JUDICIAL ETHICS & SOCIAL MEDIA

Justice Robert J. Torres
Supreme Court of Guam
2017 PJC Biennial Conference
Saipan
September 2017
Advisory Opinions Re: Social Media

- Arizona Advisory Opinion 2014-1
- Connecticut Informal Opinion 2013-6
- Florida Advisory Opinion 2009-20
- Florida Advisory Opinion 2010-6
- Florida Advisory Opinion 2012-12
- Maryland Advisory Opinion Request 2012-7
- Massachusetts Advisory Opinion 2011-6
- Massachusetts Letter Opinion 2016-1
- Massachusetts Letter Opinion 2016-8
- Massachusetts Advisory Opinion 2016-9
- Missouri Advisory Opinion 186 (2015)
- New Mexico Advisory Opinion Concerning Social Media (2016)
- New York Advisory Opinion 2008-176
- New York Advisory Opinion 2013-39
- North Carolina State Bar Formal Ethics Opinion 2014-8
- Oklahoma Advisory Opinion 2011-3
- Tennessee Advisory Opinion 2012-1
- Utah Informal Advisory Opinion 2012-1
- U.S. Advisory Opinion 112 (2014)
NO ONE RULE FITS ALL

- The Model Code of Judicial Conduct does not address the use of electronic social media ("ESM")
- ABA Formal Opinion 462
- States have issued judicial ethics advisory opinions
- Ability of judicial officers to use social media varies from state-to-state & local vs. federal

MCJC IMPLICATIONS

**Canon 1**

- A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

**Potential Ethical Issues**

- Undignified photographs or comments posted on the judge’s social page by the judge or someone else
- Ex parte communications with lawyers, litigants or parties
- Appearance of relationships with those who come before the court
- Messages may be taken out of context, misinterpreted or relayed incorrectly
SOCIAL MEDIA

MCJC IMPLICATIONS

Canon 2

- A judge shall perform the duties of judicial office impartially, competently, and diligently.

Potential Ethical Issues

- Need to disclose ESM connection with a party, witness, lawyer
- Need for recusal due to ESM connection
- Undignified / discourteous remarks posted by the judge on the judge’s page or on others’ pages
- Undignified/discourteous remarks posted by others on the judge’s page and not removed
- Inappropriate remarks about cases, litigants, or lawyers posted on pages of the judge’s assistant, clerk or other judicial employees or posted by those employees on others’ pages
- Comments or questions about a case posted on the judge’s page or directed to the judge; or posted on someone else’s site linked to the judge’s page
- Links to affected individuals or organizations appearing to indicate a bias by the judge
SOCIAL MEDIA

POLL QUESTION #1

I use social media.

- Yes
- No
MCJC IMPLICATIONS

Canon 3

- A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Potential Ethical Issues
- Comments by a judge on an organization’s social network page, supporting the organization and endorsing it, when the page is used for fundraising
- Comments by the judge construed as legal advice

INSTANT MESSAGING

Judge resigns after admitting improper IMs with wife during court, but denies steamy content

Posted Mar 5, 2013 6:15 AM CST
A New Mexico judge has resigned following allegations that he sent instant messages to his wife, a court employee, during trials and other proceedings.

The judge, Regensio Mathis of Las Vegas, N.M., admitted that he had engaged in “excessive and improper” instant messaging with his wife, but denied that any communications included intimations of courthouse sex, the Albuquerque Journal reports. The Santa Fe New Mexican and the Associated Press also have stories on Mathis’ resignation.
MCJC IMPLICATIONS

Canon 4

- A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

Potential Ethical Issues

- Appearing as a “friend” or “fan” on a candidate or political organization’s social network page
- A judge’s page listing a candidate as a “like” or “interest” of the judge
- Comments posted by the judge on a candidate or political organization’s social network page

SOCIAL MEDIA

“White filed the complaint because he believes it violates the judicial canons of ethics that prevent a judge from ‘publicly endorsing or opposing another candidate for any public office.’”

Augusta, Kan. — A Kansas judge has caused a stir by doing something millions of people do every day — “liking” a post on a Facebook page.
MCJC IMPLICATIONS

MCJC does not address the use of ESM, but two states have incorporated social media provisions into their code of conduct:

**West Virginia Supreme Court of Appeals**
- Comment 6 to Rule 3.1
- The same Rules of the Code Judicial Conduct that govern a judicial officer’s ability to socialize and communicate in person, on paper, or over the telephone also apply to the internet and social networking sites like Facebook.

**New Mexico Supreme Court**
- Preamble to the State’s Code of Judicial Conduct
- Judges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code.
ABA FORMAL OPINION 462

- Issued February 21, 2013 by the ABA Standing Committee on Ethics and Professional Responsibility
- No clear answers but identifies issues and concerns under the Model Code of Judicial Conduct and refers to various state opinions.

“"When used with proper care, judges’ use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. mail, telephone, email or texting.”
- Urges judges to use ESM with extreme caution.

---

ABA FORMAL OPINION 462

- All of a judge’s social contacts, including ESM, governed by the requirement that judges must act in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and must avoid impropriety and the appearance of impropriety.
- ABA warns of the dangers inherent in ESM—retransmission by others without permission, wider dissemination, and an increased likelihood of comments being taken out of context.
- Has the potential to compromise or appear to compromise the independence, integrity and impartiality of the judge, as well as to undermine public confidence in the judiciary.
- Judge should refrain from using ESM in a way that may be interpreted as ex parte communications concerning pending or impending matters and avoid using any ESM site to obtain information regarding a matter before the judge.
**POLL QUESTION #2**

I use this social media the most.

- Facebook
- Twitter
- LinkedIn
- Tumblr
- YouTube

---

**ETHICAL ADVISORY OPINIONS**

4

14
ETHICAL ADVISORY OPINIONS

YES

Arizona
California
Kentucky
Maryland
Missouri
New York
North Carolina
Ohio
South Carolina
Tennessee
Washington
Utah
U.S. Advisory Op. 112 (14)
ABA Formal Op 462

NO

Connecticut
Florida
Massachusetts
Oklahoma

"Has the jury tweeted a verdict?"
EXAMPLES OF STATE ADVISORY OPINIONS
ARIZONA
(Arizona Supreme Court Judicial Ethics Advisory Committee)


- Judge may use LinkedIn but not recommend a lawyer who regularly appears before the judge, nor use the judge’s title to recommend any other professional, but may recommend a former law clerk to prospective employer

- A judge may blog but avoid statements that could be perceived as prejudiced or biased, and assume that statement will end up in public

- A judge on Facebook should avoid discussions about issues that may come before the court, including postings by others

- Judges are not required to automatically disqualify themselves from cases in which lawyer Facebook friends appear, but they should evaluate each situation individually, with recusal more likely when the lawyer is in the close friend category


- If Facebook friendships raise concern sufficient for disqualification, simply de-friending is not an adequate response

- Judges need to be aware of the potential problems social media present with respect to ex parte communications and independent investigation of facts

- Although a judge may “like” or “follow” an organization on Facebook, the judge will not have to consider whether to disqualify if that organization appears as a litigant

- A judge may not be a social networking friend of a candidate’s campaign Facebook page, nor “like” that page, because that would appear to be endorsing the candidate

- A judge may not be a friend of the Facebook page of local enforcement, nor “like” such a page, since those officers appear regularly
EXAMPLES OF STATE ADVISORY OPINIONS

FLORIDA
(Supreme Court’s Judicial Ethics Advisory Committee)

- **Opinion 2009-20 (issued 11/17/2009):** A judge may not add as friends lawyers who appear before the judge, nor allow lawyers to add the judge as a friend. The judge’s acceptance of a lawyer as a friend would convey the impression or allow others to convey the impression, that a person is in a special position to influence the judge, even if that is not true.

- **Opinion 2010-06 (issued 3/26/2010):** A judge may not friend a lawyer even if the judge places a disclaimer on the judge’s Facebook page stating (1) that the judge will accept as a friend anyone that the judge recognizes or who shares a number of common friends; (2) the term “friend” does not mean a close relationship; and (3) no one listed as a friend is in a position to influence the judge.

- **Opinion 2010-06 (issued 3/26/2010) (con’t):** A judge who is a member of a voluntary bar association which uses Facebook may use that page to communicate with other members, including lawyers, about the organization and about non-legal matters, and does not have to de-friend lawyer members who appear before the judge.
  - The organization and not the judge controls the Facebook page.

- **Opinion 2012-12 (issued 5/9/2012):** Not friending lawyers on Facebook applies to other social media sites as well, including LinkedIn.
  - A judge who is a member of LinkedIn may not add lawyers who appear before the judge as “connections,” to do so creates the impression that the lawyer is in a special position to influence the judge.
Section 8.11 Social Networking and Blogging

8.11.1: "Whilst the use of social networking is a matter of personal choice, judges must

- Be wary of publishing more personal information than is necessary (security fraudsters).
- Posting some information could put your personal safety at risk. For example, your address, details of holiday plans and information about your family. Photographs.
- Check your privacy settings. You can restrict access to your profile to ensure your information is kept to a restricted group.

8.11.3: For blogging,

- Blogging by members of the judiciary is not prohibited, judicial office-holders who blog (or comment) must not identify themselves as judges.
- Judicial office-holders must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.
- Applies to blogs which purport to be anonymous.
- Failure to adhere to the guidance could ultimately result in disciplinary action.
Guiding Principle: “A judge may use electronic social media, but in doing so he or she should have regard to the guiding principles of impartiality, judicial independence, and integrity and personal behaviour. Any conduct by a judge that would undermine these principles or create a perception of impropriety or bias should be avoided.”

- Social media security settings must be changed to ensure a higher level of security
- Judges must assume that comments posted to a social media site will not remain within the circle of the judge’s connections

If a judge has a social media connection with a lawyer or party who is either appearing or will soon appear before the judge, the judge should consider whether the connection should be disclosed either prior to or at commencement of the matter.

- Comments, images, or profile information might prove embarrassing, both personally and to the Court, if publicly revealed
EXAMPLE FROM AUSTRALIA

LAW INSTITUTE VICTORIA
Guidelines on the Ethical Use of Social Media

- About Social Media and Ethics: “To guard against potential ethical violations, lawyers should use common sense, not say or do anything online that they would not do in front of a crowd, be responsible, diligent, and careful. If in doubt, don’t say it or write it.

- Confidentiality: Practitioners owe their clients a duty of confidentiality. The use of social media by practitioners may expose them to the risk that client confidential information may be disclosed, albeit by inadvertence. For example, if a practitioner tweets that she is in a certain location, either through text or geotagging, she may unintentionally disclose that she is working with an identifiable client and thereby breach the duty of confidentiality.

EXAMPLE FROM AUSTRALIA

LAW INSTITUTE VICTORIA
Guidelines on the Ethical Use of Social Media

- Inadvertent Retainer: Avoid creating unintended solicitor-client relationships. For example, if one of a practitioner’s Facebook “friends” posts a legal question on the practitioner’s Facebook wall, any answer may be construed by the questioner or other “friends” as legal advice for which the practitioner may become liable. However, there is nothing to stop practitioners engaging in general legal debate through social media.

- Duty to the Administration of Justice: Every practitioner owes a duty to the court and to the administration of justice which is paramount and prevails to the extent of inconsistency with any other duty. Practitioners must be extremely careful not to say or do things in social media channels that could be viewed as bringing the law into disrepute.

In addition, care must be taken by practitioners to ensure that opinions are not expressed on the merits of potential or current legal proceedings as this could be an interference in the administration of justice and a possible contempt of court. Similarly, adverse or demeaning comments about judicial officers and fellow members of the legal profession should never be made as they would be likely to diminish public confidence in the administration of justice.
EXAMPLE FROM AUSTRALIA

LAW INSTITUTE VICTORIA
Guidelines on the Ethical Use of Social Media

- Breach of “No Contact” Rule: A practitioner must not deal directly with another practitioner’s clients except in certain urgent and limited circumstances. For example, it would be unethical for a practitioner to make a Facebook “friend” request to another practitioner’s client to gain access to their Facebook page. Similarly, it would be unethical to accept a “friend” request from a person whom a practitioner knows to be another practitioner’s client and caution should be exercised generally when accepting “friends”.

- Other Risk Areas:
  - Defamation
  - Advising Clients About Social Media Risks
  - Employees’ Use of Social Media
  - Risk to Reputation

Example From Philippines
OCA Circular 173-2017

- Applies to all Judges and Court Personnel of 1st and 2nd Level Courts
- While engaging in social media is not prohibited, held to a higher standard
- Section 6 Canon 4 of New Code of Judicial Conduct requires they conduct themselves in manner to preserve dignity, impartiality and independence
- Like Caesar’s wife … must be above suspicion
- Enjoined to be cautious and circumspect in posting photos, liking posts and making comments
**POLL QUESTION #3**

The primary reason I use social media is:

- Personal (connect with family and friends)
- Professional (stay informed about colleagues and other court systems)
- Informative (read restaurant reviews, news, etc.)
- Other

**SUMMARY OF OPINIONS**

YES!

- “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

YES!

- 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*

YES!

- 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

NO!

- Code does not prohibit participation in Facebook and other such social media
- Judge must not “friend” attorneys, 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

NO!

- 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 “fraught with peril”
- No “tweeting”
EXAMPLES OF JUDICIAL DISCIPLINE
CASES INVOLVING SOCIAL MEDIA

“A Facebook friendship doesn’t necessarily signify a close relationship, according to Florida’s Third District Court of Appeal. A mere allegation of a Facebook friendship, without more, does not provide a basis for disqualification . . . “

“To be sure, some of a member’s Facebook ‘friends’ are undoubtedly friends in the classic sense of person for whom the member feels particular affection and loyalty. The point is, however, many are not. A random name drawn from a list of Facebook friends probably belongs to casual friend, an acquaintance, an old classmate, a person with whom the member shares a common hobby, a ‘friend of a friend’ or even a local celebrity like a coach.”

New Mexico Supreme Court cautions judges using social media
EXAMPLES OF JUDICIAL DISCIPLINE CASES INVOLVING SOCIAL MEDIA

• Public Discipline

- Granting a joint motion to resolve charges, the Alabama Court of the Judiciary publicly reprimanded and censured a judge for making public comments about pending contempt proceedings against a lawyer on his Facebook page and in an e-mail sent to all state court judges. In the Matter of Allred, Reprimand and Censure (Alabama Court of the Judiciary March 22, 2013).
EXAMPLES OF JUDICIAL DISCIPLINE
CASES INVOLVING SOCIAL MEDIA

• Private Discipline
  – The Arizona Commission on Judicial Conduct advised a justice of the peace was advised to refrain from viewing social media postings that could lead to inadvertent ex parte communication and/or acquisition of factual information outside of the record. Arizona Commission on Judicial Conduct 2016 Annual Report

– The California Commission on Judicial Performance issued a private advisory to a judge for social media activities that created an appearance of impropriety and an appearance of partiality. California Commission on Judicial Performance 2014 Annual Report

• Private Discipline
  Texas privately reprimanded a judge for soliciting public participation in a non-profit’s fundraising operations through Facebook postings and the corporation’s website and related conduct. Private Reprimand of a Justice of the Peace (Texas State Commission on Judicial Conduct April 23, 2013)

Privately warned a judge for active involvement in a charitable fund-raiser that was apparent to the public from numerous entries on a Facebook page, Private Warning and Order of Additional Education of a Municipal Court Judge (Texas State Commission on Judicial Conduct August 23, 2012)
POLL QUESTION #4

Courts should use social media to communicate:

- Yes
- No

COURTS USE OF SOCIAL MEDIA

US Supreme Court
@USSupremeCourt
Washington, DC • http://www.supremecourtus.gov

1,009 TWEETS 14 FOLLOWING 44,114 FOLLOWERS

Tweets

US Supreme Court @USSupremeCourt
SEBELIS v. AUBURN REGIONAL MEDICAL CENTER. Decided
01/22/2013 bit.ly/10d83A

Collapse ➔ Reply ☑ Retweet ⚪ Favorite ✮ More
COURTS USE OF SOCIAL MEDIA

COURTS USE OF SOCIAL MEDIA
Questions?

...and when I flush this baby it automatically poops on Twitter, Facebook, and YouTube.