

Social Media & Ethics

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SOCIAL MEDIA & ETHICS

PANEL

December 3, 2016

Hon. Laurel Myerson Isicoff (S.D. Fla.)

Hon. David Houston, III (ret'd)

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Hypo #1

[Hard to Believe]

Part A:

Judge Gee Whiz is presiding over a Chapter 7 case. She is amazed when she sees posted on a friend's Facebook page a picture of one of the creditors' counsel in an O.J. Simpson costume with the caption, "I make a killing on my cases, how about you?" Judge Whiz decides to share the picture and caption on her Facebook page.

Has Judge Whiz acted ethically?

Would it be ethical for a lawyer to post on his Facebook page a picture of his client in the costume?

Part B:

Judge Whiz also posts the following message on her Facebook page:

Having a great time on the bench. Just handled my first Chapter 11 case. Knew from day one how this one should turn out and it did. I'm so grateful that I could run my rulings by some buddies from my old firm. They're retired now, but they have a lot of experience and wisdom.

Has Judge Whiz violated any ethical rules?

Hypo #2

[Blog Away]

Part A:

Bill has become a blogger extraordinaire. He is constantly using his blogs, participating in chat rooms, and even using private postings to share his ideas regarding ongoing cases. Currently, he is posting articles criticizing a judge's handling of a case and claiming that the court has rigged the outcome. He has even gone so far as to post one of the court's decisions and dissect its inaccuracies line-by-line. Even though the judge issued a gag order in the case, Bill believes that just analyzing the law does not violate that order. He is also not particularly concerned about whether his criticisms of opposing counsel are a bit exaggerated.

- A. Does Bill's conduct violate the ethical rules?
- B. Is it protected by the First Amendment?

Part B:

Bill loves to drum up business. He currently advertises on group coupon websites and list "the daily deal" on his own website. He invites viewers to email him the nature of their concerns and he will give him some general information as to what they should do next.

Is Bill's use of these websites proper?

Hypo #3

[Just Being Friendly]

Florrie Flevinson works as the administrative assistant for a judge. She frequently uses the Internet to investigate the background of the lawyers and witnesses who appear before the court. She just wants to know their reputation in the community. Her judge has also asked Florrie to “Google” the background of potential law clerks.

Attorney Hewstone is beating the bushes to find witnesses for his case. He asks his associate to go on social media sites and reach out to individuals who used to work for the company. His approach has been quite successful. Not only has he found new witnesses for his side of the case, but he has also been able to engage in discussions with witnesses who will likely be called by the other side.

- A. Did Flevinson act ethically?
- B. Did Hewstone act ethically?

Hypo #4

[Rate Your Judge]

One of Rune's favorite activities is to go on AVVO/Linked In and other websites that evaluate attorneys and judges. She regularly poses as someone else and gives herself top rankings. She then rates, and asks her friends to rate, her opposing counsel and the judges before whom she appears. For judges who don't rule her way, she skewers them. For judges who rule in her favor, she showers them with praise. As for other lawyers, Rune gives them favorable ratings if they send business to her. Otherwise, they get failing marks.

Has Rune acted ethically?

Applicable Authorities

(Partial list)

Link to the Committee's Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees (April 2010):

<http://jnet.ao.dcn/social-media-resource-packet>

Code of Judicial Conduct, Canon 2: Appearance of impropriety

Code of Judicial Conduct, Canon 3A(4): Ex Parte Communications

Code of Judicial Conduct, Canon 3C: Disqualification of Judge if Impartiality can be reasonably questioned

Leslie W. Abramson, The Judicial Ethics of Ex Parte Communications, 37 Hous. L. Rev. 1343 (2000)

Cynthia Gray, *The Temptations of Technology*, 31 Judicial Conduct Reporter 1 (Summer 2009).

So. Carolina Ethics Advisory Op. 11-05 ("daily deal" website)

2011 Formal Ethics Opinion 10 (group coupon websites)

New York State Bar Op. 897 (Use of "daily deal" websites)

North Carolina State Bar Op. (2011) (Use of websites to advertise)

Arizona State Bar Opinion 13-01 (Apr. 2013) (dangers of using social media during practice)

Hunter v. Virginia State Bar (Feb. 2013) (attorney blog posts)

AMERICAN BANKRUPTCY INSTITUTE

Case 1:14-cv-00447-LG-RHW Document 114 Filed 08/18/15 Page 1 of 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS JONES, JOSEPH CHARLES
LOHFINK, SUE BEAVERS, RODOLFOA
REL, and HAZEL REED THOMAS, on behalf
of themselves and other similarly situated

PLAINTIFFS

v.

CAUSE NO. 1:14CV447-LG-RHW

SINGING RIVER HEALTH SERVICES
FOUNDATION, et al.

DEFENDANTS

AND

REGINA COBB, SUSAN CREEL, and
PHYLLIS DENMARK, on behalf of
themselves and others similarly situated

PLAINTIFFS

v.

CAUSE NO. 1:15CV1-LG-RHW

SINGING RIVER HEALTH SYSTEM, et al.

DEFENDANTS

AND

MARTHA EZELL LOWE, individually
and on behalf of a class of similarly
situated employees

PLAINTIFFS

v.

CAUSE NO. 1:15CV44-LG-RHW

SINGING RIVER HEALTH SYSTEM, et al.

DEFENDANTS

ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTION FOR AN ORDER
RESTRICTING ATTORNEY COMMUNICATIONS

BEFORE THE COURT is the Motion for an Order Restricting Attorney
Communications [108] filed by Singing River Health System, Singing River Health
Services Foundation, Singing River Health System Foundation, Singing River

Hospital System Foundation, Inc., Singing River Hospital System Employee Benefit Fund, Inc., Singing River Hospital System, Michael Heidelberg, Tommy Leonard, Lawrence Cosper, Morris Strickland, and Ira Polk.

After consideration of the materials and records on file, as well as the arguments of counsel, it is the opinion of the Court there is a substantial likelihood that public comments by attorneys representing the parties in this matter, which contain actionable words or pejorative rhetoric will potentially prejudice the jury venire and may adversely effect the ability of the Court to provide fair and equitable consideration of the parties' respective claims and defenses.

Therefore, for the reasons stated on the record at the hearing of this matter, the Court finds that all attorneys who have made an entry of appearance in this consolidated action shall be prohibited from making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing this judicial proceeding. *See* Miss. R. Prof'l Conduct 3.6.

The Court finds that this order constitutes the least restrictive means of limiting attorney public communications in this matter and is necessary to protect the jury pool, to prevent a circus atmosphere, and to ensure the fair treatment of all parties. *See Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488, 492 (5th Cir. 2013).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion for

an Order Restricting Attorney Communications [108] filed by Singing River Health System, Singing River Health Services Foundation, Singing River Health System Foundation, Singing River Hospital System Foundation, Inc., Singing River Hospital System Employee Benefit Fund, Inc., Singing River Hospital System, Michael Heidelberg, Tommy Leonard, Lawrence Cosper, Morris Strickland, and Ira Polk is **GRANTED** to the extent that all attorneys who have made an entry of appearance in this matter are prohibited from making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing this judicial proceeding. The Motion is **DENIED** in all other respects.

SO ORDERED AND ADJUDGED this the 18th day of August, 2015.

sl Louis Guirola, Jr.
LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE

Criminal Justice

Lawyer Puts Photo of Client's Leopard-Print Undies on Facebook; Murder Mistrial, Loss of Job Result

Posted Sep 13, 2012 09:19 pm CDT

By [Martha Neil](#)

Fermin Recalde had sought several times without success to get a new assistant public defender assigned to represent him in his South Florida murder case.

But he ultimately succeeded Wednesday, midway through trial, after his public defender posted a photo of his leopard-print underwear on her personal Facebook page, the [Miami Herald](#) reports. The judge also declared a mistrial in the Miami-Dade case.

And that wasn't the only fallout: Recalde's attorney, Anya Cintron Stern, 31, was immediately fired, Public Defender Carlos Martinez told the newspaper, explaining that a client is entitled to loyalty and respect from his attorney.

Cintron Stern reportedly snapped the photo of the briefs as a corrections officer held them up for a quick inspection while going through a bag of clothing that Recalde's family had brought for him to wear at trial.

Although she posted it on a personal Facebook page, along with a caption about "proper attire for trial," someone who saw it notified Judge Leon Firtel, the article recounts.

Also of concern to the public defender's office, the newspaper reports, was an earlier Facebook posting by the assistant PD that seemingly called her client's innocence into question.

"When a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that he is not receiving a fair trial," Martinez said.

The Herald could not reach Cintron Stern for comment.

Ethics

New Mexico high court urges judges to be discreet on social media

Posted Sep 01, 2016 02:40 am CDT

By David L. Hudson Jr.



Illustration by Steven P. Hughes

For most of its 37-page opinion in *State v. Thomas*, issued June 20, the New Mexico Supreme Court explained its finding that the convictions of Truett Thomas for murder and kidnapping violated the confrontation clause. The supreme court reversed the convictions and remanded the case for a new trial only on the murder charge because there was insufficient evidence to support the kidnapping conviction.

It wasn't until page 31 of the opinion that the justices turned to an issue that might have been a more important factor in the case, if not for the confrontation clause violation.

During the trial, Judge Samuel L. Winder of the District Court of Bernalillo County, which encompasses Albuquerque, posted the following statement on a Facebook page created for his

unsuccessful re-election campaign: “I am on the third day of presiding over my ‘first’ first-degree murder trial as a judge.” While this was a seemingly innocuous post, Winder later posted the following message after trial but before sentencing: “In the trial I presided over, the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch. Justice was served. Thank you for your prayers.”

On appeal, “defendant argues that social media postings by the district court judge demonstrate judicial bias,” wrote Chief Justice Charles W. Daniels in his opinion for a unanimous court (with one abstention). “During the pendency of the trial, the district court judge posted to his election campaign Facebook page discussions of his role in the case and his opinion of its outcome. Although we need not decide this issue because we reverse on confrontation grounds, we take this opportunity to discuss our concerns over the use of social media by members of our judiciary.”

Judges “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens,” stated Daniels, citing Rule 21-102 of the New Mexico Code of Judicial Conduct. “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.”

A NOTE OF CAUTION

Daniels emphasized that the court was sounding a note of caution to judges. “While we make no bright-line ban prohibiting judicial use of social media,” the opinion states, “we caution that ‘friending,’ online postings and other activity can easily be misconstrued and create an appearance of impropriety. Online comments are public comments, and a connection via an online social network is a visible relationship, regardless of the strength of the personal connection.”

The New Mexico Supreme Court’s opinion echoes the view expressed by the ABA Standing Committee on Ethics and Professional Responsibility in Formal Ethics Opinion 462, issued Feb. 21, 2013. “A judge may participate in electronic social networking,” states the committee in Opinion 462, “but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity or impartiality, or create an appearance of impropriety.”

The court also offered a few thoughts on how social media created to support judicial election campaigns should be used. “We recognize the utility of an online presence in judicial election campaigns, but we agree with the American Bar Association in recommending that these campaign sites be established and maintained by campaign committees, not by the judicial candidate personally,” states the court’s opinion. Moreover, the opinion states, judges should consider “any statement posted online to be a public statement and take care to limit such actions accordingly.”

Ethics expert Peter A. Joy says it is significant that the New Mexico Supreme Court said as much as it did about the trial judge's use of social media since the case already was decided on other grounds. "The portion of the decision dealing with the judge's social media activities goes far beyond what the judge did, and that is unusual," says Joy, a professor at Washington University School of Law in St. Louis. "Usually, a court does not go beyond the facts in the case it is deciding. In this case, it goes far beyond the allegations about this judge's use of social media, and the court basically uses its discussion, which is just dicta in the case, to give a mini-ethics lesson about judges using social media."

Only part of Winder's Facebook posting was problematic, says John G. Browning, a shareholder at Passman & Jones in Dallas, whose article "Why Can't We Be Friends? Judges' Use of Social Media" was published in the *University of Miami Law Review* in 2014. "As far as what the judge posted is concerned, he was fine when he limited himself to making just a factual comment, as with his post on the third day of trial or the first sentence of his follow-up post," Browning says. "It's the second part of his post, the comment about 'justice being served,' that is troubling. That could indicate to a reasonable person some partiality or bias on the part of the court. This is particularly concerning when that same judge may have to preside over post-trial motions."

Keith Swisher, an ethics counsel in Phoenix, takes issue with the New Mexico Supreme Court's conclusion that judicial campaign sites be established and maintained by campaign committees, rather than the candidate. "To be sure, that is good advice and will help the judge avoid disqualification and other ethical risks, but it is hard to read the current ethical codes as requiring that approach which might, in any event, collide with the First Amendment," says Swisher. "Although judicial candidates are generally not permitted to solicit campaign contributions personally—or even to link to a site soliciting campaign contributions—it is a bit of a stretch to suggest that candidates cannot otherwise maintain their own pages to promote their candidacy."

TECHNICAL DIFFICULTIES

How judges use social media is cause for concern, agree many ethics authorities. "In recent months, judges have been disciplined for misusing social media," Browning says. For example, an ex-judge in Mississippi was improperly endorsing political candidates on Facebook; a Minnesota judge frequently went on Facebook to comment on the cases, counsel and litigants appearing before him; and a Kentucky judge vented on Facebook about what he perceived to be racial injustice occurring in his court, Browning says.

What is surprising, Joy says, "is that not all judges have gotten the message yet: Using social media is just like talking to the press. It seems that some judges, just like some regular citizens, hang up whatever good sense they have when they use social media."

The problem is partly one of a lack of technological know-how, says Browning. "Unfortunately, many judges are not as knowledgeable or comfortable with technology as we'd like them to be, which can lead to mistakes," he says. "And more judges need to be aware that their conduct on social media is just as subject to canons of judicial ethics and the Code of Judicial Conduct as their more traditional activities and forms of communication."

Another factor is the pressure of judicial election campaigns, Swisher says. “The judges feel a need to campaign to the public and occasionally post about their cases or seek to connect with parties or lawyers. Judges have been disciplined or disqualified for their Facebook friends, their Facebook posts, or their ex parte communications with parties or lawyers over social media.”

Swisher says that the states, with a few exceptions, are fairly consistent in their approach to social media. “The approach has moved to acceptance, with warnings and limitations,” he says. “Unlike other social media users, judges are properly subject to unique restrictions and disqualification issues relating to the content of their postings and their online connections. These restrictions are justified, in part, to assure parties of judges’ impartiality—both in actuality and in appearance.”

As for Winder, he now practices law in Albuquerque after losing his bid for re-election. After the supreme court issued its opinion, Winder told the *Santa Fe Reporter* that judges perhaps should consider staying away from social media. “No one questioned my impartiality during the trial or after. We’ve all learned from this new medium, and judges should never make any comments on Facebook.”