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Cynthia Gray
Director
Center for Judicial Ethics
cgray@ncsc.org

National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185

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Social media and judicial ethics: Part 2

by Cynthia Gray

Preface

This issue of the *Judicial Conduct Reporter* is Part 2 of a two-part article analyzing the advisory opinions and discipline decisions on social media and judicial ethics. It covers off-bench conduct: conduct that undermines public confidence in the judiciary, commenting on issues, abusing the prestige of office, providing legal advice, disclosing non-public information, charitable activities, political activities, and campaign conduct. Part 1, in the spring issue (<http://tinyurl.com/y99relfw>), was a general introduction to the topic and a discussion of issues related to judicial duties: “friending” attorneys, disqualification and disclosure, ex parte communications and independent investigations, and comments on pending cases. The two parts will be combined in a comprehensive paper that will be posted on the Center’s web-site in late 2017.

Introduction to Part 2

The code of judicial conduct’s restrictions on judges’ off-bench activities apply equally on social media as in other contexts. For example, under the general ethical standards of the code regarding promoting public confidence in the judiciary, judges have been disciplined for sexual misconduct on social media and for posting injudicious, negative, or unfairly critical comments. Similarly, as anytime a judge is writing or speaking, a judge must avoid social media posts on legal and other topics that might raise reasonable questions about her impartiality.

The prohibition on judges’ practicing law precludes judges from giving legal advice on social media, either in response to a specific question or in a general post that could be construed as legal advice. Judges are prohibited from disclosing non-public information on social media even in a broad, general post.

When using social media, judges must not post anything that could be construed as using the prestige of office to advance their private interests. For example, that rule may limit a judge’s ability to “like,” review, or recommend lawyers, events, businesses, and movies on social media at least when her judicial identity is disclosed.

Just as judges may be members and officers of, volunteer with, or attend events for most non-profit organizations, they may also “like” or “follow” most civic or charitable organizations on social media as long as

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the organization is not discriminatory and its goals and activities do not undermine judicial independence, integrity, or impartiality. A judge may not, however, solicit funds for organizations on social media through, for example, posts that encourage people to attend fund-raising events.

The restrictions on judges' political activities apply on-line as well as in traditional forums. For example, to comply with the prohibition on political endorsements, a judge should not "like" the Facebook page of a political organization or candidate.

Social media is an approved communications and fund-raising tool for judicial candidates, but all the rules apply on social media that apply to traditional campaigning. Therefore, a judicial candidate should delegate at least the fund-raising aspects of a social media page to his campaign committee or staff to comply with the prohibition on personal solicitation. A candidate must also review and approve the content of all campaign statements before posting to ensure compliance with the rules limiting campaign speech.

Public confidence

The judicial ethics advisory opinions about social media emphasize the general rules that are included in the code of judicial conduct because the code cannot anticipate and specifically enumerate all possible forms of misconduct. Rule 1.2 provides that, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . ." Canon 1 requires that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 3.1(C) provides that, "when engaging in extrajudicial activities, a judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." (Unless otherwise indicated, references in this article to codes, rules, or canons are to the American Bar Association 2007 *Model Code of Judicial Conduct*.)

Judges have been disciplined for social media activity that violated these general standards even if no violation of a more specific code provision was found. For example, the obligation to promote public confidence and other general rules have been cited in cases in which judges have been sanctioned for sexual misconduct on social media. *See In the Matter of Archer*, Final judgment (Alabama Court of the Judiciary August 8, 2016) (<http://tinyurl.com/jjx9cdj>) (judge exchanged sexually explicit messages and photos on Facebook, often during office hours and from court offices, with a woman whom he had met in his official capacity); *In the Matter of Fowler*, Public admonishment (West Virginia Judicial Investigation Commission March 14, 2014) (<http://tinyurl.com/jc82567>) (magistrate exchanged sexually explicit Facebook messages with a woman who appeared before him in court).

Judges have also undermined public confidence through injudicious, negative, or unfairly critical posts on social media. For example, the

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California Commission on Judicial Performance publicly sanctioned a judge for posting on the bar association Facebook page that a judicial candidate had had “sex with defense lawyer whike [sic] shw [sic] is a DA on his cases and nobody cares. Interesting politics,” with knowing or reckless disregard for the truth of that statement. *In the Matter Concerning Ferguson*, Public admonishment (California Commission on Judicial Performance May 31, 2017) (<http://tinyurl.com/y8yztthr>). See also *In the Matter of Bennington*, 24 N.E.3d 958 (Indiana 2015) (judge posted, “Must be nice to take such an expensive trip but not pay your bills. Just sayin,” on the Facebook page of the girlfriend of her children’s father).

Discussing issues

What judges can and cannot say on social media about legal and non-legal issues parallels what they can and cannot say in more traditional formats and forums. Rule 2.10(B) provides that, “a judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Thus, the Utah committee advised that a judge may post comments and content on legal topics on social media “unless the comments show a bias toward an issue that may come before the judge’s court . . .” *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). The committee noted that, “[a]lthough social media have a potentially much broader public reach, it would be difficult to conclude that a judge’s activity in one public setting is prohibited if performed in a different setting. It would be difficult to state, for example, that the same comments made in a public meeting would be prohibited if posted on a public internet bulletin board.” The Massachusetts committee cautioned that a judge on social media should “err on the side of caution and be aware that posts a judge-user considers neutral may nonetheless lead a reasonable person to question the judge’s impartiality.” *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>).

Advisory opinions about speech in other contexts may by analogy provide guidance about judges’ social media discourse. For example, if a judge may publicly support or oppose a proposed constitutional amendment regarding drug treatment in lieu of incarceration in newspaper editorials, on radio and television talk shows, in presentations to civic, charitable, and professional organizations, on panel discussions with officials at public meetings, and in meetings with executive or legislative bodies or officials (*Ohio Advisory Opinion 2002-3* (<http://tinyurl.com/y9xxt5c8>)), the judge may also do so on social media. Conversely, if a judge may not speak to groups or send letters to voters to encourage passage of a school levy (*Washington Advisory Opinion 1995-3* (<http://tinyurl.com/ycnq7z63>)), or publish an article about the effect and constitutionality of tort reform legislation (*Florida Advisory Opinion 2000-2* (<http://tinyurl.com/yajujqwn>)), the judge may not tweet about those issues.

“What judges can and cannot say on social media about legal and non-legal issues parallels what they can and cannot say in more traditional formats and forums.”

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A judge asked the Massachusetts judicial ethics committee about his use of Twitter to, for example, post about “racism and implicit bias in the courts.” The responding opinion noted that “Massachusetts court leaders comment on and are taking steps to address these important concerns,” but cautioned that the judge’s “posts must serve a legitimate educational or informational purpose” without “individually or as a pattern” leading a reasonable person to conclude the judge has a predisposition or bias that calls his impartiality into question. *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>).

The judge also posted on selected cases, often concerning racial discrimination or police misconduct, including issues the judge regularly confronted, such as assessing the credibility of police officers. The committee stated that, “[r]eporting court decisions, even on selective topics, is consistent with the Code, but only if the reports do not compromise or appear to compromise [the judge’s] impartiality.” To avoid conduct that a reasonable person may regard as demonstrating partiality, the committee advised, the judge should Tweet, retweet, or link only “from official or neutral sources such as court websites or libraries,” not “case reports from persons or organizations with legal opinions that are clearly on one side of contested and highly-charged legal issues,” or even reports by “mainstream media,” which “may contain commentary or reaction favoring one point of view.”

The inquiring judge had a public Twitter account that disclosed his occupation, used a Twitter handle with “judge” followed by his surname, and included a photo of the judge wearing his judicial robe. The Massachusetts committee emphasized that its opinion did not necessarily apply to “the use of a Twitter account by a judge who does not disclose his or her occupation as a judge,” suggesting whether a judge may post opinions on an issue may depend on whether his social media page identifies him as a judge. However, the committee also noted that the code “applies to judges in their private as well as public spheres.” In contexts other than social media, committees have emphasized that anonymity does not mean the code does not apply. *See, e.g., Colorado Advisory Opinion 2017-1* (<http://tinyurl.com/ybck8cvy>) (a judge may not contact her federal congressional representatives to express approval of or dissatisfaction with federal legislation or cabinet appointments even if the judge does not reveal that she is a judge); *New York Advisory Opinion 2016-85* (<http://tinyurl.com/y734dquc>) (a judge may not engage anonymously in otherwise prohibited political activity, such as publishing partisan political literature).

In addition, the social aspect of social media requires a judge to consider whether her posts, however appropriate by themselves, might associate her with inappropriate material generated by others. The federal advisory committee explained that, “if a judge comments on a blog that supports a particular cause or individual, the judge may be deemed as endorsing that position or individual” and, therefore, cautioned judges “to analyze the post, comment, or blog in order to take into account the Canons that prohibit the judge from endorsing political views, engaging in dialogue that demeans the prestige of the office, commenting on issues that may arise

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before the court, or sending the impression that another has unique access to the Court.” *U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>). Similarly, the Massachusetts committee cautioned a judge to consider whether retweets, “likes,” the accounts the judge follows, and the accounts that follow the judge as well as the judge’s own tweets would cause a reasonable person to question the judge’s impartiality. *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>).

The Arizona committee also advised that on social media, “[a] judge should avoid participating in or being associated with discussions about matters falling within the jurisdiction of his or her court,” including “postings by others regarding high profile cases or legal issues that could come before the court.” *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>). The Utah committee, however, stated that a judge may follow a blog on legal or political issues that is also followed by lawyers or politicians and need not continually monitor the contents and comments to prevent association with material that might reflect poorly on the judiciary. *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>).

Blogging

A judge may write about personal opinions, activities, and experiences on an on-line blog as long as the judge is careful not to violate the code provisions relevant to communications by judges. The Arizona committee, for example, stated that a judge must ensure that none of her blog posts would negatively affect judicial proceedings, be perceived as prejudiced or biased, or necessitate frequent disqualification. *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>). See also *New York Advisory Opinion 2010-138* (<http://tinyurl.com/kwhxw15>).

The Florida advisory committee approved a judge’s plan to publish a blog that would alert readers to new state appellate decisions because the judge did not propose to editorialize, criticize, or otherwise evaluate the opinions but only to briefly describe them. *Florida Advisory Opinion 2012-7* (<http://tinyurl.com/6qed45e>). Noting it had frequently allowed judges to speak, write, or teach, the committee stated it would not make a distinction based on the technology used, although it did warn the judge to exercise caution and expect constant public scrutiny. Acknowledging it was “not practicable to list all the provisions of the Code that could apply,” the committee directed the judge to “carefully examine all provisions of the Code that relate to the blog and its topics, to insure that the judge is not publishing on the blog something the judge could not ethically say in person.” Finally, noting “that an interactive blog may invite inappropriate comment,” the committee suggested that the judge consider adding a disclaimer that he does not “endorse or vouch for” comments by others and that their comments do not represent his views.

The Washington advisory committee permitted a judge to have a blog promoting “a more fair, just and benevolent society” but suggested that the judge include a disclaimer that the opinions expressed in his posts “are only those of the author and should not be imputed to other judges.” *Washington Advisory Opinion 2009-5* (<http://tinyurl.com/y8bjnlve>). The committee also

“A judge may write about personal opinions, activities, and experiences” on an on-line blog as long as the judge is careful not to violate the code of provisions relevant to communications by judges.”

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advised the judge to describe on the blog the constraints on his conduct, such as the prohibitions on commenting on pending cases and ex parte communications.

Further, the committee recommended that the judge review any comments by others before they are published if possible, regularly monitor the comments to ensure that the discussion does not move into a prohibited topic, and consider “whether readers might perceive that the judge’s impartiality is impaired by the volume and content” of the comments. The committee stated that the judge could respond to others’ comments but should consider “the impression that may be conveyed” and tailor his responses to avoid any questions about his impartiality.

The Connecticut advisory committee allowed a judge to be an expert, with her judicial position identified, on a non-profit, non-partisan organization’s electronic “answer board” established to provide journalists with information on legal and constitutional topics. *Connecticut Advisory Opinion 2011-14* (<http://tinyurl.com/ydf8m8n6>). However, the committee cautioned, the judge’s answers must be factual and instructive, without expressing her opinion, indicating a predisposition with respect to particular cases, or providing legal advice. The committee also directed the judge to retain the right to review and pre-approve the biographical information listed on the answer board or used to promote it, to monitor the web-site to stay abreast of new features, and to ensure it does not link to advocacy groups or commercial entities.

Legal advice

Rule 3.10 provides that a full-time judge “shall not practice law.” Thus, a judge cannot respond if other users “upon learning of the judge’s identity, . . . informally” ask her for legal advice on social media. *New York Advisory Opinion 2008-176* (<http://tinyurl.com/y9nghct>). *Accord Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>); *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>); *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). See also *In re Bass*, Public reprimand (Georgia Judicial Qualifications Commission March 18, 2013) (<http://tinyurl.com/29xumav>) (judge in a private Facebook chat advised a woman how her brother should get his DUI matter into the judge’s court where he would “handle it”).

Further, applying the restriction broadly, advisory committees have cautioned judges against general posts that could be construed as legal advice. For example, the Massachusetts committee advised that, although a judge may post “purely educational” tweets advising “trial lawyers on trial practice (e.g., preparing clients to testify, delivering closing arguments, conducting cross-examination),” the posts must “offer only practice tips and not legal advice.” *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). See also *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/>

“[A] judge cannot respond if other users ‘upon learning of the judge’s identity, . . . informally’ ask her for legal advice on social media”

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com/mywqho5) (a judge may not post comments and content on legal topics that could be considered legal advice).

The West Virginia advisory committee stated that a judge should not post videos in which she answers questions about family law on her campaign web-site because that would constitute the practice of law and might result in ex parte communications. *West Virginia Advisory Opinion 2016-1* (<http://tinyurl.com/y9w89yfl>). The committee stated that the judge could post videos about child support calculations, procedures, and statutes but must ensure that her explanations “do not cross the line into legal advice or discussions concerning pending or impending matters.” The committee also warned that such videos were likely to generate follow-up questions that the judge could not answer. *See also Judicial Discipline and Disability Commission v. Maggio*, 440 S.W.3d 333 (Arkansas 2014) (judge explained how to beat a DWI charge on a public on-line fan-site).

Non-public information

Rule 3.5 provides that “a judge shall not intentionally disclose or use non-public information acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.” (According to the terminology section, non-public information includes, “but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in dependency cases or psychiatric reports.”) That prohibition applies to the use of non-public information on social and electronic media. *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/zvd9299>).

The advisory committee for federal judges explained that any post on a social networking site violates the rule if it “broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations.” *U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>). The committee stated that even communications that are not case-specific and only comment “vaguely on a legal issue without directly mentioning a particular case” may raise concerns about confidentiality and impropriety.

Prestige of office

Rule 1.3 of the code of judicial conduct provides: “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” Thus, when using social media, a judge “must be careful not to post any material that could be construed as advancing the interests of the judge or others.” *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hgo>). *Accord Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>). For example, the Texas State Commission on Judicial Conduct publicly reprimanded a judge whose Facebook profile, which identified her as a judge, included links, photos, and posts promoting her daughter-in-law’s real

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estate business and a former judge's wedding officiate business. *Public Reprimand of Uresti and Order of Additional Education* (Texas State Commission on Judicial Conduct October 11, 2016) (<http://tinyurl.com/zwtm3ql>).

The Massachusetts committee advised that a judge must not endorse commercial entities by liking or following them on Facebook, for example. *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). See also *Order of private reprimand* (Kentucky Judicial Conduct Commission April 2, 2015) (<http://tinyurl.com/y86e3unb>) (judge "liked" the Facebook pages of lawyers, law firms, and candidates). The New Mexico advisory committee noted:

- "With Yelp, a judge may be inadvertently advancing the economic interests of a restaurant upon giving his or her review,"
- "With Facebook, a judge may be inadvertently advancing the views of attorneys and parties by 'liking' or commenting on other users' posts," and
- "With Twitter, a judge may . . . be inadvertently affecting the views of attorneys and parties by re-tweeting tweets made by users."

New Mexico Advisory Opinion Concerning Social Media (2016) (<http://tinyurl.com/lra5ykb>). The committee noted that those actions "raise concerns about the potential abuse of the prestige" of office, although the opinion did not state whether those concerns were sufficient to preclude the judge from posting reviews, "liking," and retweeting.

The committee for federal judges explained that, when a judge on social media supports "a particular establishment known to be frequented by lawyers near the courthouse," the judge uses his office to aid the success of the establishment if the judge "list[s] his or her affiliation with the court" on the page. *U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>). The opinion's reference to listing a court affiliation suggests that a judge may review or "like" a business without abusing the prestige of office if she is not identified as a judge on the social media site. Similarly, the Utah committee stated that a judge could use a pseudonym or screen name "when posting something such as a restaurant review" but that a review in which a judge uses her title may create the appearance that the judge is using the prestige of the judicial office to advance the interests of a for-profit entity, noting "[t]here is no legitimate reason for using the title in such a situation." *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>).

However, the Utah committee stated that a judge may "follow" or "like" law firms or others in the legal profession although the opinion did not consider whether "liking" was an abuse of the prestige of office but only whether it created an appearance of bias. *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). The committee compared "liking" a law firm to having lunch with attorneys or attending a firm's open house, which it has allowed.

Further, the Utah committee advised that a judge may not on LinkedIn recommend attorneys who regularly appear before her. *Utah*

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Thursdays.

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Informal Advisory Opinion 2012-1 (<http://tinyurl.com/mywqho5>). The committee explained that a LinkedIn recommendation is a “stronger statement” than being a ‘friend’ on Facebook, or ‘liking’ the attorney “because the recommendation may be perceived as an endorsement of the person’s skills and credibility” and its purpose is to promote the person’s professional career. Such a recommendation would require the judge’s disqualification when the attorney appeared in a case. The committee did create exceptions that allow a judge to provide LinkedIn recommendations for law clerks and others who have worked for her, attorneys who do not appear before her, and individuals in non-legal professions. *See also Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>) (a judge may use LinkedIn to recommend a former law clerk to a specific prospective employer but not to recommend lawyers who regularly appear before him or other professionals). The New Mexico committee stated that a judge’s “recommendation” or “endorsement” of someone on LinkedIn “may be considered akin to a letter of recommendation, expressing favor toward that individual over others, and requesting that someone act upon that favor,” but the opinion did not definitively advise whether LinkedIn recommendations were permitted or prohibited. *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). *See also New York Advisory Opinion 2015-103* (<http://tinyurl.com/y734dquc>) (a judge may not write a review of her lawyer’s services for use on a public web-site, even if the review is anonymous and makes no reference to her judicial office); *North Carolina State Bar Formal Ethics Opinion 2014-8* (<http://tinyurl.com/lgv2ohg>) (a lawyer may not accept an endorsement or recommendation from a judge on LinkedIn).

Charitable activities

Although the code of judicial conduct allows and even encourages judges to engage in civic and charitable activities, there are restrictions, particularly on “activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” Rule 3.1(C). The same permissions and prohibitions apply on social media. Thus, a judge may “‘like’ or ‘follow’ a civic organization’s Facebook page” (*Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>)), be a member of a Facebook page used by members of a voluntary bar association to communicate among themselves about the organization and non-legal matters (*Florida Advisory Opinion 2010-6* (<http://tinyurl.com/n38kjmw>)), and tweet “upcoming and past bar events and other news of general interest to members of the Bar (e.g., the establishment of new specialty courts, the election of bar leaders, the nomination of judges),” including “retweets from bar associations, law schools, courts, and other organizations and institutions dedicated to maintaining high standards and professionalism among the bench and bar.” *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>). However, a judge may not join Facebook groups that invidiously discriminate on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation

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in violation of Rule 3.6(A). *Massachusetts Advisory Opinion 2011-6* (<http://tinyurl.com/y9kae7ob>).

Committees advise that a judge should not form an on-line relationship with an organization that may convey an impression that the organization is in a position to influence the judge, although the opinions do not specifically describe what types of organizations or relationships a judge should avoid. *Connecticut Informal Advisory Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjkg>). More specifically, the Ohio committee cautioned that a “judge must not foster social networking interactions with individuals or organizations” that “will erode confidence in the independence of judicial decision making,” for example, “advocacy groups interested in matters before the court” *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>).

The Utah committee stated that, “if a judge happens to review a website with which the judge is associated, and the website contains questionable content, the judge may be required to disassociate from the site.” *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). Absent a more specific fact situation, the committee declined to address “what might be considered ‘association’ and what might be considered questionable content” The committee also stated that a judge does not have a responsibility to continually monitor the comments and web-page contents of an entity with which the judge is associated on-line to ensure that the judge is not associated with material that might reflect poorly on the judiciary. *See also Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>) (a judge cannot “reasonably be expected to monitor all postings and comments on a Facebook page” of an organization that the judge follows or likes); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>) (posts on an organization’s social networking site “could bear upon subject matter or pending or impending cases that could infringe upon the judge’s impartiality”).

Fund-raising

Under Rule 3.7(A)(2), a judge may not personally solicit contributions to charitable organizations. Noting that many charitable organizations use social media to raise funds, the New Mexico committee stated that, although a judge may be identified on social media as a director of an organization, an appearance that a judge was soliciting funds for an organization on social media would be improper. *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). Although the code allows a judge to solicit contributions to charity from family members and judges over whom she does not exercise supervisory or appellate authority, the Maryland committee concluded that those exceptions did not allow a judge to solicit those individuals through social media posts because those posts would be “accessible not only to the judge’s online contacts, but potentially, to thousands of people within the social network.” *Maryland Opinion Request 2014-30* (<http://tinyurl.com/y9fvcyut>). *See also Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>) (all the code’s limitations

“Committees advise that a judge should not form an on-line relationship with an organization that may convey an impression that the organization is in a position to influence the judge.”

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apply to a judge's social media involvement including the prohibition on being involved in charitable fund-raising); *Private Reprimand of a Justice of the Peace* (Texas State Commission on Judicial Conduct April 23, 2013) (<http://tinyurl.com/create.php>) (judge solicited funds for a non-profit corporation through the corporation's web-site and Facebook posts).

Two advisory committees issued opinions on judges' participating in a social media based fund-raising campaign when the "ice bucket challenge" to fund ALS research went viral in 2014. In the "ice bucket challenge," a participant had a bucket of ice dumped on his head after which he challenged someone else to donate money or have a bucket of ice dumped on her head. (Although the person challenged could choose between donating money or having ice dumped over him, most participants did both.) The challenge and the dumping were recorded and posted on the internet.

The New York committee advised that a judge could not participate in the ice bucket challenge because she would be required to publicize her own donation and publicly solicit others to donate in violation of the code's fund-raising restriction. *New York Advisory Opinion 2014-132* (<http://tinyurl.com/y7788aad>). "[E]ven if the judge refrained from actually 'nominating' specific individuals," the committee added, "posting the required video would be readily perceived as the judge's promotion of the fund-raiser, which is similarly prohibited . . ."

The Maryland committee was less strict, advising that a judge could participate in the ice bucket challenge but only if it was clear that she was acting in a personal capacity, not as a judge. *Maryland Opinion Request 2014-30* (<http://tinyurl.com/y9fvcyut>). Thus, the committee stated, a judge could respond to a challenge from a family member or friend that did not disclose her judicial office. However, if the challenger specifically identified the judge as a judge, including her court, the committee concluded, the judge could not post her response although she could make a donation and let her challenger know "without recourse to social media, and without publicly challenging others."

Judges have been disciplined for social media posts about fund-raising events. See *In the Matter of Johns*, 793 S.E.2d 296 (South Carolina 2016) (judge posted information about a fund-raiser for a local church on his Facebook page, which identified him as a judge, in addition to other inappropriate posts); *Private Warning and Order of Additional Education of a Municipal Court Judge* (Texas State Commission on Judicial Conduct August 23, 2012) (<http://tinyurl.com/yd6yer2w>) (numerous entries on a Facebook page indicated to the public that the judge was an organizer for a charitable fund-raiser).

The Missouri Supreme Court publicly reprimanded a judge for, in addition to other misconduct, numerous posts on Facebook about charitable fund-raising events that noted his support for the organizations and encouraged others to contribute. *In re Prewitt*, Order (Missouri Supreme Court November 24, 2015) (<http://tinyurl.com/hgzmqog>). For example, on a public Facebook page that identified him as a judge, he posted:

- A photograph of the Ray of Hope Pregnancy Care Ministries sign with the statement, "I am happy to be supporting Ray of Hope Pregnancy

"Two advisory committees issued opinions on judges' participating in a social media based fund-raising campaign when the 'ice bucket challenge' to fund ALS research went viral in 2014."

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Center again at their fundraising dinner. Even if you didn't attend, consider donating to this wonderful organization."

- A copy of a flier with the caption, "In celebration of the 20th Anniversary of Tri-County Christian School, supporters are being asked to commit to giving \$20 a month for the next 20 months to help pay for two new teachers next year. I've already committed to one of these partnerships. How about you?"
- A photograph with the caption, "The Macon Jaycees are selling drinks at the Demolition Derby. Come out and enjoy the Derby and support this good organization by buying your drinks from them – at the Macon County Fairgrounds."
- A photograph of volunteers carrying a banner for the "Survivors Celebrating Life" and the caption, "Enjoying good friends, food and entertainment at the Macon County Relay for life tonight. Come out and bid on me at the Choose Your Torture auction – at Macon High School."
- A photograph with the caption, "It was my pleasure to once again donate items in support of Relay for Life of Macon County – MO. Please come out and support our effort against cancer at the events on Saturday June 14, starting at 6 p.m. at the Macon R-1 parking lot," followed by the organization's post stating, "Thank you Philip Prewitt for two great Relay Auction Items."
- A photograph with the caption, "Macon Youth Football Cheerleaders are having a bake sale fundraiser at Walmart. Come out and support them and get some really good food like we did – at Walmart Macon – E Briggs Dr."

The judge's participation in the events was not necessarily prohibited (buying something at a bake sale, for example) although some of the specific acts may have been (being auctioned off at "choose-your-torture" fundraiser, for example). However, all of the posts violated the code because the judge was urging others to participate and/or donate funds.

Political activities

The code of judicial conduct limits judges' political activities, although the restrictions vary from state-to-state depending on how the state's judges are chosen and even within a state depending on the type of judgeship and whether a judge is currently running for office. Regardless what the restrictions are, the rules apply on-line.

Thus, advisory committees have stated that judges may not on social media:

- "like" or become a "fan" of a political movement (*U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>));

"Judges have been disciplined for social media posts about fund-raising events."

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- “like” a political organization’s Facebook page (*Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>));
- “like” or “friend” any political Facebook page (*New York Advisory Opinion 2015-121* (<http://tinyurl.com/kqbpmcb>));
- follow the Twitter accounts of political parties on a public account (*Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>));
- create links to political organizations’ web-sites (*California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>); (*Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>));
- post pictures that affiliate the judge with a political party or partisan political candidate (*U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>));
- circulate an on-line invitation for a partisan political event (*U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>));
- post materials in support of or endorsing an issue or a candidate (*U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>)); or
- post a comment on proposed legislation or a controversial political topic (*Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>)).

Political endorsements

Most codes of judicial conduct prohibit judges from endorsing political candidates, and judges have been sanctioned for violating that rule on social media. For example, a Mississippi judge was reprimanded for, in addition to other misconduct, posting: “Cast your vote in the Senate District 16 Special Election. I will be voting for Angela Turner Lairy! . . . Let’s not lose this seat!” *Commission on Judicial Performance v. Clinkscales*, 191 So. 3d 1211 (Mississippi 2016). See also *Inquiry Concerning Krause*, 166 So. 3d 176 (Florida 2015) (judge asked her friends on social media to help her judicial-candidate husband correct perceived misstatements made by his opponent); *In the Matter of Romero* (New Mexico Supreme Court February 13, 2015) (<http://tinyurl.com/y9u497t7>) (judge endorsed candidates for public office on Facebook and posted their campaign materials); *In the Matter of Johns*, 793 S.E.2d 296 (South Carolina 2016) (judge, in addition to other misconduct, made extensive political posts, including ones in which he appeared to endorse a presidential candidate, on a Facebook page that identified him as a judge).

In addition, conduct commissions and advisory committees have construed “liking” and equivalent indications of support or approval on social media as endorsements prohibited by the code. See *Kansas Commission on Judicial Qualifications 2012 Annual Report* (<http://tinyurl.com/y9tevg5n>) (judge “liked” a comment on a candidate’s Facebook page); *Order of private reprimand* (Kentucky Judicial Conduct Commission December 5, 2014) (<http://tinyurl.com/ydck694v>) (judge “liked” the Facebook pages of a judicial

“[C]onduct commissions and advisory committees have construed ‘liking’ and equivalent indications of support or approval on social media as endorsements prohibited by the code.”

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candidate, in addition to other misconduct); *Order of private reprimand* (Kentucky Judicial Conduct Commission April 2, 2015) (<http://tinyurl.com/y86e3unb>) (judge “liked” the Facebook pages of candidates, lawyers, and law firms).

The Massachusetts advisory committee stated that, “[a] judge must not use Facebook to endorse (e.g., ‘like’ or ‘follow’) . . . political candidates, or otherwise violate the Code’s restrictions on abusing the prestige of judicial office and participating in political activity.” *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>). See also *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>) (a judge with a public Twitter account must avoid following the Twitter accounts of political candidates); *New York Advisory Opinion 2015-121* (<http://tinyurl.com/kqbpmcb>) (a judge may not “like” or “friend” any political Facebook page from her personal Facebook account); *U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>) (a judge should avoid “liking” or becoming a “fan” of a political candidate).

Without expressly prohibiting the act, the ABA committee suggested that a judge should be aware that clicking the “like” button on a candidate’s site “could be perceived” as an endorsement. *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). The opinion noted that, “[j]udges may privately express their views on judicial or other candidates for political office” and suggested a judge could manage privacy settings on social media sites to restrict those who have access to her page. However, as the ABA opinion noted elsewhere, “[j]udges must assume that comments posted to an [electronic social media] site will not remain within the circle of the judge’s connections.”

Two judicial ethics advisory committees have permitted judges to “friend” elected officials or candidates while prohibiting judges from “liking” an election-related Facebook page. Noting that many judges are friends in the real world with individuals who are running for office, the Utah committee stated that a judge may also be “friends” with a candidate in the virtual world without violating the prohibition on endorsements as long as the judge was careful not to make any statements on the candidate’s social media page that might create the appearance of an endorsement. *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). Further, the committee advised that a judge may not be a friend of a candidate on “a Facebook page specifically designed to promote the individual’s candidacy,” as that may constitute endorsement.

Similarly, the Arizona committee stated that, if a state representative, for example, is running for re-election, a judge “may not be a ‘friend’ of the representative’s campaign committee’s Facebook page or ‘like’ that page, as such associations would indicate that the judge supports and is endorsing that individual’s reelection.” *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>). However, the committee concluded, “friending” an elected state representative’s official Facebook page is not a prohibited endorsement, although it could raise a disqualification issue if the representative is a litigant, lawyer, witness, or other participant in a case.

Judicial election campaigns

In states where judges are elected, social media has become a “tool to raise campaign funds and to provide information about the candidate.” *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). Thus, a judicial candidate may on her personal social media page link to her judicial campaign web-site or social media page (*Louisiana Advisory Opinion 271* (2016) (<http://tinyurl.com/gqcgbmcc>)) or request that friends vote for her (*Florida Advisory Opinion 2016-13* (<http://tinyurl.com/l96nrrz>)) or “like” or “share” her campaign page. *New York Advisory Opinion 2013-126* (<http://tinyurl.com/lzzboob>); *North Dakota Advisory Opinion 2016-2* (<http://tinyurl.com/yc95hy5e>). See also *New York Advisory Opinion 2013-126* (<http://tinyurl.com/lzzboob>) (a judge may use an e-mail signature block on her personal e-mail that states, “Please Like us on Facebook,” identifying her campaign committee’s name).

Further, because the code of judicial conduct “does not address or restrict a judge’s or campaign committee’s method of communication but rather addresses its substance,” a judicial candidate’s campaign committee may establish social networking accounts and allow visitors to list themselves as “fans” or supporters of the candidate. *Florida Advisory Opinion 2009-20* (<http://tinyurl.com/ylrw9zm>). The Florida committee concluded that lawyers who practice before a judge may be fans of the judge’s campaign page even though the committee in previous opinions had prohibited judges from being Facebook “friends” with lawyers who appear before them. The distinction, the committee explained, is that, unlike a “friend” request on a personal page, on a campaign’s social networking site, the “judge or the campaign cannot accept or reject the listing of the fan,” and, therefore, “the listing of a lawyer’s name does not convey the impression that the lawyer is in a special position to influence the judge.” *Accord ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). Similarly, because a Twitter account holder does not select who follows her “tweets,” the Florida advisory committee approved a judge’s plan to use Twitter as a tool in her re-election campaign. *Florida Advisory Opinion 2013-14* (<http://tinyurl.com/kxms2dj>). The opinion did advise the judge not to create a list of followers.

The judicial ethics opinions on judicial campaigns and social media seem to assume, without expressly requiring, that a campaign page will be separate from a candidate’s personal or judicial page. The Missouri committee advised that “when a judge chooses to use social media as part of the judge’s election campaign, best practice would suggest that a separate public social media site be used.” *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>).

Restrictions

A judicial campaign’s social media efforts must comply with the code of judicial conduct. The restrictions on judicial campaigns vary from state-to-state but apply to all judicial candidates, both incumbent judges running for re-election, retention, or for a different judicial office and non-judges

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running for judicial office. The model code restrictions (Rule 4.1) that seem particularly applicable to social media prohibit a judicial candidate from:

- Making a false or misleading statement knowingly or with reckless disregard for the truth;
- Making a statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court;
- Making pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office in connection with cases, controversies, or issues that are likely to come before the court;
- Publicly endorsing or opposing a candidate for any public office;
- Making speeches on behalf of a political organization;
- Soliciting funds for a political organization or a candidate for public office;
- Personally soliciting or accepting campaign contributions other than through a campaign committee;
- Publicly identifying as a candidate of a political organization; and
- Seeking, accepting, or using endorsements from a political organization.

Thus, a judicial candidate's campaign social media page may not endorse or solicit funds for another candidate because the judicial candidate may not do so under Rule 4.1(A)(3). *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). The ban on endorsements includes any communication of approval or support, such as "liking" another candidate's social media page. See *In the Matter of Cohen*, Agreed order of public reprimand (Kentucky Judicial Conduct Commission July 21, 2014) (<http://tinyurl.com/pyx59mc>) (judicial candidate "liked" a Facebook post that publicly endorsed a candidate for public office and made a contribution to a candidate).

Under Rule 4.1(B) and Rule 4.2(A)(3), a judicial candidate must "take reasonable measures to ensure" that his campaign committee does not do something that is prohibited for the candidate (except for fund-raising) and must review and approve the content of all campaign statements and materials before they are disseminated. Thus, a judicial candidate is responsible for what is placed on social media on her behalf even if she delegates her campaign's social media component to her campaign committee or a consultant. See *Florida Advisory Opinion 2012-15* (<http://tinyurl.com/k2ugh64>); *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>).

"A judicial candidate's campaign committee may establish social networking accounts and allow visitors to list themselves as 'fans' or supporters of the candidate."

Solicitations

Except through a campaign committee, a judicial candidate cannot solicit campaign contributions (Rule 4.1(A)(4)), and, therefore, a candidate cannot solicit contributions on a social media page. The West Virginia Supreme Court of Appeals sanctioned a former judicial candidate for posting on his personal Facebook page, “I’m asking all my friends on here to visit my FB page, Edward Kohout Monongalia County Circuit Judge and please try to send us a contribution, whatever you can comfortably send. Checks payable to Ed Kohout for Judge . . .” *In the Matter of Kohout*, Order (West Virginia Supreme Court of Appeals October 7, 2016) (<http://tinyurl.com/hu5mggh>). In addition, in posts on a separate campaign Facebook page, the candidate had stated, “Anyone who wants to donate money to the campaign can make the check payable to ‘Ed Kohout for Judge,’” and, “Folks. I’m shameless[ly] asking for campaign contributions. The electioneering starts in January so I’m gonna need to buy signs etc. I’d appreciate any help you can send.”

Because of the prohibition on candidates personally soliciting campaign contributions, several committees direct that any social media page that solicits contributions must be maintained by the candidate’s campaign committee, not the candidate. See *Florida Advisory Opinion 2010-21* (<http://tinyurl.com/ycgk8ohu>); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>); *New York Advisory Opinion 2007-135* (<http://tinyurl.com/ycgk8ohu>); *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). Further, the Florida committee directed that a judicial campaign site that solicits funds must clearly indicate that the candidate does not personally maintain it. *Florida Advisory Opinion 2012-15* (<http://tinyurl.com/k2ugh64>). See also *Florida Advisory Opinion 2010-28* (<http://tinyurl.com/mp9jvlx>) (a campaign web-site may place the word “contribute” under “volunteer, endorse, education, experience, family, and photos” only if the site is clearly managed by the committee and does not give the appearance that the candidate is managing the site or its content). Cf., *North Dakota Advisory Opinion 2016-2* (<http://tinyurl.com/yc95hy5e>) (a judicial candidate may participate in those aspects of maintaining social media pages that do not involve solicitation).

The Louisiana committee stated that, in linking her personal web-site or social media page to her campaign committee’s social media page, a judicial candidate should not mention campaign contributions but only “state something very general, such as: ‘To find out more about my campaign, visit my campaign committee’s website at the following link.’” *Louisiana Advisory Opinion 271* (2016) (<http://tinyurl.com/gqcgbmc>). A candidate may link to a campaign page that in turn links to a contribution page, the committee advised, but may not link directly to a contribution page or to an account that is used solely for fund solicitation.

Campaign speech

The Missouri judicial ethics committee advised that a judicial candidate’s social media site “should be limited to the judge’s identity, qualifications, present position or other facts that are relevant to allowing the voters to

“[A] judicial candidate must “take reasonable measures to ensure” that his campaign committee does not do something that is prohibited for the candidate.”

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make an informed decision.” *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>). Similarly, the New Mexico Supreme Court stated that a judge who is a candidate should not post any personal messages on a campaign social media page “other than a statement regarding qualifications.” *State v. Thomas*, 376 P.3d 184 (New Mexico 2016).

However, judicial candidates are not limited to those types of statements in campaign mailers, advertisements, and speeches, and, therefore, that interpretation of the rule seems an unduly narrow description of what a candidate may say on social media. For example, if a judicial candidate may accurately and fairly compare his record as an attorney to that of his opponent in a written advertisement (*North Dakota Advisory Opinion 2016-3* (<http://tinyurl.com/zly66cr>)), and may, within limits, respond to questionnaires about his personal views on issues such as same-sex marriage, parental notification, and school vouchers (*Florida Advisory Opinion 2006-18* (<http://tinyurl.com/y8pu4gyb>)), the judge should be able to do so on social media as well. Thus, the Florida committee approved a judge’s plan to use Twitter in her campaign by creating a specific hashtag for her candidacy and tweeting slogans, statements about her judicial philosophy, and blurbs about her background. *Florida Advisory Opinion 2013-14* (<http://tinyurl.com/kxms2dj>). The opinion did caution the judge not to re-tweet or mark as a “favorite” a “complimentary or flattering” comment “[n]o matter how innocuous” to avoid conveying or permitting “the tweeter to convey the impression that the tweeter is in a special position to influence the judge.”

On the other hand, on social media and elsewhere, a judicial candidate is required to “act in a manner consistent with the integrity and independence of the judiciary” under Rule 4.1(A) and is prohibited from “knowingly or with reckless disregard for the truth, mak[ing] any false or misleading statement” under Rule 4.2(A). Judges or former judicial candidates have been disciplined for violating those rules on social media. *See Public Warning of Wright and Order of Additional Education* (Texas State Commission on Judicial Conduct September 22, 2015) (<http://tinyurl.com/y8v43b8u>) (judge, in addition to other misconduct, posted a message to her campaign opponent on Facebook that stated, “[H]ere’s an Italian wish...‘bafongoo’ and that’s accompanied by a flick of the wrist under the chin. My spelling is phoenic [sic], I’ll let you figure out what that means”); *In the Matter of Kohout*, Order (West Virginia Supreme Court of Appeals October 7, 2016) (<http://tinyurl.com/hu5mggh>) (judicial candidate, in addition to other misconduct, described government receptionists as “dumbass colored women;” opined that “[t]oo many women taking men’s jobs try to be men when they oughta be home taking care fo[sic] kids;” described Middle Easterners as “Abab,” “Arab,” “camel bangers,” and “ragheads;” stated that “many black men beat their women” and “so many men run off” leaving “single white women and their white parents to raise the babies;” and stated that “white women who date black men are trash and ruined”); *In the Matter of Callaghan* (West Virginia Supreme Court of Appeals February 9, 2017) (<http://tinyurl.com/ycu96ge8>) (judicial candidate posted a campaign flyer on Facebook that had a “photo-shopped” photograph of President Obama with the

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candidate's opponent, the incumbent judge, and the description, "Barack Obama & Gary Johnson Party at the White House While Nicholas County loses hundreds of jobs").

Further, the Rule 4.1(A)(13) prohibition on "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office" applies on social media. For example, by analogy, if a candidate cannot say in campaign literature that she "will show you how to stick up for your rights, beat your landlord, ... and win in court!" (*In the Matter of Chan*, Determination (New York State Commission on Judicial Conduct November 17, 2009) (<http://tinyurl.com/yd384xap>)), or "[w]e must support our hard-working law enforcement officers by putting criminals behind bars, not back on our streets" (*Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003)), she cannot do so on Twitter.

Communications

Because the interactive nature of social media may invite inappropriate communications, a judge's campaign committee "must vigilantly scrutinize" comments on a campaign social media site to avoid any appearance that the judge is participating in such communications. *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). The New Mexico Supreme Court stated that a judge who is a candidate should not allow public comments on a social media page and should not engage in any dialogue there, "especially regarding any pending matters that could either be interpreted as ex parte communications or give the appearance of impropriety." *State v. Thomas*, 376 P.3d 184 (New Mexico 2016). See also *West Virginia Advisory Opinion 2016-1* (<http://tinyurl.com/y9w89yfl>) (a judge should not post videos in which she answers questions about family law on her campaign web-site because she would be engaging in the practice of law and "potentially" in ex parte communications).

The New Mexico committee suggested that a judge's campaign committee act as a "buffer" for the judge by removing any inappropriate communication without commenting or notifying the judge. *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). See also *Florida Advisory Opinion 2013-14* (<http://tinyurl.com/ycgslr4j>) (the "most sensible way to use Twitter as a campaign tool would be for the judge's campaign committee or manager to create and maintain the account," which would eliminate the potential for ex parte communication).

"On social media and elsewhere, a judicial candidate is required to "act in a manner consistent with the integrity and independence of the judiciary...."