

MEMORANDUM

TO: All CJA Members

FROM: Nicole Virga Bautista
Executive Director & CEO

DATE: January 2020

SUBJECT: **Formal Ethics Opinion No. 78**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinion:

Opinion No. 78

ONLINE SOCIAL NETWORKING II: THE ETHICAL IMPLICATIONS OF WRITING ONLINE REVIEWS AND OF USING THE LIKE FUNCTION ON SOCIAL NETWORK PLATFORMS

Judges may direct questions on the Code of Judicial Ethics to the current 19/20 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

Special thanks to Ethics Committee member Judge James Dabney, Los Angeles Superior Court for preparing this Opinion.

NVB:jmg

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CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 78

ONLINE SOCIAL NETWORKING II

THE ETHICAL IMPLICATIONS OF WRITING ONLINE REVIEWS AND OF USING THE LIKE FUNCTION ON SOCIAL NETWORK PLATFORMS

I. Introduction

Ten years ago, the California Judges Ethics Committee published Opinion 66 which was one of the first to address the ethical implications of judges participating in online social networks. That opinion addressed three questions: 1) May a judge be a member of an online social networking community? 2) May a judge include lawyers who may appear before the judge in the judge's online social networking? and 3) May a judge include lawyers who have a case pending before the judge in the judge's online social networking? The committee concluded that the answers to question 1) and 2) was "a very qualified yes" and the answer to 3) was no.

Since the publication of Opinion 66 the degree to which people in modern society engage with one another in cyberspace has exploded. The number of ways that people share information about their personal lives, their preferences, their political views and the like continue to proliferate. This opinion addresses the ethical implications of judges using social networking apps to comment on, recommend or criticize businesses and services provided by others, and the ethical implications of using the "Like" function common on many social media platforms. The questions addressed are 1) Whether a judge may participate in sites utilizing crowdsourced reviews, such as Yelp or Trip Advisor? and 2) Whether a judge may utilize the "Like" function on a social networking site? As in Opinion 66, the answer to both questions is a very qualified yes.¹

II. Authority

Canon 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Commentary to Canon 2A: "*A judge must exercise caution when engaging in any type of electronic communication, including communication by text or email, or when participating in online social networking sites or otherwise posting material on the Internet, given the accessibility, widespread transmission, and permanence of electronic communications and material posted on the In-*

ternet. The same canons that govern a judge's ability to socialize and communicate in person, on paper, or over the telephone apply to electronic communications, including use of the Internet and social networking sites. These canons include, but are not limited to, Canons 2B(2) (lending the prestige of judicial office), 3B(7) (ex parte communications), 3B(9) (public comment about pending or impending proceedings*), 3E(2) (disclosure of information relevant to disqualification), and 4A (conducting extrajudicial activities to avoid casting doubt on the judge's capacity to act impartially,* demeaning the judicial office, or frequent disqualification)."*

Canon 2B(2): "A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others."

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not: 1) cast reasonable doubt on the judge's capacity to act impartially,* 2) demean the judicial office, 3) interfere with the proper performance of judicial duties, 4) lead to frequent disqualification of the judge."

Canon 4B: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code."

Canon 5: "Judges and candidates for judicial office* are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety.* Judicial independence,* impartiality,* and integrity* shall dictate the conduct of judges and candidates for judicial office.*"

Canon 5A: "Judges and candidates for judicial office* shall not ... (2) make speeches for a political organization* or candidate for nonjudicial office, or publicly endorse or publicly oppose a candidate for nonjudicial office..."

III. Discussion

The number of ways that individuals use the internet today is staggering. People follow their favorite entertainers, politicians, chefs, commentators, authors, and so on. They use it to decide where to eat, where to stay, where to go, and conversely, where not to go stay or go. They use it to find a plumber, an electrician a nanny, a gardener. Want to find a bar tender for your next soiree? There is an app for that. The number of sites where this type of information is shared has mushroomed. Joining Facebook and Twitter over the last 10 years are Instagram, Snapchat, Pinterest and others. Business directories have been transformed online to crowdsourced platforms where products and services are reviewed by the users of the platforms. Obvious examples of these types of sites are Yelp and Trip Advisor. In addition, online retailers such as Amazon

feature customer reviews on virtually all of the products they sell. With the vast growth of online commerce, brick and mortar retailers have increased their online presence and their sites also typically feature customer reviews of their products.

Clearly, there are few ethical implications, if any, in merely using the information provided by these online sites. The issues arise when a judge chooses to actively participate by contributing to the site or otherwise commenting on others' contributions. These issues arise even where the contribution may be as perfunctory as selecting a thumbs up icon on a post or on another's page. Indeed, depending on the circumstances, that perfunctory act may create more of an issue than a detailed post might. Before engaging in online activity of this sort, it is important for judges to understand two things: the nature of the footprint they leave while engaging in the activity, and the ethical rules that may apply as a result.

As we stated in Opinion 66, the same ethical rules apply to a judge's online conduct that apply in any other context. However, the unique nature of online activity must be taken into account in analyzing how the rules apply. In October of 2018 the California Supreme court added Commentary to Canon 2A that adopted the conclusion reached in Opinion 66.

The commentary to Canon 2A states:

“A judge must exercise caution when engaging in any type of electronic communication, including communication by text or email, or when participating in online social networking sites or otherwise posting material on the Internet, given the accessibility, widespread transmission, and permanence of electronic communications and material posted on the Internet. The same canons that govern a judge's ability to socialize and communicate in person, on paper, or over the telephone apply to electronic communications, including use of the Internet and social networking sites. These canons include, but are not limited to, Canons 2B(2) (lending the prestige of judicial office), 3B(7) (ex parte communications), 3B(9) (public comment about pending or impending proceedings*), 3E(2) (disclosure of information relevant to disqualification), and 4A (conducting extrajudicial activities to avoid casting doubt on the judge's capacity to act impartially, *demeaning the judicial office, or frequent disqualification).”*

This opinion will focus on the application of the Code of Judicial Ethics to certain common online activities: 1) contributing to crowdsourced sites, such as Yelp and Trip Advisor, and 2) “liking” sites, pages or other's posts on social networking and messaging sites. To analyze how the rules of judicial ethics may apply in a given context, it is imperative to understand the footprint left by using the site in a given manner. In other words, whether any ethical rules are implicated depends on what others will be able to see because of the judge's actions on the site and who will be able to see it. The examples in this opinion

are meant to be illustrative. With the rapid development of new applications and platforms and the constantly changing privacy settings of existing applications and platforms it is impossible to cover all the sites and how they operate. Regardless of what platform is being used, it is incumbent upon judges who choose to engage in online activity to know what the footprint of that activity will be; that is, what can others see?

A. Everyone is a Critic: Crowdsourced Reviews

Merriam-Webster defines crowdsourcing as: “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers.” There are sites that use crowdsourcing to buy and sell products and services, to fund start-ups, to disseminate news, to obtain real time traffic information and more. This portion of the opinion is focused on sites that use crowdsourcing to generate reviews of products and services. Whether a site is exclusively designed to provide user generated reviews or whether the site simply includes such reviews, the ethical implications are the same. The primary concern of a judge participating in this kind of site is whether or not doing so would violate Canon 2B(2) which states:

“A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.”

In analyzing whether Canon 2B(2) applies to a given situation the question is whether or not the conduct would lend the prestige of the judicial office or use the judicial title in any manner that would advance the pecuniary or personal interest of the judge or others. If the answer is no, then the conduct would not violate Canon 2B(2).

In the context of online activity, whether 2B(2) applies depends on both the footprint and the content of the judge’s contribution. The footprint refers to what others can see on the site as a result of the contribution and who can see it. If the content of the judge’s online contribution could not reasonably be perceived as advancing the interest of the judge or others, 2B(2) would not be implicated and it would not matter who could see it. Moreover, even where the content could be perceived as advancing the interest of another, if the footprint does not identify the user with any particularity, again 2B(2) would not be implicated. For example, Open Table, a site used to make reservations at participating restaurants, contains user reviews of those restaurants on the site.² By default, reviewers are identified by their first name, the first initial of their last name and their city. A posting by “William S., a diner in SE,” gives you so little identifying information that there is no way to connect that review with any specific individual. Assuming William S. is a judge, nothing about being identified in that manner could be said to lend the prestige of the judicial office

to that restaurant.

Would a review by William S. advance the interest of another? Possibly yes. But Canon 2B(2) does not read: A judge shall not in any manner, including any oral or written communication, advance the pecuniary or personal interests of the judge or others. Rather it reads: “A judge *shall not lend the prestige of judicial office or use the judicial title in any manner*, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.”³

Yelp, the quintessential crowdsourced review site, also uses, by default, the first name, first initial of the last name and city of the user. Therefore, a judge submitting a review on Yelp would normally not be violating Canon 2B(2). Many other sites, for example Trip Advisor, have the user select a username. Selecting initials, or a nickname or pseudonym would normally ensure that a judge is not lending the prestige of the judicial office to businesses the judge reviews. However, this presupposes that username selected does not include the judicial title or is not readily associated with the judge. This will rarely be an issue when initials, or a common name are used that could refer to hundreds or thousands of individuals because one seeing the review will be very unlikely to connect the review to the judge. On the other hand, if a pseudonym is used and others know that pseudonym is used by the judge, or initials are used under the circumstances where it is likely the judge could be identified by others, there could be a Canon 2B(2) issue.

In addition to the footprint left by the judge’s participation on these sites, the content of the contribution may also affect whether there is a violation of Canon 2B(2). The question here is whether the contribution is a legitimate review. Canon 4B allows judges to, among other things, “write about nonlegal subject matters, subject to the requirements of the code.” Based on Canon 4B, the committee has opined that a judge may write a book review on a nonlegal subject matter to be published in a local legal periodical.⁴ Judges have written movie reviews and travel reviews for similar publications. In those instances, the judges were identified by name.

On the other hand, judges have been told that they cannot write a letter to a business lauding the service the judge received from the business. Indeed, a judge was disciplined where a company used such a letter from the judge on its website.⁵ There are two important distinctions between this and writing permissible reviews. First, for whom is the review being written? In the former situation the reviews were being published by a third party. In the latter, the review was being written for the business being reviewed. When that is the case, the likelihood that the review would be used by the business to generate business is very high and, therefore sending the letter would be lending the prestige of the judicial office to further that business’s interests. Second, what

is the purpose of writing the review in the first place. In the former situation it is to impart information to others. In the latter, it is to advance the interest of the business.

These same concerns would apply in the context of online reviews. Where is the review going to be published? If it is on the business's site, this would be akin to the laudatory letter sent to the business. If on a third-party site, such as Yelp or Trip Advisor, the review is not necessarily being written for the business's benefit. Rather, the purpose of the review is to impart information to other users of the site. This situation would be akin to writing a book review published in a periodical. While it is true a positive review might inure to the benefit of the business, that would be no different than where a judge publishes a positive book review. In either case, the judge is not doing so to "advance the pecuniary or personal interests" of others. However, there could be no legitimate purpose for using one's judicial title in this context. The point here is not to suggest that judges can openly participate in these kinds of sites without concern, but rather that where it might be possible for someone to deduce that the review is being written by the judge, it would not contravene Canon 2B(2) if it is a legitimate review.

Several factors a judge should consider before writing a review on a crowd-sourced site can be gleaned from the foregoing discussion. The factors to consider are: 1) How likely is it that a reader be able to identify the post as being written by a judge? 2) Where will the post appear? 3) Is there a reasonable possibility the business being reviewed could identify who the post is from and that person's position? 4) How detailed is the review? and, 5) Who are you writing the review for? Legitimate reviews on crowdsourcing sites can be very helpful to others participating on the site and there is no reason judges are barred from writing such reviews so long as, considering these factors, the judge would not be lending the prestige of the judicial office by doing so.

B. "Likes" and the Like

Facebook introduced the world to the concept of online "friends." At the same time, they introduced the "Like" button leading to countless pleas to "Like us on Facebook." Whether or not hitting that thumbs up icon would be a violation of the code again depends on the footprint left by that "Like." The footprint left depends on where the icon appears. If you are on an establishment's Facebook page and you "Like" their establishment, the only thing that will show up on the establishment's page is an addition to the number of "Likes" the establishment has received. Your username will not appear on the establishment's page. Your Facebook page will not reflect the "Like" on your homepage, and your friends will not receive any kind of post on their pages indicating that you have "Liked" the establishment. However, your "Likes" will be listed within your profile. Who can see that section of your profile depends on your privacy settings

for that section of your profile. The most restrictive setting is “only me.” The most open is “public.” There are several settings in between. If the only person who can see your “Likes” is you, you would not be lending the prestige of the judicial office to further the interests of the establishment. If only your “friends” can see it, whether 2B(2) would be implicated would depend on how many friends you have and what their relationships are with you. If your “friends” are limited to close friends and relatives then the fact they could see your “likes” would also not likely violate 2B(2). If anyone can see your “Likes” because they are public, 2B(2) could very well be implicated.

If the icon appears following a comment on someone else’s page, or a comment made on your homepage, then the footprint of that act would be significantly different. The fact that you “Liked” the post and your username will appear on the post. For example, if you “Like” a friend’s comment lauding a business or product, others will see that you “Liked” the post on that page. That would amount to an endorsement of the business or product. Who could see the “Like” would depend on the original poster’s privacy settings, not your privacy settings. This would create an issue under Canon 2B(2) depending on whether those seeing the post can identify you as a judge. On a public post, that would occur whenever a judge uses their true name.

Even if the judge is identified by a pseudonym, the same problem could arise if others know that the pseudonym belongs to the judge. If the only people who are aware of the pseudonym are family and close friends there may not be any problem. Canon 2B(2) doesn’t prevent a judge from telling a friend that they like a particular restaurant, book or movie. Under those circumstances a judge is not perceived to be using the prestige of the judicial office to advance the interests of another. But the problem with online interactions of that sort is that that they are generally much broader than face to face encounters. You may be commenting for the benefit of one individual, but your comment is going to be potentially shared with everyone that individual is connected with, and conceivably, everyone those people are connected with.⁶ Moreover, anyone who sees the “Like” can access your page by clicking on your username. If your privacy settings don’t limit the information that others can see, such as your own posts and profile information, the probability that others can identify you as a judge increase.

Facebook is not the only social networking site to adopt “Likes.” Sites such as Twitter and Instagram also make it possible to both “Like” and or to comment on other’s postings. However, when you “Like” something on Twitter, a notification of that “Like” will appear on the twitter feed of everyone who is following you. Also, anyone who is following the original poster will be able to see you “Liked” the post. As with the situation of liking someone else’s post on Facebook, a judge must ensure that doing so would not violate Canon 2B(2). Whether Canon 2B(2) would be violated would depend on the content of the post and whether it is reasonably likely a person could identify the poster as

a judge. If the content of the post can reasonably be perceived to be advancing the interests of another and the identity of the judge can be ascertained, it would violate Canon 2B(2). With the wider dissemination of a “Like” on Twitter or Instagram, the likelihood that the identity of the judge may be ascertained increases.

Besides Canon 2B(2), other Canons that may be implicated in “Liking” a post or site are Canon 4A and Canon 5. In this context, it is important to emphasize that nothing done on social networking sites is private. Once something is shared with others on the internet control over that communication is lost. Also, nothing posted is temporary. Even platforms that are designed to display posted messages for a brief period of time, such as Snapchat, do not ensure that the message will be viewable for only that period of time. Anyone who receives the message can take a screenshot of it and then they would be free to share it with whomever they please.⁷

Canon 4A states:

“A judge shall conduct all of the judge’s extrajudicial activities so that they do not: 1) cast reasonable doubt on the judge’s capacity to act impartially, 2) demean the judicial office, 3) interfere with the proper performance of judicial duties, 4) lead to frequent disqualification of the judge.”*

Unlike Canon 2B(2) which prohibits judges from lending the prestige of the judicial office or using their title in any manner to further the pecuniary interests or other interests of the judge or others, under Canon 4A it doesn’t matter whether you are using your judicial title or the prestige of the judicial office. Therefore, it doesn’t matter whether you can be identified as a judge. Under Canon 4A the question is whether the online conduct might cast reasonable doubt on the judge’s capacity to act impartially or demean the judicial office. “Liking” an offensive post could cast reasonable doubt on the judge’s capacity to act impartially and could demean the judicial office. There simply is no place for judges engaging in that type of conduct on an inherently public platform. Indeed, judges have been disciplined for posting and sharing links to posts that were perceived as racist and offensive.⁸

Likewise, Canon 5A prohibiting judges from engaging in political activity that may create the appearance of political bias or impropriety and Canon 5B prohibiting judges from publicly endorsing or opposing a non-judicial candidate are not limited to doing so while using one’s judicial title, or to situations where one might be identified as a judge. A judge may not engage in such conduct, period. While the commentary to Canon 5 makes clear the prohibitions do not apply to “private comment,” and Canon 5A(2) prohibits a judge from “publicly” endorsing or opposing a non-judicial candidate, one must remember that social network platforms are, by their very nature, public. “Liking” a post about a non-judicial candidate (either favorable or not) is not private, it is public.

You may be hitting the thumbs up symbol or the heart symbol because you find something interesting but doing so can reasonably be perceived as an explicit endorsement of the content. This type of activity has also been a ripe area for judicial discipline.⁹

IV. Conclusion

We live in an age where people can readily share information with anyone on the globe who has an internet connection. The worlds of commerce, politics and general discourse have been transformed by online social networking platforms. Our ability to not only gain but share information with others has exploded. There has also been a corresponding increase in others' ability to garner information about those using social networking platforms. According to the Pew Research Center, seven in ten adults report using Facebook. Of those, 75% reported doing so daily. Platforms such as Instagram and Snapchat are as popular among young adults. Despite recent concerns about this loss of privacy when using social networking platforms, these numbers have remained fairly steady since 2018.

It is to be expected that more and more judges are engaging and will engage in online social networking activity, It is not reasonable to expect that judges will refrain from engaging in the types of activities so commonly engaged in by the community at large, but judges have special responsibilities given the importance of maintaining both the reality and perception of the integrity of the judiciary. To that end, judges who do choose to engage in online activity must be aware of the footprint they leave when they do so. When participating in crowdsourced review sites judges must do so in a manner where they cannot be reasonably perceived as using the prestige of the judicial office to further the interests of others. Judges should refrain from writing reviews on the business sites they are reviewing. When writing reviews on third party sites judges should do so only if it is highly unlikely that anyone would be able to connect the review with the judge and do so only when they are writing a legitimate review that is intended to impart helpful information to others using the site.

Judges should be very circumspect about "Liking" other's posts or comments about businesses or products on social media platforms. With the exception of "liking" a business or establishment on their home page where the only footprint from doing so is an added statistic to the number of "Likes" the business has received, doing so will rarely be proper. Judges should never "Like" offensive posts under any circumstances and should never "Like" posts related to candidates for non-judicial office.

Whenever judges choose to engage in online activity they should always be aware that they are engaging on a platform in which they lose control over the content they produce the moment it is sent. The question one should ask themselves before hitting enter, the heart logo, the thumbs up logo, or the send

button, is whether what they are about to broadcast to the world violates any of the Code of Judicial Ethics.

Endnotes:

- 1 Prior to publication of this opinion the Supreme Court Advisory Committee on the Code of Judicial Ethics issued a request for public comment on a proposed addition to the commentary to Canon 2B(2) which addresses the issues presented in this opinion. This opinion is based on the current Code of Judicial Ethics effective October 2018. It is unclear whether the proposed language will be adopted by the Supreme Court and if so, in what form. We have decided to proceed with the publication of this opinion in the hopes that it will both provide guidance to judges on these issues based on the current code.
- 2 As is common on these types of sites, after you have dined at the restaurant you will invariably receive an email asking you to review your experience.
- 3 Emphasis added.
- 4 CJA Opinion 65
- 5 *Public Censure and Bar of Former Judge Steven C. Bailey* (2019)
- 6 It is possible to see on Facebook whether a post on another's page is public, or limited to the poster's friends, or to the poster's friends and their friends.
- 7 The sender of a snapchat post is notified whenever a recipient takes a screenshot of the post, but all that does is let one know that what they thought was private is no longer so.
- 8 *Public Censure of Former Commissioner Joseph J. Gianquinto* (2018)
- 9 See *Public Censure and Bar of Former Judge Steven C. Bailey* (2019), *Public Censure of Former Commissioner Joseph J. Gianquinto* (2018), Com. On Jud. Perf., Ann. Rept. (2018), Private Admonishment 7, p. 27.

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