

1-1-2020

Technology, Social Media, and Professional Ethics

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Above the Law

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Georgia Court of Appeals

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Recommended Citation

Browning, John; Lat, David; Dillard, Stephen; Blackman, Josh; and Willett, Don (2020) "Technology, Social Media, and Professional Ethics," *University of Dayton Law Review*: Vol. 45: No. 1, Article 4.
Available at: <https://ecommons.udayton.edu/udlr/vol45/iss1/4>

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TECHNOLOGY, SOCIAL MEDIA, AND PROFESSIONAL ETHICS

The following is a transcript of a 2018 Federalist Society panel entitled Technology, Social Media, and Professional Ethics. The panel originally occurred on November 17, 2018 during the National Lawyers Convention in Washington, D.C. The panelists were: John Browning, Shareholder, Passman & Jones; David Lat, Founder, Above the Law; Hon. Stephen Dillard, Chief Judge, Georgia Court of Appeals; and Josh Blackman, Associate Professor of Law, South Texas College of Law. The moderator was the Honorable Don Willett of the United States Court of Appeals for the Fifth Circuit.

[RECORDING BEGINS]

HON. BARRY ANDERSON: Good morning, and welcome to the Professional Responsibility and Legal Education Panel on Technology, Social Media, and Professional Ethics.

My name is Barry Anderson. I'm an Associate Justice on the Minnesota Supreme Court. I'm filling in for Jack Park who normally handles the introduction of our moderator. I'm going to do that here in just a minute.

I first want to thank all of you for attending here today, those of you who'll be watching the video, and I want to thank our panel for participating. I do have one note that I want to share with you. Those of you who were with us last year and many previous years know that an important member of our committee was Professor Ronald Rotunda. Professor Rotunda passed away this past year—a tremendous loss to all of us.

I do want to mention in conjunction with Professor Rotunda's service that we're likely to do a teleforum about his career and life. I also want to mention to those of you who can get to the John Marshall presentation this afternoon, you should do so. I certainly recommend Richard Brookhiser's book on Marshall, but I also want to pass along to you that Professor Rotunda has a book—it's a little more academic, a little more case-oriented—about John Marshall entitled *John Marshall and the Cases that United the States of America*.¹ That book was published just shortly before he died, and I also

¹ See generally RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT (2018); RONALD D. ROTUNDA, JOHN MARSHALL AND THE CASES THAT UNITED THE STATES OF AMERICA (2018).

recommend it to you.

My principal duties today are to introduce your moderator and then get out of the way, so I will proceed to that task now.

Our moderator today will be Judge Don Willett of the Fifth Circuit Court of Appeals. I know him previously as a member of the Texas Supreme Court, where he served for over a decade, 12 years in fact.

Judge Willett has a distinguished resumé: “he served as legal counsel [for] a Texas Attorney General, a Texas Governor, a U.S. Attorney General, and the President of the United States.” His biography notes that he was raised by a widowed mom in a double-wide trailer in a town of 32 people. This, incidentally, puts him ahead of the Chief Justice of the Minnesota Supreme Court who always points out that she grew up in a town of 292 people.² So that’s about what, less than ten percent, something like that?

But he has a distinguished career as an author and speaks frequently throughout the country. I do want to note his academic career. He earned a triple major from Baylor University and then went to Duke University and liked it so much he wouldn’t leave. He earned three degrees there: a Juris Doctor, an M.A. in Political Science, and an LL.M. in Judicial Studies. He has clerked for Judge Jerre Williams on the U.S. Court of Appeals for the Fifth Circuit and practiced law before entering public service. Distinguished career in public service, and I am delighted to introduce to you Judge Don Willett.

HON. DON WILLETT: Thank you. Your Honor, thanks for the gracious introduction. Thank you, everybody. I’m thrilled to moderate this impeccably dressed panel on technology, social media, and professional ethics.

I read an article last week that opened this way: “If you want to become a miserable partisan who spends more time being angry at people you[’ve] never met than enjoying the company of friends, neighbors, and loved ones, then Twitter is the place for you.”³ [Laughter]

Today’s all-star panel will discuss the legal community as an online community. We inhabit a wired world. Twitter processes a billion tweets every forty-eight hours, half of those from this panel.⁴ [Laughter] There are

² See David Hill, *Our Supreme Court: The People Behind the Bench*, THIEF RIVER FALLS TIMES (Sept. 18, 2018), <https://trftimes.com/news/9971/our-supreme-court-the-people-behind-the-bench>.

³ Clay Routledge, *Our Fast Food Social Media Diet*, QUILLETTE (Oct. 24, 2018), <https://quillette.com/2018/10/24/our-fast-food-social-media-diet/>.

⁴ *Twitter Usage Statistics*, INTERNET LIVE STATS, <https://www.internetlivestats.com/twitter-statistics/> (last visited Jan. 15, 2020); Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 AM), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#39113c8860ba>.

more than two billion people on Facebook; there are 800 million users on Instagram and Snapchat.⁵ So for lawyers in 2018, technology's impossible to ignore; it's ubiquitous. And more and more Americans get their news from, and view the world through, social media. But lawyering and judging in the digital age is rife with ethical minefields.

So what are the rules of engagement for the legal community when it comes to social media? And our panelists today will discuss the promise and the perils of technology and social media for lawyers and courts and judges. Each speaker will, if all goes according to plan, speak for about eight minutes, roughly, and then we'll have some spirited, lively, cross-panel debate. And then we'll wrap up with some speeches from the audience. [Laughter] Sorry! We'll wrap up with some very tweet-length questions from the audience at one of our two microphones.

So batting leadoff, to my immediate left, is John Browning a.k.a. @therealjohnbrow.⁶ You can see all of our Twitter handles are at the bottom of our name cards. John is my sometimes co-presenter and co-author—by day, he's a litigation partner in Dallas handling virtually every type of matter and virtually every type of court. But in his non-billable time, he moonlights as perhaps the nation's—strike the perhaps—the nation's leading published authority on social media and the law.⁷

He's written countless books and articles on the topic with more forthcoming, including some stuff with me, I hope. He's probably the nation's most sought-after speaker on lawyers' use of technology and social media. He's written more than twenty-five law review articles, many of them award-winning.⁸ He's probably the most quoted authority in America on this topic by major national press, both print and TV, and at legal symposia all over the country.

So bottom line, John is the singular authority on this stuff, but, strangely, he doesn't tweet much himself. @therealjohnbrow has tweeted only thirty-one times, the last time on the day I was nominated, a year ago, a date which will live in infamy.⁹ [Laughter] In fact, someone tweeted last

⁵ Marr, *supra* note 4; Sara Salinas, *Instagram Stories Has Twice as Many Daily Users as Snapchat's Service — And It Now Has Background Music*, CNBC (June 28, 2018, 3:00 PM), <https://www.cnn.com/2018/06/28/instagram-stories-daily-active-users-double-snapchats.html>.

⁶ John Browning (@therealjohnbrow), TWITTER, <https://twitter.com/therealjohnbrow> (last visited Jan. 15, 2020).

⁷ See Arushi Pandya & Hayley Ostrin, *Technology Lawyer Highlight: John Browning of Passman & Jones*, THE J. OF L. TECH. AT TEX. (May 21, 2019), <https://jolttx.com/2019/05/21/technology-lawyer-high-light-john-browning-of-passman-jones/>.

⁸ *Id.*

⁹ See, e.g., John Browning (@therealjohnbrow), TWITTER, <https://twitter.com/therealjohnbrow> (last visited Jan. 15, 2020).

week, "John Browning needs to be on Twitter. He's hilarious."¹⁰

So John is a former varsity tennis player and a teaching pro. And my favorite all-time fact about John is that he won the gold medal in men's singles at the 2000 Clydesdale World Games in Mexico City.¹¹ It's an international competition for athletes 200 pounds and over.¹²

[Shows slide] Whoop, wrong one.

[Another slide shown] Wrong one. [Laughter]

[Another slide shown] There we go! Look on the right, there's John and his doubles partner. [Laughter] And he did this one week after undergoing emergency appendectomy surgery. That's incredible.

So John's going to focus on how today's practice environment makes it essential for lawyers to maintain tech competency, including being fluent in social media.

Next will be, as we go down the table, David Lat a.k.a. @DavidLat.¹³ David is editor-at-large and founding editor of *Above the Law*, but he first gained notoriety as the mysterious ghost blogger at *Underneath Their Robes*, an irreverent and, I've got to say, must-read blog about federal judges.¹⁴ David was leading a double life. So, by day he was a hard-nosed AUSA, and he was a blog world sensation by night.¹⁵ He's also served time as a big law associate in Manhattan and a law clerk to the legendary Judge O'Scannlain on the Ninth Circuit.

David grew up down the street from President Richard Nixon, who would give him candy. Right?

DAVID LAT: That's right.

HON. DON WILLETT: That's right!

He's a graduate of Harvard College and Yale Law School and a few years ago published his first novel, the much-buzzed about *Supreme Ambitions*.¹⁶ Last year, David and his husband Zach welcomed into the world

¹⁰ See Mark Bauer (@MarkBauer), TWITTER (Nov. 8, 2018, 10:42 PM), https://twitter.com/search?q=john%20browning%20needs%20to%20be%20on%20twitter&src=typed_query.

¹¹ Ross Pfund, *John Browning Sticks Up for the Average Guy Against the Recording Industry*, SUPER LAWYERS (Apr. 6, 2017), <https://www.superlawyers.com/texas/article/download-this-story/b3375828-2453-4524-a150-742196fc7573.html>.

¹² See Susan Paul, *Why Do Athena/Clydesdale Categories Exist?*, RUNNER'S WORLD (Aug. 5, 2011), <https://www.runnersworld.com/runners-stories/a20845734/why-do-athena-clydesdale-categories-exist/>.

¹³ David Lat (@DavidLat), TWITTER, <https://twitter.com/DavidLat> (last visited Jan. 15, 2020).

¹⁴ See, e.g., David Lat, *Underneath Their Robes, Indeed: Would you "Rat Out" Your Daughter to Obtain a Federal Judgeship?*, ABOVE THE LAW (Nov. 25, 2013, 2:28 PM), <https://abovethelaw.com/2013/11/underneath-their-robess-indeed/>.

¹⁵ David Lat, *Some Comments on the Legal Times Piece*, ABOVE THE LAW (Oct. 24, 2006, 12:31 PM), <https://abovethelaw.com/2006/10/some-comments-on-the-legal-times-piece/>.

¹⁶ See generally DAVID LAT, *SUPREME AMBITIONS* (2014).

... you saw it earlier ... [slide of Judge Dillard and a bulldog] That's not David! [Laughter]

[Picture of David and a little boy shown] Yeah, there we go! David! He welcomed into the world Judge Dillard! [Laughter] Into the world, Harlan. This is Harlan, everyone! Yes, named after the justices—plural? Or the great dissenter?

DAVID LAT: It's a matter of dispute, but I'll explain later.

HON. DON WILLETT: He doesn't look like a great dissenter to me. Looks like he's a rhino.

DAVID LAT: This was his Halloween costume.

HON. DON WILLETT: So welcome into the world, Harlan.

UNKNOWN SPEAKER: The kid's a rhino, huh?

HON. DON WILLETT: So, the kid is a rhino. So at that time ...
[Crosstalk then laughter]

DAVID LAT: He'll be an elephant next year.

HON. DON WILLETT: This is going to be a lively panel.

So when Harlan came along, David stepped away as managing editor of *Above the Law* and moved into the more flexible role of editor-at-large. So he wants to make it clear that this means he no longer has responsibility for *any* *Above the Law* stories except the ones that he authors personally. And he dissents, respectfully but fervently, from many of the stories that now appear on *Above the Law*.

So after John's words of caution, David will outline the benefits of social media and speak about the evolution of online media generally.

Next, Chief Judge Stephen Dillard a.k.a. @JudgeDillard.¹⁷ Stephen has served on the Georgia Court of Appeals for eight years and the last year or so as Chief Judge. He's a proud member of the so-called Manion Mafia, having clerked for Judge [Daniel] Manion on the [Seventh] Circuit, and he was an appellate specialist in private practice for many years before assuming the bench.

Chief Judge Dillard and I met—this will shock many of you—on Twitter. And he has since become a dear, dear friend, and he speaks and writes frequently and eloquently across the country on a range of topics, including the judicial use of social media.¹⁸ And it's true that more and more

¹⁷ Stephen Dillard (@JudgeDillard), TWITTER, <https://twitter.com/JudgeDillard> (last visited Jan. 15, 2020).

¹⁸ See Judge Stephen Dillard, *It's Time for Judges to Tweet, Like, and Share*, AM. BAR ASS'N (Oct. 20, 2017), <https://abaforlawstudents.com/2017/10/20/time-for-judges-to-use-social-media/>.

judges are becoming more adept, more prolific, using social media in their personal and professional lives to stay connected and to stay elected. And as his 15,000 followers can tell you, Chief Judge Dillard is living proof that a judge can engage online with surpassing civility and good humor with a healthy dose of civic education to boot. And I think every day his online activity underscores rather than undermines public confidence *in* the judiciary and public understanding *of* the judiciary.

So as he puts it, judges are public servants. They are accountable to the people, and they need to be accessible to the people. Chief Judge Dillard is president of the Alumni Association at Samford University. He's wearing a Samford University Bulldog bowtie—not a Georgia Bulldog bowtie.

He was recently named alumnus of the year, and he can frequently be seen prowling the sidelines—where is it? [Looking at slide]

That's not David! [Another slide shown] There he is! Prowling the sidelines at Samford Bulldog football games.

So Chief Judge Dillard's going to focus his remarks along the lines of a really exceptional article he published recently in *Judicature*, the scholarly journal for judges, about the benefits of judges engaging with citizens that they serve on the social media platforms that people use every day and educating folks about the important role the judiciary plays in their lives.¹⁹

And then finally, batting cleanup is Professor Josh M. Blackman of the South Texas College of Law Houston, who borrowed one of my bowties today—he doesn't own one.

JOSH BLACKMAN: —He made it for me.

HON. DON WILLETT: He's got an official FedSoc bowtie.

I met Josh about a decade ago when he was a law student, and today he is a highly caffeinated scholar whose office looks like NASA mission control. Let me show you the picture.

[Picture shown] Look at that! That's his home office! He's got seven screens, count them.

Josh writes about everything. He speaks everywhere. And he tweets about, well, he tweets all the time about every topic under the sun. He ranks among the most prolific law professors on planet Earth.

So, Josh is barely thirty years old, but he hosts one of the top legal

¹⁹ Stephen Louis A. Dillard, #Engage It's Time for Judges to Tweet, Like, & Share, 101 JUDICATURE 10, 11 (2017).

blogs in America.²⁰ He's authored more than four dozen law review articles, a couple of critically acclaimed books. He publishes commentary in most every major national legal publication. He's a five-tool professor. He blogs. He tweets. He teaches. He writes. He speaks. And Josh is going to bat cleanup and be something of a gap-filler today.

So, depending on how the conversation unfolds, he may cover—he's going to wing it—he may cover how courts can use social media more effectively. He may cover how pros and scholars can use it more effectively, or he may cover how the press covers the courts through social media.

So, with that introduction, I'll turn it over to John Browning. Take it away.

JOHN BROWNING: Alright. Well I am wearing a bowtie for the very first time at Judge Willett's behest, so this is not a regular part of my wardrobe, but—

HON. DON WILLETT: —If you can't see it—

JOHN BROWNING: —I'm thinking it's actually going to be a regular part of it.

HON. DON WILLETT: Can you all see it on the screen? *Star Wars* bowtie.

JOHN BROWNING: To go with these *Star Wars* cuff links because I fly my geek flag pretty proudly. [Laughter]

So, I guess I'm supposed to be the sayer of doom and gloom and caution our audience about that, but let me begin by acknowledging, as Judge Willett pointed out, that we are practicing in a very different environment now for lawyers. Not just the fact that the ubiquitousness of social media with 293,000 status updates posted every sixty seconds and 6,000 tweets every second—many of which may originate from somewhere else in D.C. as well as this panel—but we have got a very different practice environment than many of us who are a little more gray-haired, like myself, started practicing in.²¹ But the other reason, besides the fact that social media is so all pervasive, is that we are now being held to a higher standard as lawyers.

In 2012, the ABA passed a change to Model Rule of Professional Conduct 1.1 on what constitutes competent representation.²² And now thirty-

²⁰ See *Josh Blackman Biography*, S. TEX. C. OF L. HOUS., <https://www.stcl.edu/about-us/faculty/josh-blackman/> (last visited Jan. 15, 2020).

²¹ *The Top 20 Valuable Facebook Statistics*, ZEPHORIA, <https://zephoria.com/top-15-valuable-face-book-statistics/> (last updated Sept. 2019); David Sayce, *Number of Tweets Per Day?*, DAVID SAYCE, <https://www.dsayce.com/social-media/tweets-day/> (last visited Jan. 15, 2020).

²² Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits*, *New Model Ethics Comment Says*, AM BAR ASS'N J. (Aug. 6, 2012, 7:46 PM), http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits.

three states have adopted that change.²³ Texas is about to become state number thirty-four, and it imposes a requirement on lawyers to not just keep up with the latest developments in one's area of practice, but also to be conversant in the benefits and risks of relevant technology.²⁴ Now what does that mean?

Well, it depends on your practice, but it certainly means if you're handling litigation involving e-discovery, you should be either conversant in the use of e-discovery software, hire an outside vendor who is going to do that in a competent manner, have someone on your staff to do it, or not take the engagement. The big Wells Fargo data breach occurred, in part, because of a lawyer handling a fairly routine defamation case who didn't understand how to use the e-discovery software.²⁵

This is just one example of many I could give you of a lack of tech competence that has led to this. So it's not just the fact that social media is inescapable, but it's also the fact that we are practicing in very different times where we are under expectations of maintaining appropriate cybersecurity measures. The ABA just released a formal ethics opinion on that effect and numerous jurisdictions have addressed this as well.²⁶ We are under higher expectations in terms of protecting our clients' confidences through the use of technology, such as using encryption with email and also using social media in a responsible and ethical manner.

So let me see if we can actually advance the slides. I'm wondering if I'm just not pointing it at the right thing here—maybe up at the ceiling. Ah, here we go. [Slide shown]

Alright, so you don't need to be a member of the Geek Squad, but you also can't be the proverbial caveman lawyer from the old *Saturday Night Live* sketch confounded by the strange box of noise and light that most of us refer to as the computer.²⁷

[Next slide] Just to give you a little bit of a taste of kind of a rogue's

²³ Dan Kittay, (*Safely*) *Using All the Tools in the Toolbox: Bars Help Members Gain Technological Competence*, AM. BAR ASS'N, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2018_19/january-february/safely-using-all-the-tools-in-the-toolbox-bars-help-members-gain-technological-competence/ (last visited Jan. 15, 2020); Robert Ambrogi, *Tech Competence*, LAW.SITES, <https://www.lawsitesblog.com/tech-competence> (last visited Jan. 15, 2020).

²⁴ Kittay, *supra* note 23; Ambrogi, *supra* note 23.

²⁵ See Serge F. Kovalski & Stacy Cowley, *Wells Fargo Accidentally Releases Trove of Data on Wealthy Clients*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/business/dealbook/wells-fargo-confidential-data-release.html>; see also Christine Simmons, *Lawyer's 'Inadvertent' E-Discovery Failures Led to Wells Fargo Data Breach*, LAW.COM (July 26, 2017, 7:13 PM), <https://www.law.com/sites/almstaff/2017/07/26/lawyers-inadvertent-e-discovery-failures-led-to-wells-fargo-data-breach/>.

²⁶ See generally ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018).

²⁷ See generally *We Make It Work: The History of Geek Squad*, BEST BUY, <https://www.bestbuy.com/site/geek-squad/history-of-geek-squad/pcmcat1494529157815.c?id=pcmcat1494529157815> (last visited Jan. 15, 2020); *Unfrozen Caveman Lawyer III*, CNBC (Jan. 16, 1993), <https://www.nbc.com/saturday-night-live/video/unfrozen-caveman-lawyer-iii/2862487>.

gallery of incidents of maybe not living up to professional standards, you probably—after winning a courtroom victory like this criminal defense lawyer in Wisconsin—you probably don't want to take that victory selfie in the courtroom before the judge even leaves and then post it on Facebook because guess what?²⁸ The guy in the black robes with the gavel will not be clicking “like,” okay? [Laughter] He will, however, issue a show-cause order for you to come back and explain yourself.

[Next slide] Probably the best way to react to a major seizure of drugs and weapons if you're a young assistant prosecutor is *not* to pose for a selfie with one of the sheriff's deputies involved in the seizure with some of the weapons that were seized and caption it “You should take the plea.”²⁹ [Laughter] Your bosses may not find that consistent with proper evidence room protocol. Go figure. [Laughter]

[Next slide] And this is actually a lawyer from Chicago who was in a federal courtroom and—he's actually a securities litigator, he wasn't there on one of his own cases—but he was blogging about a big securities fraud trial. And he happened to be tweeting from the courtroom, including tweeting—I think there were about nine tweets total—of some of the evidence, some of the exhibits, that hadn't even been admitted yet.³⁰ There was a very helpful FBI agent in the courtroom, who very helpfully pointed out the big sign of Federal Rule of Criminal Procedure 53 saying no broadcasting, photography, or recording allowed.³¹ And he very helpfully escorted that lawyer to the judge for a show-cause hearing and a \$5,000 fine, forty hours of community service, and one mandatory CLE seminar on social media and legal ethics.³²

Is he here, by the way? [Laughter] I'm not sure if he's ever satisfied it, but that's what was the sentence from the court, who was not very amused at that.

[Next slide] Okay, now we all know it's important that we adequately communicate with our clients, right? And this gentleman, Curtis Jackson [III] a.k.a. 50 Cent or, as some of you folks may know him, “Fiddy.” [Laughter]

²⁸ Bruce Vielmetti, *Attorney Flagged for Facebook Selfie with Client After Winning Murder Acquittal*, J. SENTINEL (Sept. 28, 2015), <http://archive.jsonline.com/newswatch/329539971.html>.

²⁹ Joe Patrice, *DA Brandishes Shotgun in Facebook Picture Captioned, 'You Should Take The Plea'*, ABOVE THE LAW (Aug. 3, 2016, 5:38 PM), <https://abovethelaw.com/2015/08/da-brandishes-shotgun-in-facebook-picture-captioned-you-should-take-the-plea/>.

³⁰ Jason Meisner, *Tweeted Photos from 'Spoofing' Trial Get Chicago Lawyer in Trouble*, CHI. TRIB. (Nov. 9, 2015), <https://www.chicagotribune.com/news/breaking/ct-spoofing-trial-pictures-lawyer-met-20151109-story.html>.

³¹ Joe Mullin, *Lawyer Who Photographed and Tweeted Evidence from Trial May Face Sanctions*, ARSTECHNICA (Nov. 12, 2015), <https://arstechnica.com/tech-policy/2015/11/lawyer-who-photographed-and-tweeted-evidence-from-trial-may-face-sanctions/>; FED. R. CRIM. P. 53.

³² See Debra Cassens Weiss, *BigLaw Partner Is Ordered to Donate \$5,000 for Tweeting Photos During Federal Trial*, AM. BAR ASS'N J. (Dec. 15, 2015), http://www.abajournal.com/news/article/biglaw_partner_is_ordered_to_donate_5000_sanction_for_tweeting_photos_during.

Fiddy had—well, you know, that’s how I roll. [Laughter] So 50 Cent had a multi-million-dollar judgment entered against him, and he did what many people do when multi-million-dollar judgments are entered against them: they file for bankruptcy protection.³³ But somewhere along the line, the fundamental underlying principle behind bankruptcy law was not fully communicated between 50 Cent’s lawyers and him: the idea that you cannot *pay* your creditors because you do not have the *money* to pay your creditors. [Laughter]

And so 50 Cent was posting on Instagram, very prolifically, photos like this, and I believe the correct hip-hop vernacular—and correct me if I’m wrong, Judge Willett—but I believe it’s “fat stacks of cash, yo” [Laughter]—was posting all of these which led to the folks on the other side, the creditors’ lawyers, questioning whether or not his bankruptcy petition was valid or not, and that led to another show-cause hearing.³⁴ Although one of the photos I could not save, because it was deleted too quickly, was 50 Cent in the federal courthouse itself holding up “fat stacks of cash, yo.”³⁵ And that did not amuse the federal judge very much either. I think he learned a lesson about that.

[Next slide] This is—again, sometimes lawyers forget the fact that these social media platforms are very public. I published an article earlier this year called *Taking the Heat for a Tweet*, which pointed out while you may have a First Amendment right to air your views, there are going to be consequences.³⁶

This lawyer from the Austin, Texas area was not happy with a cabinet member’s decision to revise certain Obama-administration-era guidelines on handling campus sexual assault investigations.³⁷ And so, he tweeted that he would be okay if that particular individual were sexually assaulted.³⁸ Wishing sexual violence on anyone is really not a good career move to say the least. He wound up parting ways with his law firm almost immediately thereafter.

So, a very difficult sort of thing when you venture [Next slide] as this individual, who was a senior in-house counsel with CBS.³⁹ She posted on Facebook, shortly after the tragic Las Vegas mass shootings, that she actually

³³ Charlotte Alter, *Bankruptcy Judge Orders 50 Cent to Explain Instagram Posts Showing Stacks of Cash*, TIME (Feb. 20, 2016), <https://time.com/4231472/bankruptcy-judge-50-cent-instagram-posts-cash/>.

³⁴ *Id.*

³⁵ Barbara Ross, *Judge Slaps 50 Cent on the Hand for Photo He Took in Bankruptcy Court that Showed Wads of Fake Cash in His Waistband*, DAILY NEWS (Apr. 6, 2016), <https://www.nydailynews.com/new-york/judge-chides-50-cent-fake-cash-photo-federal-court-article-1.2591019>.

³⁶ See generally John Browning, *Taking the Heat for a Tweet*, D MAG., <https://www.dmagazine.com/publications/d-ceo/2013/december/lcgal-matters-of-social-media/> (last visited Jan. 15, 2020).

³⁷ Rudy Koski, *Local Lawyer Who Made DeVos Sex Assault Tweet Resigns*, FOX 7 AUSTIN (Sept. 11, 2017), <https://www.fox7austin.com/news/local-lawyer-who-made-devos-sex-assault-tweet-resigns>.

³⁸ *Id.*

³⁹ Joe Patrice, *Senior Attorney Fired for Cruel Commentary on Las Vegas Shooting*, ABOVE THE LAW (Oct. 2, 2017, 4:49 PM), <https://abovethelaw.com/2017/10/senior-attorney-fired-for-cruel-commentary-on-las-vegas-shooting/>.

had no sympathy for the victims because it was a country music concert, and country music fans were just a bunch of, as she put it, “republican gun toters.”⁴⁰ CBS fired her immediately and issued a statement indicating that her comments on Facebook were not consistent with their values.⁴¹

[Next slide] And then there was a prosecutor from Orlando. This was actually not his first questionable Facebook post. He actually posted this before he posted about the Orlando nightclub shootings, and *that* was the one that actually got him fired.⁴² And, again, he was doing this and made no distinction between his work as an individual or his views as an individual and his status as a prosecutor.

And every time I talk to audiences of lawyers, I hear lawyers say, “Well, John, I’m a boring transactional lawyer. I’m a boring tax lawyer.” That’s actually redundant. [Laughter] “I’m a boring appellate lawyer, so I don’t need to worry about this stuff. That’s the litigators who get in that kind of trouble.”

No, it’s not. Boring appellate lawyers do too. [Next slide] This was a staff attorney for the Kansas Court of Appeals, and she took great delight in the fact that a former attorney general from that state was actually in the midst of a disciplinary hearing before the Kansas Supreme Court.⁴³ She didn’t agree with him politically, and so she live-tweeted his disciplinary proceeding, and a number of the things that she tweeted were not very appropriate, and she wound up being—those came to light, and she was fired from her job.⁴⁴ And perhaps in the most ironic twist—and it’s actually kind of funny that her Twitter profile picture was her going “shh” because she should have taken her own advice—she actually wound up on the receiving end of a disciplinary proceeding herself.⁴⁵ So what goes around comes around.

[Next slide] And, of course, we have to have some mention of the fact that there are a growing number of judges who are active on social media, including the gentleman to my right.

Now there are dos and don’ts if you are a judge on social media. Don’t be like the former Ohio Supreme Court justice who responded to the #MeToo Movement while he was running for Governor of Ohio by going on

⁴⁰ *Id.*

⁴¹ Debra Cassens Weiss, *CBS Fires Lawyer Over Facebook Posts Calling Vegas Shooting Victims Likely ‘Republican Gun Toters’*, AM. BAR ASS’N J. (Oct. 2, 2017, 2:56 PM), http://www.abajournal.com/news/article/cbs_fires_lawyer_over_facebook_comments_calling_vegas_victims_likely_republ.

⁴² See *Orlando Shooting: Prosecutor Fired for Offensive Facebook Posts*, CBS NEWS (June 24, 2016, 9:28 AM), <https://www.cbsnews.com/news/orlando-shooting-prosecutor-fired-facebook-posts/>.

⁴³ Debra Cassens Weiss, *Tweeting Lawyer Gets Lightest Sanction for Disbarment Prediction During AG’s Ethics Hearing*, AM. BAR ASS’N J. (Jan. 15, 2014, 12:20 PM), http://www.abajournal.com/news/article/tweeting_lawyer_gets_lightest_recommended_sanction_for_disbarment_predictio.

⁴⁴ *Id.*

⁴⁵ *Id.*

Facebook and boasting about your sexual conquests in great detail.⁴⁶ Not a good idea. And by the way, he placed a distant fourth in his democratic primary.⁴⁷

But *do* be like one of the gold standards, like Judge Dillard or Judge Willett, and post things that obviously don't involve commentary on cases or parties but, in this case, a humorous tweet: "[Don't] consult a Dove wrapper for oral argument advice: 'Ignore the clock.'"⁴⁸

With that, I think that kind of gives you an overview of some of the danger areas, and we'll talk more about that as the panel progresses.

HON. DON WILLETT: John, thanks so much. David, take it away. [Applause]

DAVID LAT: Thank you. Can everyone hear me, including at the back? Okay, great.

John is a tough act to follow. Judge Willett, thank you so much for putting together this panel. I have to confess, because of your years of great tweeting as the Tweeter Laureate of Texas and as a member of the Texas Supreme Court, you'll always be, in some ways, Justice Willett to me—and perhaps you'll be Justice Willett again.

I must also thank Judge Willett for forcing me, a forty-something-year-old man, to learn how to tie a bowtie. I have spent several hours on YouTube this week and about a half hour on YouTube this morning, and I still needed a tune-up from Chief Judge Dillard, but I think I now have a reasonable facsimile of a bowtie.

It's great to see such a large crowd here for our Saturday morning panel. I know my co-panelists are a great draw, but I also know that we had you at ethics credit. [Laughter] And I have to say, it is an honor to be on this stage at The Federalist Society National Lawyers Convention. As a right-of-center legal nerd, being on this stage has definitely been a bucket list item, and so it is really a thrill to be here.

As Judge Willett mentioned, before I started *Above the Law*, I had a blog called *Underneath Their Robes*, which was an irreverent, occasionally snarky blog about members of the federal judiciary that I wrote while I was

⁴⁶ Lindsey Bever and Marwa Eltagouri, *Ohio Governor Candidate Apologizes for Boasting of Sexual History with '50 Very Attractive Females'*, WASH. POST (Nov. 18, 2017, 3:28 PM), <https://www.washingtonpost.com/news/politics/wp/2017/11/17/ohio-governor-candidate-boasts-of-sexual-history-with-approximately-50-very-attractive-females/>.

⁴⁷ *Ohio Governor Primary Election Results*, N.Y. TIMES (May 9, 2018, 5:35 PM), <https://www.nytimes.com/elections/results/ohio-governor-primary-election>.

⁴⁸ Judge Don Willett (@JusticeWillett), TWITTER (Dec. 18, 2016, 2:44 PM), <https://twitter.com/JusticeWillett/status/810571453271863297>.

working as a federal prosecutor.⁴⁹ You can read about the whole saga online. But in many ways, I'm like the former felon who now goes to schools and says, "Here's what you should not do." [Laughter] So there's that. My career turned out fine in the end, and I found new gainful employment in a different industry. But others may not be so fortunate.

And I have to say, I have been writing about this conference dating back to *Underneath Their Robes*. I wrote a post about the 2005 Convention, which you can still find online called *Robing Room Report: Federalist Fiesta Edition* where I gave out awards for things like the funniest panelist—that was John Yoo—prom queen and king, and, of course, I had to recognize the wife of my former boss, she's right here, Mrs. Maura Nolan O'Scannlain, as best-dressed judicial spouse.⁵⁰ [Laughter and applause]

So, as a blogger, I've actually been involved in the social media world, really dating back to 2004, and actually Chief Judge Dillard, too, was a former blogger. Blogging is really one of the earliest forms of social media, and services like Facebook and Twitter were initially called microblogs.⁵¹ Now given the lengthy screeds that people post on both services, the micro is probably no longer applicable, but you can still get the sense of the DNA of Facebook and Twitter and LinkedIn or other services in the traditional blogs, which are still, of course, very much alive and well.

So why am I here on this panel? After John put the fear of God in you by offering you a lot of cautionary tales—and, of course, you can read about my own online as I mentioned—I'm here to tell you that technology and social media are your friends. Or, at the very least, they can be used in ways that advance your career rather than destroy it.

I'm going to make three quick points, and we want to leave a lot of time for questions because social media, of course, is all about social interaction, and so it wouldn't be very fitting for us to sit here and lecture you for ninety minutes.

Point number one: social media is really nothing to be afraid of. Lawyers can sometimes be Luddites or technophobes. A lot of us went to law school because we were not STEM people, but we're still interested in gainful employment. I'm a former English major myself, and so, for many lawyers, social media and technology in general can be exotic and even scary. And

⁴⁹ Debra Cassens Weiss, *Above the Law's David Lat Taking a Break from 'The Trenches' of Daily Journalism*, AM. BAR ASS'N J. (Oct. 9, 2017, 9:04 AM), http://www.abajournal.com/news/article/above_the_laws_david_lat_takes_a_break_from_being_in_the_trenches_of_daily.

⁵⁰ See generally *Robing Room Report: Federalist Fiesta Collector's Edition! (Part 1)*, UNDERNEATH THEIR ROBES (Jan. 25, 2005), https://underneaththeirrobes.blogs.com/main/2005/01/robing_room_rep.html.

⁵¹ See Daniel Nations, *What Is Microblogging?*, LIFEWIRE (Sept. 22, 2019), <https://www.lifewire.com/what-is-microblogging-3486200>.

cautionary tales, like the ones that John shared, might reinforce this view.

But at the end of the day, social media and technology are just like any other tools available to lawyers. They can be used wisely or unwisely; they can be used ethically or unethically. They are really just what you make of them. So this is why the American Bar Association's duty of technology competence, which John mentioned, adopted by thirty-three states—I had thirty-two in my notes, but John just updated me—is actually, as a technical matter, in a comment to the existing rule of technology competence, rather than a new rule itself.⁵² What the ABA is basically saying is your existing duty of rendering competent representation to your clients includes a duty to keep abreast of relevant developments in the law and its practice, including the benefits and risks associated with new technology.⁵³

So in many ways, you can think of this as—to make this more interesting to the FedSoc crowd—something analogous to constitutional law. Here, at The Federalist Society, we do not believe in a living, breathing, StairMastering Constitution. So the rules stay the same, but their proper application to different forms of technology will, of course, constantly arise.

For example, we have the Fourth Amendment.⁵⁴ The rules and principles of that Amendment are fixed, but how it applies to GPS, how it applies to cell phone searches—that, of course, will evolve and change as the technology also evolves and changes.

In the final analysis, the responsible use of social media is really just about exercising good judgment. The examples that John pointed out in many ways could have been avoided by just a modicum of common sense, in other words, not exercising bad judgment. And so, if you are a lawyer and you are exercising judgment and providing advice to your clients for a living, after exercising judgment in this form, you shouldn't be afraid of exercising it on social media as well.

Point number two: social media—everybody's doing it. Now, of course, when you said this to your mom as a kid and wanted to get permission to do something and she said, "Well, if everyone jumped off a bridge, would you?"

Well, if you're a lawyer or law firm, yes! [Laughter] This is a profession very much focused on, obsessed with, precedent. It's a profession where peer pressure exerts a very strong pull. This is why, when one major

⁵² Bob Ambrogi, *Two More States Have Adopted Duty of Tech Competence; Total Now 34*, LAWSITES (Dec. 7, 2018), <https://www.lawsitesblog.com/2018/12/two-states-adopted-duty-tech-competence-total-now-34.html>.

⁵³ Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits*, *New Model Ethics Comment Says*, AM. BAR ASS'N J. (Aug. 6, 2012, 7:46 PM), http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits.

⁵⁴ See generally U.S. CONST. amend. IV.

law firm raises salaries, pretty much everyone else falls in line, as we breathlessly report on *Above the Law*.⁵⁵ And so, I think it will be, perhaps, persuasive to those of you who are more resistant to social media to learn about how many of your peers are actually actively involved and engaged with it.

A survey by the ABA last year found that eighty-one percent of lawyers use social media for professional purposes.⁵⁶ Seventy-seven percent of these lawyers reported that their law firms had some kind of social media presence.⁵⁷

What do lawyers use social media for? The top purposes are career development and networking, which explains why more than ninety percent of lawyers have LinkedIn profiles.⁵⁸ Second, client development; third, education and general awareness; and fourth, case investigation.⁵⁹

And social media does bring benefits to lawyers. Of the lawyers using social media, twenty-seven percent reported that they had actually obtained clients from their use of social media.⁶⁰ Now, of course, this will vary depending on your practice. If you have a very consumer-focused practice, you will get more work out of social media. If you are at an Am Law 100 firm representing large companies, you probably aren't going to be landing that billion-dollar-securities class action defense from Facebook.

But, on the other hand, I will note that I've seen—perhaps just because of my connections to the vast right-wing conspiracy—a fair number of general counsel of publicly traded large companies on Facebook. They might be posting about their pets or their kids, but if you interact with them on Facebook, you're keeping yourself top of mind for them. And even though the ways of retaining outside counsel are getting more professionalized and also more bureaucratic, sometimes whether you get an engagement depends on whether the GC or deputy or associate GC happens to remember you. So if you are engaging with them on social media, even on a platform not explicitly professional, like Facebook, that can often be an advantage.

Here's my third and final point: if you're not using social media, or if you're at least not cognizant of it or don't understand its nuances, you could

⁵⁵ Staci Zaretsky, *Salary Wars Scorecard: Which Firms Have Announced Raises and Bonuses?* (2018), ABOVE THE LAW (June 5, 2018, 1:46 PM), <https://abovethelaw.com/2018/06/salary-wars-scorecard-which-firms-have-announced-raises-2018/>.

⁵⁶ Allison Shields, *2017 Social Media and Blogging*, AM. BAR. ASS'N (Dec. 1, 2017), https://www.americanbar.org/groups/law_practice/publications/techreport/2017/social_media_blogging/.

⁵⁷ *Id.*

⁵⁸ Elizabeth H. Munnell, *LinkedIn for the Reluctant Lawyer, Part I*, Law Practice Today (Feb. 14, 2019), <https://www.lawpracticetoday.org/article/linkedin-reluctant-lawyer-part/>; see also *How Do You Talk to Your Lawyers About LinkedIn?*, PROVENTUS (Oct. 28, 2014), <http://www.proventusconsulting.com/blog/how-do-you-talk-to-your-lawyers-about-linkedin/>.

⁵⁹ Shields, *supra* note 56.

⁶⁰ *Id.*

actually be violating your ethical duties. As noted by John, there is this widely adopted comment to the ABA model rule of competence that makes this clear, and you can find a whole host of specific examples where lawyers' aversion to technology or to social media actually got them into trouble.⁶¹

For example, in a 2010 case, *Johnson v. McCullough*, the Missouri Supreme Court held that lawyers actually have an affirmative duty to research perspective jurors online.⁶² Now, this is actually one of the emerging issues in social media for lawyers, the extent to which you can turn to social media in the *voir dire* process, so you should check the rules of your own jurisdiction. Your mileage may vary.

But I think the principle of this Missouri case is pretty straightforward. Sometimes in order to serve your client well, to litigate and investigate a case properly, you will have to go on and use social media whether you are a technophobe or not. We've all, of course, heard of cases where some personal injury plaintiff who claims some terrible, life-altering injury is then busted on Facebook because they are water skiing. There are certainly cases like that.

Use of social media is very widespread in the family law context, where Facebook and other platforms are used to establish relationships, licit or illicit. And of course, social media is also very relevant in the criminal law context. There are a lot of prosecutors here, and many of you are probably using social media to research your cases. Law enforcement will often use social media for sting operations, so it's very relevant.

And it's also relevant to defense counsel, where it could be relevant in terms of mounting a defense for your client. So, for example, in the case of *Cannedy v. Adams*, a Ninth Circuit case—yes, the Ninth Circuit, but bear with me.⁶³ [Laughter] The court held that a failure to investigate the social media recantation of an allegation by an alleged victim of a sexual abuse constituted ineffective assistance of counsel.⁶⁴

Now, this case actually ended up being the subject of some *en banc* activity, and my former boss sought to have it reheard *en banc* but for a totally separate issue related to the standards for *habeas* review.⁶⁵ The core holding of that case, or the holding of the case related to social media and the duty of lawyers to use it as an investigative tool, really is not altered by the rest of the

⁶¹ See *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. 2010) (discussing use of Case.net to search for jurors' litigation history); Serge F. Kovaleski & Stacy Cowley, *Wells Fargo Accidentally Releases Trove of Data on Wealthy Clients*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/21/business/dealbook/wells-fargo-confidential-data-release.html>; Simmons, *supra* note 25.

⁶² See *Johnson*, 306 S.W.3d at 558–59.

⁶³ See generally *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013).

⁶⁴ *Id.* at 1153–54, 1166.

⁶⁵ *Cannedy v. Adams*, 733 F.3d 794, 795 (9th Cir. 2013).

aspects of that case.

So, Judge Willett also said that I would talk briefly about the evolution of online media, which I expect we'll talk about a lot in the Q&A as well. And I guess I would just have three quick observations on that.

One, as we all know, and as Judge Willett demonstrated by mentioning some statistics, the world of online media has just grown so rapidly in the past decade or so. Certainly, it has exploded since the time that I first started blogging back in 2004. So it's grown in terms of usage; everyone uses social media practically. My mother—I will not reveal her age; she would kill me—is very active on Facebook, for instance. There are just many wonderful uses of social media, and it is not just lawyers, but your clients too, who are using social media.

The second thing I would say is social media and online media have grown as businesses as well. Facebook and Twitter are multi-billion-dollar companies.⁶⁶ Facebook is one of the largest companies in the world.⁶⁷ And even small operations, like Above the Law, are now, of course, gaining economic traction. Above the Law, I should mention, is owned by a company called Breaking Media.⁶⁸ Breaking Media publishes about a half dozen different websites focused on different industries.⁶⁹ In terms of Above the Law, we have seven-figure revenues; we have about a dozen people who work full-time on it, with decent salaries and health insurance and everything.

So online media, whether you're Facebook or whether you're us, is now a viable way of making a living. Back when I first entered this business, you could probably number in the dozens all the people in the country who were actually making a living as bloggers or as social media folks. And now, of course, even law firms will hire people who handle their social media essentially. It is something that is quite imperative for both lawyers and law firms.

Here's the third and final point I would mention: social media has grown in size, and it's grown as a business, but it has also grown in vitriol. Think of the polarization that we've seen on social media, which I've noticed just as an active user of Facebook and Twitter. The types of confrontations and arguments, the name-calling that you'll see, they're all very unfortunate. And I think for those of us who've been using social media with great enthusiasm and joy for many years, recent developments have tainted that a

⁶⁶ See, e.g., Tom Huddleston Jr., *How These Billion-Dollar Businesses Started as Happy Accidents and Side Gigs*, CNBC (Jul. 26, 2018), <https://www.cnbc.com/2018/07/26/how-billion-dollar-companies-from-facebook-to-venmo-got-started.html>.

⁶⁷ Luca Ventura, *World's Largest Companies 2019*, GLOBAL FIN. (Aug. 29, 2019), <https://www.gfmag.com/global-data/economic-data/largest-companies>.

⁶⁸ *Breaking Media Announces Promotions at Above the Law*, ABOVE THE LAW (Nov. 21, 2014, 12:28 PM), <https://abovethelaw.com/2014/11/breaking-media-announces-promotions-at-above-the-law/>.

⁶⁹ *Id.*

little bit. You can locate blame for this on a lot of fronts and on both sides certainly, but I think it is an unfortunate development that we do have to grapple with.

So, the final piece of advice I would offer is just social media is a wonderful thing, but it is also possible to have too much of a good thing. Don't be afraid to occasionally log off. I just returned to Twitter after a multi-week hiatus, and I think sometimes stepping away from the computer and stepping away from social media can actually be very salutary for your mental health.

So with that, I thank you for your attention, and I look forward to interacting with you online and off.

HON. DON WILLETT: David, thank you so much. Chief Judge Dillard.

HON. STEPHEN DILLARD: Alright, well, it's appropriate that I'm here with David. We go way back, and like David, this is a bucket list item for me to be speaking on a Federalist Society panel. I've been involved with the Federalist Society since 1993. That doesn't make me one of the original founders, but it certainly means that I'm in that first generation after the apostles in terms of FedSoc lineage.

So, I'll start with a humorous anecdote. Someone came up to me recently and said, "Gosh, we really miss Judge Willett on Twitter. He was an amazing presence." This person then paused for a moment and said, "But you're doing a nice job of filling his shoes." [Laughter] And I said, "Well, maybe one shoe, but not both." In all seriousness, I don't think we can ever replace Judge Willett. He will always, to me, be the judicial Twitter king, so we hope to have you back soon, my friend.

So, what I want to talk about today is social media as a means of how we communicate as a society and whether judges ought to be involved in it. Judges are supposed to be experts in language and communication, yet when we consider the reactions of many state bar associations to judges using social media, as well as the comments frequently made by judges about social media, there is—and I think David pointed this out—a lot of resistance to change and technology.

I have a former colleague of mine, who had a computer in his office, and he never used it. He was a great judge, but it does seem odd to me that there is this resistance by the legal profession to engage in modern forms of technology and communication. And if you doubt that, David did a nice job of explaining how social media platforms and technology have evolved. I just turned forty-nine. In my lifetime, how we communicate with one another has dramatically changed. And if you are not on social media platforms—if you don't understand, as a judge, social media, or how it works—I'm not sure how

you do your job effectively. David once again did a nice job of explaining many of the different ways that technology and social media come up in cases.

And if you doubt that—now, I have two teenage daughters. My middle child, Lindley, has taught me a great deal about how teenagers communicate. They don't use text messaging much. They don't really use Facebook. They think Twitter is for old people, like me. My daughter uses, and her friends use, Snapchat as text messaging, but they take photos, selfies, and include a message in these "snaps." And if you've never seen this happen in real time, it is remarkable how fast they're communicating and taking photos. I've never seen anything like it.

They also use Instagram and have running commentaries throughout the day. And it's like some of the old AOL chat rooms.

But what it shows you is that—and it may very well be—in five years from now that Twitter is gone by the wayside or is no longer as prominent, but there are going to be new platforms. This form of digital communication is not going away, and judges, in my mind, need to understand this in order to effectively represent the people they serve.

And we are public servants. I say this repeatedly. Judge Willett pointed out my article.⁷⁰ Judges are public servants; we have to be connected to the people we serve; we have to be accessible; we have to be transparent. And I think voters are increasingly expecting that public servants will communicate with them through the social media platforms they actually use, right? Gone are the days when judges, I think, can just go to the Rotary Club and give a speech. I think those things are still effective, and I think—I can't remember who said it, but was it—who said "iPhone to iPhone" yesterday?⁷¹ Who made that remark?

DAVID LAT: Senator Lee, I think?

HON. STEPHEN DILLARD: Right, Senator Lee made that remark. And he's right. Nothing replaces talking to somebody in-person. But you have to understand that a lot of people are communicating iPhone to iPhone. People talk about their pocket friends, right? On their phone. And so, you need to understand that you're not going to be effectively communicating in society if you are not involved in social media. And once again, I think voters expect that public officials will communicate with them using the social media platforms they use. And I'm going to sever off state-elected judges from federal judges for a moment. Realistically, in terms of down-ballot races, social media is really one of the only ways that you're going to get your message out to voters. And so, I think it's important for

⁷⁰ See Dillard, *supra* note 19, at 13.

⁷¹ *Federalism and Its Alternatives*, MIKE LEE: SOC. CAP. PROJECT (Nov. 15, 2018), <https://www.lee.senate.gov/public/index.cfm/tagged?ID=712C3522-137C-4389-A219-870A9277DB05>.

people—and Judge Willett, once again, has been the leader in all of this. I think he said it's political malpractice if you are a state-elected official to not use social media, and that applies to judges as well.

So, judges are public servants, and I think the time is coming when the people we serve are not going to be content with us to simply sit in our ivory towers as black-robed philosopher-kings. Judges are different, but they are not special. Let me say that again. Judges are different. We're not special. And here's what I mean by that: judges are different because we should never be partisan. We should not do anything that would cause a citizen to doubt about whether he or she is going to get a fair shake if they come before us.

But just because we wear black robes doesn't mean that gives us a free pass to remain cloistered, like monks, away from society. When I was coming up as a lawyer, and I would meet a judge at an event, spending a few minutes with that judge and getting some advice was really amazing. But social media has changed everything. It allows law students, lawyers, and citizens to have direct access to the people that serve them.

And as I repeatedly say, we can't lose sight of the fact that judges are public servants, and they need to be accountable to the people. So, I think now is the time for judges to embrace social media platforms. Federal judges should as well, but state judges, especially, are directly accountable to the people.⁷² We have to stand for election, and so I think it's important to embrace and understand the technology used by the people we serve.

Let me give you a few reasons why I decided to embrace social media platforms as a judge.

Number one, I use it to educate the public about the Court of Appeals of Georgia. Now you can say, "Steve, really? Who's interested in the state intermediate appellate court in Georgia?"

Well, okay, there are some nerds, though—they're my people—and they are interested in learning more about my court. So, I wrote an article for *Mercer Law Review*, which is a more traditional means of communicating about the inner workings and culture of the Court of Appeals, but I repeatedly promote it online.⁷³ Now, how many people that aren't lawyers have read it? I'm not sure, but it's out there and that's important. Transparency doesn't mean that people will always use the information you're giving them, but I think for a free society, it's important to be transparent. I also promote the live streaming of our court's oral arguments—

⁷² Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. R. 689, 708 (1995).

⁷³ See generally Stephen Louis A. Dillard, *Special Contribution, Open Chambers: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals*, 65 MERCER L. REV. 831 (2014).

[Applause by Josh Blackman]

JOSH BLACKMAN: Thank you.

HON. STEPHEN DILLARD: Thank you. [Indicates Josh Blackman] He watches. [Laughter]

I confess, and I give a lot of credit to the Supreme Court of Georgia, which was live streaming long before it was cool. When I came on to the court, the first thing I said was, “Why aren’t we live streaming?” We’re in Atlanta. Georgia is a massive state; our lawyers in Bainbridge shouldn’t have to drive all the way up to Atlanta to watch oral argument. We are statewide officials in Georgia, which means we’re not in districts; we are statewide. And the people we serve should have the right to watch our oral arguments online.

I will tell you, though, that there was a lot of resistance by some of my older colleagues to live streaming our arguments. It took me five years—I was appointed in 2010—it took me over five years, and I think it was the Fall of 2016, when we started live streaming and archiving our oral arguments.⁷⁴ And I encourage you to go to our website, <http://gaappeals.us>.⁷⁵ I hate that domain name, but that’s it. So, go to our website and watch those oral arguments. This is an important part of our transparency to the public.

There are other things you can do to educate the public about what we do as judges, and this is going to dovetail into professionalism. But one of the things I use my Twitter account for is to promote professionalism in appellate practice. I’ve had Q&A sessions with my followers. I give oral argument tips. I retweet articles on legal writing. Chief Justice John Roberts has given out some really fascinating and interesting advice about how he used to prepare for oral arguments. I share that information as well.

There is also an entire culture on Twitter, a hashtag called #appellatetwitter.⁷⁶ The purpose of #appellatetwitter is about professionalism and networking and appellate lawyers getting together and nerding out. It’s really remarkable to see this community develop. You’ll have an appellate lawyer go somewhere for oral argument, and he or she will have lunch or meet up with someone that they’ve never met in real life, but they know each other from Twitter and they respect one another because of their online interactions. I’ve seen people ask questions and say, “Hey, I’ve never filed something in this court before, how do I do this?” or “What would you recommend?”

We talk about the vitriol on Twitter. What we don’t acknowledge is

⁷⁴ See *id.* at 845.

⁷⁵ See generally COURT OF APPEALS OF GEORGIA, <https://www.gaappeals.us/> (last visited Jan. 15, 2020).

⁷⁶ #Appellatetwitter, TWITTER, https://twitter.com/search?q=%23appellatetwitter&src=typed_query (last visited Jan. 15, 2020).

that there are oases of sanity where real relationships are being formed and developed, and that professionalism is being promoted by many lawyers. And I don't think it demeans my role as a judge to participate in that community and talk generally and advocate for professionalism in appellate practice and in general.

One of the most rewarding and remarkable things about being on Twitter that I never would've known—could've expected, is that it is a vehicle I am able to use to mentor law students and young lawyers. That has been very satisfying. People can ask me questions, ask for oral argument tips, legal writing tips, clerkship advice. I frequently have people who will send me messages, what we call direct messages, on Twitter, and they'll say, "Judge Dillard, I noticed that you went back and clerked after five years in practice." I had somebody—this is recent—who said, "I'm thinking about doing that. Would you mind talking to me?" Sure. I gave him my cell number and talked to him during my commute time.

And I do this because I remember how important and meaningful it was when judges, just in those small moments at the Rotary Club or the bar events, would take just a few minutes to speak with me and give me advice as a law student or young lawyer. Now, I can do that on a much broader scale. I can respond to someone's direct message in a few seconds and say, "Call this person" or "Look at this website" or "Check this out." That has been so rewarding, and as much as I love being a judge and writing opinions, I think the greatest legacy I will ever have as a judge is investing in people and mentoring. I think lawyers and public officials need to make mentoring a priority, and Twitter is an amazing platform for it. I can mentor not only law students and lawyers in Georgia, but people all over the United States, and even abroad. I've had people that are interested in coming and studying law in America, and I point them in the right direction. I have no idea how to do all that, but I try to help them as best I can.

Both David and Don pointed this out: we live in divided times. There's a lot of vitriol out there, and I, for those of you who follow me on Twitter, I try to promote civility. I try to promote—I think it's important to promote that and civics. Those to me are first principles of American life. I don't think that should be something that's controversial. Being a judge gives me a platform. I am nonpartisan, and I embrace being nonpartisan. I like being in a position to say to those who follow me on Twitter, as I say every Friday as my sign-off for the week, be good to each other. That may sound trite, but it's not. We need to be good to each other. We need to be able to discuss important issues in a way that is civil and to have meaningful dialogue and to not separate from each other into these echo chambers. So, I try to do what I can to further civil discourse online.

I'm about to wrap up here, but I'll just say this. It's also good politics,

right? In life, as my mom used to say, “Doing the right thing is good politics.” And I think being on Twitter and having people who follow me, especially from the State of Georgia, and who get a better sense of who I am is—I mean, for better or for worse, you know some things about me if you follow me on Twitter. You know I love Samford University, my alma mater. You know that I love Radiohead, Jars of Clay, and alternative music. You know that I love my family, my church, and my job.

If somebody were to describe me in terms of my professional capacity at the end of my career, I hope they would say, “Judge Dillard was a joyful public servant.” And that’s what I hope comes across on my Twitter feed, and I think it’s important for the public to see judges who love their job, are committed to the rule of law, and are committed to serving others. I don’t think that demeans the office in any way.

I’ll leave with this: are there pitfalls? Sure. I actually don’t think that’s a bad thing. If there are judges exercising poor judgment online, they are probably exercising poor judgment in real life. And the fact that it might be exposed on social media, while it may have short-term damage to the profession or to the courts, long-term there have been people in Georgia that have done that and been removed from the bench. And I think transparency reveals what it reveals, and that’s not necessarily a bad thing.

I think judges should be on Twitter, whether they’re state or federal judges. Maybe we can get into that in our discussion, but thank you for having me here today.

HON. DON WILLETT: Alright. Thank you, Your Honor. Professor Blackman, you’re batting cleanup.

JOSH BLACKMAN: Thank you so much.

So, first off, we are all wearing bowties at Judge Willett’s request, and second, I do not drink coffee, so there’s no caffeine in me.

It’s a pleasure to be here. I started law school in 2006. That year I attended my very first Federalist Society Convention. That was also the year Twitter was invented.⁷⁷ Three years later, I came to this very hotel, and I was the first live tweeter for the Federalist Society Convention. Peter Redpath gave me a free ticket to the dinner if I tweeted about the Convention. It wasn’t even a thing yet.

And now, here we are about eight or nine years later, and we have this massive social media presence; it’s being streamed online. Dozens of you have tweeted about this exact panel; I’ve been tweeting from the stage;

⁷⁷ Leo Widrich, *How Twitter Evolved from 2006 to 2011*, BUFFER, <https://buffer.com/resources/how-twitter-evolved-from-2006-to-2011> (last updated Mar. 17, 2016).

we are in a very different world.

I want to talk about four areas today. Social media in the courts, social media for judges, social media for legal reporters, and social media in law schools.

I want to start with the courts, which is a very important aspect. And I have five principles that courts should consider. First, websites for courts should be accessible. They should look like they were created in the year 2018, not in 1996 on a dial-up modem. Far too many court websites are awful. You can't navigate; they have old information; they have no photographs of the judges. Keep up with the times.

Second, make opinions freely and easily available. [Applause] Please clap for that. [More applause] There is ongoing litigation about whether PACER, which is the federal system, can charge you a nickel a page—like you're going to a copy machine—five cents a page for a PDF.⁷⁸ I think it's illegal, but I'll put that aside. It's awful policy. So, if you are in a state court, make your opinions available on a single-page download. I don't have to jump through a hoop, don't have to sign up for an account. And if you're in federal court, guess what? You can post opinions for free on your home page. Some courts have noteworthy decisions. Just link to a PDF.

The third principle—and Judge Dillard stole my thunder—live stream your arguments. I understand there are arguments, pros and cons, but enough courts have tried this, it doesn't change the dynamics. I don't know if we'll crack the Supreme Court, but the lower courts can change their policies. And I said live stream, not record it and put the video on a month later. That doesn't count. People want to see information right away. There's so much disinformation—I'll get to reporters in a minute. There's so much disinformation that you can help fix by putting your own arguments live. True, people will tweet; they'll overreact, fine. But the upshots are far greater.

Fourth, consider preparing summaries of opinions. The Ninth Circuit does this.⁷⁹ They create basically a syllabus, like the Supreme Court, where they have a short overview of a decision.⁸⁰ That is helpful. If there's a long, complicated decision, give us something. Give the press something to jump on quickly, so they don't mischaracterize it.

And last, this is probably for judges who have their own dockets,

⁷⁸ See, e.g., Stephane Francis Ward, *Pacer Fees Are Too High, Class Action Alleges*, AM. BAR. ASS'N J. (Apr. 21, 2016, 6:47 PM), http://www.abajournal.com/news/article/pacer_fees_are_too_high_class_action_alleges.

⁷⁹ See, e.g., *Opinions*, U.S. COURTS FOR THE NINTH CIRCUIT, <https://www.ca9.uscourts.gov/opinions/> (last visited Jan. 15, 2020) (once a case is selected, the reader can view the case syllabus prepared by court staff).

⁸⁰ *Id.*; see, e.g., *Olympic Forest Coalition v. Coast Seafood*, No. 16-35957, at 2 (9th Cir. Mar. 9, 2018), <https://cdn.ca9.uscourts.gov/datastore/opinions/2018/03/09/16-35957.pdf>.

please make your opinions available that you can copy and paste. It's something called OCR, optical character recognition.⁸¹ You know what this is, right? If you simply print your opinion out, sign it on paper and scan it, it's useless for us, right? We can't copy and paste from it, we can't do a Control+F or search. Make your opinions readable so that you can search them. It makes my life easier. In other words, I can't blog about your opinion if I can't do a Control+F and search for the word I'm looking for, so please OCR.

Next, social media and judges. So I have a few basic principles, right? You can have an account like Judge Dillard, which is open to the public, but a lot of judges have private accounts. And this creates, I think, certain issues. Recently, this is from a court in Florida, I think, yesterday or the day before, said that judges do not need to disclose if they're Facebook friends with, perhaps, a member of the jury or someone in a case.⁸² I'm not sure about that. But judges who do have social media accounts—I recognize you are human beings; you have children; you have parents; you want to exchange information—be very, very careful. Do not friend on Facebook your litigants or any possible people on the jury. I think you should disclose it anyway.

Much better is make your account public. Let the people see what you're doing. There was an article on BuzzFeed about a month ago, a number of federal judges, some in this building perhaps, have Facebook accounts.⁸³ They have Twitter accounts, and reporters find them. It's not hard. If you follow certain people and you like certain things, you can track it down. So, my recommendation: judges should make their accounts public.

Now, I would love if you do what Judge Dillard does and actually tweet in a meaningful way. Now, I'd asked Judge Willett if he would tweet from the podium today, he gave me a "That's a no" from a Simon Cowell meme. [Laughter] So he said no, but I would hope that more judges engage in the manner that Judge Dillard does and Justice Willett did. It's valuable. If I just tweet, I'm no one. But when a judge does, wow, that's a big deal! So, it's a very important aspect.

I'll mention briefly, apparently now Twitter is good for federal courts, right? Courts just cite tweets as if they're any evidence, so to the extent that you've any interest in government, your tweets can and will be used against

⁸¹ Renee Lynn Midrack, *How Optical Character Recognition (OCR) Works*, LIFEWIRE, <https://www.lifewire.com/optical-character-recognition-4158322> (last updated May 12, 2019).

⁸² *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, 271 So. 3d 889, 899 (Fla. 2018).

⁸³ Zoe Tillman, *Some of Trump's Judicial Nominees Have Private Twitter Accounts They Aren't Sharing with the Public*, BUZZFEED NEWS (Oct. 19, 2018), <https://www.buzzfeednews.com/article/zoe-tillman/trump-judicial-nominees-private-twitter-accounts>.

you.⁸⁴ I think one of the more dispiriting aspects of recent confirmation processes is focusing on tweets of judges that are entirely innocuous. It's disgusting, but they will use it against you, so be very, very careful, right? Don't put something on Twitter. If you delete it, it doesn't matter. It's still there. It's preserved for eternity.

The next aspect of my talk is social media and legal reporting. The way reporters cover the courts has changed drastically in the past two decades or so. It used to be that you'd have the Supreme Court decision in the morning, and the reporters would write a story for the next-day daily paper.⁸⁵ No more. They have to get stories out within *minutes* of the decision.⁸⁶ They basically write their stories in advance and just plug in the holding. It's remarkable.

It used to be that they could ask an expert for an opinion when the reporters came out. No. Now, it's right away. So, you need speed, which is why putting the opinions online, in a searchable format, is key. Whoever tweets about it first sets the agenda. And far too often people tweeting are wrong, and they change the agenda and I have to try and fix it. It's a full-time job, but I try very hard.

So put your opinions online quickly. If you're a court saying, "We're going to announce opinions at ten o'clock on a certain day," that's very good. Let the media know.

But one of the consequences of the decline in legal reporting is you have fewer reporters who cover courts. It used to be you'd have one reporter whose full-time job was the courts. No more. So now you may have the political reporter who comes over and does courts every now and then or maybe the person who does the school boards does courts; they don't know nearly as much, and I think that's unfortunate. And a lot of legal reporting today suffers for that exact reason, which is why tweeters like myself can help bridge that gap. Reporters call us up and say, "What the hell is going on," and we can give them instant impact as long as we have the PDF of the opinion. I don't trust a story that doesn't have a link to an opinion. I just don't trust it because I can't verify it for myself.

One other innovation: screenshots. If there's an opinion and there's a key passage, put in a screenshot right in the tweet. People are more likely to retweet if it has a picture in it—we like pictures—and you can jump to it right away.

⁸⁴ See Matthew J. Hamilton et al., *Getting the Snaps and Tweets into Evidence*, AM. BAR. ASS'N (Oct. 5, 2019), <https://www.americanbar.org/groups/litigation/committees/trial-evidence/articles/2018/snaps-tweets-evidence/>.

⁸⁵ See Julia Greenberg, *Why Supreme Court Interns Still Sprint to Deliver News*, WIRED (July 25, 2015, 6:20 PM), <https://www.wired.com/2015/06/instant-news-era-interns-scotus-still-sprint/>.

⁸⁶ See *id.*

One last comment. Judges have different policies when reporters contact chambers. Some may say “no comment;” they “decline to comment.” I think a good general policy is don’t even say anything, just ignore it. Even a “no comment” is kind of a comment, so I would just ignore it altogether.

The last part of my talk is the one nearest and dearest to my heart, which is law schools. I’ve been teaching now for seven years; I speak at about forty to fifty law schools a year, so I get a lot of experience, and I can’t tell you how much social media’s transformed that experience. It’s remarkable. I’m walking up and down the halls of the Mayflower, people say, “Hey, Josh, I know you from Twitter.” It’s stunning. People know this. They get to know you. They think they know you—maybe they don’t, I don’t know; I don’t drink coffee. But they think they know you well enough. [Laughter]

But a couple of principles for law professors. First, live stream your lectures. Let me give you a couple reasons why. First, you benefit your students immeasurably. They can’t possibly write down everything you say; they shouldn’t. If my students know my lectures are online, they’re not doing this thing where they’re typing frantically. They can go back and check later. In fact, my students watch last year’s lecture before class, so they know what I’m going to say. That’s powerful.

But this is not just for your own students. I have students around the globe who watch my lectures. Thousands of them. I don’t know who they are. But you know what? “You got me through property.” “You got me through Con Law,” when I meet them on the road. It’s frankly stunning. So put your lectures on YouTube.

Professors say, “Well, I may say something inappropriate.” Get over it. Your kids are recording you anyway. [Laughter] If you say something inappropriate, they will have a recording of it. And let me make a point that’s not too subtle: you have backup if you’re on recording. They can’t quote you out of context if you’ve your own recording.

I’ve been protested. I have been heckled. Do you want to know something? I have the complete video from beginning to end. They cannot take me out of context. I’ve had students accuse me of saying things that I never said. I say, “Show me the tape,” and it goes away real quick. So, it’s for your own preservation that you’re always being recorded, and I value that very highly.

Also, you can use Twitter to engage students. Judge Dillard mentors them; I can just answer questions. If the student puts a question on Twitter, I’ll answer it. And that’s a direct communication line that may not otherwise exist.

One other issue to think about in social media is discipline issues. Law students often get very active, very feisty, they like to fight. But

sometimes they do it on social media, and they actually taunt each other in class. And discussions that begin in class spill over into class Facebook pages. I tend to stay away from it, but I think at some point, schools will try to discipline that and police that. I think there's some First Amendment issues at state schools and other issues that go beyond the scope. But it's one thing to keep in mind.

Another related issue is tenure and professors saying stupid things on Twitter. Is a professor's Twitter account part of his academic freedom? You've had professors make virulent comments about the right or the left on Twitter. Can you discipline them for that? Does it promote the academic discourse? My general sentiment is yes, it's part of the academic discourse; we use lots of different mediums to communicate.

My last point, to reiterate something that John mentioned, is that Twitter's pretty awful, right? And David as well. There's a lot of hatred, racism, sexism, every -ism you can imagine. I encourage you strongly, and I mean this sincerely, do not feel the need to reply. The most powerful thing ever to do on Twitter is saying, "You know what, I don't need to reply to this person." And that's the most effective response ever.

I've had people message me saying, "Why don't you reply to me?"

I'm like, "I don't want to." And it kills them! [Laughter] So if people stop replying or instead of replying, send them an email. I had a professor say awful things to me on Twitter. I sent him an email; we diffused it in three seconds. You're not going to diffuse an argument on Twitter. Disengage, right? Use it to push information, but don't get into fights that you are not going to win.

Thank you all so much.

HON. DON WILLETT: Big thanks to our panelists. That was a high-octane presentation from everybody. High-octane and well-dressed.

We have a hard-stop because we've got the debate at 12:30. So we're going to stop about 12:25, so we got about—there's some early birds going to get a table. [Laughter]

We got about sixteen minutes for—unless you all want to do some cross-panel discussion, we can just turn it over to the crowd, but as people are coming to the microphone, I want to give a hearty, passionate, spirited, amen to cameras. And my former court, the Texas Supreme Court, has been webcasting live for about a decade.⁸⁷ Zero problems. Overwhelmingly positive response. If you're lying awake at night, insomnia creeps in, just log

⁸⁷ See Eric J. Segall, *Why There Should Be Cameras in the Supreme Court*, CHI. TRIB. (June 21, 2017), <https://www.chicagotribune.com/opinion/commentary/ct-cameras-supreme-court-hearings-20170621-story.html>.

on and pick a case. Any case! They're all archived there for posterity.

And people talk about the fear of grandstanding or peacocking or showboating. There's no showboating in Texas! [Laughter] People say they notice a certain swagger, but, in Texas, we just call that walking. [Laughter]

Okay, you're first. Go right ahead.

QUESTIONER 1: I'd love to be first; I can't make it work. So, I'll just ask loudly. Both to Judge Dillard and Willett, a conundrum for me lately is how can citizens vote for state court judges if the judiciary is a black box?

We don't know these people. We don't know what they do, and unless you live at the courthouse, you will *not* know what they do and how to vote. But you are giving me some hope that there may be ways for judges to make themselves more visible to the electorate.

I'm wondering what your thoughts are on there as what is it allowable so that we don't have to be monks. I mean, I'm not a judge, but I've been asked to be a judge, and I've turned it down because I'm much too vocal. So, if there's a way to channel that, then maybe I'll reconsider. Thank you.

HON. STEPHEN DILLARD: I'll try to answer that. You bring up a great point. On the one hand, what do we hear every election cycle? We don't know enough about the down-ballot races. We don't know enough about the judges. Who are these judges? And yet these same media types and reporters that say that, then, are like, "Judges on social media? What's that about?"

So, I think the answer to it is, is that—exactly what I said—is that you use social media platforms to engage the people you serve. And you can do that in a way that's meaningful and that doesn't violate the canons simply by being out there.

Look, at the end of the day, is the average citizen going to know about my parental rights jurisprudence? Probably not. But what they can get a sense of from my Twitter feed without me getting into specific cases is, I hope, at least, that this is a judge who is fair. This is a judge who's impartial. This is a judge who cares about his job, who is professional, and who loves doing what he does for the State of Georgia. And I think that is a more than sufficient basis for someone who is not trained in law to cast a vote.

QUESTIONER 2: It seems to me that the federal judicial branches are sort of lagging behind the trend of state judges on social media. Judge Willett has obviously gone radio silent, and probably there's people from the administrative office gave him the training. There was also a somewhat famous blog by a Judge Richard Kopf of the District of Nebraska. He had a

blog called *Hercules and the Umpire*.⁸⁸ He just stopped doing that for reasons that are not entirely clear. So, can anyone speak specifically—

HON. STEPHEN DILLARD: They're pretty clear. [Laughter] We know why he stopped. I don't want to jump in again, but let me just say this: his blog was a good example of the right way to use social media and the wrong way. The right way involved his compelling commentary regarding Shon Hopwood and his sentencing.⁸⁹ I thought that was *amazing* to have a sitting federal judge reflect and say maybe I didn't use the best judgment in sentencing not only this young man, but also other people. I thought that was remarkable.

His other comments—which I'm not going to get into the specifics; if you want to know those, you can google them—I think those comments are an example of maybe the admonition from David. Maybe sometimes it's good to step away if you're getting too caught up in things.

Once again, whether you're a federal or a state judge, whether you're elected or appointed, you still have to follow the canons and you still have to act responsibly, whether you're online or in-person.

DAVID LAT: I would add, in terms of what Judge Kopf has done well, please check out his review of my book, *Supreme Ambitions*.⁹⁰ [Laughter]

But I would add, just to echo what Chief Judge Dillard said, it's absolutely true. The rules that apply to judges ethically are the same regardless of the medium. So, for example, you're not supposed to comment on a pending case. There was an interesting case out of the Ninth Circuit called *Sierra Pacific* where there was a trial judge who had a Twitter account.⁹¹ And he followed the U.S. Attorney, but he didn't follow the other party, and he retweeted a news article about a case that was pending before him.⁹² And you might think, "Oh, isn't that innocuous, he's just retweeting a news article." But it turned out that the article was erroneous.⁹³ The headline was erroneous.⁹⁴ The headline said the defendant admitted liability when the actual settlement resolving the litigation provided for *no* admission of

⁸⁸ See generally Judge Richard Kopf, *HERCULES AND THE UMPIRE*, <https://herculesandtheumpire.com/> (last visited Jan. 15, 2020).

⁸⁹ Judge Richard Kopf, *Shon Hopwood and Kopf's Terrible Sentencing Instincts*, *HERCULES AND THE UMPIRE* (Aug. 8, 2019), <https://herculesandtheumpire.com/2013/08/08/shon-hopwood-and-kopfs-terrible-sentencing-instincts/>.

⁹⁰ Judge Richard Kopf, *David Lat's First Novel, "Supreme Ambitions," Deftly Dissects Judicial Power, How to Get It and How to Use (and Abuse) It*, *HERCULES AND THE UMPIRE* (Sept. 7, 2014), <https://herculesandtheumpire.com/2014/09/07/david-lats-first-novel-supreme-ambitions-deftly-dissects-judicial-power-how-to-get-it-and-how-to-use-and-abuse-it/>.

⁹¹ *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017).

⁹² *Id.*

⁹³ See *id.* at 1175.

⁹⁴ *Id.*

liability.⁹⁵

So, this was actually used as one of the grounds for appeal before the Ninth Circuit, with the appellant saying that the judge actually exhibited some bias by following one party, but not the other, and by retweeting this headline that was more favorable to the position of the U.S. Attorney rather than the defendant.⁹⁶

So, I think that it is wonderful for judges to be on social media, and I think it's a great engine for civic education, but the same rules apply. And there are interesting case studies of how judges can make mistakes.

JOHN BROWNING: And I can add that, as a faculty member of the Federal Judicial Center, I teach federal judges. They're very interested in doing things the right way when it comes to social media. There's already been at least one advisory opinion by the commission that oversees the federal judiciary. There may very well be some more guidance, but I can tell you it's an issue that's very much on their radar. And as both Judge Dillard and David explained about examples, like Judge Kopf, I've written and blogged and maybe even posted on Facebook about Judge Kopf, and yes, there's some wonderful things about his previous blogging, about insights into judicial decision-making, and then there are some things that are just—I'd put them under the category as he described it, "dirty old man."⁹⁷

There are some dos and don'ts inherent in both of those. If you're interested in learning more, you can check out my law review article *The Judge as Digital Citizen* in the *Faulkner Law Review*.⁹⁸ Judge Bill Pryor and I served on a panel about the role of the judge in the 21st century.

QUESTIONER 2: I just want to free the Tweeter Laureate.
[Laughter]

HON. DON WILLETT: Go right ahead.

DAN MCLAUGHLIN: Dan McLaughlin @baseballcrank.⁹⁹

DAVID LAT: Oh, I follow you.

HON. DON WILLETT: Great Twitter account.

DAVID LAT: Oh, you don't follow me though. [Laughter] I don't

⁹⁵ See *id.* at 1166.

⁹⁶ *Id.* at 1174.

⁹⁷ Nita Farahany, *On 'Being a Dirty Old Man' and a Federal Judge*, WASH. POST (Mar. 28, 2014, 10:11 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/28/on-being-a-dirty-old-man-and-a-federal-judge/>.

⁹⁸ See generally John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131 (2016).

⁹⁹ Dan McLaughlin (@baseballcrank), TWITTER, <https://twitter.com/baseballcrank> (last visited Jan. 15, 2020).

take it personally.

DAN MCLAUGHLIN: But you remembered it.

Everyone has their own opinions about the President's tweeting and obviously that's a broad subject, but just to stick to a very narrow question, has the mere fact of having a President of the United States who tweets in what is very identifiably his own voice, changed the public expectation surrounding even judges and other public servants to be more accessible and more out there on Twitter?

JOHN BROWNING: Let me start off with this. I think the answer is yes, and we're seeing that more and more. But it's also leading to some other legal questions that we haven't had to confront before, such as with respect to a government official or entity blocking an individual from following them on Twitter. Is that a limited public forum?

There are courts around the country that have confronted this.¹⁰⁰ Obviously, the President has been on the receiving end of some legal action as well.¹⁰¹ But there have been other governmental officials around the country, and the decisions right now are a hodgepodge. So, I don't think we have any clear guidance as of yet. I think it helps. Some legal scholars may disagree. I know I've got some support in thinking that the President's Twitter account that was his personal account that predated his taking office could very well be considered his personal account and not an official forum or media outlet. But there are some legal scholars who disagree.

I think we're still waiting for that issue to resolve itself, but it is very much—it's raising issues like that. It's leading to a lot of discourse, and we'll see what happens.

DAVID LAT: If I could kind of have a mashup of John's comment about this limited public forum issue, which is quite interesting, and Josh's comment about not responding to trolls, my favorite feature on Twitter is actually the mute button. You will no longer see the tweets of people you mute, people that are abusive, people that are uncivil.¹⁰² But if you block them, then they know they got to you.¹⁰³ They get notified that you blocked them. If you mute them, they have no idea.¹⁰⁴ They could be tweeting up a nasty storm at you and you are oblivious. And for me actually, I'm fine with that. So, check out the mute function if you are on Twitter.

¹⁰⁰ See generally *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019).

¹⁰¹ See generally *Knight*, 302 F. Supp. 3d 541.

¹⁰² See *How to Mute Accounts on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/twitter-mute> (last visited Jan. 15, 2020).

¹⁰³ See *How to Block Accounts on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Jan. 15, 2020).

¹⁰⁴ TWITTER HELP CTR., *supra* note 102.

JOSH BLACKMAN: And one better, there's a mute feature.¹⁰⁵ Last night I tweeted at the dinner about the standing ovation we gave for Judge Kavanaugh. Maggie Haberman of the *New York Times* retweeted me. I got 50,000 angry messages after that. Howard Dean tweeted. I didn't even know he was still around. [Laughter] Howard Dean retweeted me. God help me.

So, I said mute thread. Poof, gone. My timeline cleans up immediately. You can't mute 50,000 people; you can mute the thread.¹⁰⁶

HON. DON WILLETT: Yes, sir.

JOHN FARREY: I feel like I should be taller. John Farrey from Boston. I use LinkedIn a lot, and I use—and if you don't know it, I can't explain it—"If This, Then That" to increase the number of postings where automatically it'll go in, find business postings or articles I want to repost, some from reputable sources like the *Journal*, some from non-reputable like the *New York Times*. [Laughter]

What, from a risk point of view, pulling from sources like that, do I have a risk situation where it may pull an article that may follow up and cause me problems later on? And I'm posting probably 12 to 20 of these a day.

DAVID LAT: Are you adding commentary when you—

JOHN FARREY: No.

DAVID LAT: Okay.

JOHN FARREY: No. I do separately on certain ones. But a lot of them are just a reposting automatically—seeing an article that I have preprogrammed in might be of interest and then reposting that.

HON. STEPHEN DILLARD: Are you a judge or a lawyer?

JOHN FARREY: I'm a lawyer.

HON. STEPHEN DILLARD: Okay, alright. Well I'd have a different response if you were a judge.

JOHN BROWNING: Judges can get into ethical hot water for "liking" something and for retweeting or posting something even without any kind of commentary.¹⁰⁷ It's happened. But as a lawyer in private practice, if you're just posting something and not adding commentary of your own, I don't think there's as high a risk factor.

DAVID LAT: I would add that there are issues of essentially not a

¹⁰⁵ *How to Use Advanced Muting Options*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/advanced-twitter-mute-options> (last visited Jan. 15, 2020).

¹⁰⁶ *Id.*

¹⁰⁷ See generally Elizabeth G. Thornberg, *Twitter and the #So-Called Judge*, 71 SMU L. REV. 249 (2018).

true conflict with your clients' interests, but a sort of positional risk. If you tend to be a lawyer who represents a lot of plaintiffs, and you are retweeting some articles that are very pro-defendant, maybe there might be some issue there.

But I do generally subscribe to the whole thing that people used to have as a standard disclaimer, but I think it's just now so standard and accepted that nobody really needs to add it: RTs are not endorsements. People retweet things all the time. If I retweet something, it does not mean that I agree with every word in that. And that can't even be the case because my Twitter feed is actually fairly sort of middle of the road. I will retweet opposing viewpoints just because I think they're interesting, and, obviously, I can't agree with both of them because they disagree with each other.

So, I think as a lawyer, it's less risky. If you're a judge, then you have a sort of tricky issue, like what I mentioned about that *Sierra Pacific* case, where even a retweet of an article, if it's erroneous or if it favors one party or the other, could be cited by a party as a basis for recusal.¹⁰⁸

JOHN BROWNING: And just very quickly, for those of you in the audience who are members of the D.C. Bar, you may want to check out a November 2016 D.C. Legal Ethics Committee opinion on how social media conduct can create what are called positional conflicts, where you're advocating a position and you're acting contrary to something that's a position of the client or the firm.¹⁰⁹

HON. DON WILLETT: We've got two minutes. Two more questions. I may regret this. I'm going to go to Ilya in the back and then back to the front mic for the final question. Ilya, don't make me [crossing fingers, laughter] . . .

ILYA: I actually don't have a social media question; I have a fashion question. As a sometimes, but not always, bowtie—

HON. DON WILLETT: I see Ilya's time has expired. [Laughter] Go ahead. Go ahead. Actually, this is Ilya's tie that I'm wearing today. I had a gold version. It has the Constitution on it—

ILYA: We made a Pareto optimal exchange yesterday. We preferred the other's coloring of the Constitution bowtie, but that relates to my question. What is the provenance of your current bowtie, and, as a sometimes but not always bowtie wearer, what are your advice on when to wear a bowtie and when to go standard?

JOSH BLACKMAN: Mute. [Laughter]

¹⁰⁸ See generally *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157 (9th Cir. 2017).

¹⁰⁹ D.C. Bar Ass'n Legal Ethics Comm., Op. 370 (2016) (discussing social media for marketing and personal use).

HON. DON WILLETT: Mute the question.

JOHN BROWNING: I'm going to say as a novice bowtie wearer, choosing to accessorize the *Star Wars* cuff links with the *Star Wars* tie or the other way around, I'm liking this. I'm thinking this may be a good look. [Applause]

DAVID LAT: I respectfully dissent. I think you have to—my problem is—I noticed this in the mirror today—I am a short person. I have a round face. This bowtie is not good. I need something that accentuates my length, so I'm going back to the regular ties after this. [Laughter]

HON. DON WILLETT: All right. That's all we have time—

HON. STEPHEN DILLARD: Bowties are cool.

HON. DON WILLETT: Bowties are cool.

JOSH BLACKMAN: Ilya, delete your account. [Laughter]

MIKE: Hi, my question is for Professor Blackman. You mentioned that you promote the use of recordings, not only as a pedagogical tool, but also as a shield against false or baseless accusations or misrepresentations, as well as for other uses potentially. However, many students, faculty members, and administrators are students or members of a university in a jurisdiction where one-party consent is not the law or where the university has a policy explicitly forbidding the use of recordings in a classroom or elsewhere. What advice would you give to students, faculty members, and administrators in such jurisdictions or universities?

JOSH BLACKMAN: Yeah, you have to follow wiretap laws. You can get consent from your students. One way I kind of work around it is I have a lapel mic, and you really can't even hear the students at all, so it's just my voice so it troubles me less. But university policy should—because otherwise, I consider information free and open and the world should have access to it. Every time I give a lecture, someone else can benefit from it, so I think there are lots of things to gain.

There's a slight risk of chilling speech, which I'm not ignorant of. Students may not want to speak up if it comes out at their confirmation hearing twenty years later. If I want to go to Harvard, they'd never let me record anything. It's not allowed because they all want to be Supreme Court Justices. But I think there a lot of benefits, and schools should maybe reconsider those policies. Thank you, sir.

MIKE: Thank you.

HON. DON WILLETT: All right. Let's go eat! Everybody thank our wonderful panel.

