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## Judged by the (Digital) Company You Keep: Maintaining Judicial Ethics in an Age of Likes, Shares, and Follows

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# ARTICLE

*The Honorable John G. Browning*

## Judged by the (Digital) Company You Keep: Maintaining Judicial Ethics in an Age of Likes, Shares, and Follows

**Abstract.** Just like lawyers, judicial use of social media can present ethical pitfalls. And while most scholarly attention has focused on either active social media conduct by judges (such as posting or tweeting) or on social media “friendships” between judges and others, this Article analyses the ethical dimensions of seemingly benign judicial conduct on social media platforms, such as following a third party or “liking,” sharing, or retweeting the online posts of others. Using real-world examples, this Article analyses how even such ostensibly benign conduct can create the appearance of impropriety and undermine public confidence in the integrity and impartiality of the judiciary.

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Justice Browning gratefully acknowledges the unwavering support and inspiration of his wife Lisa, without who this Article would not have been possible.

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*“It is not only what we do, but also what we do not do,  
for which we are accountable.”<sup>1</sup>*

—Molière

## I. INTRODUCTION

Lawyers and judges, like the rest of society, live and work in an increasingly wired world in which the use of social media platforms has become ubiquitous. More than 72% of adult Americans use social media to connect with one another, engage with news content, share information, and entertain themselves.<sup>2</sup> Facebook remains the most popular platform with over 2.3 billion users worldwide, but sites like Instagram, Snapchat, Twitter, YouTube, and LinkedIn are also hugely popular.<sup>3</sup> The amount of content generated or shared on social media platforms is staggering: Twitter, which boasts 192 million daily active users, processes more than one billion tweets every forty-eight hours.<sup>4</sup> In 2020, there were 7,000 tweets each minute—just about TV or movies.<sup>5</sup>

Judges are hardly immune to the siren song of social media use, and in many ways that’s a positive thing. As the author and other commentators have pointed out, social media platforms can be a vital political tool for those judges who must run in partisan elections, a useful means of engagement with the communities they serve, and an important asset in educating the public about the judiciary’s role and fostering confidence in the integrity of the judiciary.<sup>6</sup> However, judges are human, too, and just as

1. Tryon Edwards, DD, *Sin*, in, A DICTIONARY OF THOUGHTS: A CYCLOPEDIA OF LACONIC QUOTATIONS, FROM THE BEST AUTHORS OF THE WORLD, BOTH MODERN AND ANCIENT 527, 528 (attributed to Molière) (Detroit, F.B. Dickerson, 1908).

2. *Social Media Fact Sheet*, PEW RES. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/6KTW-6EMV>].

3. *Id.*

4. Ying Lin, *10 Twitter Statistics Every Marketer Should Know in 2021*, OBERLO (Jan. 25, 2021), <https://www.oberlo.com/blog/twitter-statistics> [<https://perma.cc/GUF2-WWND>].

5. Christina Newberry, *36 Twitter Stats All Marketers Need to Know in 2021*, HOOTSUITE (Feb. 3, 2021), <https://blog.hootsuite.com/twitter-statistics/> [<https://perma.cc/575Q-L53X>].

6. See Stephen Louis A. Dillard & Bridget Mary McCormack, *The Robed Tweeter: Two Judges’ Views on Public Engagement*, 20 J. APP. PRAC. & PROCESS 179, 180 (2019) (“[O]ne of the best ways for judges to effectively engage the people they serve is to embrace the ubiquitous social-media platforms other citizens use to communicate and interact with one another.”); John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131, 131–32 (2016) (“One reason for the increased use of social media by judges may be the growing importance of these platforms in political races. With thirty-nine states using some form of election to select their trial judges, and thirty-nine states using some form of election to select their appellate court judges, use of social networking platforms as a political tool in the United States has become necessary to

social media is often a lens into the less desirable personality traits of people from other walks of life, judges' social media use has sometimes veered off into the inappropriate and inflammatory. In July 2021, NBC News even did a report on the rash of reports of judicial misconduct on social media.<sup>7</sup> Given the polarized political climate that has characterized the United States in recent years, it is hardly surprising that some judges have succumbed to the temptation to venture onto social media to weigh in on political issues and controversies. For example, in the spring 2021 issue of the *Judicial Conduct Reporter*, Cynthia Gray of the National Center for State Courts contributed an article devoted to "Social Media Posts by Judges on Controversial Issues."<sup>8</sup> In it, she describes a number of recent instances of judges who have been disciplined for social media posts about political or controversial issues.<sup>9</sup> Among this robed "rogues gallery" are examples like Tennessee criminal court Judge Jim Lammey, who received a public reprimand for making partisan Facebook posts on a wide range of political or politically-charged issues.<sup>10</sup> These included sharing posts critical of then-presidential candidate Hillary Clinton, undocumented immigrants, the Black Lives Matter movement, and transgender bathrooms.<sup>11</sup> Another was late Utah justice court Judge Michael Kwan, who received a six month suspension from the Utah Supreme Court in 2019 for Facebook posts critical of then-candidate Donald Trump, as well as one shortly after President Trump's inauguration that said, "Welcome to the beginning of the fascist takeover."<sup>12</sup>

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professional survival." (footnote omitted); John G. Browning & Don Willett, *Rules of Engagement: Exploring Judicial Use of Social Media*, 79 TEX. B.J. 100, 101 (2016) ("With judges elected in 39 states (including Texas), social media is a fruitful way to engage with the community as well as an individual means of raising visibility, building awareness, and leveraging the support of key influencers and opinion leaders.").

7. Erik Ortiz, *Reprimand of Judges for Social Media Misconduct Warrants Updated Guidelines, Experts Say*, NBC NEWS (July 8, 2021, 3:32 AM), <https://www.nbcnews.com/news/us-news/reprimand-judges-social-media-misconduct-warrants-updated-guidelines-experts-say-n1273179> [https://perma.cc/J6BQ-WWZF].

8. Cynthia Gray, *Social Media Posts by Judges on Controversial Issues*, 43 JUD. CONDUCT RPT. 2 (2021).

9. *See generally id.* (describing multiple instances of judicial misconduct on social media).

10. Daniel Connolly, *Board Clears Judge Lammey of Anti-Immigration Complaints, Reprimands Him for Partisanship*, MEMPHIS COM. APPEAL (Nov. 18, 2019, 4:51 PM), <https://www.commercialappeal.com/story/news/crime/2019/11/18/memphis-judge-lammey-gets-split-decision-partisan-remarks-ruling/4232190002/> [https://perma.cc/M32X-T98Q].

11. *Id.*

12. Mary Hanbury, *'Welcome to the Beginning of the Fascist Takeover': A Utah Judge Was Suspended Without Pay for Making Anti-Trump Comments Online and in Court*, BUS. INSIDER (May 26, 2019,

However, social media can be an ethical minefield for judges—not just for actively posting or tweeting inappropriately, but also for more seemingly benign conduct such as liking or sharing the posts or tweets of another or even following a party or counsel on social media. Previous examinations of the ethical risks associated with judicial use of social media have focused on either jurists' active participation on social media (posting, tweeting, etc.) or on the ethical boundaries of social media relationships (such as a judge's Facebook "friendships").<sup>13</sup> As this Article will demonstrate, however, because of the critical importance of avoiding even the appearance of impropriety, judges who wish to avoid recusal and potential disciplinary exposure must carefully consider not just what they themselves post or tweet. They must also be mindful of how they react to the tweets and posts of others, as well as those they follow on social media.

## II. RESPONSIBILITY FOR THE SOCIAL MEDIA ACTIVITY OF OTHERS— AN EVOLVING AREA

### A. *Liability for the Online Comments of Third Parties*

Generally speaking, the Anglo-American legal tradition has been sparing when it comes to imposing civil liability on a party for the conduct of another actor beyond that party's control, or right to control. Obviously, there are situations arising out of a contractual (indemnity) or employment relationship (witness the doctrine of *respondeat superior*) in which such responsibility is well-recognized.<sup>14</sup> For the most part imposing civil liability for the wrongs of another is disfavored. However, when it comes to conduct on social media, cracks have begun to appear in this façade. In several recent cases in the United States and Australia, parties have been held accountable for the social media postings of third parties.

In December 2019, the North Carolina Court of Appeals considered a criminal contempt case, *In the Matter of Eldridge*.<sup>15</sup> On November 29, 2018,

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10:25 AM), <https://www.businessinsider.com/utah-judge-suspended-over-anti-trump-comments-michael-kwan-2019-5> [<https://perma.cc/F8DV-62VN>].

13. See John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 MIAMI L. REV. 487, 510 (2014) (discussing incidents of judicial conduct, ethics, and social media use); Agnieszka McPeak, *The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors*, 55 IDAHO L. REV. 205, 216–19 (2019) (defining professional norms on social media for lawyers, judges, and law professors).

14. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 846 (Tex. 2018).

15. *In the Matter of Eldridge*, 836 S.E.2d 859 (N.C. 2019).

Davin Eldridge—a “citizen journalist” who published a Facebook page called “Trappalachia,” went to the Macon County Courthouse.<sup>16</sup> Despite posted signs banning the use of cell phones, cameras, or any other recording devices, Eldridge proceeded to livestream a criminal court hearing until he was caught.<sup>17</sup> At a show cause hearing on why he shouldn’t be held in contempt, Eldridge was found guilty, given a suspended jail sentence of thirty days, and placed on probation with several conditions.<sup>18</sup> One of the conditions was to write a 2,000–3,000 word essay about respect for the court system, and following approval by the court, to post it on “all social media or internet accounts that defendant owns or controls . . . without negative comment or other criticism by the defendant *or others*.”<sup>19</sup>

The court of appeals upheld the trial judge’s order, but one justice dissented in part over the court-imposed obligation to monitor and delete the negative comments that might be made by third parties.<sup>20</sup> Judge Brook felt that obligating the defendant to engage in “censoring the viewpoints of others expressed in response to speech compelled by the court . . . raise[d] serious First Amendment concerns.”<sup>21</sup> As Brook put it, “[i]t holds Defendant responsible for what is essentially the behavior of others; and while there is some truth to the adage that we are only as good as the company we keep, the relevant community in this context is incredibly diffuse, extending through cyberspace.”<sup>22</sup> Yet despite the “deeply troubling constitutional problems with this condition of probation” raised by Judge Brook, on March 12, 2021, the Supreme Court of North Carolina affirmed the lower court.<sup>23</sup>

North Carolina is not a lone outlier. In December 2019, the Houston [First District] Court of Appeals upheld a similar court order requiring a party to delete the comments of others on a Facebook post.<sup>24</sup> In *Thang Bui v. Maya Dangelas*,<sup>25</sup> an online defamation case brought under the Texas

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16. *Id.* at 860.

17. *Id.*

18. *Id.* at 861.

19. *Id.* at 863 (emphasis added).

20. *Id.* at 864 (Brook, J., concurring in part and dissenting in part).

21. *Id.* at 865–66.

22. *Id.* at 865.

23. *Id.*; *In re Eldridge*, 854 S.E.2d 579 (N.C. 2021) (per curiam).

24. *Thang Bui v. Maya Dangelas*, No. 01-18-00790-CV, 2019 WL 7341671, at \*1 (Tex. App.—Houston [1st Dist.] 2019), pet. denied (mem.).

25. *Thang Bui v. Maya Dangelas*, No. 01-18-00790-CV, 2019 WL 7341671 (Tex. App.—Houston [1st Dist.] 2019), pet. denied (mem.).

Citizens Participation Act, a Harris County trial court ordered Bui and Nguyen to delete threatening comments by third parties on Facebook.<sup>26</sup> Bui and Nguyen's Facebook posts had been found to be defamatory (allegedly accusing Dangelas of being a Viet Cong operative who funneled communist money into the United States), and comments made by third parties in response to the posts made the plaintiff fear for her physical safety.<sup>27</sup>

Bui and Nguyen maintained that their own posts were not threatening and argued that they should not be compelled to police and delete the comments of others made in response to their posts.<sup>28</sup> The First District Court of Appeals rejected that argument, determining that Facebook made such deletion possible by an account holder and pointing to the absence of any "legal authority regarding how the First Amendment protects against deletion of someone else's threatening posts made in reply to one's own post."<sup>29</sup> On May 8, 2020, the Supreme Court of Texas denied Bui and Nguyen's petition for review, allowing the troubling ruling to stand.<sup>30</sup>

Should individuals be considered their "brother's digital keeper?" May someone be compelled to censor anyone in cyberspace who might comment on their Facebook post or tweet? If a sympathetic relative, friend, or business associate posts a comment that disparages or even threatens a party's adversary, can that party be held responsible? Under the reasoning of the *Eldridge* and *Thang Bui* courts, new legal duties might be imposed, including duties to monitor and delete the comments of others. This very notion of imposing a duty to oversee the First Amendment-protected speech of third parties is concerning.

American courts are not alone in sanctioning a "digital gatekeeper" role. On September 8, 2021, the High Court of Australia issued a troubling opinion in yet another online defamation case, *Fairfax Media v. Voller*.<sup>31</sup> The defendants/appellants were various media entities that regularly posted links to their stories on their respective Facebook accounts.<sup>32</sup> As with other Facebook posts, readers routinely commented on the posts, and apparently in the eyes of plaintiffs/respondents, certain reader comments were

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26. *Id.* at \*1–2.

27. *Id.* at \*2.

28. *Id.* at \*4.

29. *Id.* (citing TEX. R. APP. P. 38.1(i)).

30. The Supreme Court of Texas, Order Denying Petition for Review (May 8, 2020).

31. *Fairfax Media Pubs. Pty. Ltd. v. Voller* [2021] HCA 27 (Austl.).

32. *Id.* at ¶ 1.



defamatory.<sup>33</sup> While Australia does not have a counterpart to the United States' Section 230 of the Communication Decency Act,<sup>34</sup> immunity for social media platforms from such civil allegations, it does recognize a defense of "innocent dissemination."<sup>35</sup> However, under Australian defamation law, a plaintiff need only establish publication in order to satisfy a *prima facie* case.<sup>36</sup> A plaintiff does not have the burden to also establish culpable dissemination.<sup>37</sup> In this case, both the lower court (the Supreme Court of New South Wales) and the High Court believed that the Facebook account holders (the media entities) "published" the readers' allegedly defamatory comments.<sup>38</sup> Consequently, in a 5–2 decision that included four opinions spanning over seventy pages, the High Court legally equated ordinary social media account holders with traditional media publishers and broadcasters, holding that Facebook users could be strictly liable for all defamatory comments to their posts.<sup>39</sup> Ruling that each appellant "became a publisher of each comment posted on its public Facebook page by a Facebook user as and when that comment was accessed in a comprehensible form by another Facebook user," the plurality opinion opens the door to a duty by social media users to actively police the comments of third parties.<sup>40</sup> In dissent, a skeptical Justice Steward opined: "[T]he mere act of posting by a Facebook page administrator is unlikely to justify, in and of itself, the factual conclusion that the administrator has thereby participated in the publication of all subsequent responses. More is needed to be a publisher."<sup>41</sup> As a result of the High Court's decision, Justice Steward warned:

All Facebook page owners whether public or private, would be publishers of third-party comments posted on their Facebook pages, even those which were unwanted, unsolicited, and entirely unpredicted. Indeed, it might extend to cases where a Facebook page is hacked and then has posted on it entirely

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33. *Id.*

34. *See generally* 47 U.S.C. § 230 (providing protections for online speech).

35. *Id.* at ¶ 11.

36. *Id.* at ¶¶ 10, 13.

37. *Id.* at ¶ 18.

38. *Id.* at ¶ 3.

39. *Id.*

40. *Id.* at ¶ 98.

41. *Id.* at ¶ 173 (Steward, J., dissenting).

unwelcome, uninvited and vile defamatory comments, whether by the hacker or in response to a post made by the hacker.<sup>42</sup>

B. *Lawyers' and Judges' Responsibility for the Social Media Conduct of Others*

While the concept of bearing some measure of blame or responsibility for the social media conduct of others may seem jarring to the average person, it is not a particularly foreign concept for lawyers and judges. After all, American Bar Association (ABA) Model Rule of Professional Conduct 5.3 provides that both partners and lawyers with direct supervisory authority over non-lawyers must “make reasonable efforts to ensure . . . that the person’s conduct is compatible with the professional obligations of the lawyer[.]”<sup>43</sup> Rule 5.3(c) mandates that

a lawyer shall be responsible for conduct of [a non-lawyer employee] that would be a violation of the Rules of Conduct if engaged in by a lawyer if[,] the lawyer orders or . . . ratifies the conduct involved[,] or if the lawyer is a partner or [someone with] . . . managerial authority[,] . . . [and the lawyer] knows of conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.<sup>44</sup>

For judges, the operative rules in such situations include Canon 1.2 of the ABA Model Code of Judicial Conduct.<sup>45</sup> This Canon states that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>46</sup> In addition, Canon 2.12(A) of this Code stipulates that “[a] judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.”<sup>47</sup>

For lawyers, unfortunately, there has been no shortage of reminders that they are their “digital brother’s keeper” when it comes to non-lawyer staff. For example, in early May 2020, lawyers at Dallas-based Thompson &

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42. *Id.* at ¶ 180.

43. MODEL RULES OF PROF'L CONDUCT R. 5.3 (AM. B. ASS'N 2022).

44. *Id.* at R. 5.3(c).

45. *See* MODEL CODE OF JUD. CONDUCT R. 1.2 (AM. B. ASS'N 2022) (promoting confidence in the judiciary).

46. *Id.*

47. *Id.* at R. 2.12(A) (listing judicial supervisory duties).

Knight learned that the firm's document services manager, Kevin Bain, had made disturbing comments on Facebook related to his anger at retail businesses requiring shoppers to wear face masks during the pandemic.<sup>48</sup> Referring to a local grocery store's policy, Bain posted that any business insisting that he wear a mask "... will get told to kiss my Corona ass and will lose my business forever."<sup>49</sup> Following a series of threatening comments involving his handgun proficiency, Bain went on to say, "[t]hey have reached the limit. I have more power than they do ... they just don't know it yet."<sup>50</sup>

Thompson & Knight reacted swiftly to their employee's social media outburst, firing Bain for the "threatening and offensive" post.<sup>51</sup> The firm also released a statement, saying, "This post is a complete violation of the values of our firm, including our commitment to the health and safety of the communities we serve. We have terminated this individual's employment and notified the proper authorities about the post as a precaution[.]"<sup>52</sup>

Of a staff member posting threatening comments online isn't troubling enough for lawyers, how about online conduct that threatens and "outs" witnesses or informants as "snitches," exposing them to intimidation, reprisals, or even death? That was the case with Tawanna Hilliard, a paralegal working at the United States Attorney's Office in New Jersey.<sup>53</sup> In August 2019, Hilliard was indicted on witness tampering, obstruction of justice, and conspiracy charges in Brooklyn federal court.<sup>54</sup> The paralegal allegedly used her position and official work computer at the United States Attorney's Office to help her son Tyquan, a member of the Bronx 5-9 Brims branch of the notorious Bloods street gang who was serving a 10-year prison

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48. Aebra Coe, *Thompson & Knight Fires Manager for COVID-19 Mask Post*, LAW360 (May 9, 2020, 6:41 PM), <https://www.law360.com/articles/1272075/thompson-knight-fires-manager-for-covid-19-mask-post> [<https://perma.cc/Z3GY-ZM7G>].

49. Debra Cassens Weiss, *Firm Fires Staffer for 'No More Masks' Social Media Post that Referred to Glock Pistol*, ABA J. (May 11, 2020, 2:15 PM), <https://www.abajournal.com/news/article/firm-fires-staffer-for-no-more-masks-post-that-referred-to-glock-pistol> [<https://perma.cc/AS8M-HDVU>].

50. Coe, *supra* note 48.

51. *Id.*

52. *Id.*

53. Debra Cassens Weiss, *Former Paralegal at U.S. Attorney's Office Accused of Using Prosecutor Info to Expose Informants*, ABA J. (Aug. 16, 2019, 2:29 PM), <https://www.abajournal.com/news/article/former-paralegal-at-us-attorneys-office-is-accused-of-using-prosecutor-info-to-expose-informants> [<https://perma.cc/9FKT-K2S9>].

54. *Id.*

sentence for robbery.<sup>55</sup> According to federal authorities, in 2016, Ms. Hilliard, a nine-year employee, used her work computer to help her son's gang find cooperating witnesses, as well as to obtain the personal information of a rival gang member whom she thought was "trying to jam [her] son up."<sup>56</sup> And in 2018, during the then-pending robbery case against her son, Hilliard allegedly posted a video on YouTube showing a post-arrest statement given by her son's co-defendant about the robbery in order to prove he was "snitching."<sup>57</sup> She allegedly titled the video "NYC Brim Gang Member Snitching Pt. 1," and the video's circulation led to the witness and his family receiving death threats from fellow Bloods gang members.<sup>58</sup>

That video clip had been obtained by the United States Attorney's Office as discovery material in Tyquan Hilliard's case.<sup>59</sup> A search of the paralegal's home led to video interviews with the co-defendant and another accomplice being found on Hilliard's computer.<sup>60</sup> Investigators also recovered text messages from Ms. Hilliard in which she complained that the co-defendant was "giving up murders, victims, shooters, and all" and that her son "has no line of defense because his [co-defendant] told everything."<sup>61</sup> Hilliard pleaded not guilty and was ordered to wear an ankle monitor, stay off social media, and refrain from contact with her son and other gang members.<sup>62</sup>

Judges also must be wary when it comes to the online behavior of their staff. For example, in June 2020, the Stanislaus County (California) Superior Court was compelled to "launch[] an internal investigation after a political tweet was posted to the court's official Twitter account . . . ."<sup>63</sup> The post was a retweet of a tweet originally made by One America News personality Alex Salvi, regarding a news item about a protester being injured during the

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*; Antonia Noori Farzan, *A Gang Member's Mother Worked in the U.S. Attorney's Office. Now She's Accused of Outing "Snitches,"* WASH. POST (Aug. 14, 2019), <https://www.washingtonpost.com/nation/2019/08/14/tawanna-hilliard-paralegal-snitches-bloods-gang/> [https://perma.cc/T762-ZS Z3].

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Sabra Stafford, *Stanislaus County Court Investigating Political Comments on Official Twitter Account*, CERES COURIER (June 17, 2020, 11:31 AM), <https://www.cerescourier.com/news/local/stanislaus-county-court-investigating-political-comments-official-twitter-account/> [https://perma.cc/D64K-V7 2N].

removal of a Confederate statue in Portsmouth, Virginia.<sup>64</sup> The retweet attributed to the court's account featured the comment, "Some like their Karma instantly. I'll take mine in November. #Trump2020."<sup>65</sup> The court's account also included a "like" of a retweet by Fox News host Jeanine Pirro as well.<sup>66</sup>

The court reacted quickly by deleting the post and posting an apology, along with a terse statement that the official account had been "compromised."<sup>67</sup> The following day, the court's Twitter account displayed a more detailed tweet, reading "Yesterday's tweet about race and partisan politics was unauthorized and completely contrary to the Court's mission to provide equal access to justice and serve the needs of our community with integrity, quality, and fairness. The Court sincerely apologizes for the post."<sup>68</sup> Later, the court's executive officer provided a statement indicating that an unnamed employee was responsible for the political tweet, and that an internal personnel investigation was ongoing.<sup>69</sup> The statement promised "appropriate action consistent with its personnel rules and applicable laws," and added that as a preventative measure, the court "imposed additional restrictions on access to its social media accounts."<sup>70</sup>

As the risks of the social media conduct of court staff members have become more evident in the last two years, some guidance for judges has emerged. In October 2020, the California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issued its CJEO Oral Advice Summary 2020-037, entitled "Judicial Obligations Relating to Social Media Comments by Appellate Court Staff."<sup>71</sup> In this opinion, the Committee mandates not only vigilance on the part of an appellate justice regarding staff members' online conduct but action as well when that justice becomes aware of posts or comments that violate judicial canons.<sup>72</sup> The Committee calls for the justice to "immediately take steps to remedy the ethical violation, including

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Cal. Sup. Ct. Comm. on Jud. Ethics Ops., *CJEO Oral Advice Summary 2020-037* 1 (2020), <https://www.judicialethicsopinions.ca.gov/wp-content/uploads/CJEO-Oral-Advice-Summary-2020-037.pdf> [<https://perma.cc/HE85-TACK>].

72. *Id.* at 2.

at a minimum requiring the staff member to take all reasonable steps to have the post taken down and removed from the public domain.”<sup>73</sup>

The opinion begins by taking note of the realities of life and work in the Digital Age, observing that social media “has taken the place of both the proverbial office water cooler and the town square.”<sup>74</sup> Appellate court staff, the Committee explains, are no different from other members of the general public, and it should come as no surprise that their posts will frequently refer to their employment at the court.<sup>75</sup> And while acknowledging that court employees are not prohibited from posting comments about the courts or their employment generally, the Committee reminds justices that, these same employees “are required to keep confidential the decision making process of a court with respect to any pending matter,” and that the canons “constrain the content of any such comment.”<sup>76</sup>

In particular, the Committee points to California’s Canon 3B(9) and 3C(3).<sup>77</sup> Canon 3B(9) provides:

A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of staff and court personnel subject to the judge’s direction and control.<sup>78</sup>

Canon 3C(3) states:

A judge shall require staff and court personnel under the judge’s direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties.<sup>79</sup>

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73. *Id.*

74. *Id.*

75. *Id.* at 2–3.

76. *Id.* at n.2.

77. *Id.*

78. CAL. CODE OF JUD. ETHICS Canon 3B(9)(a),(b) (Cal. Sup. Ct. 2020).

79. CAL. CODE OF JUD. ETHICS Canon 3C(3) (Cal. Sup. Ct. 2020).

The opinion goes on to note that appellate justices face discipline if they fail to exercise such “reasonable control and direction” over their staff—and cites at least one California example.<sup>80</sup> But what action must a justice take? At a minimum, the Committee cautions the justices to “instruct the staff member to take all reasonable steps to delete or to have removed from public view any improper comment that violates the canons, and then follow up with the staff member to ensure that they have done so.”<sup>81</sup> Practically speaking, however, given the viral nature of the internet, a controversial post or tweet can live on and be further disseminated thanks to a screenshot being preserved by an original recipient or other third party, and subsequent deletion or other efforts at obscuring the post will consequently be futile.<sup>82</sup> In that event, the opinion states, “the justice may need to instruct the staff member to correct or repudiate the comment on social media, particularly if the comment is demeaning or offensive, or otherwise undermines the dignity of the court.”<sup>83</sup>

Another judicial ethics advisory opinion was issued in 2020 addressing the conduct of judicial law clerks and externs on social media, particularly insofar as it related to the judicial obligation to supervise.<sup>84</sup> Prompted by “recent events concerning systematic racial inequalities,” Colorado Judicial Ethics Advisory Board Opinion 2020-02 took a different perspective.<sup>85</sup> Instead of the danger of online comments by judges or their staff about pending or impending proceedings, Opinion 2020-02 focused on the extent to which judges, law clerks, and externs may participate in protest demonstrations and may use social media posts “[to condemn] racism and to express general support for various reforms being discussed in the public arena.”<sup>86</sup> While acknowledging that judicial clerks and externs are not subject to the Code of Judicial Conduct’s jurisdiction, the Opinion reminds

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80. Cal. Sup. Ct. Comm. on Jud. Ethics Ops., *CJEO Oral Advice Summary 2020-037 3* (2020), <https://www.judicialethicsopinions.ca.gov/wp-content/uploads/CJEO-Oral-Advice-Summary-2020-037.pdf> [<https://perma.cc/HE85-TACK>] (citing Letter of Public Admonishment of Commissioner Mark Kliszewski (2017) (explaining a 2017 judicial disciplinary proceeding in which the commissioner’s failure to take corrective action to halt court staff from making inappropriate comments was held to have violated Canons 3B(4) and 3C(3)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* Colo. Sup. Ct., Colo. Jud. Ethics Advisory Bd. Advisory Opinion 2020–02 (2020) (discussing clerks’ “participation in protest demonstration, use of social media, and other public statements”).

85. *Id.* at 1.

86. *Id.*

us that judges, in their supervisory capacity, “remain responsible for ensuring that their staff and others subject to the judge’s direction act in a manner consistent with the Code.”<sup>87</sup> Because the behavior of a “[law] clerk or extern may be imputed to the judge” for whom he or she works, trial and appellate judges must require staff under their direction and control to act as a judge would under the Code.<sup>88</sup>

Colorado’s Board placed particular emphasis on Rule 2.12 of the Colorado Code of Judicial Conduct, which provides that “[a] judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.”<sup>89</sup> Colorado’s Rule is identical to Rule 2.12 of the Model Code of Judicial Conduct.<sup>90</sup> That “Rule[] was reworded to reflect a more [rigorous] . . . standard[]”—that “court staff [members] act in a manner consistent with *all* of a judge’s [ethical] obligations under the Code and not simply those previously enumerated in Canon 3C(2) . . . .”<sup>91</sup> As the Report’s explanation of changes to the Model Code indicated, this more rigorous standard was intended to reflect the critical place occupied by judicial staff in the justice system: “not only in terms of their role into the administration of justice but also in terms of their relevance to preserving public confidence in the system as a whole.”<sup>92</sup>

Because of this critical role, with court staff essentially viewed by the public as an extension of their judge, Colorado’s Board made it clear that higher expectations are at work here.<sup>93</sup> A judge’s responsibility for the conduct of his or her staff is not just limited to when such staff members are acting at the judge’s direction or control, or even during working hours only.<sup>94</sup> In the current climate of polarized political discourse and heightened attention to racial justice issues, this takes on new urgency. Colorado Judicial Ethics Advisory Board Opinion 2020-02 observes that while several state supreme courts around the country have issued statements concerning racial inequality, there is a dramatic difference between permissible statements like that and participation in protest

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87. *Id.*

88. *Id.*

89. *Id.* at 1; COLO. CODE OF JUD. CONDUCT R. 2.12 (Colo. Sup. Ct. 2010).

90. Colo. Sup. Ct., Colo. Jud. Ethics Advisory Bd. Advisory Opinion 2020–02, at 2 (2020).

91. *Id.* (emphasis added).

92. *Id.*

93. *Id.*

94. *Id.*



marches and rallies (such as Black Lives Matter protests or a “March for Science” gathering) or using social media to express support for or to protest current political issues.<sup>95</sup>

As the Colorado Opinion notes, the use of social media by judges to speak out on current political issues raises a number of ethical concerns, including “(1) avoiding impropriety in all conduct; (2) not lending the prestige of judicial office; (3) not detracting from the dignity of the court . . . ; (4) not engaging in prohibited political activity; and (5) avoiding association with [] issues . . .” that might come before the court.<sup>96</sup> For that reason, the Opinion warns judges to “not make political or divisive statements” themselves.<sup>97</sup> And because of Rule 2.12’s mandate, judges must counsel their law clerks, externs, and other staff against making comments “that are divisive and venture into the political sphere,” regardless of whether those comments are “made in person, in writing, [or] on social media . . . .”<sup>98</sup>

### III. JUDGES AND THE ETHICAL RISKS OF “BENIGN” SOCIAL MEDIA ACTIVITY

Looming even larger than Canon 2.12(A)’s mandate that “judges . . . require [their staff] . . . to act in a manner consistent with the judges’ ethical obligations . . .”<sup>99</sup>—the “guilt for the sins of others” standard, if you will—is Canon 1.2’s admonition for judges to act at all times in a manner that “promotes public confidence in the . . . impartiality of the judiciary [and to avoid not only] impropriety [but also] the appearance of impropriety.”<sup>100</sup> This broad but vital standard encompasses a judge’s “active” misconduct on social media, including such things as *ex parte* communications with counsel, inappropriate sexual overtures to parties, and discussing a case on social media.<sup>101</sup> Understandably, this “active” misconduct attracts the lion’s share of attention when judicial misuse of social media is discussed. However, the arguably more “benign” types of activities on social media—liking or sharing the posts or tweets of a party or someone associated with a party to a case pending before the judge, “following” a party or someone associated

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95. *Id.* at 5–7.

96. *Id.* at 6.

97. *Id.* at 7.

98. *Id.*

99. MODEL RULES OF PROFESSIONAL CONDUCT R. 2.12(a) (Am. B. Ass’n 2022).

100. *Id.* at R. 1.2.

101. Browning, *supra* note 13, at 490, 498, 500.

with a party, and so forth—can be no less concerning. In a way, it is more troubling *because* it is not as overt, as blatant, as more “active” misconduct on social media. If commenting on a case on Facebook or *ex parte* communications with a party is an ethical iceberg,<sup>102</sup> the “benign” acts like a judge following one of the parties or counsel appearing before her and liking their tweets or posts is that portion of the iceberg unseen below the water: invisible, but no less dangerous for the unwary.

One reason why judges get into ethically compromising situations arising out of such benign conduct on social media is because they may view it as harmless, rather than as behavior that can raise questions about their impartiality or create at least the appearance of impropriety.<sup>103</sup> Likes on social media platforms signify validation, approval, agreement, support, and even endorsement of the post or tweet itself.<sup>104</sup> Likes and follows have commercial significance, as indicated by the billions of dollars spent annually by brands on establishing and maintaining a social media presence.<sup>105</sup> The business valuation of an entity’s Twitter followers and similar forms of social media metrics has become a recurring issue in Digital Age litigation.<sup>106</sup> In addition, a number of studies have documented the psychological value of garnering likes and followers, and the impact such “engagement metrics” can have on an individual’s wellbeing.<sup>107</sup>

“Likes” on social media have significance. In fact, as a United States Circuit Court of Appeals’ decision has recognized, clicking “like” on a social media page is a form of speech protected by the First Amendment.<sup>108</sup>

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102. *Id.* at 509–10.

103. *Cf.* ABA Comm. on Ethics & Prof’l Resp., Formal Op. 642, at 2 (2013) (highlighting potential Model Rules violations caused by judges’ use of ESM).

104. Branwell Moffat, *The Power of Likes on Social Media: Friend or Foe?*, THE FUTURE OF COM. (Oct. 7, 2019), <https://www.the-future-of-commerce.com/2019/10/07/the-power-of-likes-on-social-media/> [<https://perma.cc/2C6Q-9JNA>].

105. Leslie K. John et al., *What’s the Value of a Like?*, HARV. BUS. REV. (Mar.–Apr. 2017), <https://hbr.org/2017/03/whats-the-value-of-a-like> [<https://perma.cc/3YWY-XPMR>].

106. *See* Phonedog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (bringing an action based on a former employee’s use of a company Twitter account containing trade secrets); *see also* Michael Furlong, *Putting a Price on Friendship: Examining the Ownership Battle Between a Business’ Social Media Networks, and the Humans That Operate Them*, 47 J. MARSHALL L. REV. 745 (2013) (“[M]any companies appoint employees to operate a social media accounts on behalf of the business . . . . It can [] become ambiguous as to whether the employee or employer has ownership rights over the account. Such ambiguity can cause problems for the business.”).

107. *See generally* *The Psychology of Being ‘Liked’ on Social Media*, MEDIUM.COM (Nov. 28, 2017), <https://medium.com/swlh/likes-on-social-media-87bfff679602> [<https://perma.cc/GQM2-WASE>] (noting a psychological response to receiving ‘likes’ on social media).

108. *Bland v. Roberts*, 730 F.3d 368, 386–87 (4th Cir. 2013).

“Liking” a political campaign page, for example, can constitute an endorsement in clear violation of ABA Model Rule of Judicial Conduct 4.1(A)(3)’s prohibition on judges’ “publicly endorsing or opposing a candidate for any public office[.]”<sup>109</sup> Some judges have learned this the hard way, and been disciplined for casually “liking” another individual’s campaign Facebook page.<sup>110</sup> For example, Butler County, Kansas District Judge Jan Satterfield caused a controversy in 2012 when she was among several dozen people who clicked “like” on a Facebook post by the campaign of Sheriff Kelly Herzet.<sup>111</sup> A supporter of Herzet’s opponent filed a complaint against Judge Satterfield with the Kansas Commission of Judicial Qualifications, noting that “[w]ith the growth of social media, the court system needs to define how its rules for judges apply in cyberspace.”<sup>112</sup> Judge Satterfield, for her part, did not seem to understand how her “like” could be viewed as an endorsement.<sup>113</sup>

Clearly, a judge engaging on social media with one party, or someone associated with that party (such as counsel), in some way to the exclusion of the other side calls into question that judge’s impartiality, and can undermine public confidence in the integrity of the judiciary. Even when the social engagement seems benign or innocuous, such as following someone on Twitter and liking or retweeting a tweet, that “heart” icon can send a message of approval or affiliation. While it may be unintended, it can also convey to observers the impression that one side or viewpoint enjoys a special or favored position with the judge.<sup>114</sup> And while many judges might be followers of certain media outlets or specific journalists—a fact that, in isolation, is harmless enough—a judge’s liking, sharing, or retweeting an article that is written about a case pending before that judge can be ethically problematic,<sup>115</sup> particularly if that article takes an editorial stance regarding

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109. MODEL RULE OF JUD. CONDUCT R. 4.1(A)(3) (AM. B. ASS’N 2022).

110. *See, e.g., Kansas Judge Causes Stir with Facebook ‘Like’*, REALCLEARPOLITICS (July 29, 2012), [https://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas\\_judge\\_causes\\_stir\\_with\\_facebook\\_like.html](https://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like.html) [<https://perma.cc/T3VV-WKCD>] (describing an instance where “liking” a campaign Facebook page was violative of the Model Rules because it “publicly endors[ed] or oppos[ed] another candidate for any public office.”).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.* (suggesting the act of “liking” a Facebook post “could be construed as showing bias . . .”).

115. MODEL RULES OF PROF’L CONDUCT R. 4.1(a)(12) (AM. B. ASS’N 2022) (“[A] judge . . . shall not . . . make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . .”).

a party or key issue involved in the case. Is subjecting a judge to recusal or even disciplinary sanction an appropriate response to concerns over the integrity of the judiciary and the appearance of impropriety? Or is such a “guilt by association” standard unduly harsh? To answer these questions, we should look at a handful of cautionary tales: one that reached the Wisconsin Supreme Court, another that reached the Ninth Circuit, and a trio of recusal cases from Texas.<sup>116</sup>

A. *Judge Michael Bitney*

Our first example is Barron County Circuit Court Judge Michael Bitney of Wisconsin.<sup>117</sup> In 2017, Judge Bitney presided over a contested hearing in a custody dispute between mother Angela Carroll and father Timothy Miller.<sup>118</sup> After the hearing, but before rendering a decision, Judge Bitney accepted a Facebook “friend” request from Carroll.<sup>119</sup> Over the course of the next twenty-five days, Carroll “liked” sixteen of the judge’s Facebook posts, “loved” two more, commented on two of his posts, and shared and “liked” several third-party posts that related to a contested issue at the hearing (domestic violence).<sup>120</sup> Judge Bitney did not “like” or comment on any of Carroll’s posts, nor did he reply to any of her comments on his posts.<sup>121</sup> However, the judge never disclosed the Facebook friendship or Ms. Carroll’s communications, and he ultimately ruled entirely in the mother’s favor.<sup>122</sup>

On the same day as his decision, Ms. Carroll posted “the Honorable Judge has granted everything we requested.”<sup>123</sup> Miller, the husband, discovered the Facebook connection and moved for reconsideration of the ruling and for Judge Bitney’s disqualification.<sup>124</sup> While Judge Bitney admitted to the

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116. *In re Paternity of B.J.M.*, 944 N.W.2d 542, 547 (Wis. 2020); *United States v. Sierra Pac. Indus.*, 862 F.3d 1157, 1163 (9th Cir. 2017); *Youkers v. State*, 400 S.W.3d 200, 203–05 (Tex. App.—Dallas 2013, pet. ref’d); *In re Hon. Michelle Slaughter*, 480 S.W.3d 842, 845–46 (Tex. Spec. Ct. of Rev. 2015); *Tex. Ethics Comm’n v. Sullivan*, No. 02-15-00103-CV, 2015 WL 6759306, at \*1, \*1–\*2 (Tex. App.—Fort Worth Nov. 5, 2015, pet. denied).

117. *In re Paternity of B.J.M.*, 944 N.W.2d 542, 543–44 (Wis. 2020).

118. *Id.* at 544.

119. *Id.*

120. *Id.* at 544–45.

121. *Id.* at 545.

122. *Id.* at 546.

123. *Id.*

124. *Id.*

Facebook interactions, he maintained that he was impartial.<sup>125</sup> The appellate court reversed and remanded the case with directions to have it heard before a different judge.<sup>126</sup> On appeal to the Wisconsin Supreme Court, the high court affirmed the appellate decision, concluding that “the extreme facts of this case rebut the presumption of judicial impartiality and establish a due process violation.”<sup>127</sup>

The Wisconsin Supreme Court based its conclusion that “a serious risk of actual bias” had been shown by the totality of the circumstances.<sup>128</sup> These included the timing of the Facebook friendship—it was sent after evidence and briefing were submitted, implying Carroll’s desire to influence the Judge’s decision, and Judge Bitney accepted it, gaining access to off-the-record facts relevant to the dispute; the volume of Carroll’s posts and the likelihood Judge Bitney viewed these posts and comments; the content of the Facebook activity as it related to the nature of the pending proceeding—Carroll had essentially twenty-five more days to portray herself in the best possible light through her Facebook access to the judge; and Judge Bitney’s lack of disclosure—which deprived Miller of an opportunity to refute what Carroll was posting and sharing.<sup>129</sup>

The court observed that while it was not determining the “general propriety” of judicial use of social media, it cautioned that judges should recognize that online interactions, like real-world interactions, must be treated with a degree of care.<sup>130</sup> In her concurring opinion, Justice Ziegler urged even more vigilance, reminding judges that their social media use “may expose both the judge and the judiciary as a whole to an appearance of bias or impropriety.”<sup>131</sup>

#### B. *Judge William Shubb*

In a case that nearly reached the United States Supreme Court, a federal judge asked to recuse himself because of his Twitter activity.<sup>132</sup> In the 2017 case of *United States v. Sierra Pacific Industries, Inc.*,<sup>133</sup> United States District

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125. *Id.*

126. *Id.* at 547.

127. *Id.* at 554.

128. *Id.* at 548.

129. *Id.* at 550–51.

130. *Id.* at 569 (Dallet, J., concurring).

131. *Id.* at 567 (Ziegler, J., concurring).

132. *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017).

133. *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157 (9th Cir. 2017).

Court Judge William B. Shubb was presiding over a case arising out of a 2007 wildfire that had devastated nearly 46,000 acres in California.<sup>134</sup> The federal government, which blamed lumber producer Sierra Pacific, reached a settlement that the lumber company sought to vacate.<sup>135</sup> Judge Shubb denied Sierra Pacific's motion.<sup>136</sup> It appealed, pointing out that not only was Judge Shubb a Twitter follower of the federal prosecutors on the case—and had received tweets about the merits of the case from the prosecutors' Twitter account—but also that he himself had tweeted about the case from his then-public Twitter account (@Nostalgist1).<sup>137</sup>

On the same day that Judge Shubb denied Sierra Pacific's motion to set aside the settlement, the United States Attorney's Office for the Eastern District of California posted multiple tweets about the case.<sup>138</sup> In addition, Judge Shubb tweeted a link to a news article about his ruling, bearing the headline Sierra Pacific Still Liable for Moonlight Fire Damage.<sup>139</sup> This irked the lumber giant, which had expressly denied liability as part of the settlement.<sup>140</sup> The defendants appealed, arguing (among other grounds) that the judge had violated multiple Canons of the Code of Conduct for United States Judges.<sup>141</sup> This included Canon 2, calling for judges "to avoid impropriety and the appearance of impropriety in all activities";<sup>142</sup> Canon 3A(4), prohibiting "*ex parte* communications or any communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers";<sup>143</sup> and Canon 3A(6), mandating that "a judge should not make public comment on the merits of a matter pending or impending in any court."<sup>144</sup> Sierra Pacific also argued that, under Canon 3C, Judge Shubb was required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>145</sup>

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134. *Id.* at 1163.

135. *Id.* at 1164–65.

136. *Id.* at 1166.

137. *Id.* at 1174–75.

138. *Id.* at 1166.

139. *Id.*

140. *Id.* at 1165.

141. *Id.* at 1174.

142. *Id.* at 1173.

143. *Id.*

144. *Id.*

145. *Id.* at 1173–74.

While the case was on appeal, the federal prosecutors notified Judge Shubb that his Twitter activity had become an issue.<sup>146</sup> Shortly thereafter, the judge changed his Twitter account from “public” to “protected,” a privacy setting permitting only certain authorized followers to view his tweets.<sup>147</sup>

In July 2017, the United States Court of Appeals for the Ninth Circuit affirmed the trial court’s ruling and declined to require Judge Shubb’s recusal on procedural grounds.<sup>148</sup> However, the Court recognized the significance of the issue arising out of Judge Shubb’s Twitter activity, stating, “[T]his 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.”<sup>149</sup>

Undaunted, Sierra Pacific filed a petition for writ of certiorari to the United States Supreme Court.<sup>150</sup> The question presented asked whether a district court judge’s impartiality might reasonably be questioned “when he not only follows the prosecution on social media, but also, just hours after denying relief to the opposing party, tweets a headline and link to a news article concerning the proceedings pending before him.”<sup>151</sup> Despite the questions raised, in June 2018, the United States Supreme Court denied the petition for writ of certiorari.<sup>152</sup>

### C. *Judge Steve Burgess*

To date, there have been only two appellate cases in Texas dealing with judicial use of social media. In *Youkers v. State*,<sup>153</sup> while the Fifth Court of Appeals rejected the notion that a judge’s Facebook friendship alone was disqualifying, it did note that social media use by judges “presents concerns unique to the role of the judiciary in our justice system,” and that in using such platforms, “judges must be mindful of their responsibilities under

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146. David Lat, *A Federal Judge and His Twitter Account: A Cautionary Tale*, ABOVE THE L. (Nov. 18, 2015, 4:48 PM), <https://abovethelaw.com/2015/11/a-federal-judge-and-his-twitter-account-a-cautionary-tale/> [https://perma.cc/DR5B-GLEA].

147. *Id.*

148. *Sierra Pac. Indus., Inc.*, 862 F.3d at 1175.

149. *Id.* at 1175–76.

150. Petition for Writ of Certiorari at i, *Sierra Pac. Indus., Inc. v. United States*, 138 S. Ct. 2675 (2018) (No. 17-1153).

151. *Id.* at ii.

152. *Sierra Pac. Indus., Inc. v. United States*, 138 S. Ct. 2675, 2675 (2018).

153. *Youkers v. State*, 400 S.W.3d 200 (Tex. App.—Dallas 2013, pet. ref’d).

applicable judicial codes of conduct.”<sup>154</sup> And in *In re Honorable Michelle Slaughter*,<sup>155</sup> a Special Court of Review appointed by the Texas Supreme Court observed that while social media activity of the judge at issue—who had been recused in connection with Facebook posts about the case before her—did not warrant judicial discipline, judges should nevertheless be aware that their conduct on social media is subject to existing rules of judicial conduct and that such online behavior by judges about their own proceedings “create the very real possibility of a recusal (or even a mistrial) and may detract from the public trust and confidence in the administration of justice.”<sup>156</sup>

But instead of a retweet or a like, what about a judge who follows one of the parties on Twitter? That was the question posed in a 2015 Texas case, *Texas Ethics Commission v. Michael Quinn Sullivan*.<sup>157</sup> In that case, the Texas Ethics Commission (TEC), a state agency charged with administering and enforcing statutes governing elections and related governmental processes, filed an action against Sullivan (a conservative activist and president of an influential conservative-leaning organization) for failure to register as a political lobbyist.<sup>158</sup> Sullivan appealed the TEC’s decision in that case by filing suit in Denton County, Texas, his alleged county of residence.<sup>159</sup> The TEC disputed his residency and filed a motion to transfer venue;<sup>160</sup> Sullivan responded by filing a motion to dismiss the TEC’s claims under Texas’s anti-SLAPP law.<sup>161</sup> On February 18, 2015, the case was heard by Judge Steve Burgess of the 158th Judicial District Court, and he denied the motion to transfer venue and granted Sullivan’s motion to dismiss.<sup>162</sup>

That same day, however, a reporter for the *Fort Worth Star-Telegram* tweeted about the hearing, noting that Judge Burgess was a Twitter follower of Sullivan.<sup>163</sup> The next day, the same reporter posted on Twitter that “1 day after ruling in [Sullivan’s] favor without disclosing he’s a Twitter

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154. *Id.* at 2–5.

155. *In re Hon. Michelle Slaughter*, 480 S.W.3d 842 (Tex. Spec. Ct. of Rev. 2015).

156. *Id.* at 852.

157. *Tex. Ethics Comm’n v. Sullivan*, No. 02-15-00103-CV, 2015 WL 6759306, at \*2 (Tex. App.—Fort Worth Nov. 5, 2015, pet. denied).

158. *Id.* at \*1.

159. *Id.*

160. *Id.*

161. *Id.* at \*2.

162. *Id.*

163. *Id.*



follower, judge deletes account.”<sup>164</sup> On February 23, the TEC filed a motion to recuse Judge Burgess, arguing that the jurist’s following of Sullivan on Twitter not only called into question Burgess’s impartiality but also made it likely that Burgess and Sullivan had *ex parte* communications through use of the platform.<sup>165</sup> The later accusation had no foundation; for two Twitter users to communicate privately, both must follow each other<sup>166</sup>—and there was no indication that Sullivan likewise followed Judge Burgess. Moreover, it was hardly unusual that an elected Republican judge like Steve Burgess, in a decidedly Republican county and state, might choose to follow the Twitter account of the leader of an influential conservative organization known for its endorsements of Republican political candidates—including judges. Certainly, there was no indication that, out of the nearly 15,000 of Sullivan’s Twitter followers, Judge Burgess and Sullivan enjoyed any real relationship.

Despite all of this, another judge was appointed to hear the recusal motion, and that judge granted it.<sup>167</sup> Should following a party automatically warrant recusal? Courts and judicial ethics opinions in multiple jurisdictions have already addressed the question of a judge’s Facebook friendships with parties, counsel, and even expert witnesses, with most noting that such a tenuous connection is not disqualifying—absent other indications of a special relationship, position of influence, or the potential for bias.<sup>168</sup> In Judge Burgess’s case, the appearance of impropriety was likely not helped by either his failure to disclose the connection or by the deletion of his Twitter account after the journalist’s revelation.

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164. *Id.*

165. *Id.*

166. *But see How to Direct Message (DM) on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/direct-messages> [<https://perma.cc/GLY6-EXWK>] (“You can start a private conversation or create a group conversation with anyone who follows you. Anyone you do not follow can send you a Direct Message if: [y]ou have opted in to receive Direct Messages from anyone[] or; [y]ou have previously sent that person a Direct Message. . . . For some . . . account settings may already be set to receive message requests from other people you do not follow. These requests are kept separate from your other DMs until you accept them.”).

167. *Tex. Ethics Comm’n*, 2015 WL 6759306, at \*2; John Reynolds, *A Twitter Follow Leads to a Recusal*, TEX. TRIB. (Mar. 5, 2015), <https://www.texastribune.org/2015/03/05/twitter-follow-leads-recusal/> [<https://perma.cc/B3AX-2KC6>].

168. *See, e.g., Law Offices of Herssein & Herssein, P.A. v. United Services Auto. Ass’n*, 271 So.3d 889, 897 (Fla. 2018) (“The clear majority position is that mere Facebook “friendship” between a judge and an attorney appearing before the judge, without more, does not create thence of impropriety under the applicable code of judicial conduct.”).

#### D. Judge Staci Williams

In 2016, Judge Staci Williams of Dallas County's 101st Judicial District Court was presiding over *State Fair of Texas v. Riggs & Ray, P.C.*<sup>169</sup> The lawsuit had been brought by the ostensibly nonprofit corporation that oversees the annual State Fair of Texas against an Austin law firm that had filed an open records request seeking “extensive financial records, contracts, and correspondence” between fair executives and various Dallas government officials.<sup>170</sup> The litigation was closely followed and covered by certain local journalists, including on Twitter. Beginning in November 2016, Judge Williams's activity on her official Twitter account began to attract the plaintiff's attention.<sup>171</sup> In July, she retweeted, without comment, a tweet by a local radio host and political commentator referencing the case, linking to an article sympathetic to the defendant's position, and praising the judge.<sup>172</sup> On another date, Judge Williams had liked a tweet by a Dallas City Council member that linked to another news article by a different journalist that was, again, sharply critical of the plaintiff and its position.<sup>173</sup>

In Twitter parlance, retweeting without comment or indication of disagreement is commonly understood to signify approval, while likes are usually understood to show appreciation for a tweet. Reacting to the judge's retweet and like—publicly posted approval by Judge Williams of tweets linked to reporting that was highly critical of one party's position in the case—the plaintiff filed a motion to recuse on November 29, 2016.<sup>174</sup> In December, Judge Williams voluntarily recused herself and asked for a new

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169. Plaintiff's Motion for Recusal, at 1, *State Fair of Tex. v. Riggs & Ray, P.C.*, 2015 WL 9941838 (101st Dist. Ct., Dallas County, 2016) (No. DC-15-04484).

170. *Id.* at 32.

171. *Id.* at 2.

172. *Id.* at 3–4.

173. *Id.* at 7. The articles in question included two pieces by Jim Schutze in the *Dallas Observer*. Both articles, along with screenshots from Judge Williams' Twitter account, were exhibits to the motion. See Jim Schutze, *Take an Embarrassing Peek into the Love Between the State Fair of Texas and Fair Park*, DALL. OBSERVER (June 9, 2016), <https://www.dallasobserver.com/news/take-an-embarrassing-peek-into-the-love-between-the-state-fair-of-texas-and-fair-park-8374766> [https://perma.cc/E3P5-ENEK] (arguing the park board is giving away the Fair Park land wrongly); see also Jim Schutze, *Transparency Isn't Just Important in Fair Park Debate. It's the Whole Enchilada*, DALL. OBSERVER (July 20, 2016), <https://www.dallasobserver.com/news/transparency-isnt-just-important-in-fair-park-debate-its-the-whole-enchilada-8504231> [https://perma.cc/VHS3-B74T] (“The specific questions the State Fair of Texas board has been ducking, dodging, suing and gluing people over in the last year have to do with alleged kickbacks from vendors, conflicts of interest, side-deals, financial arrangements with the cops, a slew of things.”).

174. Plaintiff's Motion for Recusal, *supra* note 169, at 1.

judge to be assigned to the case.<sup>175</sup> Regardless of whether this Twitter activity truly reflected a lack of impartiality, one can certainly understand why one party might question the judge's impartiality; at the very least, such activity created the appearance of bias or impropriety.

E. *Judge Glen Harrison*

In 2015, Judge Glen Harrison of West Texas' 32nd Judicial District presided over a complex breach of contract case against attorney and businessman Kerwin Stephens by several individuals and entities over a speculative project to buy (and later sell) oil and gas leases in Fisher County, Texas.<sup>176</sup> The case resulted in a verdict of over \$96 million.<sup>177</sup> In addition to making a number of rulings adverse to the defense during the trial itself, later in 2015, and well into 2016, Judge Harrison denied a variety of defendants' motions for post-trial relief, including a motion for new trial, a motion for judgment notwithstanding the verdict, motions regarding the entry of judgment, and a motion pertaining to the defendants' ability to supersede the judgment.<sup>178</sup> Baffled by rulings they felt were inconsistent with Texas law, the defendants took the case up on appeal.<sup>179</sup> On appeal, the Eastland Court of Appeals embraced most of the JNOV arguments that Judge Harrison had rejected, and also allowed Stephens the supersedeas that Harrison had denied not once, but three times.<sup>180</sup> Although Stephens was compelled to file for bankruptcy protection regardless, the appellate court's rulings greatly diminished a verdict that had been hailed in 2015 as one of the largest of that year not only in Fisher County, Texas,<sup>181</sup> and perhaps nationally as well. The appellate rulings constituted a sharp rebuke of the trial court.

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175. Signed Order of Referral on Motion to Recuse, Cause No. DC-15-04484, State Fair of Tex. v. Riggs & Ray, P.C. (101st Dist. Ct., Dallas County, 2016) (on file with author).

176. Stephens v. Three Finger Black Shale P'ship, 580 S.W.3d 687, 696 (Tex. App.—Eastland 2019, pet. denied).

177. *Id.* at 696–97.

178. Brief in Support of Debtor's Application for Order Pursuant to 11 U.S.C. § 327(a) & Bankruptcy Rule 2014 Authorizing the Employment of John G. Browning as Expert Witness at 3, 8, 9, *In re Stephens*, No. 21-40817-elm-11 (Bankr. N.D. Tex. Aug. 9, 2021), EFC No. 173; Response to Plaintiff's Brief on Recusal at 2, *In re Stephens*, No. 21-40817-elm-11, ECF No. 241.

179. *Stephens*, 580 S.W.3d at 696.

180. *Id.* at 732.

181. Paul DeBenedetto, *Texas Jury Awards \$60M In Mineral Rights Partner Suit*, LAW360 (Aug. 21, 2015, 6:12 PM), <https://www.law360.com/articles/693952/print?section=commercial-contracts> [<https://perma.cc/QB7F-3WE6>].

During the bankruptcy proceeding, as the court contemplated a remand to the state trial court on several issues, Stephens alerted his legal team to some disturbing revelations he had recently learned about, discoveries that led them to point out reasons for Judge Harrison's recusal.<sup>182</sup>

An examination of Judge Harrison's activity on Twitter during and after the trial (using the Twitter handle @gharrison32nd) revealed some interesting things. Judge Harrison had apparently begun following at least one of the plaintiffs' lawyers, Jordyn Gingras, and on August 20, 2015—just one day after the trial's conclusion—Judge Harrison liked a tweet by Gingras.<sup>183</sup> The tweet in question said, “[t]he truth doesn't cost you anything but a lie could cost you everything,” an apparent reference to the trial; it was accompanied by the hashtags “#proudlawyermoment,” “#rumbleinroby,” and “#sweetwaterstrong” (references to the trial's location).<sup>184</sup> The same day, Judge Harrison liked Gingras' tweet about the “new friends” she'd made in Sweetwater and Roby, a tweet that contained a hyperlink to an Instagram post with the Stephens trial-related hashtags “#wefilledthebucket,” “#sweetwaterproud,” “#rumbleinroby,” and “#proudlawyermoment.”<sup>185</sup> Just two days later, on August 22, 2015, Judge Harrison liked yet another tweet by Gingras, this time thanking her paralegal, Amber Schrandt.<sup>186</sup>

Later, there would be more likes coming from Judge Harrison in response to tweets by Ms. Gingras. On November 16, 2015, before the hearing on Stephen's JNOV motion, Judge Harrison liked Gingras' tweet about a CLE presentation she gave to the Dallas Bar Association about the subject matter of the trial entitled “Landman or Lawyer? \$70MM+ Reasons Why You Should Care.”<sup>187</sup> Not long after entering judgment against defendant Stephens on March 30, 2016, Judge Harrison liked a tweet by another member of the team suing Stephens, Christina Mullen, boasting about obtaining the “#15 verdict in the nation.”<sup>188</sup> Days later, on May 24, 2016, Harrison liked yet another tweet by attorney Gingras, this time tweeting a

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182. Response to Plaintiff's Brief on Recusal at 2, *In re Stephens*, No. 21-40817-elm-11, ECF No. 241.

183. Brief in Support of Debtor's Application for Order Pursuant to 11 U.S.C. § 327(a) & Bankruptcy Rule 2014 Authorizing the Employment of John G. Browning as Expert Witness at 5, *In re Stephens*, No. 21-40817-elm-11, EFC No. 173.

184. *Id.* at 6.

185. *Id.* at 29–30.

186. *Id.* at 32–33.

187. *Id.* at 6, 35.

188. *Id.* at 7, 39.

positive article about two more of the plaintiffs' attorneys, Frank and Debbie Branson.<sup>189</sup> And on June 29, 2016, not long before denying Stephens' efforts at supersedeas, Judge Harrison liked yet another of Gingras' trial-related tweets—this time one about receiving “top billing” on the 2015 Top Texas Verdicts and Settlement Report.<sup>190</sup>

Indeed, Judge Harrison continued to follow Twitter accounts associated with Ms. Gingras and other members of the trial team suing Kerwin Stephens. What's more, his Twitter interactions, including likes of tweets by Ms. Gingras, continued as well. Collectively, all of this Twitter activity—particularly the fact that Judge Harrison followed and commented (in the form of likes) on tweets by one side of the litigants in a matter before him—is indicative at the very least of the appearance of impartiality and prejudgment against Kerwin Stephens and his related entities. And while judicial rulings are rarely enough by themselves to demonstrate bias sufficient to warrant recusal, the fact that a presiding judge made rulings that were incorrect<sup>191</sup> and in favor of the side of the case he followed and commented on via Twitter would tend to reinforce concerns about impartiality. Following, liking the tweets of, and referencing lawyers on only one side of what was a high stakes and contentious piece of litigation (including tweets that referenced the size and newsworthiness of the verdict) cannot help but foster objectively reasonable doubts as to Judge Harrison's impartiality.

The fact that this Twitter engagement apparently did not occur during the trial itself is of no consequence; it occurred during a period of time in which Judge Harrison maintained jurisdiction over pending post-trial matters. In *New Mexico v. Thomas*,<sup>192</sup> a case in which a relatively new trial judge posted on Facebook about how “[j]ustice was served” after a murder trial but before sentencing, the New Mexico Supreme Court was not amused by the judge's “Facebook page discussions of his role in the case and his opinion of the outcome.”<sup>193</sup> After reversing the conviction on other grounds, the court cautioned that:

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189. *Id.* at 41.

190. *Id.*

191. *See Stephens*, 580 S.W.3d at 732 (holding at least three times out of five, according to the Eastland Court of Appeals).

192. *New Mexico v. Thomas*, 376 P.3d 184 (N.M. 2016).

193. *Id.* at 189, 198.

Judges must avoid not only actual impropriety but also its appearance, and judges must “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” These limitations apply with equal force to virtual actions and online comments and must be kept in mind if and when a judge decides to participate in electronic social media.<sup>194</sup>

Does it matter whether Judge Harrison’s Twitter activity demonstrated actual bias or prejudice? No, because, under Texas law, that is not the standard.<sup>195</sup> Texas Rule of Civil Procedure 18b(b)(1) provides that a trial judge “must recuse” when “the judge’s impartiality might reasonably be questioned.”<sup>196</sup> The test for recusal under such circumstances is “whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge’s conduct, would have a reasonable doubt that the judge is actually impartial.”<sup>197</sup> Under well-settled Texas law, it is not a showing of actual bias or prejudice that matters so much as the appearance of partiality, bias, or prejudice.<sup>198</sup> As the Texas Supreme Court noted decades ago—more than 40 years before the advent of social media:

The judiciary must not only attempt to give all parties a fair trial, but it must also try to maintain the trust and confidence of the public at a high level . . . [And] it is of great importance that the courts should be free from reproach or the suspicion of unfairness.<sup>199</sup>

Given such legitimate concerns about the appearance of partiality or bias stemming from Judge Harrison’s following and likes of one side’s tweets referencing the case before him, it is not surprising that on November 19, 2021, the United States bankruptcy judge entered an order granting Kerwin Stephens’ Motion to Remand without prejudice to his right to seek

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194. *Id.* at 198 (citations omitted) (quoting N.M. Code. Jud. Cond. R. 21-102).

195. *See* TEX. R. CIV. P. 18b(b) (explaining when a judge must recuse themselves and lacking mention of demonstrable actual bias or prejudice).

196. TEX. R. CIV. P. 18b(b)(1).

197. *Drake v. Walker*, 529 S.W.3d 516, 528 (Tex. App.—Dallas 2017, no pet.) (internal quotation marks omitted) (quoting *Hansen v. JP Morgan Chase Bank, N.A.*, 346 S.W.3d 769, 776 (Tex. App.—Dallas 2011, no pet.)).

198. *See id.* (testing, not for actual bias, but for whether a reasonable person would think the judge was biased).

199. *Indemnity Ins. Co. v. McGee*, 356 S.W.2d 666, 668 (Tex. 1962).

Harrison's recusal.<sup>200</sup> Nor is it surprising that after being informed of this ruling and of the basis for Stephens' seeking his recusal, Judge Glen Harrison entered a voluntary order recusing himself and requesting that another judge be appointed to preside over all matters in this case.<sup>201</sup>

#### IV. CONCLUSION

In considering the ethical dimensions of judicial use of social media, it is easy to focus on the obvious: the overt activity that crosses ethical boundaries like online commenting about cases, *ex parte* communications, and engaging in inappropriate commenting or communications with individuals. Sadly, such egregious examples of judicial misbehavior recur with regularity and attract media attention when they do.<sup>202</sup> However, more passive or benign conduct like following one side of a litigated matter on social media and/or liking, sharing, or retweeting their online posts is just as troubling and poses just as much of a threat to public confidence in the independence, integrity, and impartiality of the judiciary. And just like that portion of the iceberg lurking beneath the waves, it can be more difficult to discover.

In our current technology-driven world, we must be increasingly wary, not only of our own digital personas, but of those commenting on our posts. The role of being our "digital brother's keeper" is one that is increasingly

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200. Adversary Case No. 21-04021-elm, *In re Kerwin Stephens et al.*, Order Granting Motion to Remand (Nov. 19, 2021), Doc. No. 70 (copy on file with author).

201. Cause No. DC2013-0016, Voluntary Order of Recusal (Dec. 23, 2021) (copy on file with author).

202. See *Judge Rebuked for Sending Inappropriate Messages to Women Via Social Media*, WBIR.COM (Oct. 16, 2020), <https://www.wbir.com/article/news/local/judge-rebuked-for-sending-inappropriate-messages-to-women-via-social-media/51-37da05a6-fc91-4101-8d30-3ca1abcd5b1> [<https://perma.cc/NUU6-J3ZL>] (discussing the 2020 reprimand of Tennessee Judge Johnathan Lee Young for sending "inappropriate messages" to multiple women over a period of years, several of whom were litigants in his court); see also *Ottawa County Common Pleas Court Judge Sanctioned Over Improper Facebook Use*, 12ABC.COM (Aug. 17, 2021, 8:43 AM), <https://www.13abc.com/2021/08/17/ottawa-co-common-pleas-court-judge-sanctioned-over-improper-facebook-use/> [<https://perma.cc/XYH6-4U97>] (discussing the six month suspension issued by the Ohio Supreme Court to Ottawa County Judge Bruce Winters for communicating via Facebook with an offender with civil and criminal matters before the judge); see also *Ex-NC State Judge Censured for Sexual Misconduct on the Job*, ASSOCIATED PRESS NEWS (June 11, 2021), <https://apnews.com/article/government-and-politics-nc-state-wire-censures-sexual-misconduct-d0aab938012c73391128b9751176ddbc> [<https://perma.cc/GDH8-ZA9X>] (discussing the 2021 censure by the North Carolina Supreme Court of former District Court Judge C. Randy Pool for sexual misconduct in the form of inappropriate Facebook messages to thirty-five women).

placed on average citizens, and for lawyers and judges, it is a familiar burden to bear some measure of responsibility for those under our supervision. In the digital age, with the potential for posts to go viral and destroy reputations with blinding speed, this ethical duty for lawyers and judges has assumed new meaning and importance. Not only are we our digital brother's keeper, but we are also increasingly judged by the digital company we keep. For the religious conservative politician who inadvertently likes a tweet by a porn site or for the NFL team owner who mistakenly likes a tweet critical of his starting quarterback, such online faux pas can usually be laughed off as embarrassing one-offs. Judges, however, need to remain vigilant about their contacts in cyberspace and not be lulled into a false sense of security or anonymity.

As social media use has become more pervasive among the judiciary, jurists cannot afford the casual regard exhibited by most social media users. Every like, every share, and every follow can have meaning and serve as a reflection on that judge. This Article does not call for judges to retreat from the use of social media; instead, it urges a more responsible and vigilant embrace of these platforms. To maintain public confidence in the fairness of the justice system, we must continue to be concerned about not just avoiding actual bias, but about avoiding even the appearance of bias or partiality.