



# **Courting Public Trust and Confidence:**

Effective Communication in the Digital Age

*“YESTERDAY IS NOT  
TOMORROW’S ANSWER....  
THE AMERICAN JUSTICE SYSTEM  
CANNOT SIT IDLY BY AND EXPECT  
TO REMAIN RELEVANT AND  
RESPECTED INDEFINITELY.”*

— **John T. Broderick, Jr.**  
former chief Justice, Supreme Court of New Hampshire<sup>1</sup>

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<sup>1</sup> Broderick, Jr. John T. “The Changing Face of Justice in a New Century.” Court Manager. Vol. 24, Issue 2. Pg, 26.

The focus of this policy paper is building public trust and confidence through timely, accurate and understandable communication. After framing the issue and reviewing practices that restrict court communications, the paper makes several recommendations, namely, that courts should:

- **publish summaries of court decisions directed to a general audience**
- **expand transparency especially in high profile cases**
- **respond promptly to bad information**
- **use a restrained response to undue criticism of courts or a specific judicial officer**
- **increase social media presence**
- **and continue to expand civics education activities.**



## Who speaks the truth for the Court?

Courts need to be and to be seen as a trusted source for information. As such, courts should position themselves to be the first source the public turns to for the truth about what is happening within the court system.

Although courts remain the most trusted branch of government, the current climate of political polarization and general distrust of government institutions has had an alarmingly negative impact on trust and confidence in the court system.

A recent Pew Research survey points out that the favorable view of the U.S. Supreme Court has declined by 15 percent in the last three years<sup>2</sup> and that “current views of the court are among the least positive in surveys dating back nearly four decades.”<sup>3</sup> Court professionals are well aware of the differences between the federal and state judicial systems but many Americans do not distinguish between the two and negative views of the federal system get errantly applied to state court systems. At the state level, eroding trust and confidence can turn into calls for impeachment or recall of state judges based on court decisions, as happened in Ohio, where the state Supreme Court recently held that political district maps were unconstitutionally gerrymandered.<sup>4</sup>

Deliberate disinformation, misleading information, and a ready willingness on the part of individuals

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<sup>2</sup> Pew Research Center. “Public’s Views of Supreme Court Turned More Negative Before News of Breyer’s Retirement.” February 2, 2022 at: [https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/?utm\\_campaign=2022-02-09+Rundown&utm\\_medium=email&utm\\_source=Pew&subscriberkey=00Q7V-00001jGETGUAW](https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/?utm_campaign=2022-02-09+Rundown&utm_medium=email&utm_source=Pew&subscriberkey=00Q7V-00001jGETGUAW)

<sup>3</sup> Pew Research Center. “Before Ginsburg’s Death, a Majority of Americans Viewed the Supreme Court as Middle of the Road.” September 25, 2020. <https://www.pewresearch.org/fact-tank/2020/09/25/before-ginsburgs-death-a-majority-of-americans-viewed-the-supreme-court-as-middle-of-the-road/>

<sup>4</sup> Schladen, Marty, “LaRose would ‘be fine with’ Chief Justice’s Impeachment over Redistricting Rulings. Ohio Capital Journal. April 1, 2022. The case is Nieman, et. al. v. LaRose, Secy., et. al. 2022-Ohio-2471.

everywhere to accept “alternative facts” has created a situation in which government sources, for many, have become the least trusted sources. Courts are not immune to this crisis. The 2018 Mollie Tibbets<sup>5</sup> case in Iowa is a prime example of how deliberate disinformation about state court cases can be used to harm the reputation of court systems as well as individual judges. The case, which involved the horrific murder of a young woman by a man who was found to be in the United States illegally, became a rallying point for groups seeking tighter restrictions on immigration. It is also an example of how information is reported differently through traditional media and social media and how quickly distortion can enter the communication stream and change perceptions.

Courts can no longer ignore these trends and behave as though we are above the public discourse. Rather than being seen as the first and most reliable source of true information, too often we are the source of deflection. This has created a situation that is not just ripe for combustion; the conflagration has already begun. The Center for Strategic & International Studies (CSIS) released a report in 2019 documenting how Russia and other state actors are actively using traditional and social media to undermine trust in the U.S. system of justice.<sup>6</sup> Our legitimacy as a court system — indeed, the very rule of law — rests on the public’s willingness to accept court judgments as legally sound and fairly applied. We must act immediately. We can begin by speaking out — clearly and quickly — in our own name.

## Disinformation/Malinformation/Misinformation

The focus of this policy paper is on building public trust and confidence through timely, accurate and understandable communication. A brief explanation of the three types of bad information that are circulated throughout society is needed to better understand why court communication methods and messages need to adapt to modern mediums and communication styles.

**DISINFORMATION**  
is false information that has been created for the specific purpose of harming an individual or entity.

Disinformation originates from bad actors, advocacy groups, and disgruntled or disillusioned litigants. The motivation behind disinformation is as diverse as the originators but may include a desire to destabilize a political system, sow distrust of a particular institution, build opposition to a particular policy, demonize an individual, or attempt to sway a court in a particular direction. Disinformation, once created, moves fast in a variety of forms and formats: memes, videos, social media posts, letters to the editor, opinion pieces in favorable media channels (including network and cable television, radio shows and a variety of print formats), advocacy group forums and “sock puppets” which are specially created websites designed to look like authoritative sources.

<sup>5</sup> As with many high profile cases, this case is generally known by the name of the victim rather than the defendant. The court case is *St. of Iowa vs. Cristhian Bahena Rivera*, filed in Poweshiek County District Court, Case Number FECR010822

<sup>6</sup> Spaulding, Suzanne, Devi Nair and Arthur Nelson. *Beyond the Ballot: How the Kremlin Works to Undermine the U.S. Justice System*. Center for Strategic & International Studies. May 2019.

**MALINFORMATION** is the deliberate use of correct information in a manner that is meant to mislead or harm others.

It is a specific strategy used in some disinformation campaigns to discredit the original source of the information. A common strategy is to provide correct information but exclude context or important facts in order to create a misleading impression. A recent example related to a high-profile case is the purported list of co-conspirators in the Ghislaine Maxwell criminal case that began to circulate through social media on November 22, 2021. The criminal case alleges that British socialite Ms. Maxwell conspired to procure and transport minors for illegal sex acts with a prominent American financier, Jeffrey Epstein. The document attached to the social media post about the criminal case is actually a copy of an authentic court document from an unrelated civil case. That information is omitted from the post, as is the information that the civil case was dismissed as frivolous less than a month after it was filed after a judge determined the claims were unfounded.<sup>7</sup> An older, but still active and more well-known example of malinformation is the use of the “McDonald’s Coffee Cup Case.” This case, which involved a personal injury claim for injuries caused by burns from spilled coffee was taken up as an example for tort reform. The facts of the case have become so distorted that even books, magazine articles and an HBO series about the true extent of Stella Liebeck’s injuries, the jury verdict and the pattern of injury from McDonald’s coffee have not been enough to change individual perceptions that gullible jurors assisted Ms. Liebeck in milking McDonald’s for an undeserved windfall.

**MISINFORMATION** is information that is either purposefully or unintentionally incorrect.

Misinformation typically originates as a misunderstanding about policy, procedure, or the legal basis for a decision e.g., the litigant simply doesn’t understand what happened with how their case is proceeding through the court system or they don’t fully understand the court’s ruling in their case. Courts should bear in mind that “perception is reality” when it comes to assessing what litigants, victims, witnesses, and jurors say about their court experience. Individuals who have interacted with the court have high credibility because they speak from their lived experience.

For ease of reading, we will refer to all three of these types of information collectively as “bad information.”

<sup>7</sup> Lee, Ella. “Fact check: List of Ghislaine Maxwell ‘co-conspirators’ is from a previous lawsuit.” USA Today. November 30, 2021. Accessed on November 30, 2021 at <https://www.usatoday.com/story/news/factcheck/2021/11/30/fact-check-maxwell-co-conspirators-list-not-related-federal-case/8748982002/>.

Bad information is not a new problem, but it presents a new threat. A 2020 survey conducted by Pew Research Center revealed that more than eight out of ten adult Americans access the news through a digital device. Of those accessing the news digitally, 68% get their news from news websites or apps, 65% from search engines, 53% from social media and 22% from podcasts. The survey also noted that age matters when it comes to preferred news sources. For those Americans aged 29 or younger, 42% use social media as their primary news source.<sup>8</sup> An earlier survey by Pew Research Center on trends in the use of social media also revealed differences by race and education level. This 2017 survey showed that 74% of non-white respondents<sup>9</sup> and 69% of those with less than a bachelor's degree got their news from social media sites compared to 64% of white respondents and 63% of respondents with a bachelor's degree or higher.<sup>10</sup>

Today's technology allows information, both good and bad, to be disseminated within seconds to a worldwide audience. The audience itself differs from the past in that many recipients may not be actively seeking information. Instead, information that an algorithm has determined seems to match the content, source, and beliefs of an individual is curated specifically for that individual and delivered to them based on what they have viewed or searched in the past, creating what is commonly known as a "filter bubble." The source of the information is yet another distinct difference from the past. In pre-internet and pre-cable days, most individuals knew the source of their information. It came from a local news broadcast or newspaper, national magazine, or national television. With large investigative staffs and the slower pace of the news cycle, consumers could be reasonably confident that sources had been investigated and information verified prior to the release of a big news story. In today's digital world, it is often impossible for the average person to identify where a news story originated, the intent behind the piece or even how it reached their social feed.

In addition to ensuring that courts have a platform to communicate in the sphere where its target audience finds its information, effective communication strategies must also account for the way information will be processed by that audience. For example, "anchor bias" is the cognitive process that people use to measure information based on their first exposure to new information. In other words, once a person is exposed to brand new information, it becomes the measuring stick for judging the credibility of subsequent information on the same topic. "Cognitive negative bias" is the tendency for humans to respond more readily, believe and react more strongly to negative information than to positive information.<sup>11</sup> These two phenomena combined make it extremely difficult to dislodge bad information once it has been allowed to percolate in the public discourse and is another reason why courts must become more proactive in their communication.

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<sup>8</sup> Pew Research Center, "More than eight-in-ten Americans get news from digital devices." January 12, 2021. Accessed on August 1, 2022 at <http://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.

<sup>9</sup> Defined in the survey as "including all racial and ethnic groups, except non-Hispanic white"

<sup>10</sup> Pew Research Center, "Key Trends in Social and Digital News Media." October 4, 2017. Accessed on August 1, 2022 at <https://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/>.

<sup>11</sup> Soroka, Stuart and Patrick Fournier and Lilach Nir. Cross-National Evidence of a Negativity Bias in Psychophysiological Reactions to News. September 3, 2019. Accessed on September 15, 2022 at <https://www.pnas.org/doi/full/10.1073/pnas.1908369116>

## Why Courts should respond to bad information

The court's role in government and in society in general is that of resolving disputes. Courts perform this role by applying the law to a particular set of facts in order to discern the rights and obligations of the parties. The judicial process of applying facts to law is often nuanced, granular and constrained by precedent, making it difficult for the general public to easily understand and creating opportunities for doubt and mistrust to take root. The most recent State of the Courts poll conducted by the National Center for State Courts shows that 64% of respondents have either a great deal or some confidence in their state courts. This is hardly more than a majority. While public trust has always been highest for local government entities and officials (including state courts), this same poll clearly shows that even the state courts are losing the public's trust at an astounding rate. The State of the State Courts poll has been conducted annually since 2012 and the confidence rate in state courts has consistently been in the mid to high 70s until now. The 2014 summary report of the State of the State Courts Survey notes that "public opinions of the courts are soft and can shift quickly based on external factors or high-profile media stories." The summary also noted that doubts about partisanship and political bias represent the greatest threat to public confidence in the courts.<sup>12</sup> In the current political environment, it stretches the limits of the imagination to say that the average person can watch the theater of a U.S. Supreme Court appointment or the increasingly high-dollar election campaigns of state judges and still believe that once these individuals are on the bench they can set aside their personal beliefs and their funders' priorities and rule solely on the law. It is up to us, individually as court professionals and collectively as court systems, to restore and preserve belief in the independence of the judiciary through transparency in our actions and clarity in our communications. We cannot accomplish this through a wall of silence in the face of bad information.

Courts are most vulnerable as targets for bad information in four areas: (1) high profile cases involving persons or entities that are well-known throughout the United States, (2) high stakes cases that involve contentious issues which individuals feel passionate about, (3) bail decisions and criminal sentencing practices that are seen as unjust or outrageous in an individual case, or (4) compiled statistical data that appears to show systemic bias.

The United Kingdom's Civil Service released a toolkit in 2018 to assist agencies in responding to disinformation. In the Foreword to "The RESIST Counter Disinformation Toolkit" the author writes, "Our vision is to strengthen the institutions of democracy and uphold our democratic values by ensuring the public and our media have the means to distinguish true news from disinformation. This starts with us, as government communicators. We hold the responsibility of delivering the truth, well told."<sup>13</sup>

Recognizing the threat to public trust that is created by bad information, the Conference of Chief Judges and the Conference of State Court Administrators recently adopted a resolution in support of efforts to counter disinformation.<sup>14</sup>

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<sup>12</sup> Memorandum to National Center for State Courts from GBA Strategies, dated December 4, 2014. Copy on file with National Center for State Courts.

<sup>13</sup> U.K. Government Communication Services, RESIST Counter-Disinformation Toolkit (2018).

<sup>14</sup> Conference of Chief Justices and Conference of State Court Administrators. Resolution 4, "In Support of Efforts to Counter Disinformation Against the Courts," adopted July 27, 2022.

# Courts' Traditional Response to Criticism or Bad Information

**Court system responses to public outcry have traditionally fallen under four categories.**

1

## SILENCE

Court systems have traditionally chosen to ignore criticism of the court system, individual judges, and controversy over a particular ruling, even when the criticism involves false or misleading assertions.

The old adage of “least said, soonest mended” seems to be the basis for this response. But the choice to not respond may also include some elements of fear that the response will be misinterpreted or unfairly portrayed by the media. The hesitation to speak publicly about an issue was summed up in this way in the most recent media guide developed by the Kansas Bar Association: What do flies and legal careers have in common? Answer: Both can be killed by newspapers. The disconnect between the media and attorneys arise from the fear, if not actual disdain, of the media interviews...the first inclination used to be, and still is in many law offices, to grab a hard hat and run for the nearest bunker.<sup>15</sup> Although the guide is written for lawyers, this sentiment can easily be applied to most court systems.

It is not just fear of how the media will report on an issue that keeps many courts silent but also the instinct to approach media issues as if they were part of a legal proceeding. Court cases involve intricately choreographed legal procedures and frameworks that follow a set pattern. Concepts and strategies such as, “never admit anything,” “anything you say can be used against you,” “you are presumed innocent until proven guilty” and “the issue is not ripe for review,” are part of the toolkit that can make or break a case. Applied to a situation demanding a quick response to bad information, those same concepts and strategies may work against the court’s credibility.

While silence can be an effective strategy, it may not always be the best strategy because it ignores the fact that the rules of social discourse have fundamentally changed over the past few decades. Silence in the face of criticism is no longer understood by the public as the social equivalent of a raised eyebrow or quirk of the lips. As courts were cautioned more than 15 years ago, “Saying ‘No comment’ implies secrecy or something to hide.”<sup>16</sup> But even that understanding of silence is becoming dated since many people now equate silence with acquiescence to the truthfulness of messages that are already circulating.

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<sup>15</sup> Kansas Bar Association, Media Guide for Attorneys and Judges (2015), pg. 9; accessed on October 24, 2021, at: <https://issuu.com/ksbar/docs/2015mediaguideattysjudges>

<sup>16</sup> National Center for Courts and the Media. Tools for Judges and Court Personnel to Deal with the Media (2005). Pg. 19.

## 2

### OUR ORDERS/OPINIONS SPEAK FOR THEMSELVES

One of the most often used responses to questions about a case is that the opinion speaks for itself. This is true, but it is only a piece of the truth.

In reality, orders and opinions rarely speak for themselves when read by anyone outside the legal profession. Many opinions are quite long, not written in plain language, and can be analytically complicated. A recent example, while extreme, is worth noting. In a case involving the Alabama prison system, the judge issued an opinion that is 646 pages long. This is a carefully written opinion by a seasoned jurist which, in addition to the standard analysis of law applied to the specific fact situation, includes a history of the case, detailed examples of the allegations contained in the original filings, and an action plan for the defendants to comply with the court's order.<sup>17</sup> Unfortunately, the length of the opinion is so daunting that even the news entities that reported on it do not appear to have done more than rely on comments from the lawyers representing each side to explain the history of the case or the effects of the opinion. Unlike most news reports related to court cases, many of the media outlets that would normally include either a pdf copy or a hyperlink to case documents did not do so with this opinion. To read it a person needs to purchase access from the federal court or invest time in hunting the internet for a site that has posted a full copy of the opinion that is not behind a pay wall.

The average person does not take the time to track down an order and weed through the facts of the case, nor does the average person have the skills to understand the legal analysis and its many references to caselaw that require additional research to understand why the court ruled as it did. Instead, they get their information about the case by scanning a headline, reading a tweet or other social media posting, listening to a podcast or a 30-second television report, or increasingly less common, reading a story from a reputable news source that provides some context and explanation as to why a judge ruled in a particular case given the circumstances of the case. This is not laziness on the part of the public. The daily flood of visual and oral information being dumped on people who are stretched to the limit with work, social obligations, children's extracurricular activities, parental caregiving, and "me time" that has been dutifully penciled into an already bursting schedule leaves little time left for meaningful intellectual review of the non-stop cycle of information.

Courts, as a whole, can do better than we have in this area. As it has been noted, "The opinions of the high court is its voice – the means to convey and explain to both legal and general audiences that the court listened, resolved a legal dispute, impartially applied the law, and reached a fair and reasoned judgment."<sup>18</sup> There is no doubt that legal opinions must be written for legal professionals but there is room to do that and to include language that is easily understood by the non-lawyer.

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<sup>17</sup> Edward Braggs, et. al. v. Jefferson S. Dunn, in his official capacity as Commissioner of the Alabama Department of Corrections, et. al. 2:2014cv601-MHT-JTA, document 3461 (M.D. Ala.)

<sup>18</sup> Vickrey, William C., Denton, Douglas G. and Hon. Wallace B. Jefferson. Opinions As the Voice of The Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness (Published as part of the Harvard Executive Session for State Court Leaders in the 21 Century, 2008-2011, actual publication date unknown). Pg. 1.

### 3

#### INDIRECT SPEECH THROUGH A PROXY

Depending on the issue, courts may use a proxy to voice concerns that the court shares but is reluctant to publicly voice. The proxy may be a group such as a state or local bar association, a special response team established to address a hot button issue, the local chamber of commerce or local union leaders. The proxy may also be a local “trusted voice” such as a retired judge or someone who is a leader in the executive or legislative branch. An indirect response from a proxy can be interpreted as a non-response, or worse, an attempt by the court to manipulate public opinion or policymakers through a third party.

There is definitely an appropriate role for retired judges in explaining court procedures, responding to unjustified attacks on the courts, and advocating for policy change because they bring a level of expertise and real-world experience to the discussion. Because they are no longer serving in an official capacity and appear to have nothing to lose by telling things straight, they have a very high credibility level with the public. The issue with defaulting to retired judges is that their view may diverge from the court system’s view, they may have an issue from their career that overshadows their message, or they may be associated with a particular political party or social cause.

Bar associations can bring that same level of expertise and experience to discussions on policy and solutions to long-standing social issues. At the same time, they can be viewed as informal lobbyists for the court rather than an independent voice. In research conducted by Justice at Stake in the wake of the Great Recession, the data showed that policymakers found lawyers from their own staff and their own community persuasive but the public did not share that confidence.<sup>19</sup> Also concerning is that some communities consider lawyers elitist or aligned with a particular political party and therefore untrustworthy. It is particularly hard for the average individual to assign credibility to an ad hoc or grassroots group made up of individuals with current or historical ties to the court that is formed under the guise of an “independent” body to provide an “independent” opinion.

Courts generally enjoy a higher level of public confidence than the other branches of government. Even so, support of a court’s position from other branches of government can demonstrate interbranch consensus on an issue, which can lend credence to a court’s position. However, it is problematic when a court allows a co-equal branch of government to speak for the court instead of with the court.

Neither the media nor the public should have to search for someone who they can believe is speaking authentically about what the court system thinks or wants. Courts can and do have a responsibility to provide information about the administration of justice and to defend the judicial branch against bad information that is undermining the credibility of the branch.

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<sup>19</sup> Funding Justice, *Strategies and Messages for Restoring Court Funding*. Joint publication of Justice at Stake and the National Center for State Courts. (Published as part of the Harvard Executive Session for State Court Leaders in the 21 Century, 2008-2011, actual publication date unknown). Pp. 9,11.

## 4

### COURT INFORMATION OFFICER/DIGITAL CONTENT SPECIALIST

While it is always a good idea for a court system to employ professional media staff, if they are instructed to respond with a “no comment” or canned responses about the role of the court, they are not enhancing the court’s mantle of integrity. Rarely are the court’s public information officers allowed to explain the legal ramifications of a judgment or comment on the character or appellate record of a judicial officer, when in fact, these might be the most important questions put to the court about a particular controversy.

The timing of a court’s response to bad information is critical. As noted by one writer, “If the response isn’t immediate, if it seems like, at least optics-wise, there’s any uncertainty in response, or if there’s a vacuum where a narrative is allowed to go unchallenged, that’s the space where the most harm occurs.”<sup>20</sup> Every court should have a designated spokesperson who is accessible to the media, knowledgeable about the legal system, and given the authority to respond to issues that are of interest to the public. A staff attorney should be available to assist the spokesperson as needed to accurately communicate information about court filings or processes. The communications team should include at least one individual well-versed in digital content strategy and be able to use various types of media to reach the widest possible audience.

While it is ideal to have a communications team, it is understood that a lack of funding and lack of personnel make it impossible to have dedicated public information officers or digital content specialist. Staff that hold these duties in addition to their other roles within the court system should receive adequate training in communication and digital content. Courts may also consider contracting with a public relations firm to provide assistance on an as-needed basis when an immediate response is needed to an emerging issue.

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<sup>20</sup> Miller, Ben. “Can Tech Weed Out Bad Info Online?” Government Technology (July/August 2021).

## Concerns About Speaking Out

**Judicial code of conduct:** Most judges or court systems will point to their Judicial Code of Conduct as the reason they cannot provide information, respond to criticism or voice an opinion on a variety of matters. While it is true that the American Bar Association’s model Judicial Code of Conduct prohibits individual judges from discussing pending or impending cases, this prohibition has been read too broadly as applying to the court system as an entity and has led some courts to resist responding to requests to clarify decisions, explain court rules, provide insight on statistical reports, and similar inquiries.

The broad reading of this canon has extended to silence by the court system in the face of unjust criticism of good judges. Arizona is the first state to address this situation by amending its judicial code of conduct to specifically allow judges to respond to criticism. The language of the new section is: Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.<sup>21</sup> The impetus for this change was a recommendation from the Arizona Supreme Court’s Task Force on Countering Disinformation.<sup>22</sup> The report notes that criticism of judges and judicial decisions is inevitable but disinformation is not a form of criticism as contemplated by the judicial code of conduct.

Stepping into the breach created by the silence of the court as an organization, the California Judge’s Association has created a “Response to Unfair Criticism Service” to provide support and assistance to California judges who have been unfairly targeted.<sup>23</sup>

As stated by Michigan Chief Justice Bridget McCormack in a recent article on justice system reform and judicial ethics, “Careful adherence to formal and informal constraints still leaves ample room for nuanced approaches.”<sup>24</sup> The same can be said about the code of conduct. The constraints on speech that exist are primarily a construct of each court system and can be enlarged or changed by a court system that has determined that the current interpretation is no longer serving as an effective tool to defend the integrity of the court. “When precedent and precedent alone is all the argument that can be made to support a court fashioned rule, it is time for the rule’s creator to destroy it.” *Francis v. Southern Pac. Co.*, (1948) 333 U.S. 445, 471, 68 S.Ct. 611, 92 L.Ed. 798 (Black, J., dissenting).

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<sup>21</sup> Arizona Judicial Code of Conduct, Canon 2, Rule 2.10(E)

<sup>22</sup> Arizona Supreme Court. Task Force on Countering Disinformation Report and Recommendations. October 1, 2020. The report can be found at: <https://www.azcourts.gov/cscommittees/Task-Force-on-Countering-disinformation#:~:text=The%20Task%20Force%20on%20Countering,U.S.%20and%20Arizona%20justice%20systems>.

<sup>23</sup> <https://www.caljudges.org/RTC.asp>

<sup>24</sup> McCormack, Bridget Mary, “Staying Off the sidelines: Judges as Agents for Justice System Reform.” *The Yale Law Journal*, Vol. 131 (2021-2022); accessed on November 4, 2021 at: <https://www.yalelawjournal.org/forum/staying-off-the-sidelines-judges-as-agents-for-justice-system-reform>.

**Confidentiality of certain information:** The courts are at a particular disadvantage to respond to bad information when it involves confidential cases or protected information. In many instances courts cannot even confirm or deny that a confidential case or document exists. Particularly in instances of sealed or expunged cases, a shield that was designed to protect the parties can get turned around to thwart the truth in the face of bad information.

A growing concern, the discussion of which is outside this paper, is the increasing number of once-public cases that are being sealed after disposition. The intention of these reforms, whether instituted by legislatures or court systems, are good - to protect individuals from adverse employment and housing decisions. The unintended consequence of these reforms may well be a growing distrust in the accuracy and completeness of court records as criminal history checks and civil judgment rolls provided by the clerks of court increasingly lack information still available through the internet.

There are varying levels of confidential information. Entire cases can be sealed (no one is allowed access to the case) or confidential (no one except those designated by statute or court rule can have access without a court order) or a case can be open (publicly accessible) but certain documents or information are confidential (restricted from public access).

Courts should look within their own rules and work with their legislative body to create a path that allows an official response to bad information about a confidential case when it calls into question the personal integrity of a judge or the reputation of the court system.

**Fear of a public relations war:** A worst case scenario for any court is provoking a coordinated counterattack by advocates inflamed by the original bad information. Equally pause-worthy is the specter of a vitriolic battle between a judge and a critic being waged in the public square. On the other hand, letting a judge be pilloried for a decision consistent with the law without a response only reinforces the image of the court system as an institution that is biased, out-of-touch with the community, politically-motivated or any other adjective that critics choose to throw at it.

It is important for courts to have a system in place to quickly determine who should speak for the court, on what issues, and within what parameters.

Despite these very realistic concerns, court systems need to move past their reticence and work on reforms that will provide them the tools to engage with the public in a meaningful way. Gone are the days when communication originating from the courts was considered little more than public relations. As one author has noted, "Respect for the integrity of the courts ultimately results in effective communication with the public about the work of the courts."<sup>25</sup>

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<sup>25</sup> Greenstein, Marla N., "Judicial Ethics, Impartiality, and the Media." *The Judges Journal* (Summer 2019); Accessed October 28, 2021 at: [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2019/summer/judicial-ethics-impartiality-and-media/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/summer/judicial-ethics-impartiality-and-media/)

## Effective Communication

Nearly 10 years ago, Garrett Graff, an author and instructor at Georgetown University, published a monolith titled “Courts are Conversations: An Argument for Increased Engagement by Court Leaders.” In it, he lays out the reasons why in this era where individuals expect to engage with government through two-way, interactive communication, courts are at risk of losing their credibility and their voice by not engaging strategically with constituents. He concludes with this exhortation, “There is no silver bullet, no single correct answer for every state and every court. Instead it is necessary for each court in every state to begin engaging as soon as it can. Don’t wait. The world has already changed.”<sup>26</sup>

Below are important guidelines for courts to communicate effectively with today’s audiences.

1

### USE SUMMARIES DIRECTED TO A GENERAL AUDIENCE

A well-written summary that explains to the general public what legal question(s) were raised and addressed will keep the focus on the law and the process of applying the law to a set of facts rather than on the assumed motivation of the author of the decision.

Examples of state high courts that regularly use plain language summaries are Idaho, Kansas, Nevada, New Jersey, New Mexico, Minnesota, Missouri, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Virginia and Wisconsin.

In New Mexico the summaries are written by their public information office and in Ohio they are written by a team of former journalists. Compared to many summaries written by lawyers, the summaries from these two courts are succinctly written and readily understood by the average person.

It is uncommon when a summary of a trial court decision is issued, but not unknown. This practice should be encouraged whenever there is intense public interest in the ruling since it can circumvent speculation, misinformation and deliberate disinformation about a case.

2

### PROVIDE TRANSPARENCY IN MORE CASES BUT PARTICULARLY IN HIGH PROFILE OR HIGH STAKES CASES

Courts should make court processes as transparent as possible so the average person can witness the judicial system in action. A highly effective way to do this is to proactively take steps to disseminate information in high profile/high stakes cases. This prevents interested individuals from having to search the internet looking for information about the case which may come from biased sources that substitute commentary for fact.

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<sup>26</sup> Graff, Garrett M. Courts Are Conversations: An Argument for Increased Engagement by Court Leaders (Published as part of the Harvard Executive Session for State Court Leaders in the 21 Century, 2008-2011, actual publication date unknown).

Writing in *Richmond Newspapers vs. Commonwealth of Virginia*, former Supreme Court Chief Justice Warren Burger noted that “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>27</sup> Though speaking about the importance of public trials in *Richmond Newspapers*, this First Amendment principle of access applies equally to court documents (though in neither case is such right absolute). The same sentiment underpinning *Richmond Newspapers* and its progeny should guide the court in its approach to communication and information sharing because, as Chief Justice Burger observed, with openness “there is at least an opportunity both for understanding the system in general and its workings in a particular case.”<sup>28</sup>

In non-criminal cases, courts need to carefully weigh the impact of actively publishing what most people instinctively consider litigant’s private business against the responsibility of the court to provide access to public proceedings and consider providing this service in those cases where there is known public interest in the facts and outcome of the case. Since it is not always possible to predict what case will catch the attention of the public or become the target of a disinformation campaign, the assigned trial judge and the court system’s media specialist should be alerted by trial court staff as soon as public interest in a case begins to rise.

The pandemic has shown that there is an opportunity to allow the public and media to conveniently observe court processes through live-streamed video and court websites. This allowed for greater public witness to court proceedings. The court’s best opportunity to convey the true facts and reasoning behind judicial action may occur during court proceedings, when the judge can state on the record the facts and law that resulted in the court’s action.

In speaking about cameras in the courtroom and the expectations of the public, Prof. Jane Kirtley of the Sihla Center for Media and the Law citing the expanded access to court proceedings during the early years of the pandemic and the reduction of that access as the first wave of the pandemic waned notes, “Restrictions that once seemed reasonable and appropriate will appear to be secretive and anti-democratic.”<sup>29</sup>

The ease with which some state courts transitioned to live-streaming and the contrast between access to state court proceedings and access to federal court proceedings has bolstered the efforts of Congress to make federal proceedings more accessible. The “Sunshine in the Courtroom Act” would allow federal circuit and district courts to permit full electronic coverage of proceedings and the “Cameras in the Courtroom Act” would require the U.S. Supreme Court to televise all open sessions of court unless a majority of the justices determine that doing so would violate the due process rights of one or more parties to a case.

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<sup>27</sup> *Richmond Newspapers, Inc. vs. Virginia*, 448 U.S. 555, 572 (1980).

<sup>28</sup> *Id.*

<sup>29</sup> Kirtley, Jane E., “Making the Case for Cameras in the Courts,” Smerconish for Independent Minds, July 3, 2021. Accessed at: <https://www.smerconish.com/exclusive-content/making-the-case-for-cameras-in-the-courts>.

The Indiana court system recently launched a pilot project to broadcast proceedings in five trial courts. Unlike past broadcast projects, the decision to broadcast does not depend on the consent of both parties, but instead the decision rests solely with the judge.<sup>30</sup> The outcomes of this pilot project may be instructive for other courts considering expanded broadcasting without requiring the consent of all parties.

3

### RESPOND PROMPTLY TO BAD INFORMATION

Courts need to respond promptly to diffuse the impact of bad information. Waiting too long before refuting bad information only provides more time for it to become cemented in the minds of the public.

While there is a legitimate concern that repeating bad information will only draw more attention to it, research has confirmed that there is an effective 4-Component model to de-bunk bad information<sup>31</sup> without triggering the “familiarity fallacy.”<sup>32</sup>

- a. Fact – Start with the truth first. Stay with the most important main fact and explain in simple, concrete terms.
- b. Warn about the bad information – warn the reader that bad information is about to be repeated. Do not repeat the bad information later in the response.
- c. Explain – Explain to the reader how the information is bad (i.e. misleading, out of context, straight up false)
- d. Fact – Finish by reinforcing the fact. Make sure it provides an alternative explanation to the bad information.

4

### USE A RESTRAINED RESPONSE TO UNDUE CRITICISM OF THE COURT SYSTEM OR OF A SPECIFIC JUDICIAL OFFICER

Courts should not let undue criticism pass without offering a calm, factual response. A calm, factual response is fact-based, avoids intemperate language, and is constructive in its intent. To be constructive it should acknowledge the basis for the bad information, teach the audience the how and why of a situation, and provide reassurance of the court’s continued commitment to integrity and fairness.

<sup>30</sup> Bauer, Jennifer. “Broadcast Pilot Project Allows Cameras in the Courtroom.” Indiana Courttimes. Iss.31.2, Spring 2022.

<sup>31</sup> Lewandowsky, S; J., Ecker, U.K.H., et. al. The DeBunking Handbook 2020. Available at <https://sks.to/db2020>. DOI:10.17910/b7.1182

<sup>32</sup> “Familiarity Fallacy” or “Familiarity Principle” is a social psychological term to express the concept that people are more likely to trust or prefer something they are already familiar with.

To respond effectively to bad information courts need to know as soon as possible when it arises. Bad information can become viral in an amazingly short time so it is critical that someone from the court system is actively monitoring Twitter, Facebook and other social media platforms, including general legal blogs and those sites maintained by known critics of the court system, so that the court is aware of chatter and can identify the source of the bad information, if possible. The court's social media account can be used to get factual information out as soon as possible in order to spread truth and head off bad information. If they exist, the court's media account should provide links to other legitimate and official collateral sources that have the same or additional supporting information.

It can be very challenging to decide how far to engage as the engagement should not become a distraction, undignified or consume too much energy or resources. However not responding at all is problematic and risks bad information being the primary unchecked message.

5

#### INCREASE SOCIAL MEDIA PRESENCE

The Center for Strategic & International Studies recommends that courts “establish fast-responding communication capabilities to quickly counter false information with as much information as legally allowed.”<sup>33</sup>

In April 2019, the Pew Research Center reported extensive use of social media by adult Americans. The report found that 73% of adults used YouTube, 69% Facebook, 37% Instagram, 28% Pinterest, 27% LinkedIn, 24% Snapchat, 22% Twitter, 20% WhatsApp and 11% Reddit.<sup>34</sup> A more recent poll by the Media Insight Project draws a more nuanced picture of the news habits of people between the ages of 16 to 40 which shows that although social media is the dominate method for them to get news, most draw from a varied source of social media apps and traditional media sources. This age group was also cognizant of the prevalence of misinformation, with 9 in 10 respondents indicating it was an issue.<sup>35</sup> Entering the social media stream may be the most daunting task courts face. It requires staff trained in digital content strategy and careful planning as to tone, content, formats, choice of platforms, and frequency of updates. It would be tempting to continue to use traditional media and allow non-court actors to continue to push stories about the court. However, to reach the public we must engage with individuals in the medium they regularly turn to for information.

<sup>33</sup> Spaulding, Suzanne, Devi Nair and Arthur Nelson. “Beyond the Ballot: How the Kremlin Works to Undermine the U.S. Justice System.” Center for Strategic & International Studies. May 2019

<sup>34</sup> Perrin, Andrew and Erica Turner, “Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018.” Pew research Center (April 10, 2019), accessed at <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/>

<sup>35</sup> Bauder, David. “Poll: Young People Follow News, Don’t Enjoy It.” [https://bismarcktribune.com/opinion/columnists/poll-young-people-follow-news-dont-enjoy-it/article\\_a21e5841-49f0-54f9-8602-907b9efda0b3.html](https://bismarcktribune.com/opinion/columnists/poll-young-people-follow-news-dont-enjoy-it/article_a21e5841-49f0-54f9-8602-907b9efda0b3.html). Accessed on September 5, 2022.

The National Center for State Courts maintains a “Social Media and the Courts” webpage that tracks the use of social media platforms by state courts and the courts of the District of Columbia, Guam, Puerto Rico, Northern Mariana Islands, and the U.S. Virgin Islands.<sup>36</sup> To date, all but nine states use some form of social media. While this is promising, most courts are primarily using those platforms for one-way communication to drive traffic to their website. The Ninth Judicial Circuit Court of Florida does an extraordinary job of communicating in a variety of ways but especially in its use of a variety of social media platforms utilizing texts, podcasts, videos and photographs.<sup>37</sup>

Courts could also consider adding more thought-provoking and engaging content to attract more followers. The Ninth Judicial Circuit Court of Florida again leads in this area with its “Open Ninth, Conversations Beyond the Courtroom” podcasts featuring judges talking about such things as the opioid crisis, personal wellness, mediation and its “Ninth Unplugged” video interviews with judges and court staff. From the administrative perspective on the courts, a former Texas state court administrator ran a court blog for several years with posts covering such things as court committee projects and reports, sessions presented at national court conferences, and an explanation of how the grand jury process work. More traditionally, many judges over the years have published newspaper columns that covered issues ranging from the consequences of underage drinking to understanding landlord-tenant rights.<sup>38</sup>

Courts should provide media packets pro-actively before rolling out big changes, new initiatives, or high-profile cases to set the narrative before something becomes a “media event.” In that respect, courts should cultivate relationships with reporters who routinely cover the court system and the legislative staff who work with the legislative committees who hold the court system portfolio.

Courts should also use their social media presence to promote the positive work of the court system and of individual judges. “Bad news almost always leaks out. You assume that good news does too. It doesn’t...Thousands of good stories die every day simply because the media never hear of them.”<sup>39</sup> Spotlighting court innovation and humanizing the individuals behind the robes serves as a counterbalance to the constant flow of information that seek to show the courts as hidebound and judges as out of touch with the common person.

Courts must learn how to boost their social media presence by studying social media analytics to understand the types of posts that resonate and are widely shared. A wider audience that is already familiar with the court’s methods of communication will make it easier to spread good information faster and to counter bad information when it becomes necessary to do so.

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<sup>36</sup> Found at: <https://www.ncsc.org/topics/media/social-media-and-the-courts/social-media/home>

<sup>37</sup> <https://ninthcircuit.org/communication-outreach>

<sup>38</sup> See for example, the Legally Speaking column written by Judge Gerald Williams, North Valley Justice of the Peace for the publication The Foothills Focus or the column written by former Judge Michael Savre, District Court Judge in McLeod County, Minnesota published in the Dassel-Cokato Enterprise Dispatch (pub. Date March 29, 2010).

<sup>39</sup> Jones, Clarence. *Winning with the News Media*, 8<sup>th</sup> ed. (2005). Pp. 125-126

## 6

**CONTINUE TO EXPAND CIVICS EDUCATION ACTIVITIES**

All courts engage in some civics education. Almost all courts work closely with schools and provide classroom support through school visits, courthouse or court facility tours, and curriculum designed for specific grade levels. Some courts provide a justice's teaching institute or train-the-teacher program. The Ninth Judicial Circuit Court of Florida periodically puts on a free 4-week program titled "Inside the Courts" that answers frequently asked questions on topics including the judge's decision-making process, bail considerations and juvenile case outcomes.<sup>40</sup> Focusing more on procedural questions, the South Central Judicial District of North Dakota has also hosted periodic "Law School for Caring Professionals" programs.<sup>41</sup>

On top of these more formal programs, judges and court staff are frequently asked by civic clubs to speak on specific topics.

All of these programs are necessary and effective teaching tools. However, one group is consistently missed in our educational efforts. That group is the general population of adults between the ages of 18 and 65. Courts should consider better use of social media to reach this group who are active in civic life and most likely to be court users or jurors. Unsurprisingly, this group is also most likely to be digital natives and active on social media. The law profession is word-intensive and the natural teaching tool for lawyers and court system staff is the written word. Courts should consider civics education using non-traditional formats to quickly convey concepts such as memes, GIFs, podcasts and explainer videos. According to an investigative report by USA Today, because of the way they capture attention "memes are arguably the most effective way to reach a massive audience with minimal resources."<sup>42</sup> Although it is uncomfortable to consider reducing complex concepts into a few words or pictures, courts cannot ignore the primary means by which adults learn new information in today's world. The National Center for State Courts provides two examples of the success in communicating this way through its popular "Tiny Chats" podcasts and its explainer videos on the history and role of state courts and jury service. To preserve public trust, courts must become part of the curated stream that shape individuals' worldview.

Courts should regularly provide civics education to business groups, law enforcement associations and similar entities to reinforce the value of a fair and independent judiciary. Each of these groups has their own network of supporters and social media presence and, because they are heavy users of court services, they are natural allies in the struggle to maintain confidence in the rule of law and the institutions charged with protecting it.

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<sup>40</sup> For details see their website at: <https://ninthcircuit.org/communication-outreach/inside-courts>

<sup>41</sup> For details see their news release at: <https://www.ndcourts.gov/news/north-dakota/district-courts/events/scjd-to-present-law-course-for-caring-professionals>

<sup>42</sup> Azar, Taraneh, "Propaganda of the Digital Age: How Memes are Weaponized to Spread Disinformation," Sept. 20, 2022. Accessed on September 20, 2022 at: <https://www.usatoday.com/in-depth/news/investigations/2022/09/20/memes-disinformation-trump-maralago-jan-6-hearings-covid/7832934001/>

Civics education activities must be fully supported by the court's public information and education departments. Ensuring that judges and court staff have easy to use and adaptable training materials and curriculum to draw from will encourage more judges to engage in this type of activity. Courts that do not have these departments should consider having staff join the Conference of Court Public Information Officers or the National Association of Judicial Educators to obtain access to training and curriculum specifically created for courts. Courts should also periodically provide adult learner and presentation skills training to judges and court staff who are interested in being speakers or trainers. To increase requests and expedite the planning and logistics for engagement, courts should provide a list of available speakers and topics along with an online form for requesting speakers.

Although not often thought of as civics education, there are some nontraditional opportunities to educate legislators, community leaders, and the general public about the judiciary. These include the opportunity for members of the public to serve on court committees, the use of citizen juries<sup>43</sup> to provide laypersons' perspective on policy issues and having someone from the judiciary providing an overview of the courts during legislative orientation sessions. A non-court example of civics education efforts that courts could adapt for court system use is the Commons Town Hall Meetings hosted by the Yolo County California District Attorney's Office covering such topics as efforts to reduce racial disparities in prosecution and sentencing, mental health courts, and gun violence restraining orders.<sup>44</sup>

Yet another non-traditional form of civics education is the regular publication of the court's performance measures as recommended by COSCA in its 2008 paper, "White Paper on Promoting a Culture of Accountability and Transparency: Court System Performance Measures." That paper encourages courts to measure performance and share the results with the other branches of government and the general public to improve understanding of the judicial branch, to educate funding bodies and the general public about what the court system believes are important standards, and to hold ourselves accountable for the standards we have set for ourselves.<sup>45</sup>

Finally, leaders of the court system should consider talking directly to their governor and legislators about the distrust in all of government that is sown when the response to a particular ruling is to immediately attacking the intentions of the judge rather than addressing the legal reasoning behind the ruling.

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<sup>43</sup> Citizen juries are made up of a randomized selection of 12 - 24 adults who agree to work collaboratively with experts within a public entity to weigh policy alternatives on a specific issue.

<sup>44</sup> Archived videos of these meetings can be found at: <https://yoloda.org/commons-town-hall-meetings/>.

<sup>45</sup> Conference of State Court Administrators, "White Paper on Promoting A culture of Accountability and Transparency: Court System Performance Measures." Adopted December 2008. Found at: [https://cosca.ncsc.org/\\_\\_data/assets/pdf\\_file/0015/23523/2008whitepaper-performance-measurement-final-dec5-08.pdf](https://cosca.ncsc.org/__data/assets/pdf_file/0015/23523/2008whitepaper-performance-measurement-final-dec5-08.pdf).

## Recommendations

Courts should adopt the following recommendations to facilitate greater engagement in combatting bad information and protecting the reputation of the U.S. system of justice as independent, fair and grounded in the equitable application of the rule of law.

- Courts should consider amending their Judicial Code of Conduct to allow judicial officers to respond directly to bad information and targeted campaigns based on bad information e.g. Arizona Code of Judicial Conduct, Canon 2, Rule 2.10E.
- Court staff and judges should be trained on best practices for responding to bad information and defusing heated media coverage.
- Courts should have a communications plan and a team that includes staff trained in digital content best practices so they can proactively provide information to the public in a variety of formats. The communications team should actively monitor for bad information and be empowered to respond quickly when necessary, and to publicize positive information as often as practical.
- Communication plans must include employee education for all levels of staff. Since line staff are more visible, more accessible, and more approachable than judges, they are more likely to be asked direct questions about court cases when engaged in personal conversations outside of the workplace. The court should be confident that staff understand legal process and how to read court orders and legal opinions, so they are able to defuse bad information by explaining things correctly while engaged in these informal conversations.
- Courts should consider establishing a media committee that meets regularly and includes members of the media, journalists, attorneys, and representatives of the court to discuss privacy issues and resolve any tension points between reporting efforts and the legal process.
- Statutes and rules governing confidentiality should be modified so courts can respond directly to bad information about otherwise confidential cases if they can do so without revealing personally identifiable information about the parties beyond what the parties themselves have already revealed.
- Judicial Conduct Commissions should be able to correct bad information regarding complaints or disciplinary actions involving a judicial officer.
- Courts of Last Resort and Appellate Courts should include a plain language summary with opinions when they are released. Trial courts should be encouraged to do the same for cases that have attracted a high degree of public interest. When possible, trial judges should state on the record the basis for a decision in order to immediately provide truthful, accurate information to the public audience.
- Judicial writing seminars should include training on how to write clear decisions that explain potentially controversial rulings and how to acknowledge emotion to reduce emotion (see attached examples).
- Courts should provide greater transparency for all cases, but particularly for high profile cases. For high profile cases, court should consider holding daily press briefings to provide an opportunity for media to clarify legal process and procedure or to explain the effect of a ruling from the bench, post documents online as they are filed, and broadcast the trial to allow the public to see the judicial process at work. (e.g. St. of MN vs. Chauvin, St. of WI vs. Rittenhouse).

## Examples of opinions issued in high stakes cases that are directed toward a public audience

### **Crow Indian Tribe; et. al. vs. United States of America, et. al. and State of Wyoming, et. al. No., 18-36030 (9th Circ. 2020)**

The Court is aware of the high level of public interest in this case, as well as the strong feelings the grizzly bear evokes in individuals, from ranchers and big game hunters to conservationists and animal rights activists. The policy implications of the Greater Yellowstone grizzly delisting are significant, but they cannot affect the Court's disposition. Although this Order may have impacts throughout grizzly country and beyond, this case is not about the ethics of hunting, and it is not about solving human- or livestock-grizzly conflicts as a practical or philosophical matter. These issues are not before the Court. This Court's review, constrained by the Constitution and the laws enacted by Congress, is limited to answering a yes-or-no question: Did the United States Fish and Wildlife Service (hereinafter "Service") exceed its legal authority when it delisted the Greater Yellowstone grizzly bear?

### **Julie Smith, as Guardian of Jeffrey Smith v. West Chester Hospital, LLC, Court of Common Pleas Case # CV 2021 08 1206, Judge Michael A. Oster, Jr. Decision Denying Plaintiff's Action for a Preliminary Injunction, filed Sept 6, 2021**

It is impossible not to feel sympathetic to the Plaintiff in the case at bar. The Plaintiff wants her husband to get better. She has sought out a doctor who prescribed ivermectin with the hopes that it could help. The Defendant Hospital wants to follow what it believes are appropriate medical standards and make the husband get better using those protocols. Everyone involved wants Jeff Smith to get better. Simply stated, there are no bad actors in this case. Just the bad of a worldwide pandemic: COVID-19. *See also discussion on the rule of law and the way this judge laid out the legal question to be answered and purpose of an injunction.*



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