

# Social Media and Ethics 2019 Update





Judge M. Sue Kurita  
March 2019

# Electronic Social Media Terms:

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



# 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”, or “liking”

# 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
- 90% of people under 30 are users
- Two-thirds of 31-64 year olds are users

# 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
- Using ESM in Elections
- Being ESM challenged

# 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"
- Duty to be current

# Ethical Rules Apply in an Electronic World

- Ethics Advisory Opinions
- Code of Judicial Conduct
- Case Law



# Ethics Advisory Opinions

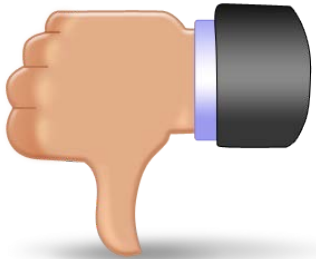
The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

facebook

## “Friending Lawyers”

# 17 Ethical Advisory Opinions

3.5

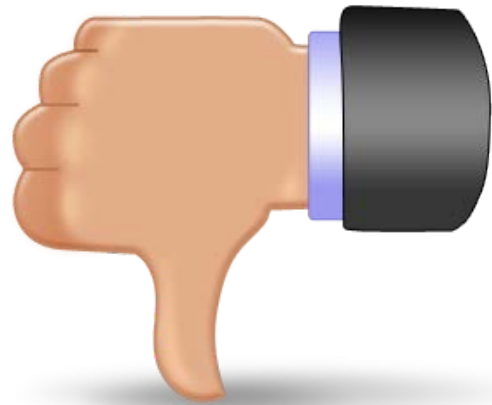


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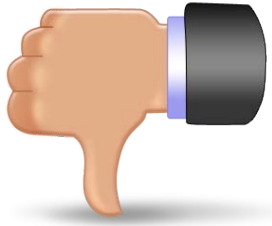


# Ethical Opinions NO !!!

1. Florida\*
2. Oklahoma
3. Connecticut
4. Massachusetts



\*Law offices of Herssein & Herssein versus USAA  
(Florida Nov. 15, 2018)



# Summary of Opinions

- Judge must avoid contacts that erode confidence in judicial independence
- Conveys impression that lawyer is in position to influence judge
- May have page but not identify self as a judge
- No “friending” attorneys, even with disclaimer
- 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
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 adding “friends”



# 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



# 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 \***



# Code of Judicial Conduct

- *Ex Parte* Issues
- Impartiality
- Public Comments
- Order and decorum-promoting
- Public confidence in the judiciary
- Campaign issues
- Soliciting funds

# *Ex Parte Issues*

# "A Wise Judge"

*--District Judge Carlton Terry (N.C.) 2009*

- ▶ 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.

# "A Wise Judge"

*--District Judge Carlton Terry (N.C.) 2009*

- ▶ 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.

## "Text *Parte*" In re Coker CJG #13-0376-DI

- ▶ -On August 8, 2012, Polk County District Judge 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.
- ▶ 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

# Texas Case Law

## *Youkers v. State*

- ▶ The 5<sup>th</sup> 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.

# Texas Case Law

## *Youkers v. State*

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

# Recent Case Law 2019

## In re Bitney Miller versus Carroll

- ▶ Wisconsin 3<sup>rd</sup> Court of Appeals February 20, 2019
- ▶ Judge Michael Bitney was removed from the case and rehearing granted.
  - Accepted Friend request from mother pending ruling
  - Mother likes or commented on Judges page.
  - *“...actions created a substantial risk of bias resulting in the appearance of partiality. The lack of disclosure heightens those concerns.”*



*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

# *Actual or Apparent bias????*

- ▶ In November 2016, a Texas County Judge
- ▶ 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 a police detective.
- ▶ SCJC issues a Public reprimand and additional education.           CJC 17-0320-CO

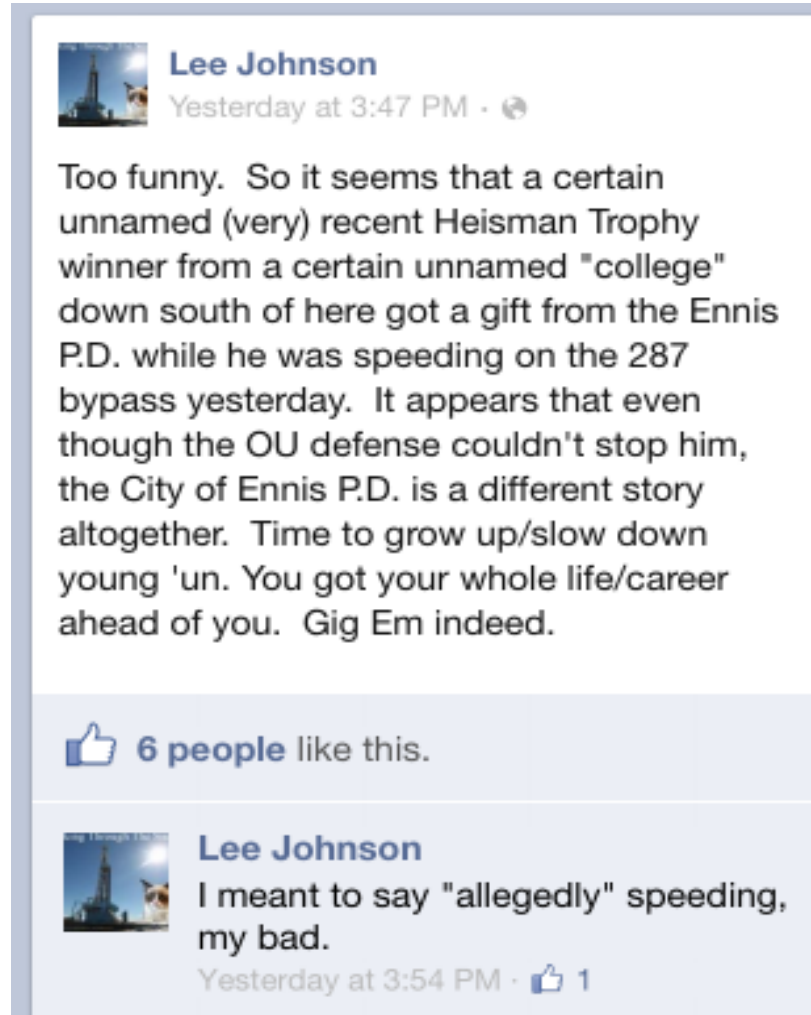
# In re Matter of McLaughlin

Kentucky Judicial Conduct Commission 6/12/2018

- Judge Sandra McLaughlin posted on her Facebook page:
  - ▶ *“This murder suspect was RELEASED FROM JAIL, just hours after killing a man and confessing to police.”*
- Facebook account was entitled “Judge Sandra McLaughlin
- Agreed Public Reprimand

# Commenting on a Pending Case

# Texas Monthly "Bum Steer Award" ≠ MVP



The image shows a screenshot of a Facebook post. At the top left is a small profile picture of Lee Johnson. To its right, the name "Lee Johnson" is written in blue, followed by "Yesterday at 3:47 PM" and a globe icon. The main text of the post is a paragraph of text. Below the text is a light blue bar containing a thumbs-up icon, the number "6", and the text "people like this.". At the bottom of the screenshot is a comment by the same user, "Lee Johnson", with a smaller profile picture, the text "I meant to say 'allegedly' speeding, my bad.", and "Yesterday at 3:54 PM" followed by a thumbs-up icon and the number "1".

**Lee Johnson**  
Yesterday at 3:47 PM · 🌐

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.

**Lee Johnson**  
I meant to say "allegedly" speeding, my bad.  
Yesterday at 3:54 PM · 👍 1

# Texas Cases

## Judge Christopher Dupuy

- ▶ 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.
- ▶ In January 2019, Dupuy sentenced to 6 years for an online “revenge” case-creating sex for hire accounts in the name of former girlfriends.

# Commenting on a pending case

- 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.
  - In re: Michelle Slaughter Special Court of Review15-0001



## Commenting on a pending case- *Urie,* *Order (Arizona Commission on Judicial Conduct June 12, 2018*

- “In the category of you can make this stuff up” Arizona posts every detail of the case including the defendant denying it was his cocaine since his drug of choice was heroin so “one of the hookers” must have left it.
- “Not the brightest bulb in the chandelier”.
- Public Reprimand

# Undermining Public Confidence

Demeanor

Distractions

# 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.**”

# “Significant concern about the content of posts”

*In the Matter concerning Gianquinto* California

Committee on Judicial Performance August 22, 2018

- Judge agreed to delete posts, refrain from sharing and designate his Facebook account as private.
- 4 months still posted
- Content was anti-immigrant, anti-muslim, anti-gay, anti-liberal, anti-federal justice system and undermines public confidence

# Matter of Fisher

NY State Commission on Judicial Conduct June 26, 2018

- Judge posted disparaging comments in a property dispute in retaliation of criticism of his conduct in unrelated case.
- Did not identify self as “Judge”
- “...judge’s right to speak publically is limited because of the important responsibilities a judge has in dispensing justice, maintaining impartiality and acting in a manner at all times that promotes public confidence in the judges integrity.”

# Undermining Public Confidence

- ▶ 4A(1) A judge shall conduct all of the judge's extracurricular activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge.
- ▶ Texas Constitution Article V sec. 1-a(6)A

# Undermining Public Confidence

- ▶ Texas State Commission on Judicial Conduct accepted a resignation from Smith County Judge in lieu of disciplinary action.
- ▶ 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.

In re Baker CJC # 16-0626-CO & 16-0910-CO

# Undermining Public Confidence

- Judge posted meme about Marine Corp General James Mattis being fired by Obama to please Muslims and hired by Trump to exterminate them.
- Additional political “rants” & intolerance

Public Reprimand of Burkeen CJC 17-0381-CO February 21, 2018



# Campaign Issues and Fundraising

# Facebook Campaign Posts

- A Nevada judge posted a picture of herself with Dwayne "The Rock" Johnson, which misled people to think that he was endorsing her.
- Political account was managed by her committee who have to follow the Code

▶ In the Matter of Almase (Nevada Commission on Judicial Discipline October 22, 2018)

# Facebook Campaign Posts

- Facebook campaign page: “The truth about Gregg Lerman” who “makes money trying to free Palm Beach criminals”
- “judges who commit “egregious misconduct during campaign in order to attain office will not be allowed to reap the benefits, Removal only sanction for “win-at-all-costs” campaigns.

Inquiry Concerning Santino (Florida 2018)

# Campaign endorsements and fund raising for others

- Two Texas judges held a joint campaign function and advertise it on social media.
- Canon 5(2) “shall not authorize the public use of his or her name endorsing another candidate for any public office..”
- Both judges received a Public Warning and order for Additional Education
  - ▶ Cooks CJC 18-0819, 18-0877 December 20, 2018
  - ▶ Martin CJC 18-0818, 18-0876 December 20, 2018

# Campaign endorsements and fund raising for others

- Campaign advertisements for other candidate that were done by the campaign manager for other candidates.

Public Reprimand of Lopez Texas State Commission on Juridical  
Conduct June 6, 2018

# Facebook Fundraising

- ▶ Canon 2B *“A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others”*

Judge and Constable “Annual School Supply Drive” and AR-15 Raffle Ticket \$10

Public Admonition of Metts Texas State Commission on Juridical Conduct October 3, 2018

# Facebook Fundraising

- ▶ Washington state sanctioned a Judge for two posts soliciting support for a Burlington Fire Department Pancake Feed.

In Re Svaren (Washington State Commission on Judicial Conduct December 7, 2018)

# Facebook Fundraising

## In Re Yu

- ▶ Justice's page
- ▶ "member of the judiciary"
- ▶ To educate viewers about the judiciary and make court more accessible and transparent.
  1. "Support these folks who are just trying hard to earn some money in an honest way" ..
  2. "Join Lifelong for Dining Out For Life" . Lifelong is a non-profit organization

In Re YU (Washington State Commission on Judicial Conduct December 7, 2018)



**STRATEGIES:**  
**DOs and DON'Ts for Ethical Use**  
**of ESM**

# 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

- Monitor changes
- Monitor posts and tags
- Be aware of security settings
- Monitor family use and photos
- Be aware of ESM terms



# DON'T

- Do not engage in ex parte communications
- Don't use terms or emoji's if not familiar with meaning
- Do not participate when drunk, tired or angry

# Why The Frown?



*Social Media and Judicial Ethics: Friend of Foe for Judges*  
St. Mary's Law Journal on Legal Malpractice and Ethics 2017  
Volume 7, Number 2

