

Social Media and the Judiciary

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U.S. Federal Judges Association
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1. What is the best way to respond to unfair comments about judges made on social media? Should the response be given through social media itself or should it be given by other means? Who should be responsible for this response, the judges themselves or someone on their behalf? If possible, kindly provide examples of cases in which said responses were given and what were the results and outcome (good or bad) of said responses accordingly.

In the United States, there is no uniform way for judges to respond to social media criticism. The U.S. Federal Judges Association is currently studying ethical ways to respond to unfair criticism. U.S. courts, including federal and state judges, have used different methods to address social media criticism.

Because the U.S. judiciary is often tasked with reviewing the legality of controversial, high-profile government actions, there is a long history of public criticism of judicial officers dating back to the nation's founding.¹ Although criticism of the American judiciary itself is not new, social media provides a new, easily-accessible avenue for the public and other branches of government to comment about the judiciary. At times, social media provides a way for individuals to criticize the judiciary, both fairly and unfairly.²

Some judges choose to respond to criticism over social media but must ensure to do so in a manner that is consistent with applicable judicial ethical rules. Social media provides an easily-accessible avenue for the judiciary to respond to criticism by engaging in public outreach to better the public's understanding of the judiciary's role.³ In order to ensure that the judiciary remains apolitical in the face of criticism, U.S. federal judges have lifetime appointments and cannot have their salaries reduced during their tenure in office. Due to the judiciary's traditional role above the political fray because of its apolitical nature, judges must be mindful in their approach to social media criticism of the judiciary. Ultimately, judges are free to respond to criticism, but must do so in a manner that is consistent with judicial ethics rules and the role of the judiciary. The advent of social media does not expand a judge's ethical obligations, but rather, provides a new forum in which the judge must apply preexisting ethical rules. Judicial

¹ See, e.g., Letter from Thomas Jefferson to Thomas Ritchie, Dec. 25, 1820, *available at* <https://founders.archives.gov/documents/Jefferson/98-01-02-1702> (a letter from American founding father and former President Thomas Jefferson calling the judiciary a "subtle corps of sappers & miners constantly working underground to undermine the foundations of our confederated fabric."); Johnathan R. Nash, *Trump is not the first president to criticize judiciary*, THE HILL (Feb. 9, 2017), <https://thehill.com/blogs/pundits-blog/the-judiciary/318783-trump-is-not-the-first-president-to-criticize-judiciary> (detailing further examples).

² See Elizabeth Thornburg, *Twitter and the #So-CalledJudge*, 71 SMU L. REV. 249, 253 (2018).

³ See John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131, 131 (2016).

ethics committees have broadly instructed that judges using social media “err on the side of caution and be aware that posts a judge-user considers neutral may nonetheless lead a reasonable person to question the judge’s impartiality.”⁴ As the federal Judicial Conference’s Committee on Codes of Conduct notes, a judge’s use of social media implicates judicial ethical rules regarding:

(1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate.⁵

The Judicial Conference’s Committee on Codes of Conduct also notes that “judges and employees should assume that virtually all communication through social media can be saved, electronically re-transmitted to others without the judge’s or employee’s knowledge or permission, or made available later for public consumption.”⁶

In one example, U.S. Supreme Court Chief Justice John Roberts addressed criticism of the judiciary by U.S. President Donald Trump.⁷ President Trump referred to a judge who rejected his migrant asylum policy as an “Obama judge.”⁸ Chief Justice Roberts responded by saying, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”⁹ Chief Justice Roberts concluded by saying, “The independent judiciary is something we should all be thankful for.”¹⁰ These remarks were widely publicized on social media.

Another example involves tweets by President Trump that criticized a judge ruling on President Trump’s first travel ban on immigrants from certain Muslim-majority countries.¹¹ A judge responded to the President’s tweets by issuing his own tweet pointing to a need for respect for the judicial branch and rule of law, and linking to a New York Times article on the case.¹² One commentator has argued that this response was proper because it did not address the merits

⁴ Mass. Sup. Ct. Comm. on Judicial Ethics, Op. 2016-09 (2016), *available at* <https://www.mass.gov/opinion/cje-opinion-no-2016-09>.

⁵ Comm. on Codes of Conduct Advisory Opinions, Op. 112 (2017) at 227, *available at* https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

⁶ *Id.* at 225.

⁷ Mark Sherman, *Roberts, Trump spar in extraordinary scrap over judges*, AP NEWS (Nov. 21, 2018), <https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Amy B. Wang, *Trump lashes out at ‘so-called judge’ who temporarily blocked travel ban*, WASHINGTON POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.92c29aed9329.

¹² Thornburg, *supra* note 2, at 266.

of the case, but rather focused on the role of the judiciary.¹³ The same commentator provides examples of proper social media use by judges:

Some could be aimed at the general public, seeking to increase their understanding of the courts. Others could be aimed at members of the legal profession. Tweets aimed at either audience could go beyond mere description to celebrate certain facets of the court system, to criticize the system, or to urge that changes be made. Some tweets would touch on topics that could be considered controversial but still pose no threat to judicial integrity or independence, and the fact that a judge has raised the issues may lend credibility to the discussion, call attention to the perceived problem, and help spark meaningful conversation both on Twitter and off.¹⁴

Rather than an individual judge responding, some courts have responded to criticism of the judiciary by informing the public, and providing increased transparency about the judiciary and court cases. Through social media, some courts disseminate links to important judicial opinions to allow members of the public to directly review the court's rationale, and increase engagement and understanding of the judicial process. The Ninth Circuit Court of Appeals maintains a blog on which it summarizes notable court opinions in order to provide the public with accurate accounts of court opinions.¹⁵ The Ninth Circuit publishes the full opinion on its website for public consumption.¹⁶ This addresses the problem of the public learning of court decisions through second-hand reporting over social media, which can increase the potential for distortions and inaccuracies to seep into the public's understanding of a case. The Ninth Circuit also posts online video livestreams and recordings of oral arguments heard before that court.¹⁷ By allowing the public to directly hear the parties' arguments as they are presented to the court, courts can increase public investment in judicial proceedings and diminish the potential of later confusion about court decisions stemming from inaccurate or misleading reporting. Some courts have a public affairs office to turn to in the face of social media criticism. For example, the Administrative Office for the U.S. Courts handles the public affairs of the federal judiciary and has an active social media presence.¹⁸

Alternatively, in order to avoid judicial ethical issues, in some instances it may be best for someone other than a judge or court to respond to such social media criticism. This may include legal academics, representatives of the legal community like bar associations, and the public. As the American College of Trial Lawyers has explained:

¹³ *Id.* at 273, 285.

¹⁴ *Id.* at 308.

¹⁵ NINTH CIRCUIT BLOG, <http://circuit9.blogspot.com/> (last visited May 7, 2019).

¹⁶ *Court of Appeals*, UNITED STATE COURTS FOR THE NINTH CIRCUIT, <https://www.ca9.uscourts.gov/> (last visited May 14, 2019).

¹⁷ United States Court of Appeals for the Ninth Circuit, YOUTUBE, <https://www.youtube.com/user/9thcirc> (last visited May 7, 2019).

¹⁸ *In Profile: The Administrative Office of the U.S. Courts – Annual Report 2017*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/profile-administrative-office-us-courts-annual-report-2017> (last visited May 13, 2019).

Because it is the weakest of the three [branches of government], the judicial branch has the greatest need to be defended. But who is to provide the defense? Not the judiciary itself, because it is by design not a political entity; its power to enforce its decrees and protect its independence are limited. The other two branches, its potential antagonists, cannot always be counted on for that defense.

The judiciary's principal defense must then come from its intended beneficiaries, the people. As a practical matter, lawyers, both individually and through the organized bar, must take the lead in that defense.¹⁹

For example, Deans of Harvard Law School and Yale Law School responded to President Trump's criticism of the judge who ruled on the President's first travel ban by publishing an editorial defending the judiciary.²⁰ In another instance, legal academics published strong responses to President Trump's allegation that a federal judge ruled against one of the President's businesses in a civil lawsuit because of the judge's ethnicity.²¹ The U.S. Federal Judges Association is evaluating ethical ways for it and others to respond when judges are unfairly criticized over social media.

In sum, a judge may respond to social media criticism within the bounds of judicial ethical rules and in consideration of the need to maintain respect for the judiciary. Some courts address social media criticism by informing the public, and providing increased transparency about the judiciary and court cases. Further, the broader legal community and public can play a robust role in defending the judiciary from unfair attacks over social media.

2. Are there rules in your country defining how to respond to unfair comments about judges made on social media? If so, are those rules determined by some higher body of the judiciary and are they binding?

All federal courts except the U.S. Supreme Court are bound by the Code of Conduct for United States Judges, a set of ethical principles and guidelines created by the Judicial Conference of the United States.²² The rules from the Code of Conduct for United States Judges are called "Canons." The Judicial Conference, the national policy-making body for the federal courts, is chaired by the Chief Justice of the U.S. Supreme Court and comprised of the chief judge of each federal judicial appellate circuit court, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit.²³ Although the Code of Conduct does not

¹⁹ AM. COLLEGE OF TRIAL LAWYERS, JUDICIAL INDEPENDENCE: A CORNERSTONE OF DEMOCRACY WHICH MUST BE DEFENDED, 2 (Sept. 2006).

²⁰ Martha Minow & Robert Post, *Standing Up for 'So-Called' Law*, BOSTON GLOBE (Feb. 10, 2017), <https://www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdjCn8qs5FPJaK/story.html>.

²¹ See, e.g., Cruz Reynoso, *I'm Mexican American, and I Was a Judge. What Trump Is Doing Is Appalling*, WASHINGTON POST (June 8, 2016), available at https://www.washingtonpost.com/posteverything/wp/2016/06/08/im-mexican-american-and-i-was-a-judge-what-trump-is-doing-is-appalling/?utm_term=.cbdf9e26223e.

²² CODE OF CONDUCT FOR UNITED STATES JUDGES (2019), available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

²³ 28 U.S.C. § 331.

directly address social media use, the Judicial Conference’s Committee on Codes of Conduct has issued an advisory opinion guiding judges on the application of the Code of Conduct to use of social media.²⁴

In Advisory Opinion 112, issued in April 2017, the Committee emphasizes that the Code of Conduct covers all aspects of communication, including social media.²⁵ The Committee also acknowledges that social media may provide a valuable new tool for the court and therefore it does not intend “to discourage the official use of social media by the courts in a manner that does not otherwise raise ethics concerns.”²⁶ The opinion states that use of social media by judges raises ethical considerations implicating Canons of the Code of Conduct, including:

- (1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate.²⁷

The opinion addresses the applicability of particular Canons to certain uses of social media. For example, the Committee opines that any frequent social media exchanges between a judge and a lawyer who appears before the court, even if not concerning litigation, may “convey or permit others to convey the impression that they are in a special position to influence the judge,” in violation of Canon 2B.²⁸ The Committee also states that with regards to impartiality under Canon 4, “[a] judge would be permitted to discuss and exchange ideas about outside activities that would not pose any conflict with official duties, (e.g., gardening, sports, cooking), yet the judge must always consider whether those outside activities invoke a potentially debatable issue that might present itself to the court, or an issue that involves a political position.”²⁹ Further, a “a judge or judicial employee may detract from the dignity of the court by posting inappropriate photos, videos, or comments on a social networking site,” in violation of Canon 4A.³⁰ The Committee opines that “[a]ny posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D.”³¹ The opinion concludes by emphasizing that:

[S]ocial media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of

²⁴ Comm. on Codes of Conduct Advisory Opinions, *supra* note 5, at 222–27.

²⁵ *Id.* at 222.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 224.

²⁹ *Id.*

³⁰ *Id.* at 225.

³¹ *Id.* at 226.

communication. There is no “one size fits all” approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.³²

Judicial ethics committees in state courts have similarly issued opinions interpreting state judicial ethical rules through the lens of social media. For example, the Florida Supreme Court Judicial Ethics Advisory Committee has stated that a judge may post comments and other material on social networking sites if the publication does not otherwise violate Florida’s Code of Judicial Conduct.³³ The New York State Advisory Committee on Judicial Ethics has issued an opinion stating that a judge who receives social media messages from a victim’s relative containing substantive discussion of the case must disclose such messages to all parties as ex parte communications, but recusal is not required because the communication occurred post-disposition.³⁴ The Arizona Supreme Court Judicial Ethics Advisory Committee has issued an advisory opinion addressing the use of LinkedIn, blogs, and Facebook, stating that a judge “must ensure that any statements they make will not negatively affect judicial proceedings, and they must avoid making statements that could be perceived as prejudiced or biased” under the relevant ethical rules.³⁵ That opinion further states that “[a] judge should avoid participating in or being associated with discussions about matters falling within the jurisdiction of his or her court. This extends to postings by others regarding high profile cases or legal issues that could come before the court.³⁶ While federal judges and some state judges are appointed, judges are elected in 39 states.³⁷ Many states with elected judiciaries have issued opinions guiding judges use of social media in fundraising and campaign activities, however these states generally have more lax restrictions on social media use because social media is seen as an important tool in a judge’s campaign.³⁸

Social media is a burgeoning area of judicial ethics, and although governing bodies have provided some initial guidance, the ethics of a judge’s social media use is largely addressed on a case-by-case basis. As the Judicial Conference’s Committee on Codes of Conduct has stated, “due to the ever-broadening variety of social media forums and technologies available, different types of social media will implicate different [judicial ethics] Canons and to varying

³² *Id.* at 227.

³³ Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html>.

³⁴ N.Y. Courts Advisory Comm. on Judicial Ethics, Op. 17-53 (2017), available at <http://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/17-53.htm>.

³⁵ Ariz. Sup. Ct. Judicial Ethics Advisory Comm., Op. 14-01 (2014), available at [https://www.azcourts.gov/Portals/137/ethics_opinions/2014/Revised%20Advisory%20Opinion%2014-01%20\(8-5-14\).pdf?ver=2014-08-05-154033-003](https://www.azcourts.gov/Portals/137/ethics_opinions/2014/Revised%20Advisory%20Opinion%2014-01%20(8-5-14).pdf?ver=2014-08-05-154033-003).

³⁶ *Id.*

³⁷ Am. Bar Ass’n, *Fact Sheet on Judicial Selection Methods in the States*, https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited May 7, 2019).

³⁸ See Nat’l Ctr. for State Courts Ctr. for Judicial Ethics, *Judicial Conduct Reporter* (Summer 2014), at 16, https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Summer_2017.ashx.

degrees.”³⁹A general guiding principle is that the conduct of a judge that would be prohibited in person is also prohibited over social media.

3. Do the courts of your country use social media as a means of communication? If so, which ones are used (e.g. Facebook, Instagram, Twitter or others)? In general, what type of information is disseminated by the courts through social media? If possible, kindly give examples. Do the courts have any communication assistance for this purpose? Are there rules that establish what contents can be released by the courts through social media? If so, who defines these rules? Have the courts of your country ever suffered criticism for any content published on social media? If so, kindly give examples.

Most courts currently use social media in order to keep the public informed on the court’s ongoing activities, the release of noteworthy opinions, and continuing education opportunities and other events for attorneys. A survey found that Facebook, Twitter, and YouTube are primary social media tools used by courts.⁴⁰ Many courts have a public information office or an administrative office to run their social media. A federal court’s use of social media must comply with the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees. The Judicial Conference’s Committee on Codes of Conduct acknowledges in its Advisory Opinion 112 that “social media may provide valuable new tools for the courts, and that some courts have begun to use social media for official court purposes.”⁴¹

Twitter, the most popular tool for courts, allows for dissemination of time-sensitive information and interactive outreach.⁴² For example, Georgia’s courts maintain a Twitter account on which it announces new opinions, professional development opportunities, and court events, among other things.⁴³ Periodically on its Twitter, Georgia courts host a “Twitter Town Hall,” inviting the public to ask questions via Twitter using the hashtag #AskGAJudges.⁴⁴ The Administrative Office for the U.S. federal courts similarly has a Twitter, which it describes as the “[o]fficial source for news and information about the U.S. courts.”⁴⁵ The Administrative Office also runs the “United States Courts” YouTube page, on which it publishes informational videos and podcasts.⁴⁶ For example, one video on the page entitled “The Patent Process: An Overview for Jurors” is used by federal courts to educate jurors in patent trials.⁴⁷ The public may comment on the videos. The U.S. Court of Appeals for the Ninth Circuit also has a YouTube channel on which it publishes video of oral arguments heard before that court.⁴⁸ Notably, public comments

³⁹ Comm. on Codes of Conduct Advisory Opinions, *supra* note 5, at 222.

⁴⁰ Browning, *supra* note 3, at 131 (citing *2014 CCPIO New Media Survey*, CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS (Aug. 6, 2014), http://ccpio.org/wp-content/uploads/2014/08/CCPIO-New-Media-survey-report_2014.pdf [hereinafter, “CCPIO”]).

⁴¹ Comm. on Codes of Conduct Advisory Opinions, *supra* note 5, at 222.

⁴² Thornburg, *supra* note 2, at 258.

⁴³ Georgia Courts (@GACourts), TWITTER, <https://twitter.com/GACourts> (last visited May 7, 2019).

⁴⁴ *Id.*; Ga. Courts Journal, *2018 Twitter Town Hall*, <http://journal.georgiacourts.gov/article/2018-twitter-town-hall> (last visited May 7, 2019).

⁴⁵ United States Courts (@uscourts), TWITTER, <https://twitter.com/uscourts> (last visited May 13, 2019).

⁴⁶ United States Courts, YOUTUBE, <https://www.youtube.com/user/uscourts> (last visited May 7, 2019).

⁴⁷ United States Courts, *The Patent Process: An Overview for Jurors*, YOUTUBE (Nov. 22, 2013), <https://www.youtube.com/watch?v=ax7QHQTbKQE&feature=c4-overview&list=UUicgGfaeUGYJS07bLeUr1hw>.

⁴⁸ United States Court of Appeals for the Ninth Circuit, YOUTUBE, <https://www.youtube.com/user/9thcircuit> (last visited May 7, 2019).

are disabled on such videos. The Ninth Circuit also maintains a blog on which it summarizes new court opinions.⁴⁹ Public comments are permitted on the blog.

4. Are judges in your country allowed to use social media in their private lives? If not, where is this prohibition stated and determined? If so, are there any rules setting limits for the expression of judges on social media and accordingly what are these limits?

Judges are permitted to use social media in their private lives, but private use of social media must comply with judicial ethical rules. A national survey found that social media use by the judiciary increased from 40% in 2010 to 86% 2013.⁵⁰ On request by two judges, the Utah Judicial Ethics Committee issued a thorough opinion addressing social media usage explaining that prohibiting judges from using social media would have created a bright line rule for judges to easily follow, but “social media ha[s] become so prevalent and in many ways an important form of communication. Similar to other public settings, judges should be permitted to enter.”⁵¹ A judge is permitted to identify herself as a judge on social media, although as one commentator notes:

Many judges use Facebook only in a private capacity and limit access to a carefully circumscribed circle of family and close friends. A judge may choose not to identify himself or herself as a judge on Facebook and may request that others do the same. Some judges may avoid identifying themselves as judges due to concerns over the personal safety of the judge or the judge’s family members.⁵²

Regardless of whether a judge identifies herself as such, judicial ethical rules “appl[y] to judges in their private as well as public spheres[.]”⁵³ Therefore, the Code of Conduct for United States Judges applies to federal judges’ use of social media in their private lives.

5. Have there ever been cases in your country where judges were criticized by the press or had disciplinary problems because of the content of their posts on social media? If so, kindly give examples. Have there ever been cases of judges who have been disciplined because of those posts? Is there a disciplinary body in charge of imposing sanctions on judges in such cases?

Numerous state court judges have been disciplined for their social media conduct.⁵⁴ For example, the Arizona Commission on Judicial Conduct publicly reprimanded a judge for posting on Facebook a purported verbatim account of a conversation with a litigant along with the

⁴⁹ NINTH CIRCUIT BLOG, <http://circuit9.blogspot.com/> (last visited May 7, 2019).

⁵⁰ Browning, *supra* note 3, at 131 (citing CCPIO, *supra* note 39).

⁵¹ Utah Judicial Ethics Comm., Op. 12-01 (2012), *available at* https://www.utcourts.gov/resources/ethadv/ethics_opinions/2012/12-1.pdf.

⁵² Duke Law Ctr. for Judicial Studies, *to tweet or not to tweet*, JUDICATURE, Vol. 101 No. 4 (Winter 2017) at 76, <https://judicialstudies.duke.edu/wp-content/uploads/2018/01/JUDICATURE101.4-tweet.pdf>.

⁵³ Mass. Sup. Ct. Comm. on Judicial Ethics, *supra* note 4.

⁵⁴ See Cynthia Gray, *Social Media and Judicial Ethics Up-date*, NATIONAL CENTER FOR STATE COURTS CENTER FOR JUDICIAL ETHICS (April 2019), <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/SocialMediaandJudicialEthics%20Update.ashx> (listing examples).

comment “It goes without saying but the tenant wasn’t the brightest bulb in the chandelier.”⁵⁵ The Commission determined that the post, mocking the intelligence level of a litigant, violated a state judicial ethical rule addressing independence, integrity, and impartiality of the judiciary.⁵⁶ The Commission also ordered the judge to delete the post.⁵⁷ In another example, a judge in Florida, a state with an elected judiciary, was removed from office by the Florida Supreme Court for email and Facebook campaign advertisements that implied her opponent was unfit for judicial office by stating that her opponent “has made a lot of money trying to free Palm Beach County’s worst criminals. Now he’s running for judge!”⁵⁸

The U.S. Court of Appeals for the Ninth Circuit in 2017 addressed social media use by a judge in the case *United States v. Sierra Pacific Industries, Inc., et al.*⁵⁹ There, Defendants alleged that the district court judge followed the U.S. Attorney’s Office, plaintiff’s counsel in that case, on Twitter, and tweeted a link to a news article about the case.⁶⁰ Defendants argued that the judge was required to recuse himself from the case because the Twitter account at issue created an appearance of bias, constituted an ex parte communication, and included a public comment on the substance of a pending case, in violation of the Code of Conduct for United States Judges.⁶¹ A judge is required to recuse from “any proceeding in which his impartiality might reasonably be questioned.”⁶² Because the Twitter account at issue did not publicly identify the owner as a member of the judiciary, the Ninth Circuit was unable to conclude that the Twitter account actually belonged to the judge. Regardless, the Ninth Circuit held that even if the account did belong to the judge, recusal was not required. First, with regards to following the U.S. Attorney’s Office, the Ninth Circuit stated:

A Twitter account holder may “follow” other Twitter account holders, meaning that the “following” user will receive all of the tweets generated by the other user. Some Twitter users restrict their posts to a private audience. But news organizations, celebrities, and even high-up government officials use Twitter as an official means of communication, with the message intended for wide audiences. Thus, without more, the fact that an account holder “follows” another Twitter user does not evidence a personal relationship and certainly not one that, without more, would require recusal. Thus, assuming the account belonged to the district judge, the judge did not plainly err in not recusing himself because he “followed” the U.S. Attorney’s office on Twitter.

For similar reasons, the fact that the Twitter account “followed” the U.S. Attorney does not mean that the public tweets published by the U.S. Attorney constituted improper ex parte communications. The relevant opinion from the Committee on Codes of Conduct explains that concerns of improper communication arise in the

⁵⁵ State of Ariz. Comm. on Judicial Conduct, Disposition of Complaint 18-119 (June 12, 2018), *available at* <http://www.azcourts.gov/portals/137/reports/2018/18-119.pdf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Re Santino*, 257 So. 3d 25, 36 (Fla. 2018).

⁵⁹ 862 F.3d 1157 (9th Cir. 2017).

⁶⁰ *Id.* at 1166.

⁶¹ *Id.* at 1174.

⁶² 28 U.S.C. § 455(a).

context of “the exchange of frequent messages, ‘wall posts,’ or ‘tweets’ between a judge or judicial employee and a ‘friend’ on a social network who is also counsel in a case pending before the court.” Comm. on Codes of Conduct Advisory Opinion 112. The situation in the current case, however, does not present the type of circumstance that the Committee warned against in its opinion. Here, none of the challenged tweets were specifically directed from the U.S. Attorney to the judge, nor have the Defendants alleged that there were any personally directed tweets. Thus, the public tweets did not constitute communication from the U.S. Attorney to the judge. Rather, the relevant tweets from the U.S. Attorney’s account constituted news items released to the general public, intended for wide distribution to an anonymous public audience. Under the circumstances, the social media activity alleged to have occurred in this case did not constitute prohibited *ex parte* communication.⁶³

With regards to the judge allegedly tweeting an article about the case, the Ninth Circuit similarly held that recusal was not required, emphasizing that “[t]he tweet consisted only of the title and link to a publicly available news article about the case in a local newspaper, without any further commentary.”⁶⁴ The Ninth Circuit did warn that “this case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases, and we reiterate the importance of maintaining the appearance of propriety both on and off the bench.”⁶⁵ Although the Ninth Circuit determined that recusal was not required, and the judge was never disciplined, he faced substantial media criticism.⁶⁶

In another instance, a federal judge who forwarded an email to acquaintances that included a racist joke about then-President Obama’s mother resigned following a Ninth Circuit Court of Appeals judicial misconduct investigation.⁶⁷ The email forwarding was widely reported in the press, resulting in substantial response from members of Congress and the public.⁶⁸ Prior to the judge’s resignation, the Ninth Circuit Judicial Council concluded that the judge’s email violated Canons of the Code of Conduct for United States Judges, noting that “[t]he strength and breadth of the public reaction to the publication of the February 2012 email illustrates the severity of the violation.”⁶⁹ The Ninth Circuit Judicial Council therefore issued a public reprimand, ordered that no new cases be assigned to the judge for 180 days, and ordered the judge to complete training on judicial ethics, racial awareness, and elimination of bias.⁷⁰

⁶³ *Sierra Pacific*, 862 F.3d at 1174–75.

⁶⁴ *Id.* at 1175.

⁶⁵ *Id.* at 1175–76.

⁶⁶ See, e.g., David Lat, *A Federal Judge And His Twitter Account: A Cautionary Tale*, ABOVE THE LAW (Nov. 18, 2015), <https://abovethelaw.com/2015/11/a-federal-judge-and-his-twitter-account-a-cautionary-tale/>.

⁶⁷ Rachel Weiner, *Judge who forwarded racist Obama joke retires*, WASHINGTON POST (Apr. 3, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/04/03/judge-who-forwarded-racist-obama-joke-retires/?utm_term=.ad15408b30ec.

⁶⁸ Judicial Council of the Ninth Circuit, *In re Complaint of Judicial Misconduct*, Nos. 12-90027, 12-90028, 12-90029, 12-90030, 12-90031, 12-90033, 12-90034, 12-90035, 12-90039, 12-90042, 12-90043 and 12-90050 (Jan. 24, 2014), available at <http://cdn.ca9.uscourts.gov/datastore/misconduct/12-90027.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.*

Another example involves a judge who, prior to his current position on the U.S. Court of Appeals for the Fifth Circuit, was a Texas Supreme Court Justice, and maintained a highly active Twitter presence.⁷¹ When he was initially nominated to the Court of Appeals, the U.S. Senate Judiciary Committee held a hearing at which they questioned the judge's Twitter usage.⁷² At the hearing, the judge told the committee that if he were confirmed to the Court of Appeals, his Twitter presence would focus on civic education.⁷³ In response, one senator suggested that it might be a wiser course for him to not tweet at all.⁷⁴ The judge's appointment was ultimately confirmed, but his Twitter presence dwindled. The judge has not published a tweet since January 1, 2018. This serves as an example that aside from official discipline, there are other reasons for judges and attorneys in general to be mindful of social media use.

A violation of a Canon from the Code of Conduct for United States Judges may provide grounds for discipline of a federal judge. Congress has set forth procedure for disciplinary proceedings against a federal judge.⁷⁵ American federal judges hold lifetime appointments, subject to a rarely invoked impeachment process requiring the approval of both houses of Congress, and cannot have their salaries reduced during their tenure in office. A person may file a complaint against a judge with the court of appeals for the judge's circuit showing that the judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts[.]"⁷⁶ The chief judge for the court of appeals then reviews the complaint, which then is referred to a special committee of judges.⁷⁷ After investigation, the committee files a written report including its findings and recommendation with the judicial council of the circuit.⁷⁸ The judicial council may then conduct additional investigation, dismiss the complaint, or take appropriate action, including ordering that no further cases be assigned to the judge on a temporary basis, and censuring or reprimanding the judge in either private communication or public announcement.⁷⁹ The council may request that the judge voluntarily retire, but the judicial council may not order removal of the judge.⁸⁰ The judicial council must refer a complaint to the Judicial Conference of the United States if the judicial council determines the judge's actions might constitute grounds for impeachment under Article II of the U.S. Constitution or is not amendable to resolution by the judicial council.⁸¹ If the Judicial Conference determines that impeachment may be warranted, it forwards the complaint to Congress for determination of whether the judge should be impeached.⁸² State courts similarly have their own disciplinary processes.

⁷¹ See Judge Don Willett (@JusticeWillett), TWITTER, <https://twitter.com/justicewillett> (last visited May 7, 2019).

⁷² Emma Platoff, *Don Willett defends controversial tweets as jokes at confirmation hearing before U.S. Senate*, THE TEXAS TRIBUNE (Nov. 15, 2017), <https://www.texastribune.org/2017/11/15/don-willett-defends-controversial-tweets-jokes-confirmation-hearing-us/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See 28 U.S.C. §§ 351, *et seq.*

⁷⁶ *Id.* § 351(a).

⁷⁷ *Id.* § 352 (b).

⁷⁸ *Id.* § 352(c).

⁷⁹ *Id.* § 354(a).

⁸⁰ *Id.*

⁸¹ *Id.* § 354(b).

⁸² *Id.* § 355.