

Social but Not *Too* Social: Judicial Social Media Ethics

By: Tyler Parker

Along with four billion people, judges regularly venture into a worldwide phenomenon: *social media*.¹ However, a judge's use of social media can present unclear ethical issues.² Many users quickly add *friends* to their accounts, post publicly, and double-tap the *like* button with ease.³ But for a judge, likes and other social media communications require thoughtful considerations.⁴ Each social communication “signal[s] our validation and approval with a single click, without having to type anything.”⁵

For ethical guidance, the American Bar Association (“ABA”) lists the Model Code of Judicial Conduct (“Model Code”).⁶ For federal judges, the Code of Conduct for United States Judges (“Code of Conduct”) lists the ethical canons each judge must follow.⁷ For instance, the Code of Conduct requires members of the judiciary to “avoid impropriety and the appearance of impropriety in all activities.”⁸ Similarly, ABA Rule 1.2 states, “[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.”⁹ But in terms of social media use, what does that mean?

It means limits. In *U.S. v. Sierra Pac. Indus., Inc.*, a federal judge *followed* a federal prosecutor on Twitter and tweeted about a pending case on his public account.¹⁰ The Ninth Circuit Court of Appeals scolded the judge's behavior and forcefully reminded federal judges not to throw out their ethical obligations when they step off the bench, stating:

[R]etroactive recusal is not warranted . . . Nonetheless, this 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.¹¹

¹ *How Many People Use Social Media In 2023?*, OBERLO (LAST VISITED FEB. 19, 2023), <https://www.oberlo.com/statistics/how-many-people-use-social-media> [https://perma.cc/LGL9-CKFS].

² Barbara Berenson & Douglas Nazarian, *To Tweet or Not to Tweet*, 101 JUDICATURE 4 (Winter 2017).

³ John G. Browning, *Ethical Risks in Judicial Use of Social Media*, ABA (Feb. 11, 2022), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/january-february/ethical-risks-judicial-use-social-media/ [https://perma.cc/D668-CJVZ].

⁴ *Id.*

⁵ Branwell Moffat, *The power of likes on social media: Friend or foe?*, The Future of Commerce (last visited Feb. 19, 2023) [https://perma.cc/L5U4-JG7L].

⁶ MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

⁷ *Code of Judicial Conduct for United States Judges*, U.S. Cts. (Mar. 12, 2019), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [https://perma.cc/K753-GES3].

⁸ *Id.*

⁹ MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2010).

¹⁰ *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017).

¹¹ *Id.* at 1167.

In 2020, the Wisconsin Supreme Court addressed a similar problem.¹² In *Miller v. Carroll* (*In re B.J.M.*), Judge Michael Bitney conducted a child custody hearing and later took the matter under advisement.¹³ A few days later, Judge Bitney accepted a friend request from the child's mother.¹⁴ Before Judge Bitney issued a final decision, the mother *reacted* at least twenty times and commented twice on the judge's Facebook posts.¹⁵ On appeal, the Supreme Court of Wisconsin ruled that Judge Bitney's behavior created a clear due process violation.¹⁶

While judges are human, they are also officers of the court. To ensure ethical social media use, a judge should never underestimate the *power* of a tweet.

¹² *Miller v. Carroll* (*In re B.J.M.*), 2020 WI 56, 944 N.W.2d 542, 544.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 552.