

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
Alistair Dawson
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Tom Riney
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Re: Revised Recommendations re Judicial Use of Social Media

Sept. 22, 2018

In his letter of December 21, 2016, Chief Justice Hecht requested this SCAC Subcommittee to draft amendments to the Code of Judicial Conduct to provide guidance on permissible social media use by judges. The Committee discussed draft proposals at its August 11, 2017 and December 1-2, 2017 meetings. In light of comments and votes made at those meetings, the Subcommittee presents the following new subsection to Canon 4 of the Texas Code of Judicial Conduct and a revised comment regarding the use of social media by members of the judiciary

New Subsection J and New Comment to Canon 4
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J. Judicial Use of Social Media

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

Social media has become a powerful communication device for persons holding public office, including judges.¹ 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 trial² and public confidence in the integrity and impartiality of the judiciary.³

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. Judges should understand that their communications will likely be scrutinized by others, even when they are not identified as a judge.

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

¹ 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>.

² 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.”).

³ 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).

intended. Content on social media can lie dormant and then be recirculated long after the original posting. Tone (such as humor) is not always evident in a post.

Social media also creates new and unique relationships, such as “friends⁴” 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. [Similarly, liking, commenting upon, or sharing others information generally does not, in and of itself, indicate an endorsement⁵ of that information.]

Judges should remember that all of their social media postings, even where they are not identified as a judge, could be used in support of a recusal motion or for referral to the State Commission on Judicial Conduct.

Judges should also consider the following:

- a. Liking or sharing⁶ social media can portray approval of the content.

⁴ This comment was added in 2018. “Friending” someone is the act of sending another user a friend request on Facebook. The two people are Facebook friends once the receiving party accepts the friend request. You can have 5000 friends on Facebook. You automatically follow someone you are a friend with and you can also follow a group or a page that accepts followers. There are currently other social media connections that use different terms. For example LinkedIn allows you to “join” someone’s network and have “personal contacts” with other professionals by accepting their computer invitation. You can “follow” someone’s Twitter feed without any invitation or permission. Social media platforms and formats are constantly changing. This comment is intended to cover all such types of connections.

⁵ See *In re Hecht*, 213 S.W. 3d 547 (Tex. Spec. Ct. Rev. 2006) (An endorsement is more than support or praise).

⁶ Facebook has a thumbs up button that you click to like someone’s post. Twitter uses a small heart button that you can click to “show appreciation” for a tweet. You share a post to your computer friends or followers when you click a share button. The post you share is then available for your own friends or followers to view.

- b. Posting frequently (either favorably or negatively) about a place of business, a person, or a product, could be used in support of a recusal motion to show bias or a relationship with that business, person, or product.
- c. It is also easier for people to attempt to engage in ex parte communications⁷ with a judge via social media. Any known attempt at an ex parte communication should be disclosed to all parties and should be discouraged.⁸
- d. Most social media posts can be commented upon. Judges should consider whether a particular post might draw unwanted or inappropriate comments about a pending case that could reflect on the impartiality or integrity of the court.
- e. Consider not joining private groups where lawyers comment on pending cases, because this could lead to ex parte communications.

⁷ As defined in Canon 3B(8).

⁸ *Youkers v. State*, 400 S.W.3d 200, 205 (Tex. App.—Dallas 2013, no pet.)