

Navigating Judicial Ethics in the Age of Social Media

United States District Judge Virginia M. Kendall
Northern District of Illinois



JUDGE VIRGINIA KENDALL

- Served 6 years on Judicial Codes of Conduct Committee
- Serve as Expert for UNODC Judicial Integrity Unit drafting model ethics code
- Drafted Court's employee \judge human resources policy
- Teaches at University of Chicago, Yale, Loyola, Northwestern Schools of Law
- 14 years as a federal judge

CANON 1

- A Judicial Officer/employee should uphold the integrity and independence of the judiciary and of the employee's office



Canons 1 & 2

Canon 2: A Judicial Officer/employee should avoid impropriety and the appearance of impropriety in all activities

Canon 3: A Judicial Officer/employee should adhere to appropriate standards in performing the duties of office

“Contemplation of Justice”





Canon 4: In engaging in outside activities, a Judicial Officer/employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements

Canon 5: A Judicial Officer/employee should refrain from political activity

ADVISORY OPINION 112



- 1) Confidentiality
- 2) Impropriety
- 3) Prestige of office
- 4) Dignity of the Court
- 5) Special access to Court
- 6) Pending matters
- 7) Fundraising
- 8) Political activity
- 9) Frequently litigated issues

CANON 3: CONFIDENTIALITY

- No disclosure of information received during the course of one's official duties
- No public comments about pending litigation
- No use of information received during the course of official duties for private gain
- No commenting on legal issues that are likely to come before the court
- No participation in social media with an organization that frequently litigates in court

CANON 3 IMPLICATIONS

- Always must screen for potential conflicts of interest to maintain the integrity of the Court
- Recusal may be appropriate depending on the degree of involvement
- Analysis of recusal situations goes beyond financial conflicts and requires complete analysis of the interaction and communication between the Court or court employee and the attorney

CANON 4 IMPLICATIONS

- Even in the Court's and Court employee's outside activities, the employee must avoid the appearance of impropriety, avoid conflict with official duties, and comply with disclosure requirements
- What

Would

Judge

Do??



CANON 4 IMPLICATIONS

- Blogging
- Planting a rose garden vs. the right to conceal and carry



CANON 4 – WHO AM I ON LINE?

- Self-description as a court employee risks putting you in a position that lends prestige to your view on line
- Committee recommends that at the least you not identify yourself with a particular judge
- Your identity as a courthouse employee even without posting it can be determined by others
- Security reasons also apply – protect the Court
- Do not use the Court email for personal postings of sales, rentals, businesses, solicitation of donations, chain letters, endorsing products

DETRACTING FROM THE DIGNITY OF THE COURT

- Are your actions detracting from the dignity of the Court, interfering with official duties, or causing embarrassment by posting inappropriate videos or comments?
- Are you expressing discriminatory or harassing viewpoints?
- Are you espousing hate filled language or viewpoints?
- All can be saved FOREVER



ABUSE OF THE PRESTIGE OF YOUR OFFICE

- “Liking” or giving a thumbs up to a restaurant near the courthouse
- Writing a post on Facebook about your favorite charity
- Encouraging others to come to a social event on Twitter
- The restaurant gains market customers from your thumbs up
- The charity earns more donations from your post
- The event is successful due to your tweet

SHOWING IMPARTIALITY TO A PARTY

- “Friending” a party appearing before the court on Facebook
- Shows special access to the court
- Participating in a SnapChat group with a group of attorneys
- Gives special access to the court
- Seeking a date with a party on Tumbler
- Hopes for special access to the court

“CONFIDENTIAL INFORMATION”

“A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. [...]

This general restriction on use or disclosure of confidential information does not prevent, nor should it discourage, an employee or former employee from reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person.”

NEW DUTIES INCLUDE:

“A judicial employee should be **patient, dignified, respectful, and courteous** to all persons with whom the judicial employee deals in an official capacity, including other employees and the general public.”

“A judicial employee should **not engage in sexual or other forms of harassment** of court employees or retaliate against those who report misconduct.”

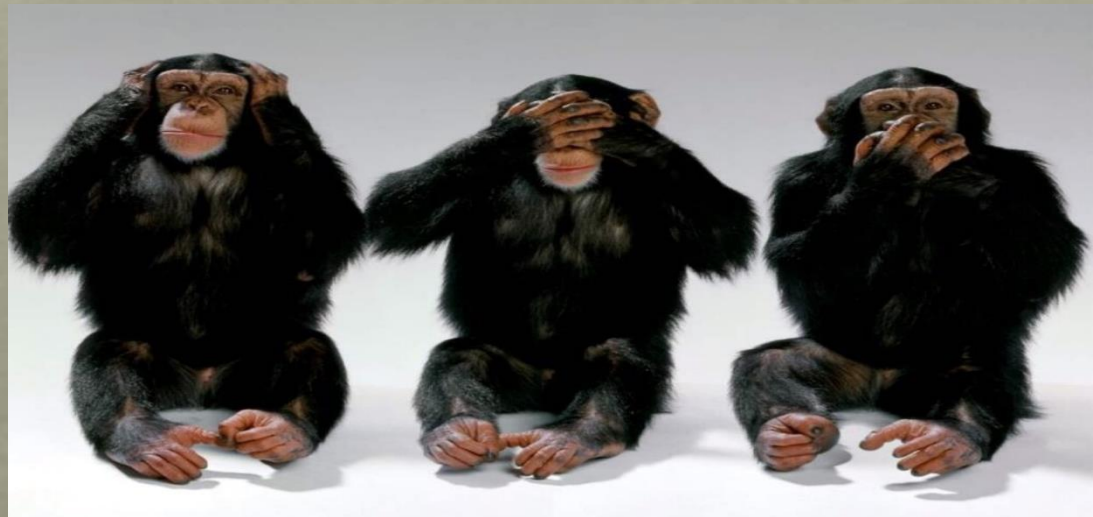
JUDICIAL OFFICER/EMPLOYEE'S DUTIES

“A judicial employee should hold court personnel under the judicial employee's direction to similar standards.

“A judicial employee should take appropriate action upon receipt of reliable information indicating a likelihood of conduct contravening this Code.”

ARE YOU TEACHING YOUR EMPLOYEES?

- Do you have a social media policy in your chambers?
- Have your employees been trained?
- Have you had your staff sign a policy statement?
- Do you need training?



Title of Session: Using social media in ways that promote or undermine judicial integrity.

Session Chairperson: The Hon Mr. Justice Ivor Archie ORTT

Session Panellists (name, organization):

Professor DR HC Rudolf Mellinghoff- President, Federal Supreme Finance Court of Germany

The Hon Judge Virginia Kendall – Judge, United States District Court for the Northern District of Illinois

The Hon Mr. Justice Kashim Zannah – Chief Judge, Borno State, Nigeria

Objectives of Session:

At the end of this session, participants will be able to:

- a. Explain the complexities of social media use in relation to the administration of justice, and
- b. Identify ways in which social media can be utilised to promote or to undermine judicial integrity.

Key points from presentations (state who presented and their key points):

1. Professor DR HC Rudolf Mellinghoff :

- Social networks are of extreme importance today and access to internet is projected to be at 2.9 billion by the end of 2019 and is expected to be close to 3 billion by 2021. These virtual networks allow for the exchange of mutual interests and experiences. They allow for the creation of personal profiles which communicate with others across the world through virtual boards that can show the personalities of the judicial officers.
- Social networks offer judges opportunities and risks. One opportunity is communication with the public to demystify the judiciary. On the other hand, there are special challenges such as unfair characterisation of judges on these platforms.
- Professor Mellinghoff mentioned two cases from both the US and European Jurisdictions which considered judges and social media case. In the first instance, the **Florida District Court** Ethics Committee Commented on whether judges can be the subject of investigations for bias if the investigating prosecutor is found to be among their Facebook friends. The court indicated that the Guidelines say that say judges should avoid Facebook friendships in certain cases, for example where the lawyers may come before them in the courts because this might suggest that these attorneys hold some special position. In **Germany** there was an instance where the presiding judge

posted pictures of himself on a publicly accessible Facebook profile at his home wearing a T-shirt with an inscription saying 'we give your future a home JBA'. On his same post he indicated where he was acting as a judge. An entry in the comments section mentioned that 'this is why when you come out I will be retired you'. The highest German civil court saw this as a reason to exclude the judge from further criminal proceedings because his Facebook was public and available to all persons and it suggested that he will not be judging objectively the proceedings and may make fun of the defendants.

- Judges have recognised that social media can be associated with problems. In many places across the world including Canada, Spain and the United States, there have been significant guidelines and ethical principles as well as various advisories issued concerning judges and the use of social media. This reflects the growing significance of this area.
- Professor Mellinghoff suggested that social media has been used for some time in the economy and the judiciary will not escape this growing movement because social media is necessary to give the judiciary a face in the public. In light of this, he provided general comments on how to use social media:
 - a. **Define your goals for using social media** - Not all social networks are necessary and the judiciary should develop a communications strategy according to their goals. An example of an important goal for the judiciary might be the publication of interesting cases.
 - b. **Look at your audience** – This is relevant to identify an effective communication strategy. You (the judiciary) must determine what are your target groups so that you can best meet their needs. If you know your objectives then you can take appropriate communication measures. For the judiciary the target audience is primarily the people but it may specifically include the legal community.
 - c. **Identify your favourite social networks to avoid scattering information** - Focus on particular social networks. The major question should be, Where does your target groups inform themselves? You can identify the platforms on which communication is most worth your while and each network has special characteristics. For example, Facebook is a great marketing tool and allows for targeting a wide audience. In Germany, Twitter, in Germany is particularly attractive to opinion leaders dealing with very targeted topics. Instagram storylines are good for informing on the judiciary. Youtube is good for films and presentations of court decisions or procedure. The European Court of Justice makes many films to explain procedures.
 - d. **Make an inventory of resources** - Social media requires regularity and resources the judiciary needs to know their capacity. Is there staff to service these social networks, how much time can be spent on this? Does the Court have a social media budget? There is a need to define the usage of each network while considering them as complementary and developing a tailored and detailed strategy.
 - e. **The tone of the social media presence is also important and must reflect the tone of the judiciary and the jurisdiction.** The format must be careful and reflective of the objectives. This could include frequent publications either weekly

or daily and these publications could be scheduled with a set day or time. The content can also vary to include tips, tutorials, news and the opinions of the Chief Justice for example.

- f. **In planning their social media platform, the judiciary should engage advice from professional consultants.** This assistance could assist with content and also with scheduling. The judiciary should also keep their eyes and ears open to the media and the legal community following the reactions to their online activities and seeing how they can be used in the future but not every reaction needs to be answered.
- g. **Extend your network** – the judiciary can use its social media platforms to extend its network. There must be partnerships with the courts of the country to ensure consistent appearance on the scene.
- h. **Judicial Officers can also leverage social media to build targeted personal networks.**
- i. It takes time to see the results of the implemented strategies and measures so officials must be patient and remember that development is long term and represents society.

2. **The Hon Judge Virginia Kendall:**

Judge Kendall's presentation was focused on '**Navigating Judicial Ethics in the Age of Social Media**' .

- In addressing social media use by judicial officers in the US, Judge Kendall utilised the five Canons of the Employee Code of Conduct of Judicial Employees:
 1. A judicial employee should uphold the integrity and independence of the judiciary and of the judicial employee's office.
 2. A judicial employee should avoid impropriety and the appearance of impropriety in all activities.

Canons 1 & 2 address confidentiality, impropriety, prestige of office, dignity of the court, special access to the court and were mentioned under Advisory Opinion 112.

The important question in this regard is what are you writing on social media? You can't comment on political issues that are out in the political discourse because this is something that may come before you in the future for decision and then persons may believe that 'they have the wrong judge or the right judge depending on your perceived bias', which would be a violation of the Bangalore principles and trigger a recusal debate.

3. A judicial employee should adhere to appropriate standards in performing the duties of office.

4. In engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with the disclosure requirements.

There are significant implications for this Canon and it addresses conduct outside the court house. Judge Kendall made the point that in today's world everything is filmed by persons on their handheld devices etc. Therefore, judges should always ask: what would judge do? Judges should only enter into the most benign areas of discussion . They should not include any areas that are likely to come before them in the court.

Security is a very important matter when it comes to safety and privacy to protect the judicial employee and the court. When you are doing something with your judicial title you are putting the stamp of the court and the authority of your position behind it to aid someone outside the institution and in the US this is a violation.

Abuse of the prestige of the office is also a concern. Some practices which could raise this issue are:

- Liking or giving a thumbs up to a restaurant or charity, the restaurant gains market customers,
- Writing a Facebook post about your favourite charity gives the impression that you of a judicial officer are endorsing this charity.
- Seeking a date with a party on tumbler gives the impression that this person has special access to the court.

5. A judicial employee should refrain from inappropriate political activity.

3. The Hon Mr. Justice Kashim Zannah:

Chief Judge Zannah shared the opinion that social media is inevitable and is more helpful than harmful if used correctly. His portion of the presentation spoke to the Guidelines for the use of social media by the judiciary which could be found around the world but many of them are yet to be finalised. He made specific references to the Guidelines prepared by the UNODC Global Judicial Integrity Network

- The guidelines that have been created address various concepts such as friendship and followership and their traditional vs social media meanings. After considering these concepts and their social media meanings, the guidelines concluded that the use of social media by judges should be encouraged and not discouraged but it depends on the individual judge.

For example, the Florida Supreme Court Ethics Committee had a unanimous position addressing the meaning of friendship when used online vs when they are used in the traditional offline setting. In the case of *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, Case No. SC17-1848, 2018 Fla.



LEXIS 2209 (Fla. Nov. 15, 2018), the court found that Facebook ‘friendship’ between a lawyer and a judge does not require disclosure or recusal because the word ‘friendship’ is not being used in the traditional sense. Instead, it is the degree of intimacy online or in the social network that will determine what actions need to be taken.

Furthermore, when considering the concept of ‘followship’ in the traditional sense it means that you subscribe to the ideas and principles of that person but on social media it carries a different meaning and simply indicates that you read whatever that person posts. The consensus is that judicial officers may follow persons online but you must follow both sides of the story. Restricting yourself to one point of view is like creating a mark and the public perceives that this is the opinion that you are going to accept. As judges the idea is that you analyse what is done.

- Chief Judge Zannah’s major recommendation was that judges, institutional courts and judiciaries should be trained on the various social media platforms. He felt that some areas where emphasis should be placed were:
 - a. how these social networks work;
 - b. how they impact the work of judicial officers; and
 - c. how they impact the behaviour of judicial officers.
- The major takeaway is that the same rules apply online and offline but you should have knowledge of the social media platforms and how they operate so that you can behave the same. For example, judicial officers should ‘should expect any inappropriate communication online to be even more widely disseminated’. Dissemination in the social media world is much more instant.
- The conclusion is that judges’ use of social media should be encouraged and not discouraged but it depends on the individual judge and institutional courts and judiciaries should be trained on the various platforms, how they work, how they impact the work and how judges behave.
- Decisions of identification, for example by the Chief Judges, how should they be chosen and what should they say. Whatever is chosen, judicial officers are subjected to the same ethical standards as you are in life. What is required is for the individual to translate these offline standards into their conduct whether you are anonymous or identified you shouldn’t behave online in a way that you wouldn’t offline. For example, when looking into privacy- institutional proceedings should be made public to make sure that they understand the extent to which their opinions and themselves should be exposed online.
- Extra judicial evidence – judges use social media for research to find evidence. In many jurisdictions this kind of evidence is prohibited and not admissible. Even if you search online and you find some evidence or testimony that is incredible the question is how do you introduce this? Do you just say you find it online? Even if territory allows it, it must be used circumspectly. Judicial officers however should be a part of the society and participate in activities that do not undermine their judicial work. E.g social networks.

- Incidentally, it also reflects on capacity of the judge. Lots of defamation cases on these sites that they find difficult. For example, on FB, Zannah saw a post and found it so outrageous and in bad taste that before he could navigate away from it he saw that it had a high number of likes and was curious about it. HE was using a handheld device and in an effort to expand it to see who liked it, he ended up liking it well.
- The Bangalore Principles of conduct and the national codes of conduct say that all judges must participate in certain conduct and it is even a duty to do so. Use of social media allows them to discharge their functions effectively. In some instances you can see that it is almost a duty for judges to decide about use of social media and networking sites but it is about training and it falls on the judiciary to ensure that judges are trained to use social media in a positive way.

Questions and Responses (note who asked the question, their jurisdictions, and key points from the response/discussion):

Comment: Ian Morley, Eastern Caribbean Supreme Court (Montserrat) - Suggests that the answer to this social media debate is that all judges should get off social media. Justice Morley introduced the example of a programme expected to become available within two years that allows the official photograph of any person to be linked and connected with all photographs of them on the internet. This software is also expected to allow trolling through all social media to find and identify every comment ever made about the judicial officer and collate it into a single website for download.

Comment: Justice Sandra Oxner - I have to wonder if this isn't similar to when cars came out and judges were told to stay off the roads because it was dangerous. Now, judges are just told that they should learn how to drive and drive carefully. Similarly, with the advent of technology, how are we to communicate with family and use this efficiently especially with younger persons. Isn't it more practical for judges to just learn how to drive?

Question: Justice Sandra Oxner- What do we do about judges writing references? For example writing references for friends is forbidden in US – there is small exception for law clerks because of special knowledge of what happened with them during their working time but otherwise judicial officers are not allowed to give testimony etc. unless they are subpoenaed.

Response: Chief Judge Zannah- Whether you are on social media or not, there are other persons on social media who can still upload all their information and comments about you and use it. However, if you know that a lot of the things you do, you want to remain out of the public eye then maybe you should stay off social media. Secondly, there are dangerous and

harmful social sites strictly dedicated to negative activities; such as hate groups. In these cases, you should avoid the use of these social networks.

Response: Professor DR HC Rudolf Mellinghoff - If you want to be in contact with the younger generation, social media is the only way to do this. As the judiciary you have to be present on social media and the general internet. Ways to be engaged include distributing your decision, sharing and explaining how people access justice both on and off the social media. There is no need for judicial officers to be afraid of social media, they just need to be careful. Everything can be changed over time.

Response: Judge Virginia Kendall – One of issues raised at the level of the UNODC is that if judicial officers aren't able to protect themselves by speaking out on social media when the judiciary is under attack who will take responsibility for this?

The question is how do judiciaries respond when under attack. One of the ways to do this is that the court as a whole can respond. For example, the Chief Justice might be able to comment on behalf of the institution as a whole. However, the individual judge should not be able to comment when someone attacks one of them specifically.

Question from the Floor- If an individual judge is not publicly able to support a charity how can the judiciary be charitable?

Response: Judge Virginia Kendall – You can be charitable in the sense that the actions of a judge send a strong message to the community.

Comment: Jacqueline Graham, Registrar and Marshal of the CCJ- The Caribbean Court of Justice (CCJ) uses social media to enhance access to justice. There are two employees assigned to monitor social media responses. For example, when hearings are occurring, the Court streams them live and based on responses these employees have the authority to shut down the system if the comments are too sensitive etc. This was done for example in the recent Guyanese case.

The Communications Department of the CCJ also sits and plans communications strategy and pulls messages to promote weekly thematic issue around social media.

Comment: The Hon. Mme. Justice Charmaine Pemberton -Court of Appeal, Trinidad and Tobago- The question is 'What is the position of judges in Trinidad and Tobago?' Recently, CES was devoted to social media and judges and a Committee is now formed and is expecting to have their first meeting within the next week to streamline operations of the Committee and to come up with recommendation as to how they will move forward on the impact of social media on the judiciary.

Comment: Magistrate Sunil Scarce – Environmental Commission, Trinidad and Tobago: I sense that we are talking about two spectrums – organisational vs individual. I am understanding that it is proper for organisations to be present and promote its work but that on

a personal level, there is a boundary about how far the individual judge goes on social media. To me, there is a dividing line between the judiciary itself and the individual judge. These are two separate issues.

Rebuttal: Ian Morley, Eastern Caribbean Supreme Court (Montserrat) – The concept of learning to drive sounds great but they are rules of the road. However, in social media land there are no rules and that is the problem so therefore get off the social media.

Any other pertinent information coming out of the session

Conclusions: Professor DR HC Rudolf Mellinghoff - Social media and the internet is not without rules. All the legal codes and policies which apply off the internet are also applicable on the internet. If you read those rules, which are reflective of the Bangalore Principles, there are many things which apply.

Judges are obliged to see and observe these rules, you are also obliged to see them in the social media context. Some people think that they are free to do whatever they want to but they are not. In Germany there are existing anti-hate speech laws to penalise people if they are outrageous on social media.

Also a distinction must be made between the judiciary on one side but and the individual judges on the other. Nowadays, judges are obliged to communicate so it isn't possible to be so anonymous. When you are elevated to the bench, what happens to everything that came before this, you must be aware of all the circumstances and conditions that exist. Even if you choose not to access social media yourself you are there because others will put you there.

Conclusions: Chief Judge Zannah- When it comes to the institutions, it is their duty to be on social media because court exists for society and needs to be present within society. Individuals have a duty to protect courts and to protect them in the right way online. As a result, it is better to know what you are doing and to understand the platforms. Only then can you have an indication on how to apply judicial ethics and codes of conduct.

However, my views of social media use are positive. Chief Justice Zannah indicated that one TV station banned anything from his judiciary because he wouldn't do what media wanted. So social media came to the rescue because of reform measures which were creating some difficulties.

Facebook created a way for the court to communicate with younger generations. Throwing social media away completely will isolate society for communication.



Conclusions: Judge Virginia Kendall – Learn social media, if you do not learn you cannot know the implications or what the staff is doing online. You have to ensure that court employees are protecting the integrity of the court.