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to tweet or not to tweet

More judges are using social media. Is it wise?

SOCIAL MEDIA APPLICATIONS HAVE BECOME UBIQUITOUS IN MODERN COMMUNICATION. But the use of these applications presents unique challenges for judges, who are not only judicial officers but also parents, community members, churchgoers, and media consumers. Some argue that judges should avoid social media altogether. Others say social media is just another form of social interaction easily governed by other rules and canons – and that social media may even offer a new way for the judiciary to constructively engage with and educate the public.

Many state bar ethics committees have offered guidance on social media use. That guidance varies widely, but some recent opinions have indicated a

less cautious view of social media. By contrast, the Judicial Conference Committee on Code of Conduct issued advisory opinion No. 112 in April 2017, providing guidance – but no hard and fast rules – that generally discourages federal judges from social media engagement.

DOUGLAS NAZARIAN, a frequent social media user and a judge on the Maryland Court of Special Appeals, and **BARBARA BERENSON**, counsel to the Massachusetts Committee on Judicial Ethics, respond here to questions about whether and how judges might ethically use social media. Both offered their candid opinions on the subject, informed by their experiences.

State bar ethics commissions offer varying guidelines on how judges may or may not engage on social media. Is this confusing to judges? Should a national standard or recommendation be developed? How would a more unified standard help or harm the profession?

NAZARIAN: We each serve in only one state, or in one federal judiciary, and are subject to only one particular set of ethical rules and rulings. I am fortunate that the Judicial Ethics Commission in my state, Maryland, has issued a published opinion on the use of social media to guide me and my colleagues. But judicial colleagues in many other states are not so lucky and are left to apply general principles and reconcile differing interpretations by different ethical bodies. A unified national standard obviously would resolve the differences, but failing that, I suspect our governing ethics bodies will come over time to understand social media better and to reach more consistent conclusions about how judges can and should interact on social media platforms.

BERENSON: I serve as counsel to the Massachusetts Committee on Judicial Ethics, and my answers to the questions asked are largely based on advice we have given to Massachusetts judges. In my opinion, a national standard may be unworkable so long as some state judges are appointed while others are elected. All judges in Massachusetts are appointed until age 70; judges never face the voters nor participate in any other sort of reappointment process. Because judges in Massachusetts do not need to raise money and campaign, we impose limits on judicial behavior that are sometimes more restrictive than those imposed where judges face the voters.

Although a national standard may not be workable, jurisdictions learn from one another. I frequently consult ethics opinions from other jurisdictions. The Center for Judicial Ethics of the National Center for State Courts is a useful clearinghouse for judicial ethics and discipline. Cynthia Gray, the director of the Center, is a wonderful resource. Just this year, she published two informative articles about social media and judicial ethics in the quarterly *Judicial Conduct Reporter*. (The articles appear in the Spring and Summer 2017 editions, available at NCSC.org.)

Social media is rife with conversations about products, restaurants, and businesses. Indeed, social media is a primary marketing vehicle and a tool for businesses to interact with customers. The Judicial Conference Committee's advisory opinion states: "[I]f the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies him/herself as a supporter, the judge has used the office to aid that establishment's success." Is this a reasonable standard? Can a judge like, review, or follow a business online without improperly using the prestige of his office?

NAZARIAN: I think we can, although social media environments require extra care and caution. The key, as always, is avoiding connections between our statements or actions and our office, and adapting overarching ethical obligations to these new public spaces.

Judges are people. We live and work in our communities, both before we take the bench and after. We buy things, we use services, and we eat in restau-

rants, just like everyone else. In those day-to-day interactions, we are citizens or customers, not judges. We never should use our status as judges to get special treatment or to draw particular attention to something. Nothing about the fact of our participation in social media alters this principle; it is only the context in which an interaction takes place that changes.

I live in a suburb of Baltimore. I know a lot of people in my town, and many of my neighbors know that I am a judge. One friend recently started selling delicious barbecue from a smoker truck that he parks on the side of a busy road. I like barbecue. When I stand in line to buy brisket, I'm visible to cars passing by. Is that a judicial endorsement of his business? I don't think so. If another neighbor asks me if I liked the brisket, is it a judicial endorsement to say that I did? I don't think it is.

Neither of these 'thumbs-ups' violates my ethical obligations as a judge because I'm buying and eating barbecue as a consumer in street clothes, not in my judicial role. Importantly, nobody witnessing these exchanges would think otherwise. My neighbor or another customer would be right to call me out if I demanded a discount or special treatment or tried to cut the line because I'm a judge (or for any other reason, for that matter). But judges otherwise should be able to engage in social interactions in the same way and on the same terms as their fellow citizens.

I and other judges I know manage this by taking care in how we present ourselves. My Facebook page is avowedly personal. Only friends can see it. My friends can see that I am a judge, and I do sometimes mention judicial things — a recent sitting of our court at a local law school, for example, or congratulations to my departing law clerks. But it's 'Doug's page,' not 'Judge Nazarian's' ▶

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page,' and I make sure that there is no confusion about this (I have disclaimers on my profile, too). I specifically avoid discussions about law, politics, and religion, even when people ask. And access is restricted to people whom I've agreed to treat as friends (more on that in the next question).

Some judges do participate in social media as judges. This is especially true on Twitter. My handle doesn't refer to me as "judge," as some do, but I am more visibly a judge on Twitter because I participate in part of a community of appellate lawyers and judges (#AppellateTwitter) that discusses good appellate practice, writing and grammar, professional development, mentoring, work-life balance, and similar issues that confront appellate courts and practitioners. My profile contains disclaimers, and I never comment on substantive legal issues or politics or religion there either.

One might ask why a judge should even step into this thicket — it certainly is easier to stay away altogether. To me, a careful and thoughtful social media presence makes judges more visible to, and creates connections with, the public we serve. It's important that the public can see judges as people and have a sense of who is making the important decisions we make. And this additional transparency helps keep us accountable. A colleague of mine teaches new judges to apply "*The New York Times Rule*" to whatever we say and do, i.e., don't say

it if you wouldn't be comfortable seeing it printed on the front page of *The New York Times*. That is good advice generally, and social media is just another platform in which we should follow it.

BERENSON: I agree that social media does not alter judges' overarching obligations but only the context in which certain interactions take place. I also agree with '*The New York Times rule*,' and frequently cite it to judges asking for advice.

Rule 1.3 of the Massachusetts Code of Judicial Conduct (which tracks the language of the Model Code) prohibits a judge from abusing the prestige of judicial office to advance any interest inconsistent with the judge's obligation to promote confidence in the judiciary. We have advised Massachusetts judges that "abuse" as used in Rule 1.3 does not require a judge to act with bad purpose or bad effect. In Massachusetts, Rule 1.3 prohibits, for example, a judge from appearing on billboards that are part of an in-state university's marketing campaign, even though the billboards support the worthy goal of encouraging people to pursue higher education.

In our view, a judge's obligation to avoid abusing the prestige of judicial office to advance the economic interests of others requires a judge to avoid "liking" or "following" a business near the courthouse that is frequented by lawyers who appear in front of the judge. "Liking"

or "following" a venue on social media is, in our opinion, different from the judge's simply eating lunch at a particular restaurant near the courthouse.

Social media is a primary marketing vehicle and tool for businesses to interact with customers. "Liking" or "following" has, therefore, a promotional aspect that violates the prohibition in Rule 1.3.

Moreover, the hypothetical given suggests that the judge is praising the restaurant near the courthouse. What if a judge instead were to dislike or post a scathing review of a restaurant near the courthouse? An undignified or inappropriately critical post may erode public confidence in the judiciary.

In Massachusetts, we have not yet been asked to opine concerning whether a judge may, for example, post on Yelp or a comparable social media platform an anonymous review of a restaurant that the judge visited while on vacation. In general, a judge may not do anonymously what he or she may not do under the judge's own name. Social media may, however, lead to certain exceptions. In my opinion, the answer to whether to permit such an anonymous review is "yes," so long as there is no danger that the judge's action, if it became known, would undermine public confidence in the judiciary. Last summer, a Yale dean was placed on leave (and then left her post) after posting one review on Yelp that recommended a restaurant as perfect for "white trash" and another that described employees at a movie theater concession stand as "barely educated morons." Though the dean posted using only her first name and the first letter of her last name, her identity was discovered. Anonymously or not, a judge may never act in a manner that will erode public confidence in the judiciary.

The size and makeup of a judge's network of contacts may be seen as a gauge for whether a judge might be biased if a case involving a person who is a member of that network were to ever come to her court. The advisory opinion notes that a "Canon 2 concern arises, for example, when a judge or judicial employee demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a 'fan' of an organization), or where a judge or judicial employee circulates a fundraising appeal to a large group of social network site 'friends' that includes individuals who practice before the court." Is a judge who 'friends,' 'fans,' or 'follows' an individual or organization that may one day appear in her courtroom always compromising her neutrality?

NAZARIAN: No, and for the same reason judges don't always compromise their neutrality simply by being members of their communities. We absolutely need to be careful. But because social media friendships and affiliations are visible in ways friendships and affiliations normally aren't, social media may even make our lives more transparent and accountable.

Judges have friends in real life, some of whom are lawyers who might appear before us. We ourselves were lawyers before we became judges, and we almost always practiced in the communities we serve. And we must always be aware of whether and how our personal relationships might affect our ability to remain impartial. But we aren't required to jettison our friendships, nor can we recuse ourselves from all cases where a lawyer we know represents a party. We have to

take each friendship and situation on its merits and in context, and recognize when a relationship of any sort (personal, financial, or otherwise) creates an ethical concern or an appearance of impropriety. Outside of social media, these relations are known only to us, and not necessarily to other parties before us. All along, then, we have borne the responsibility to understand our ethical obligations, identify situations that we should avoid, and take steps to avoid them.

Social media creates a new context for this same analysis. Just as all real-life friendships aren't equivalent, different social media platforms create different cultures of friendship, and the meaning of social media "friendships" is evolving. On Facebook, friendship is binary — people are "friends" or they aren't, and there's no way to distinguish depth or closeness. I am friends on Facebook with a lot of people from high school and college who might not have called me a friend back then — that's just what the connection is called now. Twitter connections are looser. Many people appear anonymously, and a follower is simply someone who reads what you post. Unlike real-life friendships and interests, our social media connections are a lot more visible. That doesn't change anything about the ethical implications of these connections, but it does make us more accountable for these connections than we otherwise might have been, and that might even be preferable to the alternative.

As judges, we need to recognize these connections for what they are and act accordingly. Maryland's Judicial Ethics Committee has ruled that judges may not participate in fundraising activities at all, so we obviously shouldn't like or follow fundraisers on social media. We need to be aware that if we follow or like someone or some organization, we could be viewed as affiliating ourselves with

them or endorsing a viewpoint. The more politically or viewpoint-oriented an organization, the more cautious we should be.

We also need to make conscious decisions about the connections we want to make and why. There are different schools of thought, for example, on whether judges should be Facebook friends with lawyers. One school holds that we should avoid being friends with lawyers altogether, while another posits that we should be friends with everyone who offers a connection so as not to discriminate. My approach is closer to the former: I am not Facebook friends with lawyers other than judges, my former law clerks, and people I know from other lives who live and work outside of Maryland. Twitter is harder to police, but "following" doesn't imply a personal connection in the way that Facebook friendship might, and my Twitter follows (in both directions) are visible to others.

BERENSON: In 2016, the Massachusetts CJE considered friending, recommending, and following in opinions discussing Facebook, LinkedIn, and Twitter. With regard to Facebook friends, we acknowledged that the issue of a judge's being a Facebook friend with lawyers is complex, particularly because the degree to which Facebook friendship signifies genuine personal friendship varies widely. After much deliberation, we concluded, however, that a lawyer who is a Facebook friend with a judge may appear to others to be in a special position to influence the judge. Even the most casual of Facebook friends may, for example, acquire personal information about the judge (e.g., celebration of a family event, a vacation destination) that could be used to convey the impression that the Facebook friend has special knowledge about and access to the judge. ▶

We therefore concluded that the Code prohibits a judge from being Facebook friends with any attorney who is reasonably likely to appear before that judge. We similarly held that a judge who uses LinkedIn may not be connected with any lawyer reasonably likely to appear before that judge.

In our Twitter opinion, we wrote that a judge, who was tweeting as a judge, must be cautious when selecting accounts to follow in order to avoid any actions that would compromise or appear to compromise the judge's impartiality. We explained our concern that the public may perceive the judge's communications to have the imprimatur of the courts. We therefore concluded that, in general, a public, unrestricted Twitter account of an identified judge may be used only for informational and educational purposes. We noted that if the judge so desires, the account also may reflect who the judge is as a person, so long as the judge is careful not to implicitly or explicitly convey the judge's opinions on pending or impending cases, political matters, or controversial or contested issues that may come before the court. As to each piece of information revealed by the judge's Twitter account (whether it is a tweet, a retweet, a "like," the identity of an account that the judge follows, or the identity of an account that follows the judge), the judge must consider whether it would cause a reasonable person to question the judge's impartiality.

One of the challenges in interpreting many provisions of the Code is to determine when to apply bright-line rules and when to rely on judges' discretion. While we favor relying on judges' own informed decision-making in many instances, including the substance of most social media posts, we have favored bright lines when it comes to tweeting in one's judicial capacity and friending

lawyers who are reasonably likely to appear in front of a judge. Our reliance on bright lines in these contexts may partially reflect the relative newness of social media; we have sought to give clear guidance that will prevent any conduct likely to erode public confidence in the judiciary. It is certainly possible that we will take a somewhat more deferential approach to judges' use of social media in the future, if we conclude that we have overestimated the risks that social media poses to upholding public confidence in the judiciary.

Many social media interactions center on highlighting one's day-to-day activities and interests. The advisory opinion raises Canon 4A concerns with respect to such posts on blogs and social media: "For example, 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. The Committee advises that all judges and judicial employees behave in a manner that avoids bringing embarrassment upon the court." How can a judge determine what is inappropriate? Is it possible for a judge to use social media to comment on or highlight current events, hobbies and interests, participation in church events, or even programs at his child's school without risking embarrassment to the court or appearing to endorse or affiliate with a particular political viewpoint?

NAZARIAN: It is possible, in my view, to comment on my life and family and activities without endorsing a political viewpoint. When I am out in the world living my life, I'm visible to

anyone there to see me. Social media only broadens the range of people who can see what I do. So long as I am acting appropriately, the fact that more people might see me doesn't make my conduct any less ethical.

You won't see anything on social media that you couldn't see by reading my court biography, talking with me, or following me around. And again, the fact that more people might see me makes me more accountable. If I were to do anything or post anything inappropriate, the world would know it a lot more quickly; if one were inclined to behave inappropriately, the prospect of exposure via social media might serve as an additional deterrent.

I don't comment — in public in any forum — on current events that have any sort of political or legal character, and I think judges play with fire when they do. But that's because those sorts of statements violate the governing rules of judicial ethics however or wherever we make them, not because we make them on social media. The rules are the same whatever the platform or venue.

BERENSON: We largely rely on the sound judgment of judges to determine what are appropriate and inappropriate personal posts. We believe that a judge's social media accounts may reflect who the judge is as a person, and that it is appropriate for a judge to comment on hobbies and interests, including participation in religious events and school programs. A judge must be careful, however, not to implicitly or explicitly convey the judge's opinions on pending or impending cases, political matters, or controversial or contested issues that may come before the courts.

In our Twitter opinion, we observed that many of the judge's tweets reflected pride in her personal characteristics, background, and achievements. We

found these appropriate, and noted that it is long-settled law that a judge's race, gender, religion, or other personal characteristics are not grounds for a reasonable person to question the judge's ability to interpret and apply the law fairly and impartially.

In our Twitter opinion, we also commented on posts that detract from the dignity of the judiciary and court system. The judge's posts had connected to reports of an out-of-state examination in which a defendant used profanity when addressing the judge and another in which a defendant threw bodily waste at a judge following sentencing. We advised that judges must avoid these sorts of posts, as a reasonable person might perceive these posts to be needlessly offensive, or as making light of behavior by litigants who may have mental health problems.

One of the many challenging aspects of social media is that a judge has no control over what may be posted by others (e.g. a photo that "tags" the judge in an undignified state, a friend's posting that questions the impartiality of a judge's decision). In Massachusetts, we advise judges to avoid liking or following social media accounts with content that undermines the integrity or impartiality of the judiciary.

Some ethics codes distinguish between a judge's tightly controlled private account on social media, used to post family photos, recipes, or notes about hobbies, and a public account that reveals the judge's professional identity. The Judicial Conference advisory opinion states that through "self-description or the use of a court email address, for example, the judge

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or employee highlights his or her affiliation with the federal judiciary in a manner that may lend the court's prestige." When, if ever, is it okay for a judge post to social media under his professional identity?

NAZARIAN: There's a difference, and a delicate balance, between being a judge and speaking as a judge. On the one hand, we are who we are, and we don't want to misrepresent ourselves. I'm proud to be a judge, and don't have anything to hide. On the other hand, we can't invoke our office for an improper purpose. As I mentioned earlier, I don't use the title 'judge' in my Facebook or Twitter profiles for that reason — my pages are 'Doug's,' they're tied to my personal email accounts. They acknowledge that I am a judge by profession, but that my postings are personal. All the same, I follow the rules of judicial ethics anyway, as should any judge, whether her page is official or not.

One particular reason a judge might create an official page is that some judges are elected, and social media can allow judges to be visible to and engage with voters in a cost-effective way. In that context, they need to juggle their ethical obligations as judges and comply with election laws. But assuming that they do, social media undoubtedly can be a useful tool. Newly confirmed Fifth Circuit Judge Don Willett (@JusticeWillett) pioneered the use of Twitter in this fash-

ion; when he went quiet after President Donald Trump nominated him to that seat, he had more than 102,000 followers and had posted more than 25,000 tweets about himself, his children, the Constitution, Texas history, and similar topics. Chief Judge Stephen Dillard of the Court of Appeals of Georgia (@JudgeDillard) tweets about his court's activities, his Chambers Music selection of the day, civility, and good writing, among other things, to his nearly 11,000 followers. Neither of these judges, nor any of the many others I have seen, discusses pending cases, opines on legal questions, or posts anything that oversteps our ethical boundaries. But even from a distance, I feel like I know these judges I've never met, and I suspect that over time, more and more elected judges will become visible on social media for this reason.

BERENSON: A judge is a judge 24/7/365. A judge may post to social media under his or her professional identity so long as the judge complies with the Code. This statement is an example of how the advice in Massachusetts has changed, as we become more familiar with and knowledgeable about social media. In 2011, the Massachusetts CJE advised judges using Facebook that they should not identify themselves as judges nor permit others to do so. In 2016, the CJE parted ways with that earlier opinion and wrote: "We do not believe ▶

that the Code requires a judge who uses Facebook to conceal the judge's judicial identity. A judge's appropriate use of Facebook should not threaten the dignity of judicial office, constitute an abuse of the prestige of judicial office, or otherwise violate the Code. It is reasonable to assume that a judge's Facebook friends will be aware of the judge's judicial office, and the Code governs a judge's personal as well as professional life."

In our experience, however, 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.

On Nov. 15, 2017, the Senate Judiciary Committee held a hearing on the nomination of Justice Don Willett to the Fifth Circuit Court of Appeals. Justice Willett was criticized for a tweet involving a transgender person. Although noting that the tweet was really intended to poke fun at a prominent baseball figure recently in the news, Willett conceded that his attempt at levity taken out of context was inappropriate. In response to questions from other senators on his intentions to continue tweeting, Willett defended tweeting as an effective means to educate the public, but he also agreed to give the matter more attention. What is the lesson judges should take away from Willett's experience?

NAZARIAN: I think the lesson here is the obvious one: Some topics are risky subjects for humor, and social media

magnifies the risk. As with deposition and trial transcripts, social media posts don't let the speaker convey tone or inflection, and the cold text may well read differently than a hearer would have heard it. Also: the internet is forever, so a joke that might have fallen flat is there to be read and shared years later. Again, the rules are the same, and judges just need to follow them in these new public spaces.

BERENSON: Justice Willett's experience indicates some of the most well-known perils of social media. Postings may be saved and shared indefinitely, and humor may insult. A particularly risky form of humor is that which mocks a group (or individuals who are part of a group). A judge may be held responsible for both what the judge directly states — and for how others may respond to what the judge states. Because Justice Willett was posting in his judicial capacity, his tweets included the added risk that the public might perceive his tweets to have the imprimatur of the courts. The lesson for judges is the one stressed in every advisory opinion on this issue: Judges must be careful and cautious when using social media.

Is there a professional downside for a judge who chooses not to engage in social media?

NAZARIAN: There isn't necessarily any professional downside for judges who don't engage on social media. We can do our jobs without it, and I respect any judge who decides that it's not worth the trouble. I wonder if judges facing election might be at some disadvantage if they avoid social media, or at least if they might have to create visibility for themselves in other ways that might require more fundraising. For those of

us who do not face contested elections, I see the decision to refrain from appropriate social media engagement as a lost opportunity to improve our visibility and transparency to the public.

More generally, social media interactions are an increasingly common and important component of the evidence in certain kinds of cases (family cases come immediately to mind), and it's helpful for judges to understand the context in which those interactions arise when deciding whether to admit them or what weight to accord them. Social media abstainers may find themselves at a disadvantage from time to time in their judicial roles if they don't understand how the platforms work and how people engage on them.

BERENSON: At the moment, I don't believe there is a professional downside for Massachusetts judges who don't actively engage on social media. If more bar associations and other law-related organizations abandon email in favor of social media to inform their members of news and upcoming events, there would be a downside for judges who are not at least passive users of social media. A passive user just receives messages but refrains from posting. I myself have both Facebook and LinkedIn accounts and rarely post to either. Having the accounts permits me, though, to receive notifications from members of my social media network who rely on their social media accounts to share news.

*For another perspective on judges and social media, see "Engage: It's time for judges to tweet, like, and share," by Judge Stephen Dillard, in *Judicature*, Vol. 101. No. 1 (Spring 2017).*