Social Media and Ethics

2018 Fall Judicial Education
November 16, 2018

Judge M. Sue Kurita
Electronic Social Media Terms:

1. Social Networking/Social Media profile sites Participation and interaction (wall, profile, posts, liking, “friending”).

![Social Media Logos]
E-Terms and definitions

2. **Blogs** from “web logs”

3. **Micro-blogs** – Twitter (Limited 140 characters participation with followers)

4. **Visual Media** –

5. **Virality**- the ability to reshare content instantly by “sharing”, “retweeting”, “liking” or “pinning”
Who has a Facebook page?

• For personal use only?
• For professional use only?
• For campaign purposes?
• Mixed use?
ESM Uses

• To connect with *family*
• To connect with *friends*
• To connect with *classmates*
• To seek *information*
• To share *political or social dialogue*
• Because *I have grandkids!*
ESM Concerns

- ESM Privacy Issues
- ESM Ethical Issues
- ESM in Trials
- ESM in Elections
- ESM challenged
Use of ESM – General Public

Pew Research Center:

- Face Book has over a billion users
- 72% of people that use the Internet sign on to a social media.
- 5 times a day; 20 minute per use
Increase Facebook Use

CPIO reported an increase in Facebook use by courts for information outreach.

ESM used in juvenile or probation monitoring.

*Conference of Court Public Information Officers (CCPIO)

Facebook use in voir dire has increased. Voir

Google
Challenges

• Balance first amendment rights and ethics
• Rapid changes in technology and the lag in ethical direction
• ABA Model of Judicial Conduct encourages judges to promote public understanding of and confidence in the system”
• Attorney duty to be current
Ethical Rules Apply in an Electronic World

- Ethics Advisory Opinions
- Code of Judicial Conduct
- Texas Disciplinary Rules
- Case Law
Ethics Advisory Opinions

“Friending Lawyers”
17 ETHICAL ADVISORY OPINIONS

3.5

13.5
Ethical Opinions NO !!!

1. Florida
2. Oklahoma
3. Connecticut
4. *Massachusetts
Summary of Opinions

- Code does not prohibit participation in Facebook and other such social media
- Judge must not “friend” attorneys who may appear before the judge
- Judge must not “friend” law enforcement officials, social workers, or persons who appear frequently in court in adversarial role
- Judge must avoid contacts that erode confidence in judicial independence, must maintain dignity
Summary of Opinions

- May have page but not identify self as a judge
- No “friending” attorneys, even with disclaimer
- Conveys impression that lawyer is in position to influence judge
- Bright line
- No “tweeting”
Ethical Opinions Yes but ....

1. California
2. Kentucky
3. New York
4. Ohio
5. Tennessee
6. Utah
7. South Carolina
8. Missouri
9. North Carolina
10. Arizona 2014
11. New Mexico
12. ABA Opinion
13. U.S. Court Opinion
Summary of Opinions

- “Friend” is term of art
- Judge may be member of social networking site
- Nature of social networking page
- Number of friends
- Judge’s practice in deciding whom to “friend”
Summary of Opinions

- Judge may “friend” lawyers “who may appear” before the judge
- How regularly attorney appears before judge?
- Whether on-line connections rise to close social relationship

*Disclose *Recuse* Disqualify*
Summary of Opinions

- Judge may **NOT** “friend” lawyers who have case pending before the judge. Must **unfriend** and disclose
- Employ appropriate level of prudence, discretion & decorum
- Stay abreast of new features
- Monitor
“...I don’t know why anyone would like to be 'friended' on the network. I mean, what kind of a narcissistic society is it that people want to put out there, ‘This is my life’, and ‘this is what I did yesterday’? I mean ... good grief. Doesn’t that strike you as strange? I think it’s strange.” ...

-Justice Scalia, October 2013
Code of Judicial Conduct

- *Ex Parte* Issues
- Independent investigations
- Impartiality
- Public Comments
- Order and decorum
Ex Parte Issues
While Judge Terry was presiding over a child custody dispute, he met in chambers with both plaintiff's and defense counsel. The judge and the father’s attorney learned they were both active users of Facebook.

Judge Terry and the father’s attorney proceeded to "friend" each other, which allowed each to see what the other posted on his Facebook page.
Judge Terry saw the father’s attorney's post asking how he could prove a negative (that his client didn't have an affair).

The father’s attorney also posted “I have a wise judge.” Judge Terry posted that he had two good parents to choose from.

The two also posted (with the judge responding to defense counsel's post) about how long the trial would last.
A Wise Judge????

District Judge Carlton Terry (N.C.)

After the wife's lawyer discovered the “friendship,” she asked for a new trial and for the judge's disqualification.

Judge Terry recused himself and the wife got a new trial.

Judge Terry was publicly reprimanded for the improper ex parte communications.

Public Reprimand of Terry (NC Comm’n 2009)
Happy Birthday Judge!
No ex parte concerns

The Supreme Court of South Dakota held that the posting of a birthday greeting on a trial judge’s Facebook page by a witness was not a prohibited ex parte communication warranting recusal of the judge because the post did not concern the pending proceeding and because the judge did not invite or initiate the Facebook post.
Ex Parte Issues

-Judge engaged in private chat with woman about her brother’s DUI matter.

-In re Bass (GA Comm’n 2013)
Texas Case Law
Youkers v. State

The 5th District Court of Appeals in Dallas, Texas, ruled that a trial judge’s Facebook communications, initiated by the victim’s father, did not constitute an improper *ex parte* communication demonstrating partiality and bias because

1) the judge’s actual relationship with the victim’s father was limited, and

2) his prompt and clear measures on Facebook, to the parties’ counsel, in the court’s file, and to the judicial conduct committee addressed any problem.
However, when the judge received the *ex parte* communication from the victim’s father, he took the following actions:

- informed the victim’s father that his message violated *ex parte* rules;
- placed a copy of the message in the case file;
- disclosed the communication to the attorneys in the case;
- asked the judicial conduct commission whether any further action was needed.
“Text Parte”

- On August 8, 2012, Polk County District Judge Elizabeth Coker presided over a jury trial in State of Texas v. David M. Reeves, an injury to a child case.

- While the defendant was testifying, Judge Coker sent text messages to an Assistant District Attorney, instructing her to tell the lead prosecutor to ask the defendant very specific questions.
“Text Parte”

-The text messages between Judge Coker and the ADA contained the following exchange:

**Judge Coker**

KAYCEE!!

**ADA**

-Yes?

Baby pooped on defendant
That pissed him off
He just testified baby poopd on him

-I need to pay closer attention instead of reading on my Kindle app

If he threw dog off bed because dog poed on him, what would he do if baby pooped on him??????

-Good point

Tell Beverly

-Ok
“Text Parte”

- On October 21, 2013, following a 9 month investigation into the texting incident and other allegations of judicial misconduct, Judge Coker and the Texas Commission on Judicial Conduct entered into a Voluntary Agreement to Resign in Lieu of Discipline
- Judge Coker took a leave of absence until December 6, 2013, at which time she formally resigned her office
- Shortly thereafter, Former Judge Coker announced her candidacy for the office of Polk County District Attorney
- State Bar disciplinary proceedings against the former ADA remain pending
The handwritten note given to the prosecutor by the ADA relayed the following message from Judge Coker:

• **Judge says**
  - *Baby pooped on Δ – if he threw a dog off the bed because dog peed on bed what would he do if baby pooped on him?*
Independent Investigations
Georgia judge resigned after allegations surfaced about his alleged inappropriate contact with a defendant through Facebook postings.

Woods reportedly offered the woman “behind the scenes” help in a criminal case.

Allegedly used a photo taken from the woman’s Facebook page as a basis for issuing a revocation against another defendant.
9th U.S. Circuit Court found that a Kenyan citizen was denied due process when the Immigration judge conducted an independent investigation and subsequently denied an application for withholding of removal and protection under the Convention Against Torture.

*Kiniti-Wairimu v. Holder 2009*
Independent Investigations

- 2011 cases *Arizona Free Enterprise Club v. Bennett* and *McComish v. Bennett*,
- US Supreme Court Chief Justice Roberts announced that he had done his own internet research.

Research (General information)

versus

Adjudicative facts (case or fact specific)
Impartiality
Actual or Apparent
Bias
Actual or apparent bias…

-North Las Vegas Judge Pro Tem was fired over a MySpace page that was reportedly hostile to prosecutors and used graphic language.

-On his MySpace page, MacArthur boasted his skills in the courtroom and listed his interests as:

"Breaking my foot off in a prosecutor's ass, anything relating to the NFL, video games, sex and improving my ability to break my foot off in a prosecutor's ass."

MacArthur Nevada 2007
In November 2016, Burnet County Judge James Oakley commented “time to for a tree and a rope” on a Facebook post from a San Antonio news station announcing that an arrest had been made in the shooting of police Detective Benjamin Marconi. Matter referred to SCJC.
To like or not to like ……
Is it an endorsement?

• Is a Facebook like an endorsement?
• Is a LinkedIn endorsement a violation?

SBOT Compliance Division believes the LinkedIn endorsement does not violate the rules, since it is a third party clicking the button. Lawyer must review information.
Commenting on a Pending Case
Judge publicly commented about pending contempt proceedings against lawyer

- On Facebook page
- In e-mail to other judges

-In the Matter of Allred (AL Court of Judiciary 2013)
Too funny. So it seems that a certain unnamed (very) recent Heisman Trophy winner from a certain unnamed "college" down south of here got a gift from the Ennis P.D. while he was speeding on the 287 bypass yesterday. It appears that even though the OU defense couldn't stop him, the City of Ennis P.D. is a different story altogether. Time to grow up/slow down young 'un. You got your whole life/career ahead of you. Gig Em Indeed.

6 people like this.

I meant to say "allegedly" speeding, my bad.
Bum Steer: The Judge Who Facebooked Johnny Football’s Speeding Ticket

by JASON COHEN

WED JANUARY 23, 2013 7:44 AM

-Of course, nobody wants to hear what Johnson has to say about the speeding ticket; just about his own actions. The Facebook post could certainly be seen as a violation of the Texas Code of Judicial Conduct (h/t to TexAgs there as well), which says, among other things, that a judge “should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards” and “should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

-Really, if you're a judge—unlike, say, an attorney general, or a Congressman—you probably shouldn't be on social media.

-“It's not clear why a municipal judge has a Facebook page in the first place,”

-Andrew Lu of Findlaw’s Tarnished 20 blog.
On August 28, 2013, Galveston County Court at Law Judge Dupuy was found in contempt of court for violating a gag order in his criminal case.

Judge Dupuy was sentenced to 45 days in the Galveston County Jail for using his Facebook page to make personal attacks against the prosecutor in his criminal case.

Dupuy was also ordered to cease using the Internet, any social media platforms or any electronic media to communicate about his case.
Commenting on a pending case - Judge Michelle Slaughter

- A Texas Special Court of Review dismissed a sanction initially issued by the Texas State Commission on Judicial Conduct that issued a sanction for the Judge’s posting about a pending “Boy in the Box” case. The Court found that there was no rule, canon of ethics or ethics opinion prohibiting Texas judges from using social media outlets like Facebook.
Demeanor

Distractions

“Sexting”

Not so “smart phone” use
Bored on the Bench

• A part-time Criminal Court Judge in Brooklyn was transferred to another court after supervisors learned of his online social networking activities.

On his Facebook account, the judge provided details of his location and schedule, updating his profile and “status” while on the bench, and posting photos of his crowded courtroom. The judge also had a MySpace account, which, when accessed in August 2009, listed his mood as: “amorous.”
-The Michigan Commission on Judicial Tenure has accused Judge Wade McCree of “sexting” from the bench with Geniene La'Shay Mott, a complaining witness in a child support case involving Robert King, the father of her child, that was before McCree.

-Judge McCree is also accused of carrying on a sexual relationship with Ms. Mott while presiding over Mr. King’s case and failing to recuse himself.

-Judge McCree has admitted that on occasion, he and Mott had sex in his chambers.
One of Judge McCree’s texts contained the following:

"C'mon, U'r talking about the 'docket from hell,' filled w/tatted up, overweight, half-ass English speaking, gap tooth skank hoes ... and then you walk in."

According to Judge McCree, "The text message was sent in an effort to flatter Ms. Mott and was not intended to demean any person who had appeared in his courtroom."
“Weiner-Gate” Part Deux

-In South Carolina, Magistrate James Oren Hughes, while attending a Horry County Bar reception, made an inappropriate comment to a law student. In addition, Hughes showed the law student and others an inappropriate image that he had saved on his cell phone.

-Sources claimed that the inappropriate image and/or images on his cell phone were of the Rep. Weiner variety

-After being placed on suspension, Judge Hughes resigned from the bench. As a result, he received a Public Reprimand for the conduct
Judge Theodore Abrams left an assistant public defender at least 28 voicemails and sent her at least 85 text messages containing personal and often sexual content. In one voicemail message, Abrams described a sexual act he wanted to perform on the attorney. Later, when the attorney appeared in chambers, Abrams offered to take her to his friend’s condo for sex. She declined, saying he was crazy and disgusting.
Judge Theodore Abrams

As a result of this, and other misconduct, Judge Abrams and the Arizona Commission on Judicial Conduct agreed to a Public Censure and the judge’s resignation from office, along with an agreement never to serve as a judge in the future.

In addition, the Arizona Supreme Court suspended Judge Abrams’ law license for two years.

The City of Tucson is defending a lawsuit filed for Judge Abrams’ sexual harassment.
Texas State Commission on Judicial Conduct accepted a resignation from Smith County Judge Joel Baker in lieu of disciplinary action for conduct alleged in the complaint that he had exchanged sexually graphic messages, photos and videos with a woman he has “friended” on Facebook. Some of these communications were alleged to have been sent while serving as vice chair of the SCJC.
Texas Disciplinary Rules

• Rule 7.02 prohibits false, misleading or deceptive communications
• Rule 7.03 & 7.05 Prohibits electronic and digital solicitations
• Rule 7.04 & 7.07 advertisements and filing requirements
May a Texas Lawyer respond to a former client’s adverse comments on the internet?

Rule 1.05 Confidentiality & Attorney Client Privilege

“The lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violates the Texas Disciplinary Rules of Professional Conduct”.
STRATEGIES: DOs and DON’Ts for Ethical Use of ESM
DON’T

• Do not engage in ex parte communications with the decision maker
• Do not instruct clients to delete information
• Do not advertise
• Do not participate when drunk, tired or angry
DO

• Assume everything you say & do can become public
• Educate yourself on policies, privacy controls
• Up-date settings
• Keep track of contents of page
• Consider recusal implications
DO

- Be dignified in every comment, photograph, status update
- Comply with advertising restrictions
- Provide guidance to staff
DO

• Monitor changes
• Monitor posts and tags
• Be aware of security settings
• Monitor family use and photos
• Be aware of ESM terms
Why The Frown?
More Helpful Information
Social Media and Judicial Ethics: Friend of Foe for Judges

St. Mary’s Law Journal on Legal Malpractice and Ethics 2017
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