duddy, but certain cardinal rules must be followed. Chief among

these is that the ethical restrictions applicable to every other means of communication are just as applicable ***102** to social media. For example, judges shouldn't discuss pending cases--period. And before posting, tweeting, or responding to what someone else has posted or tweeted, judges need to ask themselves whether their statement could be seen as inappropriate or conveying partiality or bias. Judges are free to use social media, a terrific, low-cost way to remove distance and demystify the judiciary. But they must exercise caution, taking care to honor the distinctive constitutional role they've taken on as well as the public's confidence in the judiciary. Whether they're crafting a 140-page opinion or a 140-character tweet, judges must always be judicious.

Footnotes

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1 *Kansas judge Causes* Stir *With Facebook 'Like*,' Real Cleat Politics (July 29, 2012), http://www.reatelearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like_html.

2 *In re the Honorable Dianna L. Bennington*, No. 18S00-1412-JD-733, (Ind. Feb. 10, 2015), http://caselaw.findlaw.com/in-supreme-court/1691967.html.

3 *In re Honorable Michelle Slaughter, Presiding Judge of the 405th Judicial District Court, Galveston County, Texas*, Docket No. 15-0001 (Special Court of Review of Texas, Sept. 30, 2015).

4 *Id.* (Citing John G. Browning, "Social Media and the Law: Symposium Keynote Address," 68 U Miami L. Rev. 353, 359 (2014).)

5 *Id.*

6 In the Matter of Senior Judge Edward W. Bearse, Amended Public Reprimand (Minnesota Board on judicial Standards, File No. 15-7, Nov, 20, 2015).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 Andrew Wolfson, *Judge Slams Victims for Tot's 'Black Men' Fear*, Courier-Journal (April 15, 2015), http://www.courier-journal.com/story/news/local/2015/04/10/judge-slams-victimstots-black-men-fear/25581605/.

[12] Jacob Gershman, *Prosecutors Want Judge Off Criminal Casts Because of Facebook Posts*, Wall Street Journal Law Blog (Nov. 18, 2015), http://blogs.wsj.com/law/2015/11/18/prosecutors-want-judge-off-criminal-cases-because-of-facebook-posts/.

[13] Matthew Glowicki, *Judge Kicked Off Cases Over Online Comments*, Courier-Journal (Nov. 19, 2015), http://www.courier-journal.com/story/news/local/20**l**5/11/18/prosecutorwants-judge-off-cases-over-raciai-stand/75957606/.

[14] Matthew Glowicki and Andrew Wolfson, *Wine Renews Call to Take Olu Stevens Off Cases*, Courier-Journal (Dec. 14, 2015), http://www.courier-journal.com/story/news/crime/2015/12/14/prosecutors-say-judge-broke-mediation-agreement/77290214/.

[15] David Lat, *A Federal Judge and His Twitter Account: A Cautionary Tale*, Above the Law (Nov. 18, 2015). www.abovethelaw.com/2015/u/a-federal-judge-and-his-twitter-accounta-cautionary-tale/.

[16] *U.S. v. Sierra Pacific Industries, et al*, No. 15-15799, Appellants' Motion for Judicial Notice (9th Cir. Nov, 6, 2015).

[17] *Id.*

[18] *See Youkers v. State*, 400 S.W.3d 200 (Tex. App.--Dallas [5th Dist.] 2013).

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