Responding to poll questions

- WEBSITE: www.PollEv.com/guamjustice
- DOWNLOAD THE APP on your Android or iPhone device
  - Poll Everywhere
  - Click “I’m participating”
  - Join a presentation by entering username: guamjustice
OBJECTIVES

• Better understand the social media issues related to judicial officers and court employees

• Appreciate ethical constraints that apply to your social media and internet usage as a judicial officer

• Recognize the key areas for courts’ use of social media

ESM

Suggested Comprehensive, Working Definition of Electronic Social Media (ESM):

Social Media: Technology-based applications, including without limitation one or more pages of information published on the Internet by a natural or juridical person, whether or not about a particular subject, that enable users to create or share content electronically or otherwise participate in internet-based communication using a computer, tablet, mobile phone, or other device.
SOCIAL MEDIA USE IN THE UNITED STATES

• Total Users: Approximately 207 million. “It is safe to assume any judges can be counted in these figures.” Cal. Judges Ass’n Advisory Opinion 66 (2010).

• Breakdown of percentage of users in each age group (2019):
  – 18-29: 86%
  – 30-49: 80%
  – 50-64: 64%
  – 65+: 34%

State v. Thomas, 376 P.3d 184 (New Mexico 2016)  Judges participating in social media must keep in mind that the Code of Judicial Conduct applies with equal force to virtual actions and online comments.

In the Matter of Whitmarsh, Determination (New York State Comm’n on Judicial Conduct, December 28, 2016)  Code of Judicial Conduct applies “in cyberspace as well as to more traditional forms of communications.”

“[P]articipating in social networking sites and other [electronic social media] clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions . . . .”

Accord, Massachusetts Letter Op. 2018-03
New Mexico Advisory Opinion Concerning Social Media (2016)

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*

- 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 on the judge’s social page
- *Ex parte* communications
- Appearance of relationships with parties
- Messages may be taken out of context
A judge shall perform the duties of judicial office impartially, competently, and diligently.

Potential Ethical Issues

- Need to disclose electronic social media (“ESM”) connections
- Recusal/disqualification
- Undignified /discourteous remarks
- Inappropriate remarks about cases, litigants, or lawyers
- Comments about a case posted on the judge’s page
- Links to individuals or organizations appearing to indicate bias/prejudice
You have a Facebook account that was created primarily for communicating with friends and family members in other states. Although you have not disclosed or identified on your Facebook page that you are a judge, you have “friended” several attorneys who regularly appear before you. You have had no social or professional relationship outside the courtroom with those lawyers. You have also friended a former law clerk who currently works for a personal injury law firm that has cases before you.
POLL QUESTION 1
Must you disclose your Facebook friendships when your friends appear in your courtroom?

Yes, but only the friendship with your former law clerk.

No, a Facebook account is personal; the Code of Judicial Conduct has no bearing on a judge's non-judicial behavior.

Yes. You have an ethical duty to avoid impropriety or the appearance of it. Failure to disclose could be perceived as violating the Code of Judicial Ethics.

No, as long as the friendships do not compromise your judicial independence and impartiality.
ABA Opinion No. 462 (Feb. 21, 2013)

“Because of the open and casual nature of ESM ['Electronic Social Media'] communication, a judge will seldom have an affirmative duty to disclose an ESM connection.”

ABA Opinion No. 462

Opinion No. 462 notes:

when used with proper care, a judge’s use of electronic social media (“ESM”) does not necessarily compromise the judge’s duties under the Model Code of Judicial Conduct anymore than the use of traditional and less public forms of social connection such as U.S. mail, telephone, e-mail or texting.
ABA Opinion No. 462

However, “when a judge knows that a party, a witness or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.”

Jurisdictions Differ on Facebook Friendships

A few states that have rules or opinions on this issue include:

(1) New York
(2) Florida
(3) California
(4) Kentucky
(5) Kansas
(6) Nevada
Jurisdictions Differ on Facebook Friendships

1. **Domville v. State**, 103 So. 3d 184 (Fla. 2012) (holding a judge must disqualify himself or herself when Facebook friend who was a prosecutor appeared before the judge).


3. **NY Bar Association Opinion 13-39** (May 28, 2013) (holding that just being a Facebook friend without more is insufficient to warrant recusal and would be unreasonable to base a finding of impropriety on this factor alone).
POLL QUESTION 1A
Virtual “Friends” (Continued)

Would it matter if you accepted every friend request from attorneys who appear before you?

Yes, it would matter.

No, it would not matter.
POLL QUESTION 1B
Virtual “Friends” (Continued)

Would it matter if your former law clerk is a prosecutor assigned to your court?

Would it matter if your former law clerk is a prosecutor assigned to your court?

Yes, it would matter.

No, it would not matter.
Problem # 2

“Posting Pictures”

A judge posts this picture of the judge and his or her friends on the judge’s Facebook page.

POLL QUESTION 2

Has the judge violated the Code of Judicial Ethics by posting the picture?
Has the judge violated the Code of Judicial Ethics by posting the picture?

Yes. The judge should not post the picture because it can create the appearance of impropriety in some situations.

No. The judge’s Facebook account is personal and the Code of Judicial Conduct has no bearing on a judge’s non-judicial behavior.

Yes. Judges are never allowed to post photographs of themselves on the Internet or Facebook unless permitted by the Chief Judge of the court.

No. The picture does not specifically identify the judge.

POLL QUESTION 2A
(“Posting Pictures”)

Does it make any difference if the photo is posted on a personal page that in no way identifies him or her as a judge?
**Potential Problems (See ABA Opinion No. 462)**

1. Photographs similar to comments posted on an electronic site may not stay within a judge’s electronic contacts group.
   
   - Photos can be used out of context and not for their original purposes
   
   - Photos can be used to embarrass a judge and could lead to a situation where a judge may appear to be compromised or subject to compromise
Potential Problems *(See ABA Opinion No. 462)*

- Photos posted on ESM can be disseminated to thousands of people without the knowledge, consent or permission of the poster.

2. Others viewing the photograph may believe that those persons within the photo have an undue influence on a judge and may provide an appearance of impropriety.

  - *(See Canon 1 (highlighting the importance of an independent and impartial judiciary that avoids impropriety and the appearance of impropriety))*
Potential Problems (See ABA Opinion No. 462)

✓ See Rule 1.2 (identifying the importance of promoting confidence in the independency, integrity, and impartiality of the judiciary)

- **Comment 1:** Public Confidence applies to professional and personal conduct of a Judge

- **Comment 2:** a judge can be subject to “public scrutiny that might be viewed as burdensome if applied to other citizens....”

Potential Problems (See ABA Opinion No. 462)

➢ See Canon 2 (emphasizing the importance of a judge being impartial, competent, and diligent)

✓ See Rule 2.2 (providing that a judge must uphold and apply the law fairly and impartially)

✓ Rule 2.4 and Comments (highlighting a few of the external influences on judicial conduct including public opinion, family, social, political, and financial interest)
ARGUMENTS PRO
May promote public confidence in the judiciary
• Prevents isolation
• Provides a platform for educating the public about the courts and the law
• Allows the public to observe how the judge communicates and behaves
• Provides transparency, greater understanding, and confidence in judiciary.

ARGUMENTS CON
• Judges cannot isolate themselves
• Some behavioral restrictions are inherent in the judicial office
• “Friending” affords the judge the option to accept or reject “friends,” and to convey the existence of the “friendship” to the public and
• Creates the impression that the “friend” is in a special position to influence the judge.
**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 on a social network page can be construed as supporting or endorsing
- Organization website names judge among members
- Fundraising issues
- Comments by the judge construed as legal advice

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**INSTANT MESSAGING**

*A*BA*JOURNAL*

Law News Now

**JUDICIARY**

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, Eugenio Mathis of Las Vegas, N.M., admitted that he had engaged in “excessive and improper”*
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

➢ “Friend” or “fan” on a candidate social network page.
➢ A judge’s page listing a candidate as a “like” or “interest.”
➢ Comments on a candidate or political organization’s social network page.
➢ Public perceptions of political bias or prejudice.

SOCIAL MEDIA

Kansas judge causes stir with Facebook 'like'

THE ASSOCIATED PRESS
July 29, 2012 - 1:52 pm EDT

AUGUSTA, Kan. — A Kansas judge who once called something millions of people do every day “obscene” has filed a 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.”
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
- No clear answers but identifies issues and concerns under the Model Code of Judicial Conduct and refers to various state opinions

ABA FORMAL OPINION 462

- Urges judges to use ESM with extreme caution
- All social contacts, including ESM, governed by requirement to promote public confidence in the independence, integrity and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety
- Warns of the dangers inherent in ESM—retransmission without permission, wider dissemination, and increased likelihood of comments taken out of context
ABA FORMAL OPINION 462

- 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.
- Refrain from using ESM in a way that may be interpreted as *ex parte* communications and avoid using any ESM site to obtain information about a matter before the judge.

ETHICAL ADVISORY OPINIONS

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ETHICAL ADVISORY OPINIONS

**YES (cautiously)**

- 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

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**ETHICAL ADVISORY OPINIONS**

**NO**

- Connecticut
- Florida
- Massachusetts
- Oklahoma

"Has the jury tweeted a verdict?"
EXAMPLES OF STATE ADVISORY OPINIONS –

ARIZONA
(Arizona Supreme Court Judicial Ethics Advisory Committee)

❖ Advisory Opinion 14-01: Some conclusions include...

➢ may use LinkedIn but may not recommend a lawyer who regularly appears
➢ may not use the judge's title to recommend professionals except former law clerk
➢ may blog but must be careful and assume statements will end up in public
➢ avoid discussions about issues that may come before the court
➢ not required to disqualify automatically from cases in which lawyer Facebook friends appear, but recusal more likely when the lawyer is in the close friend category


➢ simply de-friending is not an adequate response to disqualification concerns
➢ be aware of ex parte communications and independent investigation of facts
➢ may “like” or “follow” an organization but consider whether to disqualify if that organization appears as a litigant
➢ may not be a friend of a candidate’s campaign Facebook page, nor “like” page
➢ may not be a friend of local law enforcement, nor “like” page, since officers appear regularly
EXAMPLES OF STATE ADVISORY OPINIONS

FLORIDA
(Supreme Court’s Judicial Ethics Advisory Committee)

- **Opinion 2009-20 (issued 11/17/2009):** may not friend lawyers who appear nor allow lawyers to add the judge as a friend...conveys the impression that a person is in a special position to influence the judge.

- **Opinion 2010-06 (issued 3/26/2010):** may not friend a lawyer even if the judge has disclaimer that (1) the judge will accept anyone that the judge recognizes or shares common friends; (2) "friend" does not mean a close relationship; and (3) no friend can influence the judge.

- **Opinion 2010-06 (issued 3/26/2010) (con't):** Judges who are members of voluntary bar associations which use Facebook may use that page to communicate with other members about the organization and non-legal matters; 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.

- **N.B.** The ongoing validity of these opinions is called into question by a November 2018 Florida Supreme Court decision – see next slide.
FLORIDA: “FRIENDING” LAWYERS

In Law Offices of Herssein & Herssein, P.A. v. United Services Automobile Ass’n, 2018 Fla. LEXIS 2209 (Nov. 15, 2018), the Florida Supreme Court, by a vote of 5-3 disagreed, the majority siding with ethics opinions in other States (AZ, KY, MD, MO, NM, NY, OH, UT).

Social media friendships, the Court found, were more casual, less permanent, and do not imply any significant relationship, and the way they are communicated is not conceptually significant vis-à-vis the way traditional friendship is communicated.

The three dissenters concluded that traditional and Facebook friendships were not comparable: A Facebook friend “gains access to all of the personal information on the user’s profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public . . . [and] Facebook ‘friends’ to be privy to considerably more information, including potentially personal information, on an almost daily basis.”

SUMMARY OF MAJORITY VIEW

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 MAJORITY VIEW

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*

SUMMARY OF MAJORITY VIEW

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.

“When you say you want to be ‘just friends’ do you mean Facebook friends, MySpace friends, Twitter friends, Buzznet friends, LinkedIn friends...?”
SUMMARY OF MAJORITY VIEW

- 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

NO!

SUMMARY OF MAJORITY VIEW

- 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”
Judge posted “Time for a tree and a rope...” on Facebook in response to the arrest of an African-American man for the killing of a police officer.

(Texas State Commission on Judicial Conduct May 8, 2017)
JUDICIAL DISCIPLINE & SOCIAL MEDIA – PUBLIC

Suspended 6 months w/o pay for posts about a case, political matters, and a fund-raiser for a local church.

Publicly reprimanded and censured for public comments about pending contempt proceedings against lawyer on Facebook page and in e-mail sent to all state court judges.

- In the Matter of Johns, 793 S.E.2d 296 (South Carolina 2016).
- In the Matter of Allred, Reprimand and Censure (Alabama Court of the Judiciary March 22, 2013)

JUDICIAL DISCIPLINE & SOCIAL MEDIA – PRIVATE

Justice of the peace 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

Private advisory issued 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
Reprimanded for soliciting public participation in a non-profit’s fund-raising operations through Facebook postings and the corporation’s website and related conduct.

- Texas State Commission on Judicial Conduct April 23, 2013

Warned for active involvement in a charitable fund-raiser that was apparent to the public from numerous entries on a Facebook page, in addition to related conduct.

- Texas State Commission on Judicial Conduct August 23, 2012

Potential Best Practices

1. **Monitor** content constantly.

2. Periodically **audit** social media accounts, review content, review relationships.

3. Develop **etiquette for removing or blocking friends**, followers, etc., especially where failure to do so would create an appearance of bias or prejudice.
Potential Best Practices

4. Familiarize yourself with the security and privacy policies, rules, and settings of each social media platform used and review periodically.

5. Avoid accepting or sending friend requests from or to parties, lawyers, and witnesses during any pending court proceeding.

Potential Best Practices

6. Educate family and close friends about judicial ethics obligations and how their use of social media can undermine the judge’s compliance.

7. Get periodic training on social media, even if not a user.

8. Be aware that photos or recordings may be used in embarrassing manner to the court or create a potential ethical problem were they to “go viral.”
INDEPENDENT INTERNET RESEARCH

A judge’s use of the internet can affect public perception of all judges.

The accelerated pace at which technology changes makes any “one size fits all” ethical prescription unlikely to stand.

Judicial use of internet can be both positive and negative.

Problem #3

A company files a motion to dismiss for lack of jurisdiction on the ground that it has no presence in the jurisdiction. The judge denies the motion and issues an order stating that a Google search disclosed factual information from a state governmental Web site (which reported that the defendant was licensed to do insurance business in the state), and the defendant's company’s Web site (which reported that the company operates in 49 states).

Was that independent research proper?
Was that independent research proper?

Yes  

No

Answer to Problem No.  

3: YES.

• No independent investigation into the underlying facts of the dispute.

• Considered only evidence that was legitimately subject to judicial notice by its nature and its reliability.
  
  – Material subject to judicial notice – governed by applicable Evidence Rules:

  1. Judicial notice is appropriate only for a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

  2. Typically a judge discloses on the record when he or she is taking judicial notice of a fact, and the parties may contest the propriety of taking judicial notice and the nature of the fact to be noticed.
Problem #4

A judge is presiding over a toxic tort trial. After experts for both parties have testified about whether a chemical at issue could have caused plaintiff’s disease, the judge in chambers performs independent research about the properties of that particular chemical.

Is that independent research proper?
Answer to Problem No. 4: **NO.**

This is tantamount to an improper *ex parte* communication. The chemical’s properties are germane to the case before the judge. The judge is learning about relevant facts outside the presence of the parties. This is like consulting an expert -- ON FACTS, NOT LAW -- without notifying the parties that the judge is doing so.

**Problem #5**

- A judge is assigned a case that will involve issues regarding epidemiology. Epidemiology is the branch of medical science dealing with the incidence and prevalence of disease in large populations and with detection of the source and cause of epidemics of infectious disease.

- Before learning any of the details of this case, the judge does Internet research on basic principles of epidemiology.

Is that independent research proper?
Is that independent research proper?

Yes

No

Answer to Problem No. 5: YES.

• This is permissible provided that the background information is not specific to any case or sets of cases to which the judge is assigned.

• Acquiring an understanding of these scientific facts may make the judge more qualified to handle such matters fairly and expeditiously. Learning these hypothetical facts from the Internet is no different in concept from attending judicial education classes.
Real-life version of Problem No. 5

• Prisoner alternatively denied, and then given ineffective treatment for gastrointestinal reflux disease. District court granted summary judgment to state officials because “expert” evidence of prison doctor (who was a named defendant) was not rebutted by the impecunious prisoner.

• Split U.S. Court of Appeals reversed. Judge Posner did extensive internet research on disease and the drug used to treat it (Zantac) that discredited prison doctor’s and other defendants’ testimony. Judge Hamilton, dissenting, criticized Posner’s resort to non-record factual material. Judge Rovner, concurring, agreed with Posner that this was permissible because doctor’s testimony was inadequate and benefit should be given non-moving party who cannot afford a lawyer or his own expert.

Policy Issues

• We do not want to encourage “trial by search engine.”
• Independent factual research thwarts the premise of our adversarial system, which is that judges are ideally just umpires.
• Such research undermines transparency in the judicial system and introduces the potential of the judge’s bias.
• The language of the evidence rule on judicial notice is exacting.
• The analogy to ex parte communications is strong.
• Posner sidesteps these arguments by—
  – Relying on only reputable websites (e.g., Mayo clinic, Rx manufacturer)
  – Arguing, based on the procedural posture of the case, that he’s not claiming the Internet research is true or conclusive, merely adequate to highlight the existence of material facts in dispute.
Federal Agency Policy

- Customs and Border Protection (CBP)
    - Effect of revisions to CBP Directive
- Immigration and Customs Enforcement (ICE)
  - Original policy under the Obama Administration: Directive No. 7-6.1 (Aug. 18, 2009)
  - This Directive has not been revised
    - Implications
Pertinent MCJC Provisions to Remember

• Compliance with Law – Rule 1.1
  ➢ Can judges engage in civil disobedience?

• Prestige of Judicial Office – Rule 1.3
  ➢ Think about traffic tickets

• Intentional Disclosure of Nonpublic Information – Rule 3.5
  ➢ What is “nonpublic information”?
  ➢ Is the disclosure “intentional”?

• What should judges do when traveling abroad?

QUESTIONS?
Thank you!