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**NCSC**  
National Center for State Courts  
*Center for Judicial Ethics*

## Social Media and Judicial Ethics

Compiled by Cynthia Gray, Director  
NCSC Center for Judicial Ethics  
[www.ncsc.org/cje](http://www.ncsc.org/cje)

- Citations to judicial ethics advisory opinions on social media
- Code of conduct provisions referencing social media
- Judicial discipline cases involving social media
- Judicial campaigns and social media
- Judicial disqualification cases involving social media

### **Citations to judicial ethics advisory opinions on social media**

*Arizona Advisory Opinion 2014-1*

([http://www.azcourts.gov/LinkClick.aspx?fileticket=zNRP1\\_l8sck%3d&portalid=137](http://www.azcourts.gov/LinkClick.aspx?fileticket=zNRP1_l8sck%3d&portalid=137))

*California Judges' Association Advisory Opinion 66 (2010)*

(<http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>)

*Connecticut Informal Opinion 2013-6*

(<http://jud.ct.gov/Committees/ethics/sum/2013-06.htm>)

*Florida Advisory Opinion 2009-20*

(<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>)

*Florida Advisory Opinion 2010-6*

(<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>)

*Florida Advisory Opinion 2012-12*

(<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2012/2012-12.html>)

*Kentucky Advisory Opinion JE-119 (2010)*

([http://courts.ky.gov/commissionscommittees/JEC/JEC\\_Opinions/JE\\_119.pdf](http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_119.pdf))

*Maryland Advisory Opinion Request 2012-7*

(<http://mdcourts.gov/ethics/pdfs/2012-07.pdf>)

*Massachusetts Advisory Opinion 2011-6*

(<http://www.mass.gov/courts/sjc/cje/2011-6n.html>)

*Massachusetts Letter Opinion 2016-1*

(<http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-01.html>)

*Missouri Advisory Opinion 186 (2015)*

(<http://tinyurl.com/gwm3246>)

*New Mexico Advisory Opinion Concerning Social Media (2016)*

(<http://tinyurl.com/z7fapll>)

*New York Advisory Opinion 2008-176*

(<http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>)

*New York Advisory Opinion 2013-39*

(<http://www.nycourts.gov/ip/judicialethics/opinions/13-39.htm>)

*New York Advisory Opinion 2014-5*

(<http://www.nycourts.gov/ip/judicialethics/opinions/14-05.htm>)

*North Carolina State Bar Formal Ethics Opinion 2014-8*

(<http://www.ncbar.com/ethics/ethics.asp>)

*Ohio Advisory Opinion 2010-7*

([http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2010/default.asp](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/default.asp))

*Oklahoma Advisory Opinion 2011-3*

(<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147>)

*South Carolina Advisory Opinion 17-2009*

(<http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>)

*Tennessee Advisory Opinion 2012-1*

([http://www.tncourts.gov/sites/default/files/docs/advisory\\_opinion\\_12-01.pdf](http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf))

*Utah Informal Advisory Opinion 2012-1*

(<http://www.utcourts.gov/resources/ethadv/index.asp>)

*U.S. Advisory Opinion 112 (2014)*

(<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>)

*ABA Formal Opinion 462 (2013)*

([http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_462.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf))

## **Code of conduct provisions referencing social media**

- In a new code of judicial conduct effective December 1, 2015 (<http://www.courtswv.gov/legal-community/court-rules/Orders/2015/CJC-REVISED-FINAL-Nov-2015.pdf>), the West Virginia Supreme Court of Appeals included a comment 6 to Rule 3.1 that provides: The same Rules of the Code of Judicial Conduct that govern a judicial officer's ability to socialize and communicate in person, on paper, or over the telephone also apply to the Internet and social networking sites like Facebook.
- Effective December 31, 2015 (<http://www.nmcompcomm.us/nmrules/nmruleset.aspx?rs=21>), the New Mexico Supreme Court added to the preamble of the state's code of judicial conduct the statement: "Judges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code."

## **Judicial discipline cases involving social media**

### **Public discipline**

Granting a joint motion to resolve charges, the Alabama Court of the Judiciary publicly reprimanded and censured a judge for making public comments about pending contempt proceedings against a lawyer on his Facebook page and in an e-mail sent to all state court judges. *In the Matter of Allred*, Reprimand and Censure (Alabama Court of the Judiciary March

22, 2013) (<http://judicial.alabama.gov/judiciary/COJ42PUBLICREP.pdf>).

Based on a “report not contested” filed by the Judicial Discipline and Disability Commission, the Arkansas Supreme Court removed a judge from office (1) for, on a public on-line fan-site, posting comments regarding the closed adoption of a famous actress; making inappropriate statements about official duties, pending cases, and independent investigations; and making inappropriate gender, race, and sexually related statements; (2) spoliation of evidence; and (3) involvement in a hot check case in which he was the victim. *Judicial Discipline and Disability Commission v. Maggio*, 440 S.W.3d 333 (Arkansas 2014).

Based on a stipulation and recommendation of the investigative panel of the Judicial Qualifications Commission, the Florida Supreme Court suspended a judge for 30 days without pay for using social media to seek the assistance of her friends to help her husband, at the time a judicial candidate, correct perceived misstatements of his opponent. *Inquiry Concerning Krause*, 166 So. 3d 176 (Florida 2015).

Based on his consent, the Georgia Judicial Qualifications Commission suspended a judge for 60 days without pay and reprimanded him for, in addition to other misconduct, engaging in a private Facebook chat with a woman who contacted him on behalf of her brother about a DUI matter, advising her how her brother should get the matter to his court where he could handle it, and failing to recuse from the case. *In re Bass*, Public Reprimand (Georgia Judicial Qualifications Commission March 18, 2013) (<http://www.gaiqc.com/news.cfm>).

Accepting a statement of circumstances and conditional agreement for discipline, the Indiana Supreme Court permanently banned a former judge from serving in any judicial capacity for posting an injudicious comment on the Facebook page of the biological father of her twin children, in addition to other injudicious behavior outside of the courtroom, misusing her judicial authority, failing to record guilty plea and sentencing hearings, and failing to cooperate with the Judicial Qualifications Commission. *In the Matter of Bennington*, 24 N.E.3d 958 (Indiana 2015).

The Minnesota Board on Judicial Standards publicly reprimanded a senior judge for comments he publicly posted on his Facebook page about cases to which he was assigned as a senior judge. *In the Matter of Bearse*, Public reprimand (Minnesota Board on Judicial Standards November 20, 2015) (<http://www.bjs.state.mn.us/file/public-discipline/1517-news-release-and-reprimand.pdf>).

With the consent of the judge and based on the findings of the Commission on Retirement, Removal and Discipline, the Missouri Supreme Court publicly reprimanded a judge for, in addition to other misconduct, Facebook posts that abused the prestige of office and constituted personal participation in fund-raising activities and a Facebook post that was unfairly critical of the integrity of other judges in the circuit. *In re Prewitt*, Order (Missouri Supreme Court November 24, 2015).

Granting a petition to accept a stipulation, the New Mexico Supreme Court ordered the permanent retirement of a judge who admitted that he had endorsed candidates for public office on Facebook, after retiring but while designated a pro tempore judge, and continued to endorse candidates on Facebook and post their campaign materials on Facebook after telling the Judicial Standards Commission he would no longer do so. *In the Matter of Romero* (New Mexico Supreme Court February 13, 2015) (<http://www.nmjsc.org/recentcommissionactionandnotices.php>).

The North Carolina Judicial Standards Commission publicly reprimanded a judge for engaging in ex parte communications on Facebook with counsel for a party in a matter being tried before him and being influenced by information he independently gathered by viewing a party's website. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (<http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>).

The Texas State Commission on Judicial Conduct publicly warned a judge for, in addition to other misconduct, a Facebook post that directed an offensive term to her political opponent. *Public Warning of Wright and Order of Additional Education* (Texas State Commission on Judicial Conduct September 22, 2015) (<http://www.scjc.state.tx.us/pdf/actions/FY2016-PUBSANC.pdf>

Following a de novo trial, a Texas Special Court of Review dismissed charges that a judge's comments about pending cases on her Facebook page violated the code of judicial conduct. *In re Slaughter*, Opinion (Texas Special Court of Review September 30, 2015) (<http://www.scjc.state.tx.us/caseinfo.asp>).

Based on the judge's resignation and agreement to be disqualified from future judicial service, the Texas State Commission on Judicial Conduct agreed not to pursue disciplinary proceedings against a former judge based on a complaint filed with the Commission alleging that the judge had engaged in inappropriate conduct with regard to messages sent through his Facebook account. *In re Holmes*, Voluntary Agreement to Resign from Judicial Office in Lieu of Disciplinary Action (Texas State Commission on Judicial Conduct June 14, 2013).

The West Virginia Judicial Investigation Commission admonished a former magistrate for exchanging sexually explicit Facebook messages with a woman who appeared before him in court. *In the Matter of Fowler*, Public Admonishment (West Virginia Judicial Investigation Commission March 14, 2014).

### Private discipline

The California Commission on Judicial Performance issued a private advisory to a judge for social media activities that created an appearance of impropriety and an appearance of

partiality. *California Commission on Judicial Performance 2014 Annual Report* ([http://cjp.ca.gov/res/docs/annual\\_reports/2014\\_Annual\\_Report.pdf](http://cjp.ca.gov/res/docs/annual_reports/2014_Annual_Report.pdf)).

The Kansas Commission on Judicial Qualifications privately ordered a judge who “liked” a comment on a candidate’s Facebook page to cease and desist from publicly endorsing a candidate for any office. *Kansas Commission on Judicial Qualifications 2012 Annual Report* (<http://www.kscourts.org/appellate-clerk/general/commission-on-judicial-qualifications/2012-Annual-Report.pdf>).

The Kentucky Judicial Conduct Commission privately reprimanded a judge for “liking” the Facebook pages of lawyers and a judicial candidate and posting offensive comments about a lawyer on Facebook ([http://courts.ky.gov/commissionscommittees/JCC/Documents/Public\\_Information/PrivateReprimand120514.pdf](http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand120514.pdf)).

The Kentucky Judicial Conduct Commission privately reprimanded a judge for “liking” the Facebook pages of lawyers, law firms, and candidates ([http://courts.ky.gov/commissionscommittees/JCC/Documents/Public\\_Information/PrivateReprimand040215.pdf](http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand040215.pdf)).

The New Mexico Judicial Standards Commission privately cautioned a judge who, on a social media site, allegedly made public and ex parte comments about a case over which the judge was presiding, including comments about the jury’s verdict. *New Mexico Judicial Standards Commission 2013 Annual Report* ([http://www.nmjsc.org/docs/annual\\_reports/FY13AnnualReport.pdf](http://www.nmjsc.org/docs/annual_reports/FY13AnnualReport.pdf)).

The Texas State Commission on Judicial Conduct privately reprimanded a judge for soliciting public participation in a non-profit’s fund-raising operations through Facebook postings and the corporation’s website and related conduct. *Private Reprimand of a Justice of the Peace* (Texas State Commission on Judicial Conduct April 23, 2013) (<http://www.scjc.state.tx.us/pdf/actions/SummariesPrivateSanctions012714.pdf>).

The Texas State Commission on Judicial Conduct privately warned a judge for active involvement in a charitable fund-raiser that was apparent to the public from numerous entries on a Facebook page, in addition to related conduct. *Private Warning and Order of Additional Education of a Municipal Court Judge* (Texas State Commission on Judicial Conduct August 23, 2012) (<http://www.scjc.state.tx.us/pdf/actions/SummariesPrivateSanctions012714.pdf>).

## **Judicial campaigns and social media**

The Arizona Supreme Court suspended a judge for 90 days for, in addition to other misconduct, posting pictures of himself in his robe in front of the judicial bench on his campaign Facebook page. *In the Matter of Grodman*, 2015 Ariz. LEXIS 319 (Arizona 2015)

Based on the candidate's agreement, the Kentucky Judicial Conduct Commission publicly reprimanded a judicial candidate for "liking" a Facebook posting that publicly endorsed a candidate for public office and made a contribution to a political candidate. *In the Matter of Cohen*, Agreed order of public reprimand (Kentucky Judicial Conduct Commission July 21, 2014) ([http://courts.ky.gov/commissionscommittees/JCC/Documents/Public Information/PublicReprimandCohen.pdf](http://courts.ky.gov/commissionscommittees/JCC/Documents/Public%20Information/PublicReprimandCohen.pdf)).

The Texas State Commission on Judicial Conduct publicly warned a judge for, in addition to other misconduct, a Facebook post directing an offensive term to her political opponent. *Public Warning of Wright and Order of Additional Education* (Texas State Commission on Judicial Conduct September 22, 2015) (<http://www.scjc.state.tx.us/pdf/actions/FY2016-PUBSANC.pdf>)

*Florida Advisory Opinion 2009-20*

(<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>)

*Florida Advisory Opinion 2010-28*

(<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-28.html>)

*Missouri Advisory Opinion 186 (2015)*

*New York Advisory Opinion 2013-126*

(<http://www.nycourts.gov/ip/judicialethics/opinions/13-126.htm>)

*New York Advisory Opinion 2015-121*

(<http://www.nycourts.gov/ip/judicialethics/opinions/15-121.htm>)

ABA Formal Opinion 462 (2013)

([http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_462.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf))

## **Judicial disqualification cases involving social media**

The Florida 4<sup>th</sup> District Court of Appeal held that a judge was disqualified from a criminal case because the judge was a Facebook friend of the prosecutor assigned to the case. *Domville v. State*, 103 So. 3d 184 (4<sup>th</sup> District Florida Court of Appeal 2013).

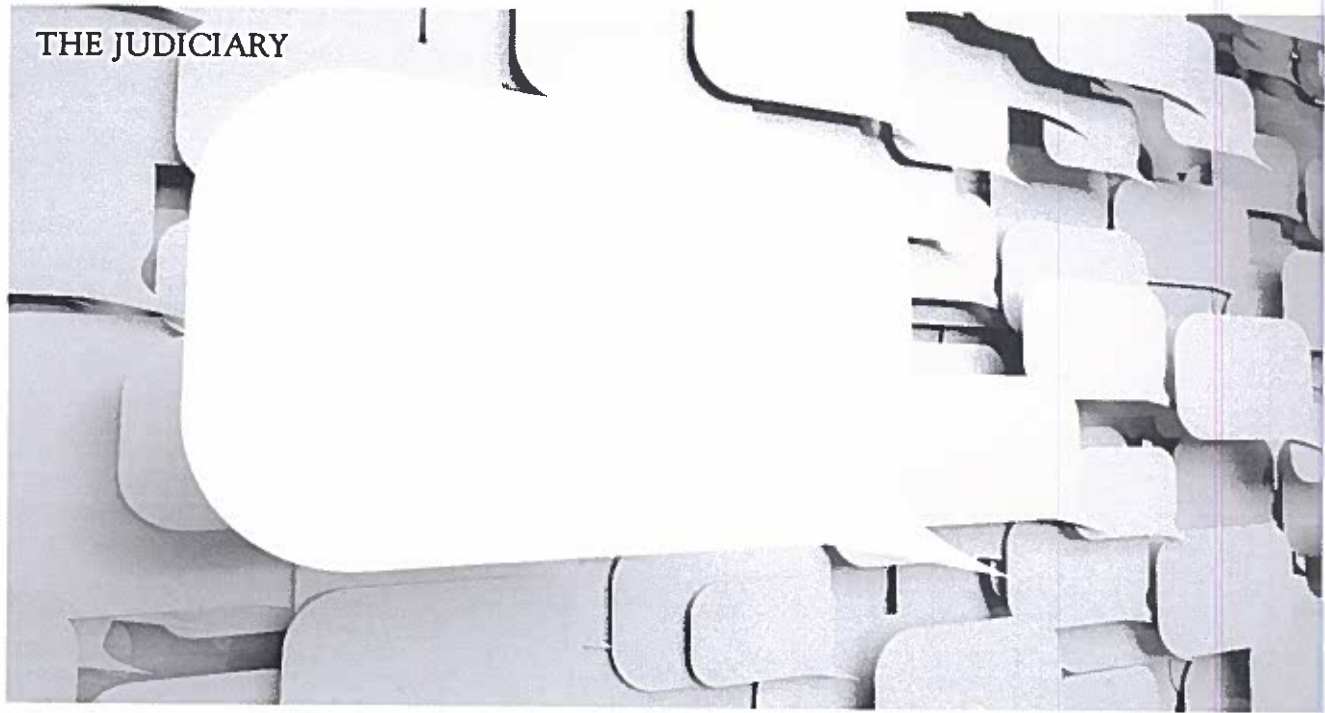
The Florida 5<sup>th</sup> District Court of Appeal held that the ex parte “friend” request a judge sent on Facebook to the petitioner in a custody case would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. *Chace v. Loisel* (Florida 5<sup>th</sup> District Court of Appeal January 24, 2014) (<http://www.5dca.org/Opinions/Opin2014/012014/5D13-4449.op.pdf>).

Affirming the trial court judgments in a case in which the jury had convicted the defendant of sale of 2 prescription drugs and the trial judge’s consecutive 6-year sentences, the Tennessee Court of Criminal Appeals held that the trial judge could properly fulfill his role as 13th juror despite his status as “Facebook friend” with the state’s confidential informant who had been a witness at trial. *State v. Ferguson* (Tennessee Court of Criminal Appeals February 18, 2014) (<http://www.tsc.state.tn.us/sites/default/files/fergusonjmopn.pdf>).

Affirming the trial court judgments in a case in which a jury had found the defendant guilty of second degree murder and tampering with evidence and the judge had imposed a 29-year sentence, the Tennessee Court of Criminal Appeals held that the judge’s Facebook friendship with one of the witnesses did not require his disqualification. *State v. Madden* (Tennessee Court of Criminal Appeals March 11, 2014) (<http://tncourts.gov/sites/default/files/maddenopn7.pdf>).

Affirming the revocation of a defendant’s community supervision and the imposition of an 8-year prison sentence, the Texas Court of Appeals for the 5<sup>th</sup> District rejected the argument that the trial judge lacked impartiality or neutrality based on a Facebook friendship and communications with the father of the defendant’s girlfriend, in addition to other arguments. *Youkers v. State*, 400 S.W.3d 200 (5<sup>th</sup> District Texas Court of Appeals 2013).





# Rules of Engagement

## Exploring judicial use of social media.

BY JOHN G. BROWNING AND DON WILLET

**W**e 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.<sup>1</sup> 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."<sup>2</sup>

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.<sup>3</sup> Noting social media's "transformative effect on society" as well as the fact that "no rule, canon of ethics, or judicial

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.”<sup>4</sup> 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.”<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup> 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. ...”<sup>8</sup> 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.<sup>9</sup>

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.”<sup>10</sup>

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.”<sup>11</sup> 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 all-white juries is not where we need to be in 2015. Do not sit silently. Stand up. Speak up.”<sup>12</sup> Wine demanded Stevens’s disqualification due to the “inflammatory” Facebook posts.<sup>13</sup>

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.”<sup>14</sup>

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*.<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup>

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

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. **TBJ**

## NOTES

1. *Kansas Judge Causes Sin With Facebook 'Like.'* Real Clear Politics (July 29, 2012), [http://www.realclearpolitics.com/news/sip/politics/2012/jul/29/kansas\\_judge\\_causes\\_sin\\_with\\_facebook\\_like.html](http://www.realclearpolitics.com/news/sip/politics/2012/jul/29/kansas_judge_causes_sin_with_facebook_like.html).
2. *In re the Honorable Danna L. Bennington*, No. 18S00-1412-JD-733, (Ind. Feb. 10, 2015), <http://e.sclawfindlaw.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 Tut's 'Black Men' Fein*, *Courier-Journal* (April 15, 2015), <http://www.courier-journal.com/story/news/local/2015/04/10/judge-slams-victims-tut-black-men-fein/25581605/>.

12. Jacob Gershman, *Prosecutors Want Judge Off Criminal Cases 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/2015/11/18/prosecutor-wants-judge-off-cases-over-racial-stand/75957066/>.
14. Matthew Glowicki and Andrew Wolfson, *Wine Critics 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 Lai, *A Federal Judge and His Twitter Account: A Cautionary Tale, Above the Law* (Nov. 18, 2015), [www.abovethelaw.com/2015/11/a-federal-judge-and-his-twitter-account-a-cautionary-tale/](http://www.abovethelaw.com/2015/11/a-federal-judge-and-his-twitter-account-a-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).



### JOHN G. BROWNING

is a partner in *Passman & Jones* in Dallas, where he handles commercial litigation, employment, health care, and personal injury defense matters in state and federal courts. He is an award-winning legal journalist for his syndicated column, "Legally Speaking," and the author of *the Social Media and Litigation Practice Guide* and a forthcoming casebook on social media and the law. He is an adjunct professor at Southern Methodist University Dedman School of Law.



### JUSTICE DON WILLETT

has served on the Texas Supreme Court since 2005. A former drummer and rodeo bull rider, he is the grateful son of a heroic single mother, the blessed husband of a sainted wife, and the exhausted co-founder of three wee Willetts. You can find the Tweeter Laureate of Texas (@JusticeWillett) on Twitter, Facebook, and Instagram.

LARRY D. THOMPSON

# Dark Money

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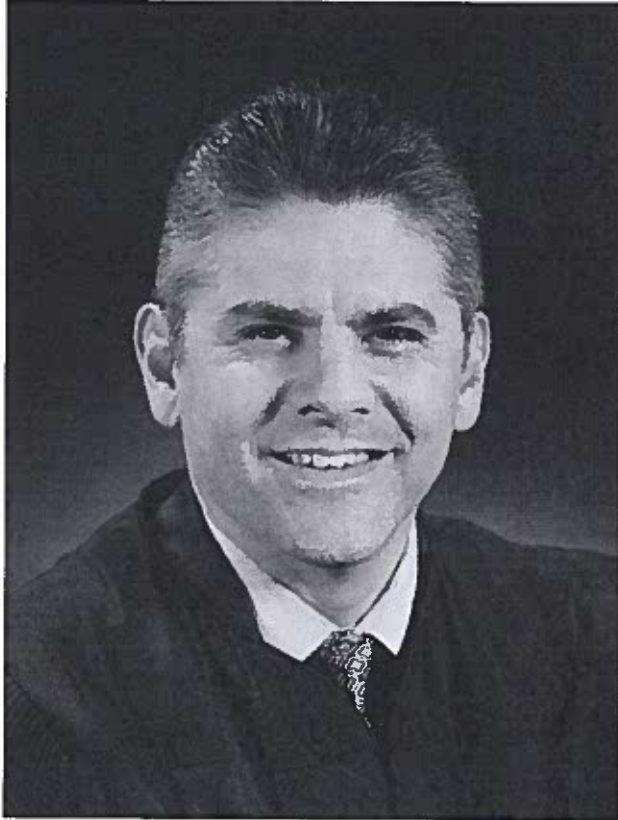
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# Can Facebook sway Avery, Dassey judges?

Alison Dirr, USA TODAY NETWORK-Wisconsin 7:04 p.m. CST February 1, 2016  
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Washington state Supreme Court Justice Steven C. González (Photo: Photo courtesy of the office of Washington state Supreme Court Justice Steven C. González)

What happens when your outraged Facebook post about "Making a Murderer" shows up in a judge's news feed?

It's not outside the realm of possibility, given that people from around the globe have seen the Netflix docu-series and chatted about it via their social media accounts.

Michael O'Hear, a professor at Marquette University Law School, says he doesn't think it's possible for judges to insulate themselves anymore.

"I think judges would say social media doesn't affect the way cases are decided, but I imagine it could make a difference in some cases," O'Hear said. "Judges are human beings. If they feel enormous pressure, then it has to play some sort of role in the back of their minds."

He's not accusing judges of making decisions based on social pressures, but subtle influences are there. When judges — just like the rest of us — look at Facebook for updates from friends and family, news stories and cultural references can't be weeded out.

**Daily newsletter:** [Sign up for 'Making a Murderer' updates](#)

**Timeline:** [History of the Steven Avery case](#)

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In fact, it's impossible to measure how often something judges see in their news feeds influences their courtroom decisions, said John Browning, a Texas attorney who has written extensively about social media's effect on the legal system.



John Browning (Photo: Photo courtesy of John Browning)

Some judges try to shut out as much outside commentary as possible while others are less strict in their media consumption.

But, if you think about it, it's not like judges couldn't gauge public opinion before Twitter and Facebook. Front-page newspaper articles and local TV broadcasts have always held sway, but additional influences have crept in with the Internet.

Washington state Supreme Court Justice Steven C. González said it's a myth that judges weren't affected by public opinion before social media, "but the point of being a neutral decision-maker is you're supposed to base your decision on the evidence that's produced in court and that both parties have a chance to contest."

"The courts are the one branch of government that is not supposed to be influenced by popularity but by the rule of law — regardless of how popular the outcome might be," he added.

Even so, González said justices receive daily news clippings about cases, and he might even hear through the news that someone is asking for review by the Supreme Court before the briefs actually reach his desk.

"I think it's important for us to understand what's happening in the world and I think judges need to be part of the community in which we live," he said. "I think that's healthy. We don't want to be cloistered and hidden away."

Most of the information judges get through news clippings center on details that are already in the court file or they'll include the public reaction to a case that has been decided, he said. Those clippings don't drive a decision, but understanding the effects of what the justices do is important, he said.

In the cases where the information in a story is outside the court record, however, he said he thought justices should generally avoid reading it.

González says he watched "Making a Murderer" because he won't be ruling on any part of Steven Avery's case. The issues raised, including administration of justice questions, are interesting, he said, but watching the 10-part series doesn't give him the ability to determine whether Avery should be released.

The 10 episodes have turned an uncomfortable spotlight on Manitowoc County, where Avery and his nephew, Brendan Dassey, were accused of killing 25-year-old freelance photographer Teresa Halbach.

Juries convicted both men in 2007, and they were sentenced to life terms in the Wisconsin prison system, though Dassey has taken his case into the federal court system in hopes of being released. His case is awaiting a decision by Magistrate Judge William E. Duffin of Milwaukee, whose office declined to comment because the case is before him.

Beneath the chatter about Avery's guilt or innocence is the question of whether the public can really trust the criminal justice system.

That's a factor that González said justices take into account in writing their decisions.

"It affects often how we write and the care we take in explaining why we've ruled the way we've ruled," he said. "I'll also say that our democracy works if people believe that it's fair, so it's critical that we not only be actually fair but that we appear to be fair as well."

For Texas District Court Judge Steve Smith, avoiding the social chatter about a case he's handling goes back to how he wanted judges to handle his cases when he was an attorney.

Today he mutes the television or just turns it off if coverage of a case he's handling comes on. He'll tune out talk at a nearby table when he's out to eat.

"People have the right to have their cases decided based on properly admissible evidence and they should not have any part of their case decided upon by innuendo, speculation or somebody's personal feeling about what a result should or should not be," he said.

Theoretically, it gets harder to tune out public opinion as the amount — and volume — of the community conversation grows.

Although the public's potential reaction to his decision might enter his mind, he said, it doesn't drive his decisions. He said that public perception is based on media reports that don't include every piece of evidence from a trial. In other words, those sentiments can be based on incomplete information.

Wisconsin Appellate Judge Mark D. Gundrum doesn't get into the Facebook commentary but doesn't deliberately shy away from the news, either.

Still, he said, he knows how to separate the relevant from the irrelevant when it comes to deciding cases.

"To think about other extraneous matters like that would really not be doing my job as a judge," he said.

He hypothesized that his time as a state legislator helped him learn to focus on the issues at hand and not get distracted by media commentary.

Maintaining that separation is something he has to do at work, too. He said in his job he often sees evidence that isn't meant to play a role in a decision.

"At the end of the day, whether it's personal experience, opinions, social media, news — you have to set all that aside and look at what the law requires in this particular case," Gundrum said.

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