Judicial Ethics and the Internet (Revisited)

By Judge Herbert B. Dixon Jr.

Query: Is it reasonable to question a judge's impartiality if the judge "follows" on social media only one of the parties in litigation before him, and, shortly after denying relief to the opposing party, posts on his social media account an inaccurate headline and link to a news article concerning his ruling? The answer to the question may depend on whom you ask, but the issue is likely to resurrect itself often. Welcome to my technology column for this issue of *The Judges' Journal.*

Eight years ago, I wrote a column entitled "The Black Hole Effect: When Internet Use and Judicial Ethics Collide."[1] The column discussed the conduct of some judges on the Internet that strayed beyond the limits imposed by the ABA Model Code of Judicial Conduct. Unfortunately, accusations of Code violations continue to arise about judges allegedly not heeding those limitations.

I am writing this column based on a single social media post in 2015—a tweet by a federal judge. That tweet resulted in litigation in the U.S. Court of Appeals for the Ninth Circuit and a subsequent petition for certiorari to the U.S. Supreme Court—significant high-powered litigation that could have been avoided.

If you do not recognize the controversy that gives rise to this discussion, the drama involved the case of *United States v. Sierra Pacific Industries, Inc., et al.*, a case assigned to the tweeting judge.

The case concerned a two-week wildfire in September 2007 that destroyed nearly 65,000 acres of forest in northern California. Because of the nearby Moonlight Peak, the public came to know the incident as the "Moonlight Fire."

In August 2009, the Office of the California Attorney General sued in state court on behalf of the Department of Forestry and Fire Protection (Cal Fire) to recover damages resulting from this fire. Later that month, the U.S. Attorney sued in federal court on behalf of the United States to recover its damages. Although the two cases proceeded independently, the state and federal prosecutors entered a joint prosecution agreement, which included coordinated deposition questions and joint preparation of witnesses and hiring of consultants and experts.

In July 2012, the parties settled the federal case, which resulted in its dismissal with prejudice. As a part of that settlement, the defendants denied liability.

Nineteen months later, in February 2014, the state judge dismissed the state action with prejudice because of the plaintiffs' failure to establish a prima facie case against any defendant. The court also awarded sanctions against the state government entity and its attorneys due to extensive discovery abuses.

In October 2014, because of the favorable rulings in the state court and their independent investigation that led to dismissal of the state court action, the defendants moved pursuant to Rule 60(d)(3) to set aside their settlement of the federal litigation, alleging "fraud on the court."

The federal judge denied the motion in April 2015. On the same day as the ruling, the U.S. Attorney's Office for the Eastern District of California posted several tweets about the outcome of the case. Additionally, the federal judge tweeted a headline

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and link to a news article about the ruling. The headline read, "Sierra Pacific still liable for Moonlight Fire damages." The judge's tweet annoyed the defendants because their settlement of the federal court litigation expressly denied liability. The defendants appealed the judge's order denying the motions to set aside the federal settlement and included the propriety of the judge's tweet among the issues on appeal.

While the appeal was pending, the federal prosecutors sent a letter to the judge advising him that his Twitter usage had become an appellate issue. Following this notice, the judge changed his account's privacy settings from "public" to "protected," which permitted only authorized followers to see the judge's Twitter posts.

On appeal, the defendants argued that the judge, because he followed the Twitter account of the U.S. Attorneys' office, violated Canon 2 of the Code of Conduct for U.S. Judges to "avoid impropriety and the appearance of impropriety in all activities," 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," and Canon 3A(6) that a judge "should not make public comment on the merits of a matter pending or impending in any court." In addition, the defendants argued that the judge was required to recuse himself under Canon 3C and 28 U.S.C. § 455(a)—a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In July 2017, the U.S. Court of Appeals for the Ninth Circuit affirmed the ruling of the federal judge denying the defendants' motion to set aside the federal settlement. The court addressed several significant issues in its decision. However, recognizing the importance of the issues arising from the judge's tweet, the court stated:

> [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.

Yes, it is!

A petition for writ of certiorari to the U.S. Supreme Court followed. As related to the issue concerning the judge's tweet, the question presented was

> Whether a district court judge's impartiality might reasonably be questioned, thereby requiring recusal under 28 U.S.C. §455(a), 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.

The petition for certiorari argued that the federal judge should have recused himself retroactively because (1) the judge followed the prosecutors' Twitter account and (2) the judge tweeted a link to a news article about the proceedings in front of him. The petitioners implored the Supreme Court to make clear that a party facing a billion-dollar government civil action should not have to face a federal judge "following" the local federal prosecutors or tweeting about his rulings.

In response, the U.S. Department of Justice argued the petitioners had cited no authority to support their claim that the judge following the prosecutors on Twitter generates an appearance of bias. The Department also referenced American Bar Association Formal Opinion 462,[2] Judge's Use of Electronic Social Networking Media, and argued that "closer electronic media connections—such as judges and litigants identifying each other as 'friends' on Facebook—do not ordinarily require disclosure, much less recusal." Finally, the Department of Justice argued that questions surrounding social media use by judges would benefit from further development in the lower courts before the Supreme Court intervenes to take up the issue.

In June 2018, the U.S. Supreme Court denied the defendants' petition for writ of certiorari. Although it is possible the Supreme Court justices agreed with the Justice Department that questions surrounding judges' use of social media would benefit from further development in the lower courts before the Supreme Court takes up such an issue, we do not know if that is the reason. As often occurs, no justice stated a reason for his or her vote to deny certiorari. Although I would never suggest putting this legal issue to a vote of the citizenry, I must share with readers of this column the result of an online poll conducted in 2015 regarding the judge's tweet. Eighty-five percent of the online respondents (1,337 of 1,581) agreed that (1) the judge's tweet was improper and (2) judges should not tweet about cases before them.[3]

So, where are we? Are there bright-line rules for judges on social media? Although I am not the final authority on this issue, I am offering a few commandments that might be helpful for judges to consider before posting comments to a social media account. I base each of these commandments on the ABA Model Code of Judicial Conduct. Although I believe 10 is an ideal number for a list of commandments to establish acceptable conduct, I will avoid the temptation this time to create a list of 10 and provide only four.

I. Maintain dignity in every comment, photograph, and other information shared on social networking sites.

This commandment is based on Rule 1.2 of the Model Code 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." A comment to the rule states, "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety" and notes that the principle "applies to both the professional and personal conduct of a judge." In my opinion, judges also should be especially careful with social media posts that include biting commentary, images, and humor.

II. Do not make any comment on a social networking site about a pending matter—not to a party, not to counsel for a party, not to anyone.

This commandment is based on Rule 2.9(A) of the Model Code that a judge

"shall not initiate, permit, or consider ex parte communications . . . concerning a pending or impending matter." Although there are understandable and obvious exceptions to the prohibitions of this rule, a judge's comment about a pending case on social media, including a trivial comment, is more likely to create a problem than solve one. Just ask the judge in the *Sierra Pacific Industries* case that almost made it to the Supreme Court.

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III. Do not view a party's or a witness's pages on a social networking site or use social networking sites to obtain information regarding a pending matter.
This commandment is based on Rule 2.9(C) of the Model Code that a judge "shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." A comment to the rule provides that the prohibition against a judge investigating the facts in a matter "extends to information available in all mediums, including electronic." Formal Opinion 478 provides a helpful discussion about this prohibition.[4] In addition, my eight-year-old technology column provides real-life examples of some problems that can result from a judge independently doing online factual research.

IV. Recuse from any case where the social networking relationship with an attorney or a party creates bias or prejudice concerning the lawyer or party.
This commandment is based on Model Rule 2.11(A)(1) of the Model Code that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, [including circumstances where] . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding."

In support of arguments for recusal, proponents often cite Model Rule 2.11(A) in addition to alleged violations of other rules on which proponents base their argument for recusal. For example, recasting the arguments in the *Sierra Pacific Industries* case using the ABA Model Code of Judicial Conduct[5] might result in the following: Because of the judge's conduct "following" only one party in the case and "tweeting" the erroneous news headline about the ruling, the judge's conduct was a violation of Model Rule 1.2, failing to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and "avoid impropriety and the appearance of impropriety"; and Model Rule 2.9, initiating, permitting, or considering "ex parte communications" "concerning a pending or impending matter"; and Model Rule 2.10, making "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." Moreover, as the proponents might make the argument, the judge should have recused himself under Model Rule 2.11(A), providing that "a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Conclusion

Your takeaway from this column should not be that I agree or disagree with the decisions regarding the judge's tweet in the case of *United States v. Sierra Pacific Industries*. However, I agree with the Ninth Circuit's observation that the case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases. Borrowing language from the Sierra petition for certiorari to the Supreme Court, a judge's conduct on the Internet and social media raises questions old and new that go to the heart of fair trials and impartial justice. The technologies of the Internet are new and still developing, but our principles of fairness are well established. The demands for judicial impartiality and fairness are paramount when parties face off in a court of law. Our justice system should ensure not only actual fairness, but also the appearance of fairness to all litigants. Any appearance of partiality resulting from a judge's conduct on the Internet or any social media platform toward or against any party is a result our justice system cannot tolerate. ■

Endnotes

1. Judge Herbert B. Dixon Jr, *The Black Hole Effect: When Internet Use and Judicial Ethics Collide*, 49 Judges' J., no. 4, Fall 2010, at 38, https://bit.ly/2uZLaCn.

2. ABA Standing Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462, Judge's Use of Electronic Social Networking Media (Feb. 21, 2013), https://bit.ly/2wuVpeA.

3. David Lat, *A Federal Judge and His Twitter Account: A Cautionary Tale*, Above the Law (Nov. 18, 2015, 4:48 PM), http://bit.ly/2CG8Hri.

4. ABA Standing Comm'n on Ethics & Prof'l Responsibility, Formal Op. 478, Independent Factual Research by Judges Via the Internet (Dec. 17, 2017), https://bit.ly/2mOetAr.

5. A comparison of the ABA Model Code and the Code of Conduct for United States Judges will reveal parallel provisions with similar or slightly different wording and other provisions with distinct differences, some of which are dictated by federal statutory provisions or case law or by inherent characteristics of the federal courts. *See, e.g.*, ABA Comments on Proposed Revisions to Code of Conduct for United States Judges (April 18, 2008), https://bit.ly/2oZk60p.