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Electronic Social Media: Friend or Foe for Judges

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ARTICLE

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Electronic Social Media: Friend or Foe for Judges

Abstract. The use of electronic social communication has grown at a phenomenal rate. Facebook, the most popular social networking website, has over 1,968,000,000 users—a number that has exponentially grown since its inception in 2004.[1] The number of judges accessing and using electronic social media (ESM) has also increased.[2] However, unlike the general population, judges must consider constitutional, ethical, technical, and evidentiary implications when they use and access ESM.[3] The First Amendment forbids "abridging the freedom of speech" and protects the expression of personal ideas, positions, and views.[4] However, the American Bar Association's Model Code of Judicial Conduct and the Texas Code of Judicial Conduct require a judge to "act at all times in a manner that promotes public confidence in the independence,[] integrity,[] and impartiality[] of the

1. *Leading Social Networks Worldwide as of April 2017, Ranked by Number of Active Users (in Millions)*, STATISTA, https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (last visited July 28 2017) [hereinafter *Number of Facebook Users*].

2. *See* Cynthia Gray, *Judges and Social Networks*, 34 JUD. CONDUCT REP., no. 3, 2012, at 1 (reporting a 2012 survey conducted by the Conference of Court Public Information Officers that indicates that state judges increased their use of social media by nearly 6% in two years).

3. *See* Peter Geraghty, *Recent Ethics Opinion Summary: ABA Standing Committee on Ethics and Professional Responsibility Issues Formal Opinion 462 Judge's Use of Electronic Social Networking Media (2013*), https://www.americanbar.org/newsletter/publications/youraba/201305article11.htm (last visited July 28, 2017) ("The [ABA] committee also stated that when judges assume the bench, they 'accept a duty to respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system . . . and must avoid impropriety and even the appearance of impropriety,' therefore, they must be very careful about their interactions with [ESM].").

4. U.S. CONST. amend. I.

judiciary and . . . [to] avoid impropriety and the appearance of impropriety" in all areas of the judge's activities."[5] Additionally, for the judges that are elected, the essential use of ESM in campaigns creates an additional ethical dimension.[6] The virality or the capability to share and re-share content exponentially, makes judges' expression and conduct more vulnerable to public scrutiny. This Article examines ESM's use and impact on the judiciary. It will examine the parameters imposed by the Texas Code of Judicial Conduct on the use of ESM by reviewing and comparing recent state and national developments.

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Judge Kurita has served on the boards of Judicial Section of the State Bar of Texas, and on the National Association of Women Judges (NAWJ). She was elected Vice-President of the NAWJ and also served as the Chair for the New Judges Program for NAWJ. In 2010, the Texas Supreme Court appointed Judge Kurita to the State Commission for Judicial Conduct, where served as Vice-Chair from 2013–2015. Moreover, in 2014, the Texas Supreme Court appointed Judge Kurita to the nine-member Grievance Oversight Committee.

Judge Kurita was an official U.S. delegate to the 2004 Latin America Seminar on the 1980 Hague Convention Child Abduction Treaty. Judge Kurita was named the 2015 Outstanding Jurist by the American Board of Trial Advocates. Currently, Judge Kurita is an adjunct professor at the University

5. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2011). In a canon entitled "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities," the Texas Code of Judicial Conduct states that a judge shall "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and forbids judges from allowing relationships to influence the judge or permitting an impression of influence from being conveyed. TEX. CODE JUD. CONDUCT, Canon 2(A)–(B), *reprinted in* TEX. GOV. CODE ANN., tit. 2, subtit. G, app. B (West 2013).

6. *See* John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV 487, 511 (2014) (describing the important role social media plays during campaigns and generally describing the ethical traps within common social media features, such as the "like" buttons being construed as approval or endorsement).

of Texas-El Paso; Park University and Excelsior College. In 2015, she was named 2015 Outstanding Faculty Member by Excelsior College. Further, Judge Kurita received the 2013 Daniel H. Benson Public Service Award from The Texas Tech University School of Law Alumni Association.

Judge Kurita is committed to furthering legal and judicial education. Currently, she serves on the Texas Center for the Judiciary Curriculum Committee and is a frequent speaker at seminars including the National College on Judicial Conduct and Ethics, the Texas Association of Counties, and the West Coast Casualty Construction Defect Seminar.

Judge Kurita is a graduate of the University of Texas at El Paso, Webster University, and Texas Tech University School of Law. Additionally, Judge Kurita is also a graduate of the Defense Language Institute completing the Modern Greek Language Course.

Judge Kurita received her certification in Criminal Law and Civil Law from the Texas Center for the Judiciary, Judicial College. Judge Kurita is certified by Mediators Without Borders, as a mediator and arbitrator.

Judge Kurita is one of the 100 women featured in JoAnne Gordon's recently published book "100 Happy Women at Work." Judge Kurita has received the City of El Paso Conquistador Award and was named a Woman Trailblazer by the El Paso Bar Association.

Judge Kurita would like to thank Kristie Duchesne and Marissa Olsen for the numerous hours committed to this Article. They are models for professionalism and hard work.

ARTICLE CONTENTS

I. ELECTRONIC SOCIAL MEDIA BACKGROUND

A. *Using Electronic Social Media*

Electronic social communications are Internet-based platforms that allow for creating and sharing of information, ideas, and videos on web-based applications.[7] Electronic social communications are user generated and allow for interactive commenting and sharing within designated networks or communities.[8] Traditional communication transfers content from one source to the receivers, thus, the initiating source determines the reach, the frequency, and the quality of the content.[9] On the other hand, electronic social communication allows many sources to transfer content to many receivers; thus, sources of electronic communication forfeit any centralized control on the reach, the frequency, or the quality of said content.[10] Additionally, one of the distinguishing properties of electronic social communication is its virality, meaning the ability to reshare the content instantly.[11] In fact, some social media sites encourage the

7. *See* Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMM. POL'Y 745, 745 (2015) (describing how technological advancements made the evolution of user-generated content feasible).

8. *Id*; *see* Hope A. Comisky & William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing,* 20 TEMP. POL. & C.R.L. REV. 297, 298 (2011) (describing the ability to instantaneously share user-created content on social media).

9. *See* Bill West, *Traditional Communication Channels*, HOUS. CHRON., http://smallbusiness.chron.com/traditional-communication-channels-65162.html (last visited July 27, 2017) (outlining the traditional communication channel will "create a relevant message and choose the proper communication channel" targeted for a specific audience).

10. *See* Mehedi Khan, *Advantages and Disadvantages of Electronic Communication*, MEAM MKTING. (Oct. 27, 2013), http://www.meammarketing.com/advantages-and-disadvantages-of-electronic-communication/ ("Worldwide communication has been facilitated by the electronic transmission of data which connects individuals, regardless of geographic location, almost instantly.").

11. *See* Obar & Wildman, *supra* note 7, at 748 ("Internet users [have] access to an array of user-

resharing of the content and provide a one key stroke virality function, such as Twitter's "retweet," Facebook's "share," Pinterest's "pin" buttons.[12] It is important to be familiar and understand the more commonly used terms and definitions.

B. *Electronic Social Media Definitions*

Electronic Social Media (ESM) refers to forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content such as videos.[13]

Social networking: According to the Judicial Conference Committee on Codes of Conduct, social networking:

> refers to building online communities of people who share interests or activities[], or who are interested in exploring the interests and activities of others. These web-based applications allow users to create and edit personal or professional "profiles" that contain information and content that can be viewed by others in electronic networks that the users can create or join. There is a distinction between social networks that offer personal connections and professional networks that market a business or accomplish other business-related goals.[14]

Facebook is the most popular electronic social networking site with over 1,968,000,000 users.[15] Although the social networking site was originally created for college students, it is now available to anyone over

centric spaces they could populate with user-generated content, along with a correspondingly diverse set opportunities for linking these spaces together to form virtual social networks [where users may instantly share these spaces]."); *see also* Comisky & Taylor, *supra* note 8, at 298 (describing the ability to instantaneously share user-created content on social media).

12. Aaron W. Brooks, *Social Media 101*, 29 GPSOLO 54, 55 (2012) (illustrating virality with the following example: a user posts a picture on Facebook, 10,000 users view the photograph, and 1,000 of those individuals create a follow-up story by clicking "like," posting a comment beneath the picture, or clicking "share" so it appears on their personal profile).

13. *See* COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., RESOURCE PACKET FOR DEVELOPING GUIDELINES ON USE OF SOCIAL MEDIA BY JUDICIAL EMPLOYEES 9 (2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf [hereinafter JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET] (providing an overview on social media).

14. JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET, *supra* note 13, at 9.

15. *See Number of Facebook Users*, *supra* note 1 (noting "Facebook was the first social network to surpass [one] billion registered accounts").

the age of thirteen.[16] Facebook's growing popularity is likely because the website provides an easy way for people, particularly friends, to keep in touch, and for individuals to have a presence on the web without needing to build a website.[17] Since Facebook makes it easy to upload pictures and videos, nearly anyone can create and publish a customized profile with photos, videos[,] and information about themselves.[18] Friends can browse the profiles of other friends or any profiles with unrestricted access and write messages on a page known as a "wall" that constitutes a publicly visible threaded discussion.[19] Facebook allows each user to set privacy settings.[20] Other popular social networking websites include "LinkedIn," "MySpace," "Pinterest," Twitter, Instagram, LinkedIn, and Snapchat[21]

Visual Social Media are electronic social networks that are primarily for video sharing, such as "YouTube."[22]

Blogs: The term "blog," a contraction of the term "weblog," is a type of website maintained with regular entries of commentary, descriptions of events, or other material such as graphics or video.[23] "Blog" can also be used as a verb, meaning "to maintain or add content to a blog."[24] Many blogs provide commentary or news on a particular subject; others function as more personal online diaries.[25] A typical blog combines text, images,

16. JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET, *supra* note 13, at 9; *see also* Sarah Phillips, *A Brief History of Facebook*, Guardian (July 25, 2017, 05.29), https://www.theguardian.com/technology/2007/jul/25/media.newmedia (detailing the origins of Facebook as a profiling tool for Harvard students).

17. *Id.*

18. *Id.*

19. *Id.*

20. JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET, *supra* note 13, at 9–10.

21. Obar & Wildman, *supra* note 7, at 746.

22. *See* JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET, *supra* note 13, at 12 (discussing video-sharing sites where users can search, watch, and share posted video clips, and noting that other networking sites, like Facebook, also enable users to share uploaded videos); Michael Stelzner, *Visual Social Media: How Images Improve Your Social Media Marketing*, SOCIAL MEDIA EXAMINER (Jan. 31, 2014), http://www.socialmediaexaminer.com/visual-social-media-with-donna-moritz/ (defining visual social media as forums where images or videos are used "to tell a story or share a message").

23. Julian Weiss-Roessier, *What's the Difference Between an Article and a Blog Post*, INTECHNIC, https://www.intechnic.com/blog/whats-the-difference-between-an-article-and-a-blog-post/ (last visited July 27, 2017) (explaining a blog is a "website or section of a website where updated are posted regularly").

24. Leslie Miller, *What's the Difference Between a Blog and an Article: Content Explained*, SYMANTEC (Mar. 18, 2009), https://www.symantec.com/connect/blogs/whats-difference-between-blog-and-article-content-explained.

25. *See* Weiss-Roessier, *supra* note 23 (comparing the original purpose of blogs, which were personal in nature, to the modern purpose of blogs, which provide "more opinion than most

and links to other blogs, web pages[,] and other media related to its topic.[26] The ability for readers to leave comments in an interactive format is an important part of many blogs.[27] Entries are commonly displayed through "threaded discussions" in reverse chronological order.[28]

Microblogging (e.g., "Twitter" "Instagram"): Microblogging allows users to convey and receive messages using "brief text updates or micromedia."[29] Among the more popular micro-blogging websites worldwide are Twitter and Tumblr. Twitter is a micro-blogging application that is more or less a combination of instant messaging and blogging.[30] Twitter has quickly established itself as a popular tool for communicating news, market trends, questions and answers and links with numerous benefits for both business and personal use.[31] Twitter enables its users to send and read messages known as tweets.[32] Tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers, who are known as followers.[33] Senders can restrict delivery to those in their circle of friends or, by default, allow open access.[34]

Virality is the tendency of online content, such as information, images, or videos, to be widely and rapidly propagated on the Internet through the ability of individual users to reshare social media posts instantly.[35] Many social media sites encourage resharing content by providing a one key stroke virality function, such as Twitter's "retweet," Facebook's "share,"[36] Pinterest's "pin" buttons.[37] Virality is a key concept on social media

articles").

26. *Id.*

27. See *id.* (explaining blogs focus on the interaction between the author and the readers and "invite the participation of the audience, usually through comments.").

28. *Id.*; JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET, *supra* note 13, at 10–11.

29. CHRISTOPHER J. DAVEY ET AL., NEW MEDIA COMM. OF THE CONFERENCE OF COURT. PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 7 (2010), http://ccpio.org/wp-content/uploads/2012/06/2010-ccpio-report.pdf.

30. *Id.*

31. *Id.*

32. *Id.*

33. JUDICIAL EMPLOYEE SOCIAL MEDIA RESOURCE PACKET, *supra* note 13, at 11.

34. *Id.*

35. *Virality*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/virality (last visited July 27, 2017).

36. *See* Aaron W. Brooks, *supra* note 12 at 55–7 (2012) (describing the concept of "virality" and explaining the individual characteristics of Facebook and Twitter that cause virality).

37. *See* Lauren Rae Orsini, *Why Pinterest Is Growing So Fast*, https://www.dailydot.com/business/pinterest-virality-study/ (last updated Dec. 11, 2015, 7:26 AM) (explaining participation on Pinterest only requires "one click of the repin button" and, thus, sharing content with a user's Pinterest

because when a user endorses online content, the user's social media connections can be motivated to look and share that same content.[38] Indeed, it is how information quickly, and at times uncontrollably, circulates across the Internet.[39] Judges who use ESM must be cautious of what they post due to this phenomena.

II. JUDICIAL USE OF SOCIAL MEDIA

A. *Who Is on ESM?*

The use of electronic social communication has grown at a phenomenal rate.[40] One form of ESM is Facebook, which is the most popular social networking site with over 1,968,000,000 users,[41] a number that has increased exponentially since its introduction.[42] ESM is used by almost two-thirds of American adults.[43] Similar to the majority of the American public, many judges maintain an ESM presence. ESM use has had a profound impact on many areas of life, including global communications, political action, and social trends.[44]

When polled, individuals state various reasons for using ESM According to Pew Research Center, ESM is used to communicate and reconnect with family and friends, seek information, and to share similar social and political dialogue.[45] People use ESM to share family news, post

audience presents a low barrier).

38. *See* Aaron W. Brooks, *supra* note 12, at 55–56 (expanding how endorsements by one person may cause a cascade of other people to view the content thereby causing the virality concept).

39. *See id.* (discussing the value of virality to social media because each post "can lead to significant financial gain (as well as devastating reputational harm)").

40. *See* Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RES. CTR. (Oct. 8, 2015), http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015 (reporting the number of American adults utilizing social media websites has risen from 7% in 2005 to nearly 65% in 2015).

41. *Number of Facebook Users*, *supra* note 1.

42. *See Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2016 (in Millions),* STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited July 27, 2017) (showing Facebook's rise from 100 million users in 2008 to more than 1.8 billion users in 2016).

43. Andrew Perrin, *supra* note 40.

44. *See id.* (highlighting Pew Research documentation on the various areas of life affected by social media (citations omitted)).

45. Aaron Smith, *Why Americans Use Social Media,* PEW RES. CTR. (Nov. 15, 2011), http://www.pewinternet.org/2011/11/15/why-americans-use-social-media/. According to this study, 67% of social media users surveyed said a major reason they used social media was to stay in touch with current friends, 64% said they used it primarily to stay in touch with family, 50% said a major reason for their use was to reconnect with lost friends, and 14% said they used social media

photographs, communicate about happenings in their lives, speak about interests, and opine on current events.[46] Because of the virality function, people are able to reach not only individuals within their own intimate, designated network or social community by posting or "tweeting," but they also have the ability to communicate the information to an unlimited audience.[47] This mass communication can be accomplished when other users repost the content with one key stroke command (such as "retweet" on Twitter) or indicate acquiescence to or disagreement with the expressed content by clicking a single word ("like" on Facebook, for example) or one symbol expression (such as Facebook's "thumb's up," "love," "sad," and "angry" icons or emojis.[48] In turn, each recipient of the original content is able to do the same.[49] The ease of passing on the original content with one keystroke is what creates the enormous virality and outreach of social media.[50]

Young adults between the ages of eighteen and twenty-nine are the greatest users of ESM, with 90% of Americans in that age group being regular users—a 78% increase from the 2005 statistics.[51] In the thirty- to forty-nine-year-old age group, 77% of the population are regular ESM users, up from 8% in 2005.[52] In the fifty- to sixty-four-year old age group, only about half of the population are regular ESM users, though this group has had a large increase in users since 2005, from 5% in 2005 to 51% by 2015.[53] Seniors, aged sixty-five-years old or over, have increased their social media presence from 2% in 2005 to 35% in 2015.[54] The Pew study also indicates that people who obtained higher education are more inclined

largely to connect with people with a similar interests or hobbies. *Id.*

46. Shannon Greenwood et al., *Social Media Update: Facebook Usage is on the Rise, While Adoption of Other Platforms Holds Steady*, Pew Res. Ctr. (Nov. 11, 2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/.

47. *See* Aaron W. Brooks, *supra* note 12, at 55 (discussing how virality is critical because of its ability to rapidly cause the vast spread of information).

48. *See id.* (illustrating virality with an example where a user posts a picture on Facebook, 10,000 users view the photograph, and 1,000 of those individuals create a follow-up story by clicking "like," posting a comment beneath the picture, or clicking "share" so it appears on their personal profile).

49. *See id.* at 55–56 (crediting virality's impact with the fact that every Facebook user's activity is displayed to the user's connections and the user's connections frequently look at the user's activity and further share the content).

50. *See id.* at 55 (addressing the importance of virality to social media because "it is how information rapidly—and often uncontrollably—propagates across the Internet").

51. In 2005, 12% of young American adults used social media. Perrin, *supra* note 40.

52. This represents a 69% increase since 2005. *Id.*

53. *Id.*

54. *Id.*

to use social media as 76% of individuals with a university degree or higher use ESM.[55] Lastly, the Pew study suggests that the use of electronic social media is not impacted by gender.[56]

According to the demographic information contained in the Texas Office of Court Administration 2015 statistical report, the average Texas judge is male, forty-nine to fifty-eight years old, with a higher education level.[57] Thus, application of this statistic to the general Pew study demographics suggests that over half of Texas judges probably use ESM.[58]

B. *Judge's ESM Activity*

Since 2005, the Conference of Court Public Information Officers (CCPIO) has compiled and published national statistics on the use of ESM by judicial officers.[59] Not surprisingly, the use of ESM by judges has also increased significantly, mirroring the general population.[60] In general, "judges use social media just like everyone else."[61] As one author explained:

> They post news to share with friends, list their interests, opine about books

55. On the other hand, 70% of those who enrolled in but did not complete college are on social media. *Id.* Individuals who obtained a high school diploma or less education increased their social media use from 5% of that population in 2005 to 54% in 2015. *Id.*

56. In 2009, more women used social media than men. *Id.* However, the statistics balanced out by 2015, with both genders using ESM at similar rates. *Id.* In 2015, "68% of women and 62% of men report[ed] social media usage, a difference that is not statistically significant." *Id.*

57. TEX. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2015 xx–xxi (2015), http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf [hereinafter 2015 ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR].

58. *See* Perrin, *supra* note 40 (setting forth demographical statistics that indicate the following percentages of certain groups who use social media: 51% of adults ages fifty to sixty-four, 76% of adults who have a college education or higher, and comparable percentages of over 60% for men and women).

59. *Judges and Courts on Social Media? Report Released on New Media's Impact on the Judiciary*, CCPIO (Aug. 26, 2010), http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/ ("The survey findings were part of a . . . national collaborative research project which for the first time measures the impact of new media on the courts, and identified the cautious approach courts have taken toward new media because of the effects on ethics. . . .").

60. *See* CONFERENCE OF COURT PUB. INFO. OFFICERS, 2014 CCPIO NEW MEDIA SURVEY 24 (2014), http://ccpio.org/wp-content/uploads/2014/08/CCPIO-New-Media-survey-report_2014.pdf [hereinafter 2014 CCPIO SURVEY] (revealing social media use in the judiciary is the same as the general population).

61. MICHAEL CROWELL, ADMIN. OF JUSTICE BULLETIN, JUDICIAL ETHICS AND SOCIAL MEDIA 2 (2015), http://sogpubs.unc.edu/electronicversions/pdfs/aojb1509.pdf.

> and movies, put up photographs from their trips, and so on. They may be inclined to comment about current events, perhaps tweeting a few words about a news story or retweeting someone else's commentary. And, like everyone else on social media, they will read and view the news, comments[,] and photographs of people who interest them.[62]

According to the CCPIO 2014 Media Summary, when asked "[whether] [j]udicial officers can maintain a *personal* Facebook profile without compromising professional codes of ethics[,]" 72.9% of the judicial officers, court staff members, and court-related personnel polled answered in the affirmative or were neutral.[63] When asked about maintaining a professional profile on ESM, the CCPIO poll indicated that court personnel are more hesitant, and using social media to share content, post, or comment in a professional capacity remains limited by these individuals.[64] But courts' use of ESM is growing as judicial officers experiment with this medium to implement transparency and promote public understanding of the courts.[65] The American Bar Association's Model Code of Judicial Conduct (the Model Code of Judicial Conduct) encourages judges "to participate in activities that promote public understanding of and confidence in the justice system."[66] Many courts have turned to ESM as a means "to connect with the public and" impart court information.[67] The CCPIO survey found a 5% increase from 2013 to 2014 in Facebook use by courts because ESM allows for massive outreach.[68]

It is obvious why courts are recognizing the use of ESM as an easy and cost-effective tool to inform and reach the public.[69] The CCPIO reported one out of "every thirteen people on earth" has a Facebook account.[70] Facebook reported that there were "1.86 billion monthly active users" on

62. *Id.*

63. *See* 2014 CCPIO SURVEY, *supra* note 60, at 24 (emphasis added) (reporting that of those polled 11.9% agreed, 32.6% somewhat agreed, and 28.4% were neutral to the statement).

64. *See id.* at 4, 18 (revealing less than 10% of judicial officers and court affiliated personnel share content, post, and comment professionally on social media with the exception of LinkedIn).

65. *See id.* at 3, 27 (acknowledging courts' increasing use of social media and awareness of how social media can facilitate their connection with the public and the satisfaction of their duties "to be open, transparent, and understandable institutions").

66. MODEL CODE OF JUD. CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2011).

67. 2014 CCPIO SURVEY, *supra* note 60, at 3, 27.

68. *Id.* at 3. The CCPIO survey goes on to provide tips for maximizing a court's activity on various forms of social media. *Id.*

69. *See id.* at 3 (asserting judges agree social media is necessary for public outreach).

70. *Id.* at 5.

average in December 2016, of which 1.15 billion were active on mobile devices on a daily basis.[71] In the United States, 71.2% of all Internet users are on Facebook, with nearly a quarter of those "users check[ing] their accounts at least five times per day," with the average Facebook visit being twenty minutes.[72] Facebook's website also indicates that 93.5% of the daily active users access ESM using mobile devices.[73]

Courts are not alone in their use of ESM. ESM has provided judicial campaigns with an efficient and effective campaign tool. In Texas, judges are elected and need to have an ESM component as part of their campaigns.[74] Judicial elections are usually last on the ballot and of minimal political interest to the average voter, so the massive outreach provided by ESM is essential for a candidate.[75] Judicial candidates need a "Facebook" page to post campaign information and a "Twitter" or "Instagram" account to get their message out to the voter base in a resourceful manner.[76] Supreme Court of Texas Associate Justice Don Willett maintains a Twitter account, and was named the "Tweeter Laureate of Texas" by the 2015 Texas Legislature.[77] Willett joined Twitter in 2009, but began posting prolifically in 2012, during his re-election campaign.[78] "He has said he realized that social media was a way to reach voters who

71. *Company Info*, FACEBOOK, http://newsroom.fb.com/company-info/ (last visited July 27, 2017).

72. 2014 CCPIO SURVEY, *supra* note 60, at 5.

73. *See Company Info*, FACEBOOK, http://newsroom.fb.com/company-info/ (last visited July 27, 2017) (indicating in December 2016 there were "1.23 billion daily active users" and "1.15 billion mobile daily active users on average").

74. *See* CROWELL, *supra* note 62, at 2 (describing the need for elected judges to gain voter support through social medial); *see also* 2015 ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR, *supra* note 57, at xi–xiv.

75. *Cf.* Randy Wilson, *Some Judicial Election Observations*, HOUS. LAW., July/Aug. 2015, at 32, 33, https://issuu.com/leosur/docs/thl_julaug15_9b462ff6ba0ad3 (suggesting social media allows voters to be more informed about candidates who are outside the mainstream political realm).

76. *See* CROWELL, *supra* note 62, at 2 ("Judges who are subject to election, as in North Carolina, need to have a social media component to their campaign. They need a Facebook page and have to try to connect with voters by Twitter and Instagram and any other means they can find to get their message out.").

77. Tessa Berenson, *Meet the Judge on Donald Trump's Supreme Court List Who Is Great at Twitter*, TIME (May 18, 2016), http://time.com/4340565/donaldtrumpsupremecourtdonwillett/. Texas is the first state in the United States to dub a "Tweeter Laureate." Chris McNary, *Meet the State Supreme Court Justice Who's Also Texas' 'Tweeter Laureate,'* DALL. MORNING NEWS (June 2015), http://www.dallasnews.com/news/local-politics/2015/06/05/meet-the-state-supreme-court-justice-who-s-also-texas-tweeter-laureate.

78. Brandi Grissom, *Justice Don Willett, the Boy From Talty, Takes Twitter by Storm, and Maybe SCOTUS, Too*, DALL. MORNING NEWS (May 20, 2016), http://www.dallasnews.com/news/politics/2016/05/20/justice-don-willett-the-boy-from-talty-takes-twitter-by-storm-and-maybe-scotus-too.

are typically under-informed about judicial candidates."[79] After the election, Justice Willett has continued to use ESM.[80] His consistent tweeting has made him a popular ESM personality, and increased his name recognition,[81] with almost 81,300 followers.[82]

In addition, some judicial officers have incorporated ESM into their judicial activity.[83] In one case, a Galveston, Texas lawyer asked for a continuance because of the death of her father.[84] However, Galveston County District Judge Susan Criss had seen the lawyer's Facebook posts, detailing a week of drinking and partying.[85] But in court, in front of Judge Criss, the lawyer told a completely different story, and the continuance was denied.[86]

In addition to using ESM to see what parties or lawyers are doing, some judges require access to juveniles' or probationers' ESM accounts to ensure compliance with court orders and restrictions.[87] Some courts have requested access to jurors' ESM accounts during trial to verify compliance with the jury instruction to refrain from ESM activity.[88]

Although ESM use is becoming mainstream for the judiciary in many different forms, there are still those who oppose to the use of ESM for professionals within the bar. Interestingly, the late Justice Antonin Scalia provided his "good grief opinion" on ESM use during an October 7, 2013 interview with Debra Cassens Weiss of the New York magazine:

> 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

79. *Id.*

80. *See id.* (noting Justice Willett's "Twitter postings blossomed . . . after the election" and he continues to tweet, sometimes multiple times a day). In addition to his Twitter page, Justice Willett also maintains a Facebook page. Justice Don Willett, FACEBOOK, https://www.facebook.com/justicedonwillett/ (Mar. 11, 2017).

81. *See* Grissom, *supra* note 80 (crediting Justice Willett's "humor and general normal-guyness, which most folks do[] [not] expect from a man of robes" for his Twitter fame).

82. Don Willett (@JusticeWillett), TWITTER, https://twitter.com/justicewillett?lang=en (last visited July 27, 2017).

83. CROWELL, *supra* note 62, at 2.

84. Cynthia Sharp, *Social Media Ethics in the Age of Documented Mischief*, GPSOLO, May/June 2015, at 50, 52.

85. *Id.*

86. *See id.* ("Judge Criss had granted ["the lawyer] a one-week continuance in a matter because she claimed that her father had died.").

87. CROWELL, *supra* note 62, at 2.

88. *See* CROWELL, *supra* note 62, at 2 ("Judges have become all too familiar . . . with problems of jurors communicating with the outside world and conducting their own research via their smart phones and other devices.").

> 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[.][89]

III. ETHICAL STANDARDS (OR THE LACK THEREOF) GOVERNING JUDICIAL ESM USE

The explosion of ESM has created a balancing challenge of three major facets. The first challenge is ESM conduct that could potentially conflict with a jurisdiction's Code of Judicial Conduct:[90]

> The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges . . . must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is . . . a highly visible symbol of government under the rule of law.[91]

The second challenge is an affirmative responsibility for judges to educate the public about the judicial institution and create an open and transparent understanding of the courts.[92] The courts remain the most misunderstood and elusive branch of government.[93] The third challenge is a judge's constitutional right of freedom of expression,[94] which the United States Supreme Court, in *Citizens United v. Federal Election Commission*,[95] recently expanded. The virality of social media content, or the capability to share and re-share content exponentially, makes judges' expression and conduct more vulnerable to public scrutiny.[96]

89. Debra Cassens Weiss, *Scalia: The Devil is Getting 'Wilier' and Society Is Getting Coarser*, A.B.A. J. (Oct. 07, 2013, 01:20 PM), http://www.abajournal.com/news/article/scalia_the_devil_is_getting_wilier_and_society_is_getting_coarser.html.

90. Every jurisdiction will follow its specific code of conduct.

91. TEX. CODE JUD. CONDUCT, preamble, *reprinted in* TEX. GOV. CODE ANN., tit. 2, subtit. G, app. B (West 2013).

92. *See* MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS'N 2011) ("A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.").

93. *See id.* (recognizing the judicial branch's intangible nature by encouraging judge's to educate the public on its role).

94. U.S. CONST. amend. I.

95. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

96. *See* Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016) ("Postings, including comments on other's posts, may be transmitted without the judge's permission or knowledge to unintended recipients, and Facebook communications may be taken out of context or relayed incorrectly. Facebook communications may be saved indefinitely."); Barbara A. Jackson, *To Follow or Not to Follow: The Brave New World of Social Media*, JUDGES' J., Fall 2014, at 12, 14–15 ("[A]ll this communication contains many traps for the unwary. It is inherently spontaneous, and spontaneity can be the downfall

A. *Codes of Judicial Conduct*

Though every state and the American Bar Association (ABA) have promulgated codes of judicial conduct, only three states have amended their codes of judicial conduct to specifically address ESM issues.[97] The West Virginia Supreme Court of Appeals, effective December 1, 2015, included comment 6 to Rule 3.1 of their Code of Judicial Conduct, stating: "The same Rules of the Code of 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."[98] The New Mexico Supreme Court added this statement to its 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."[99]

In its amended version of Code of Judicial Conduct, the Idaho Supreme Court included a comment to Rule 3.1 that states:

> While judges are not prohibited from participating in online social networks, such as Facebook, Instagram, Snapchat, and the like, they should exercise restraint and caution in doing so. A judge should not identify himself as such, either by words or images, when engaging in commentary or interaction that is not in keeping with the limitations of this Code.[100]

The Texas Code of Judicial Conduct, amended in 2002, does not specifically address ESM.[101] However, the Preamble places a big

of anyone in public life. One ill-chosen post, photo, or tweet sent in a moment of anger, frustration, or misplaced humor can do irreparable damage."); *see also* Brooks, *supra* note 12, at 55 (describing virality as a critical component for social media because "it is how information rapidly—and often uncontrollably—propagates across the Internet").

97. *See* W. VA. CODE JUD. CONDUCT r. 3.1 cmt. 6 (2015) (explaining the rules governing a judge'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"); N.M. RULES ANN. r. 21-001 preamble (2015) (amending the preamble of the New Mexico Code of Judicial Conduct, and encouraging judges "to pay extra attention" to their participation in social media so as to avoid ethical implications); IDAHO CODE JUD. CONDUCT r. 3.1 cmt. 5 (2016) (emphasizing caution to judges who participate in social media).

98. W. VA. CODE JUD. CONDUCT r. 3.1 cmt. 6 (2015).

99. N.M. RULES ANN. r. 21-001 preamble.(2015).

100. IDAHO CODE JUD. CONDUCT r. 3.1 cmt. 5 (2016).

101. *See* Youkers v. State, 400 S.W.3d 200, 206–07 (Tex. App.—Dallas 2013, no writ) ("No Texas court appears to have addressed the propriety of a judge's use of social media websites such as Facebook. Nor is there a rule, canon of ethics, or judicial ethics opinion in Texas proscribing such

responsibility on every judge as "a highly visible symbol of government under the rule of law" and "to be governed in their judicial and personal conduct by general ethical principles."[102] The Texas Code of Judicial Conduct is "intended . . . to state basic standards [that] should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct."[103]

B. *Judicial Ethics Advisory Opinions*

Judges' conduct is subject to the codes of judicial conduct of their jurisdiction, and failure to do so subjects the judge to discipline. Each jurisdiction has tasked specific agencies with the authority to respond to specific ethical questions posed by judges to provide ethical guidelines and assistance in the interpretation of the codes of conduct. Texas judges, with few specific exceptions,[104] are subject to review and action by the State Commission on Judicial Conduct for a violation of the Texas Code for Judicial Conduct.[105] The Judicial Section of the State Bar of Texas has been tasked with issuing written ethics advisory opinions that interpret the Texas Code of Judicial Conduct.[106] Judicial ethics advisory opinions are issued only "in response to written questions."[107] As of the date of this Article, the Texas Judicial Ethics Committee has not received a request nor

use."). *See generally* TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV. CODE ANN., tit. 2, subtit. G, app. B (West 2013) (consisting of several canons, none of which speak on the issue of ESM).

102. TEX. CODE JUD. CONDUCT, preamble.

103. *Id.*

104. *See generally* TEX. CODE JUD. CONDUCT, Canon 6(B) (enumerating exceptions for compliance with the Texas Code of Judicial Conduct).

105. The Texas State Commission on Judicial Conduct mission statement states:

> The mission of the State Commission on Judicial Conduct is to protect the public, promote public confidence in the integrity, independence, competence, and impartiality of the judiciary, and encourage judges to maintain high standards of conduct both on and off the bench.
>
> The Commission accomplishes this mission through its investigation of allegations of judicial misconduct or incapacity. In cases where a judge is found to have engaged in misconduct or to be permanently incapacitated, the Texas Constitution authorizes the Commission to take appropriate disciplinary action, including issuing sanctions, censures, suspensions, or recommendations for removal from office.

Tex. State Comm'n on Judicial Conduct, Mission Statement (2017); *see also* TEX. CODE JUD. CONDUCT, Canon 8(A).

106. *See Judicial Ethics*, JUDICIALSECTION.COM, http://judicialsection.com/Committees/Judicial-Ethics (last visited July 27, 2017) ("The Judicial Ethics Committee receives requests for ethics opinions and issues advisory opinions regarding ethics matters for [j]udges.").

107. *Id.*

issued an ethical advisory opinion regarding the judicial use of ESM.[108] This lack of a canon or judicial ethics opinion was the reason the Special Court of Review dismissed a sanction issued by the Texas State Commission on Judicial Conduct to Judge Michelle Slaughter.[109]

Texas is one of the thirty-three states that does not have a judicial ethics advisory opinions on ESM.[110] Only seventeen states have issued opinions;[111] the ABA[112] and the United States Courts[113] have also issued ethics advisory opinions on judicial use of ESM. While most of the advisory opinions discuss Facebook because it is the most popular social media site, the same rationale would apply to all ESM.[114] The opinions also focus on ESM relationships with attorneys.[115]

108. *See* COMM. ON JUD. ETHICS, STATE BAR OF TEX., TEXAS JUDICIAL ETHICS OPS.: 1975 TO PRESENT, http://judicialsection.com/Portals/0/JudicialEthicsOpinions.pdf (listing all topics covered by ethics opinions since 1975, none of which address ESM).

109. *In re* Slaughter, 480 S.W.3d 842, 845–48 (Tex. Spec. Ct. Rev. 2015) (per curiam).

110. *See* CYNTHIA GRAY, NAT'L CTR. FOR STATE COURTS, CTR. FOR JUDICIAL ETHICS, SOCIAL MEDIA AND JUDICIAL ETHICS (2017), http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/SocialMediaandJudicialEthicsFeb2016.ashx (identifying the states who have and have note issued opinions addressing ESM).

111. For the various opinions, see generally Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Advisory Op. 14-01 (2014); Cal. Judges Ass'n Judicial Ethics Comm., Advisory Op. 66 (2010); Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Mass. Comm. on Judicial Ethics, Op. 2016-8 (2016); Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016); Mass. Comm. on Judicial Ethics, Op. 2011-6 (2011); Md. Judicial Ethics Comm., Op. 2012-07 (2012); Mo. Comm. on Ret., Removal, and Discipline, Op. 186 (2015); N.M. Advisory Comm. on the Code of Jud. Conduct, Advisory Op. Concerning Social Media (2016); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009); N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013); N.Y. Advisory Comm. on Judicial Ethics, Op. 14-05 (2014); Ethics Comm. of the N.C. State Bar, 2014 Formal Ethics Op. 8 (2014); Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. No. 17-2009 (2009); Tenn. Jud. Ethics Comm., Advisory Op. 12-01 (2012); Utah Courts, Informal Advisory Op. 2012-1 (2012); Wash. Ethics Advisory Comm., Op.09-05 (2009). For the Washington opinion on judicial blogging, see Wash. Ethics Advisory Comm., Op. 09-05 (2009).

112. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013).

113. U.S. Comm. on Codes of Conduct, Advisory Op. 112 (2015), http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf.

114. *See* Gray, *supra* note 2, at 1, 5 (attributing broad application of the opinions due to the comparable features of Facebook and other social media websites); *see also* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010) (stressing its earlier opinion, which focused on Facebook, provided a conclusion applicable "to *any social networking site*" (quoting Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009))).

115. *See* Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016) ("Disagreement among jurisdictions continues, however, concerning whether a judge may be a Facebook friend with a lawyer

These ethics advisory opinions can be divided into two types of opinions, restrictive and permissive opinions.

1. Restrictive Judicial Ethics Opinions—Judicial Use of ESM Forbidden

Florida,[116] Connecticut,[117] Oklahoma,[118] and Massachusetts[119] ethics advisory opinions are restrictive and forbid the use of Facebook by judges. States with restrictive ethic advisory opinions are concerned that ESM relationships with attorneys could "convey the impression that they are in a special position to influence the judge."[120]

The Florida committee concluded that "identification in a public forum of a lawyer" as a "friend" conveys "the impression of influence" and, therefore, violates its Code of Judicial Conduct.[121] In response to the original Florida ethics advisory opinion, two scenarios were posed to the Florida committee which they addressed in a subsequent advisory opinion.[122] The first was about prominently displaying a disclaimer on the judge's social networking page that states a friend is only "an acquaintance of the judge[] [and] not a 'friend' in the traditional sense."[123] The second scenario proposed defining friend as a misnomer or term of art, as well as adopting a policy of accepting all friend requests.[124] The Florida committee rejected both the scenarios and issued opinions reiterating the prohibition of any ESM relations between judges and attorneys who appear before them.[125]

Recently, Massachusetts reaffirmed its complete prohibition on "friending" attorneys, but may have provided judges with a bit more flexibility than previously enjoyed.[126] In 2011, the Massachusetts

who may appear before the judge."); Gray, supra note 2, at 1, 5–7 (identifying a split in judicial ethics advisory opinions "on whether judges may 'friend' attorneys on social networks who appear before them in court").

116. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

117. Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013).

118. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011)

119. Mass. Comm. on Judicial Ethics, Op. 2016-8 (2016); Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016); Mass. Comm. on Judicial Ethics, Op. 2011-6 (2011); and

120. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

121. *Id.*

122. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010).

123. *Id.*

124. *Id.*

125. *Id.* Three members of the Florida Ethic Advisory Committee dissented in this opinion. *See* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010)

126. Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016).

committee adopted a bright-line test that unequivocally "prohibit[ed] judges from associating in any way on social networking web[]sites with attorneys who may appear before them."[127] In concluding that judges give up electronic social relationships with lawyers when they assume the bench, the committee reasoned that judges "accept restrictions on the judge's conduct that may be viewed as burdensome by the ordinary citizen."[128] However, in 2016, the Massachusetts committee dulled the bright-line test.[129] A judge must still refrain from ESM relationships "with any attorney who is reasonably likely to appear before the judge."[130] Yet in reaching this conclusion, the Massachusetts committee introduced the notion that disqualification may not be required where a lawyer who is also a Facebook friend unexpectedly appears before the judge.[131] The opinion also departed from some of its prior prohibitions on ESM activity, but indicated judges are still required to be very cautious in their social-media use.[132] The Massachusetts committee later extended this guidance to LinkedIn profiles.[133] Although recognizing a newly-appointed judge may arrive at the bench with hundreds of ESM relationships, the opinion requires judges to monitor their list of connections and remove connections when necessary.[134]

The restrictive opinions create a bright- line test, under which a judge should not have an ESM relationship with a lawyer who may appear before the judge.[135] This approach does not leave any room for discussion—

127. Mass. Comm. on Judicial Ethics, Op. 2011-6 (2011).

128. *Id.*

129. Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (precluding judges from having ESM connections with lawyers that may appear before them); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011) (determining judges may not have social media relationships with attorneys that may appear in their court). Comparatively, the California Committee stated:

> While it may be permissible for a judge to interact on a social network site with an attorney who *may* appear before the judge, it is not permissible to interact with attorneys who have matters *pending* before the judge. When a judge learns that an attorney who is a member of that judge's online social networking community has a case pending before the judge[,] the online interaction with that attorney must cease (i.e. the attorney should be "unfriended") and the fact this was done should be disclosed . . . . Regardless of the nature of the social networking page, maintaining online connections while a case is pending creates appearance issues that cannot be

judges are not allowed to have ESM relationships with lawyers who may appear before them—period![136] However, Florida Advisory Opinion 2009-20, states, "The Code of Judicial Conduct does not address or restrict . . . [the] method of communication but rather addresses its substance. . . . [T]he substance of what is posted may constitute a violation."[137] In those jurisdictions, the conduct that may violate the applicable Code of Judicial Conduct includes identifying oneself as a judge[138] and "friending" lawyers[139] or persons who appear frequently in court in adversarial roles.[140] The prohibited substance or conduct cannot be cured by posting a disclaimer.[141] Thus far, these states remain firm that judges cannot friend lawyers who may appear before them in court.[142] Under the restrictive view, the prohibited conduct also includes micro-blogging, such as Twitter, and professional pages, such as LinkedIn.[143]

2. Permissive Judicial Ethics Opinions—Use with Caution

Originally thirteen state opinions (Arizona, California, Kentucky, Maryland, Missouri, New Mexico, New York, North Carolina, Ohio, South

overcome through disclosure of the contacts.

Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (2010) (second emphasis added).

136. *See* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (condemning any ESM interaction between judges and attorneys); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011) (emphasizing the ESM interaction between attorneys and judges is forbidden when the attorneys appear before the judge).

137. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

138. *Id.*

139. *Id.*

140. *See id.* (concluding Canon 2(B) is violated by way of ESM connections with attorneys "who may appear before a judge" if the online connection "is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet"); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011) (rejecting a judge's ability to maintain an ESM page on which the judge "friends" attorneys or other people who may appear in the judge's court); Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013) (permitting judges to participate in social media sites provided the judge does not become the online "'friend' of attorneys who may appear before the" judge).

141. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010) (rejecting judge's proposed disclaimers on the "About Me" section of the Facebook page and explaining the term "friend" does not mean that the judge has a close relationship with the person, or that the judge would even recognize the person or that "certainly in no way means that the person [listed as a 'friend'] is in any position to influence [the judge's] decision in any case or in any manner").

142. *See generally* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011); Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013).

143. *See* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012) (clarifying the restrictive view includes all types of ESM).

Carolina, Tennessee, Utah, Washington) plus ABA Opinion 462, and the U.S. Court Opinion were permissive thereby allowing for very cautionary use of ESM by judges.[144] Noted previously, Massachusetts recently modified its restrictive position to allow very cautious use of ESM, even though it maintains the restriction on judges being friends with lawyers that appear before them.[145] These permissive ethics advisory opinions focus on the words "friend," "fan," or "follower" and recognize that they are "terms of art used by the site."[146] For example, an early ethics advisory opinion poetically opined: "A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily."[147] Moreover, these permissive ethics advisory opinions agree the designation of a "friend," "fan," or "follower" does not automatically make that relationship special or one that has influence on the judge.[148]

Opinions adopting the permissive approach normally ground their reasoning upon a judge's ability to maintain relationships with others in forums other than social media. In 2012, the Maryland Judicial Ethics Committee stated individuals "become judges after years of working in the legal profession and establishing personal relationships with others in that profession" and are "neither obligated nor expected to retire to a hermitage

144. Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Advisory Op. 14-01 (2014); Cal. Judges Ass'n Judicial Ethics Comm., Advisory Op. 66 (2010); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Md. Judicial Ethics Comm., Op. 2012-07 (2012); Mo. Comm. on Ret., Removal, and Discipline, Op. 186 (2015); N.M. Advisory Comm. on the Code of Jud. Conduct, Advisory Op. Concerning Social Media (2016); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009); N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013); N.Y. Advisory Comm. on Judicial Ethics, Op. 14-05 (2014); Ethics Comm. of the N.C. State Bar, 2014 Formal Ethics Op. 8 (2014); Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. No. 17-2009 (2009); Tenn. Jud. Ethics Comm., Advisory Op. 12-01 (2012); Utah Courts, Informal Advisory Op. 2012-1 (2012); Wash. Ethics Advisory Comm., Op.09-05 (2009); ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 462 (2013); U.S. Comm. on Codes of Conduct, Advisory Op. 112 (2015).

145. *See supra* Part III.B.1.

146. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010).

147. Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010). The opinion goes on to state: "A social network 'friend' may or may not be a friend in the traditional sense of the word." Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010).

148. *See* Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010) (concluding the mere designation of social networking site participants as "friends" "does not reasonably convey to others an impression that such persons are in a special position to influence the judge"); Utah Courts, Informal Advisory Op. 2012-1 (2012) (recognizing "the designation of someone as a 'friend' on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term" nor "does it automatically create the appearance that the lawyer is in a special position to influence the judge").

upon becoming a judge."[149] A frequently quoted New York ethics advisory opinion compared a connection with an attorney on an ESM network as being "no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting."[150] The opinion noted that:

> A judge generally may socialize in person with attorneys who appear in the judge's court . . . . Moreover, the Committee has not opined that there is anything per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page. Thus, the question is not whether a judge can use a social network but, rather, how [the judge] does so.[151]

The California Judicial Ethics Committee shares the same position and is against "a *per se* rule barring all interactions [on social networks] with attorneys who may appear before the judge."[152] Just as "[j]udges are permitted to join social and civic organizations that include attorneys who may appear before them . . . [t]he same considerations apply to interacting with lawyers on online social networking sites."[153] The opinion goes on to state, "It is the nature of the interaction that should govern the analysis, not the medium in which it takes place."[154] The latest California Judicial Ethics Committee Opinion identified multiple factors to be considered in defining the nature of the interactions to determine the appropriateness of a judge-attorney ESM relationship.[155] By analyzing the factors enumerated by the California opinion in light of both the restrictive and permissive approaches, judges have a more comprehensive framework regarding their permissive use of ESM.

Those factors included:

> 1) The nature of the social networking site[;] . . . 2) The number of "friends" on the page[;] . . . 3) The judge's practice in determining whom to include[;] . . . [and] 4) How regularly the attorney appears before the

149. Md. Judicial Ethics Comm., Op. 2012-7 (2012).

150. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

151. *Id.* (citations omitted).

152. Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (2010).

153. *Id.*

154. *Id.*

155. *Id.* (discussing enumerated factors to determine if a judge's online interaction with an attorney would convey an impression that "the attorney is in a special position to influence the judge and cast doubt on the judge's ability to be impartial").

judge[.][156]

In addition, the opinion states other "factors relating to the nature of the offline relationship" should be considered when deciding if the ESM interaction is permissible.[157] One example, pointed out in the opinion, is whether "the nature of the contacts with an attorney is such that disclosure is required when the attorney appears before the judge."[158]

Under the first factor, (examining the nature and theme of the social networking site page) the more personal the page is, the more likely it is that an attorney in that circle of friends could appear to "be in a special position to influence the judge."[159] The selection of friends could create an impression of special position, especially if the judge does not accept everyone's request, and this was the most troublesome factor for the Florida committee to accept.[160]

The number of friends is also a factor.[161] The greater number of friends a judge has on ESM, the more diluted the relationship and accessibility between the judge and the friend will be.[162] Therefore, the greater the judge's friend pool is, the less likely it is that the attorney friend will appear to be in a special "positon to influence the judge."[163]

The third factor involves the practice of choosing whom to friend or include within the social media contacts.[164] The more control the judge exercises in the selection of friends, the more likely it is to convey a perception that a special relationship exists with an individual attorney on the page.[165] However the practice of including all requests is not the best practice since lawyers with pending cases could be included.[166]

In considering whether the ESM relationship is proper between an attorney and a judge, the fourth factor is the frequency an attorney appears

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (indicating the unease of the Florida Ethics Committee when considering the selection of "friends").

161. Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (2010).

162. *Cf. id.* ("Interacting on a page with hundreds of participants is different from interacting on a page with a small number of participants.").

163. *Id.*

164. *Id.*

165. *See id.* (explaining how a judge that accepts a large number of prosecutors, but not criminal defense attorneys, as friends could convey the impression of influence in favor of prosecutors).

166. *See id.* (acknowledging a fine line for a judge in accepting all requests or being selective in their acceptance of friend requests).

before the judge.[167] Even the permissive opinions discourage judges from maintaining an ESM relationship and recommend unfriending the lawyer who is appearing in a case presently before the judge.[168] Once the case is resolved, then the ESM relationship can resume.[169] The Florida restrictive opinion specifically rejected this practice because it requires the judge to constantly monitor their pool of connections and delete or unfriend attorneys depending upon the cases assigned to the judge.[170] This practice of selecting who is in and who is out, conveys the "impression of influence" and is, therefore, prohibited by its Code of Judicial Conduct.[171]

Considerations should also be made for the existing face-to-face relationship between the lawyer and the judge outside the realm of ESM.[172] The New York committee stated: "A judge must . . . consider whether any . . . online connections, alone or in combination with other facts, rise to the level of a 'close social relationship' requiring disclosure and/or recusal."[173] If the face-to-face relationship is one that would mandate the disqualification or recusal of the judge, then it is immaterial if there is a virtual relationship, because that lawyer would not appear before the judge in any litigation in the first place.[174]

The permissive jurisdictions are more challenging for judges "because judicial ethics are so often about appearances, not reality. It[i]s the appearance of impropriety you want to guard against, and if social media is about anything, it[i]s about making complicated social relationships look simple."[175] These permissive opinions advise judges to use caution.[176]

167. *Id.*

168. *Id.*

169. *Id.*

170. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012).

171. *See* ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 462 (2013) (condemning the practice of continuously friending and unfriending attorneys); U.S. Comm. on Codes of Conduct, Advisory Op. 112 (2015) (echoing the selection of friends by judges is not proper).

172. In addition to the enumerated four factors, the California Committee indicates additional factors pertaining "to the nature of the offline relationship" should also be considered. Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (2010).

173. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

174. *Id.*

175. Dahlia Lithwick & Graham Vyse, *Tweet Justice: Should Judges Be Using Social Media?*, SLATE (Apr. 30, 2010, 6:22 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

176. *See supra* Part III.B.2.; *see also* Bethany Leigh Rabe, *Can Judges "Friend" Attorneys on Social Media?*, LITIG. NEWS (Jan. 14, 2013), http://apps.americanbar.org/litigation/litigationnews/mobile/article-judicial-ethics-social-media.html (encouraging judges to employ caution when using ESM, and discussing the Tennessee advisory opinion, which does not implement specific guidelines but does urge the judiciary to weigh the benefits and risks of using social media).

However, without specific guidance, judges have no clarity about their use of ESM.[177] Judges in jurisdictions where there are permissive opinions or where there are no ethics advisory opinions are left to their own interpretation "to employ an appropriate level of prudence, discretion, and decorum" in the use of ESM.[178]

Additionally, judges are cautioned to stay abreast on all new features and security settings on the electronic media platform.[179] If judges are not technologically savvy and fail to appropriately set their settings, the results might reflect poorly on the judge.[180] Facebook frequently changes the security settings on their network and, at times, resets to the least secure setting.[181] Users, especially judges, should constantly monitor these settings.[182]

There is also an affirmative duty to monitor the posts and messages of one's friends to insure the material is appropriate and not in violation of

177. *See id.* ("Without more specific guidance, judges might decide 'to avoid social media entirely given the lack of clarity.'").

178. *See* N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009) (providing a non-exhaustive list of issues judges should consider when using ESM, and encouraging "all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion, and decorum in how they make use of this technology, *above and beyond what is specifically described*" in the opinion (emphasis added)).

179. *See id.* (suggesting judges "stay abreast of new features of, and changes to, any social networks they use").

180. *See* Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013) (identifying the security and ethical concern caused by security settings and subjecting judges' use of ESM to the condition that they "be aware of the contents of [their] social networking profile page[s], be familiar with the site's policies and privacy controls, and stay abreast of new features and changes"); *see also* Rabe, *supra* note 176 (warning judges using ESM approach the judge's online "post[s] with the same attention as [the judge] would give to a prepared statement or a speech at the bar association" because information posted online often reaches unintended audiences). For example, liking posts on Facebook produces data that is collected, "allow[ing] researchers to predict accurately certain qualities and traits concerning users." Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013). In addition, one's failure to enable certain security features when accessing social media websites, such as Facebook, from a mobile device, may transmit the user's physical location to other participants on that social media forum. *Id.*

181. *See* Thomas Fox-Brewster, *Facebook Is Playing Games with Your Privacy and There's Nothing You Can Do About It*, FORBES (June 29, 2016, 07:00 AM), https://www.forbes.com/sites/thomasbrewster/2016/06/29/facebook-location-tracking-friend-games/#33da1d3c35f9 (recognizing Facebook can change its privacy settings at its discretion and several security settings previously provided are omitted, leaving settings with less security to choose from).

182. *Cf.* Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010) (cautioning judges to "be familiar with the social networking site policies and privacy controls"); Dennis O'Reilly, *Secure Your Facebook Account in Six Easy Steps*, CNET (Dec. 19, 2014, 9:03 AM), https://www.cnet.com/how-to/secure-your-facebook-account-in-six-easy-steps/ (providing six methods to have a more secure Facebook page).

the judicial canons.[183] Social media sites are created to post opinions and comments to a mass audience, and unflattering or offensive comments that appear on the user's wall may be attributable to that person.[184] The instantaneous and viral nature of ESM makes it impossible to purge a post.[185] Therefore, a judge choosing to use ESM "should exercise [an] appropriate degree of discretion in how to use the social network and should stay abreast of [the] features" of any such service used as new developments may impact duties under the applicable rules.[186]

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 462[187] (ABA Formal Opinion 462), on February 21, 2013, regarding judicial use of ESM. ABA Formal Opinion 462 recognized "[s]ocial interactions of all kinds, including [ESM], can be beneficial to judges to prevent them from being thought of as isolated or out of touch."[188] It examined the issue while applying the Model Code of Judicial Conduct, and surmised, "[w]hen used with proper care, judges' use of [ESM] does not necessarily compromise their duties under the Model Code any more than [the] use of traditional and less public forms of social connection. . . ."[189] However, ABA Formal Opinion 462 warns judges to use ESM with extreme caution[190] because of two concerns. The first concern is:

> All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity and impartiality of the judiciary," and must "avoid impropriety and

183. *See* Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010) (suggesting a judge "be aware of the contents of his or her social networking page . . . and be prudent in all interactions on a social networking site").

184. *See infra* note 382.

185. *See* Francis Bea, *Turns Out 'Delete' Doesn't Quite Mean the Same Thing to Facebook As It Does to You*, DIGITAL TRENDS (July 2, 2013, 2:30 PM), www.digitaltrends.com/social-media/deleting-facebook-posts-fail/ ("The problem with permanently deleting anything on Facebook is the fact that nothing is actually seemingly deleted. Just simply 'deleting' content stores the content to a backup Facebook drive."); Rabe, *supra* note 176 (reminding users the content posted on social media "generally lasts forever").

186. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 at n.7 (2013).

187. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013).

188. *Id.*

189. *Id.*

190. *Id.*

the appearance of impropriety."[191]

The second concern reiterates the concerns voiced in the permissive advisory opinions:

> Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination 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.[192]

ABA Formal Opinion 462, the permissive state opinions, and the states without opinions do not provide judges with clear answers. Instead, the decision and the parameters remain with the judge and the judge's own interpretation of the respective judicial codes.

ABA Formal Opinion 462,[193] U.S. Advisory Opinion 112,[194] and the state judicial ethics advisory opinions allowing judges to use ESM emphasize the use of extreme caution by any judge who elects to participate in ESM.[195]

IV. ETHICAL IMPLICATIONS AND EXAMPLES OF ISSUED SANCTIONS BECAUSE OF JUDGE'S ESM USE

The various state advisory opinions look to provisions in their state's code of judicial conduct or to the Model Code of Judicial Conduct in the issuance of the respective opinions.[196] As noted before, Texas has not issued an ethical advisory opinion on judges' social media presence, but since the Texas judicial canons are similar or identical to other states'

191. *Id.* (quoting MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2011).

192. *Id.*

193. *Id.*

194. U.S. Comm. on Codes of Conduct, Advisory Op. 112 (2015).

195. *See, e.g.*, Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010); Md. Judicial Ethics Comm., Op. 2012-7 (2012).

196. *See, e.g.*, Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (referencing the Florida Code of Judicial Conduct Canon 2A commentary and Canon 2B), Okla. Judicial Ethics Advisory Panel, Op. 2011-03 (2011) (utilizing the preamble and canon 1 in reaching its opinion), Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010) (referring to the Ohio Code of Judicial Conduct Canons 1, 2, and 3 throughout the opinion).

canons, the rationale and holdings of other states' advisory opinions can be applied.[197] Ethical conduct is expected, even in a high-tech world. The Texas Code on Judicial Conduct "is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct."[198]

Recently, state conduct commissions began issuing sanctions to judges for ESM ethical violations. Most of the sanctions issued to judges involve either "impropriety and the appearance of impropriety" or not performing their judicial duties impartially.[199] The 2009 *Public Reprimand of Terry*,[200] was the first sanction reported involving social media, and since the *Terry* reprimand, the number of sanctions issued for ESM code violations has steadily risen. In the North Carolina *Terry* sanction, Judge Terry was presiding in a child custody case.[201] During a meeting in chambers, the attorney for the father discovered that he and the judge were active on Facebook.[202] Judge Terry and the father's attorney friended each other and communicated on Facebook about the case.[203] The attorney posted a question on Facebook asking, "How do I prove a negative?," and that same night, the judge posted on his account, noting "he had 'two good parents to choose from.'"[204] The attorney then posted again, responding with, "I have a wise [j]udge."[205] The two continued to post exchanges on Facebook[206] Additionally, Judge Terry conducted a Google search on the

197. *Compare* IDAHO CODE JUD. CONDUCT r. 1.2 (2016) ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."), N.C. CODE JUD. CONDUCT Canon 1 (2015) ("A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."), *and* W. VA. CODE JUD. CONDUCT r. 1.2 (2015) ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.") *with* TEX. CODE JUD. CONDUCT, Canon 2(A), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013) ("A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

198. TEX. CODE JUD. CONDUCT, Canon 8(A).

199. *Id.* Canon 3.

200. *In re* Terry, No. 08-234 (N.C. Apr. 1, 2009), http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

mother.[207] Opposing counsel discovered the Facebook friendship, and even though Judge Terry recused himself, the North Carolina Judicial Standards Commission publicly sanctioned him for:

> failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved ([in violation of North Carolina Code of Judicial Conduct] Canon 1), failure to respect and comply with the law ([in violation of North Carolina Code of Judicial Conduct] Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary ([in violation of North Carolina Code of Judicial Conduct] Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the [c]ourt ([in violation of North Carolina Code of Judicial Conduct] Canon 3A(4)).[208]

Due to the absence of judicial canons specific to social media use and the ambiguity inherent in many existing advisory opinions, the line separating judicious and unethical social media activity remains blurred.[209] However, as previously discussed, most judicial ethical standards are identical or similar nationwide. Therefore, in an effort to help guide future judicial use of ESM, this Article next reviews judicial social media activity for which judges have been or almost were sanctioned.

207. *Id.*

208. *Id.* The North Carolina Canons relied upon in *Terry* are substantially the same as the Texas Canons. *Compare* N.C. CODE JUD. CONDUCT Canon 1 (2015) ("A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."), *Id.* Canon 2(A) (recognizing a "judge should respect and comply with the law"), *Id.* (proclaiming judges should always conduct themselves "in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), *and Id.* Canon 3(A)(4) (creating a rule in which, unless otherwise authorized by law, a judge should "neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding"), *with* TEX. CODE JUD. CONDUCT Canon 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013) ("A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved."), *Id.* Canon 2(A)\ (omitting the aspect of respect and strictly requiring that "a judge *shall* comply with the law" (emphasis added)), *Id.* (suggesting judges "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), *Id.* Canon 3(B)(8) ("A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties . . . concerning the merits of a pending or impending judicial proceeding.").

209. *See Supra* Part III.

A. *Ex Parte Issues*

The violation of ex parte communications between the judge and a party via social media falls under the more general rule prohibiting ex parte communications in any case,[210] and social media provides an easy conduit for violation of this general rule.[211] Judicial canons nationwide, and specifically the Texas Code on Judicial Conduct Canon 3B(8),[212] prohibit a judge from communicating with one party outside the presence of the other party.[213] These ex parte communications give the appearance that one side is in a position of influence; the potential for online ex parte communications which manifest such influence is one of the main reasons that the prohibitive advisory opinions restrict electronic social communications by judges.[214] With respect to the *Terry* reprimand, even though other canon violations were also cited, Judge Terry was sanctioned for the ex parte communications on Facebook.[215] Several judges from other states have also been sanctioned for similar ex parte communications on ESM.[216]

210. *See generally* MODEL CODE OF JUD. CONDUCT r. 2.9 (AM. BAR ASS'N 2011).

211. *Id.*

212. The Texas Code of Judicial Conduct Canon 3B(8) states:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding.

TEX. CODE JUD. CONDUCT Canon 3(B)(8).

213. *Compare* MODEL CODE OF JUD. CONDUCT r. 2.9 (AM. BAR ASS'N 2011) (prohibiting a judge from participating in ex parte communications unless otherwise provided for under an exception) *with* TEX. CODE. JUD. CONDUCT Canon 3(B)(8) (requiring a judge to refrain from ex parte communications when the communication concerns the merits of a judicial proceeding that is pending or impending). However, there are exceptions to this general prohibition. *See* MODEL CODE OF JUD. CONDUCT r. 2.9(A)(1) (AM. BAR ASS'N 2011) ("When circumstances require it, ex parte communication . . .is permitted . . . [when] the judge reasonably believes that no party will gain . . . [an]advantage as a result . . .; and the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.").

214. *See generally,* Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

215. *See In re* Terry, No. 08-234 (N.C. Apr. 1, 2009), http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

216. *See, e.g.*, *In re* Fowler, No. 125-2013 (W. Va. Mar. 14, 2014), http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Fowler.ashx (admonishing a

According to an article in the *Southern Center for Human Rights*, Georgia judge, Mountain Circuit Superior Court Chief Judge Ernest "Bucky" Woods, retired December 29, 2009 after the Georgia Judicial Qualifications Commission began inquiring about "the judge ha[ving] a personal relationship with a defendant in his court that began on Facebook."[217]

The Judicial Qualifications Commission of the State of Georgia issued a public reprimand to another jurist, Judge J. William Bass, Sr. for "engag[ing] in a private Facebook chat with a woman" about her brother's criminal case and advising her on how to get the case transferred to his court.[218]

The West Virginia Judicial Investigation Commission publicly admonished a former magistrate for exchanging sexually explicit Facebook messages with a woman who appeared before him in court.[219]

The Supreme Court of South Dakota addressed an ESM issue in an appeal involving Judge Srstka's denial of a motion for new trial.[220] The appellant, Onnen, "moved for a new trial based on 'ex parte communications.'"[221] Judge Srstka received a Facebook post from a major defense witness "wishing him a happy birthday in Czech."[222] The birthday wish was posted on the judge's Facebook while the case was pending.[223] However, the Supreme Court of South Dakota concluded no violation of the ex parte canon occurred since the post did not relate to any facts regarding the case.[224] Therefore, the court held Judge Srstka did not

judge for sending sexually suggestive messages on Facebook to a woman who was a party to cases before his court, among other violations).

217. R. Robin McDonald, *Behind the Flurry of Judges' Resignations*, FULTON COUNTY DAILY REP. (Aug. 19, 2010), https://www.schr.org/action/resources/behind_the_flurry_of_judges_resignations. The inquiries were prompted when the District Attorney received complaints about the relationship. *Id.*

218. *In re* Bass, No. 2012-31(Ga. Mar. 18, 2013), http://www.gajqc.com/news.cfm (citing Canon 3B). Judge Bass also told a family member that he would handle the matter once it got to his court and, thereafter, failed to recuse himself from hearing the matter in violation of Canon 2B. *Id.* The public reprimand was additionally based upon other violations of the Georgia Code of Judicial Conduct. *Id.*

219. *In re* Fowler, No. 125-2013 (W. Va. Mar. 14, 2014), http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Fowler.ashx. The sanction was issued for a culmination of violations. *Id.*

220. Onnen v. Sioux Falls Indep. Sch. Dist. 49-5, 2011 SD 45, ¶ 18, 801 N.W.2d 752, 757.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 758.

abuse his discretion in denying the motion.[225]

The Texas State Commission on Judicial Conduct agreed to accept a resignation from Judge Clarence E. Holmes, Jr. in lieu of disciplinary action for conduct alleged in two complaints that he had sent inappropriate messages through his Facebook account.[226]

In *Youkers v. State*,[227] a case of first impression, the Texas Fifth Court of Appeals ruled a trial judge's Facebook communications, initiated by a victim's father, did not constitute an improper ex parte communication that demonstrated partiality and bias.[228] The court concluded the judge's actual relationship with the victim's father was limited and the judge took the appropriate action when the ESM message was posted and the judge immediately disclosed the communication to the parties.[229] This opinion provides a comprehensive guide for Texas judges with regards to attempted ex parte communications by litigants or third parties.

B. *Independent Judicial Research on the Internet*

Independent research using ESM is another problem area for judges. The Model Code of Judicial Conduct specifically forbids such research unless judicial notice has properly been taken.[230] Only eighteen states have incorporated this Model Code Canon and Texas is not one of them.[231] In states that do not have a specific canon, independent research by judges on any medium has been limited by the rules of evidence, the type of information, notice of its use to the parties, and fairness.[232] Research using ESM is more tempting because of the vast amount of information available and the ease of obtaining such information quickly.

225. *Id.*

226. *Disciplinary Actions*, STATE COMMISSION JUDICIAL CONDUCT, http://www.scjc.state.tx.us/disciplinary-actions.aspx?t=Resignations&ptype=1336 (last visited July 27, 2017).

227. Youkers v. State, 400 S.W.3d 200 (Tex. App.—Dallas 2013, no writ).

228. *Id.* at 206–07.

229. *Id.*

230. MODEL CODE OF JUD. CONDUCT r. 2.9(C) (AM. BAR ASS'N 2011). Specifically, Rule 2.9(C) states, "A judge shall not investigate facts in a matter independently . . . and shall consider only the evidence presented and any facts that may *properly be judicially noticed*." *Id.* (emphasis added).

231. *See* CTR. FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS (last updated Aug. 31, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_9.authcheckdam.pdf (comparing Model Judicial Code Rule 2.9 with the fifty states). The states that have adopted this rule include: Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maryland, Minnesota, Montana, Nebraska, New Hampshire, Nevada, Ohio, Oklahoma, and Utah. *Id.*

232. *See e.g.* TEX. R. EVID. 201 (permitting judicial notice of adjudicative facts).

The Model Code of Judicial Conduct, however, has a built-in loophole allowing independent research and use of an adjudicative fact if the judge takes judicial notice of the information.[233] The Texas Rules of Evidence specifically allow a court to "judicially notice a fact that is not subject to reasonable dispute."[234] The problem with information obtained using ESM is that the information may be outdated, inaccurate, unauthenticated, and/or one-sided.[235] There are no prohibitions on doing independent research on a legislative fact, which is "[a] fact that explains a particular law's rationality and that helps a court or agency determine the law's meaning and application."[236] Furthermore, legislative facts are not case specific nor do they pertain to the parties in litigation.[237] Although not specifically ESM cases, courts have held that, "In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality."[238] In addition, due process may be compromised when the court conducts independent investigations. In *Kiniti-Wairimu v. Holder*,[239] which was an immigration removal proceeding, the United States Court of Appeals for the Ninth Circuit held a Kenyan citizen was denied due process in his pursuit of an application for withholding of removal and protection under the Convention Against Torture "when the [immigration judge] conducted independent research of Kiniti's family circumstances [on] the Internet and then relied on" reports of which Kiniti was not aware, "to make an adverse credibility determination."[240]

The 2009 Georgia judicial complaint against Judge E.H. "Bucky" Woods

233. *See* MODEL CODE OF JUD. CONDUCT 2.9(c) (AM. BAR ASS'N 2011) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may *properly be judicially noticed*." (emphasis added)); *see also* FED. R. EVID. 201 (governing a judge's ability to take judicial notice of adjudicative facts).

234. TEX. R. EVID. 201(b). A fact "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." *Id.*

235. *See generally* John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence From Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 478–85 (2011) (analyzing the challenges associated with admitting social media evidence).

236. *Legislative fact*, BLACK'S LAW DICTIONARY (10th ed. 2014).

237. *See Id.* ("Legislative facts are not ordinarily specific to the parties in a proceeding.").

238. NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 798 N.Y.S.2d 309, 313 (N.Y. App. Term. 2004).

239. Kiniti–Wairimu v. Holder, 312 F. App'x 907 (9th Cir. 2009).

240. *Id.* at 908.

III, included the allegation of improper independent investigation which resulted in Judge Woods issuing a revocation against a defendant for being in an inappropriate photo on Facebook.[241]

During oral arguments in the 2011 United States Supreme Court cases of *Arizona Free Enterprise Club v. Bennett*[242] and *McComish v. Bennett*,[243] Chief Justice Roberts announced that he did his own Internet research, saying, "I checked the Citizens' Clean Elections Commission website this morning . . . . It says that this act was passed to, quote, 'level the playing field' when it comes to running for office. . . . Why isn't that clear evidence that [the law] is unconstitutional?"[244] However, Chief Justice Roberts and the other justices of the United States Supreme Court are "not bound by [any] code of judicial conduct."[245] Therefore, it is arguable the justices of the Supreme Court could use ESM to conduct independent judicial research, just like Chief Justice Roberts used the Internet. It is important to note that all other judicial officers are prohibited from using the Internet to conduct research.

C. *Recent Examples Casting Public Discredit on the Judiciary and on a Judge's Impartiality*

The Texas Constitution,[246] as well as Canon 4A(1) of the Texas Code of Judicial Conduct[247] mandate a judge to avoid "willful and persistent conduct that casts public discredit on the judiciary" or "casts a reasonable doubt on the judges capacity to act impartial."[248]

In a May 2017 sanction, the Texas State Commission on Judicial Conduct issued a Public Reprimand and Order of Additional Education to County Judge James Oakley of Burnet County[249] for his inappropriate

241. McDonald, *supra* note 218.

242. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

243. McComish v. Bennett, 562 U.S. 1060 (2010).

244. *Social Media Has Benefits and Pitfalls for Courts*, AM. BAR ASS'N (Sept. 2011), http://www.americanbar.org/newsletter/publications/youraba/201109article03.html (last visited July 27, 2017).

245. *Id.*

246. TEX. CONST. ART. V, § 1-a(6) (announcing a judge shall not engage in "willful or persistent conduct" which "casts public discredit upon the judiciary or administration of justice").

247. TEX. CODE JUD. CONDUCT, Canon 4(A)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013) ("A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties.").

248. TEX. CONST. ART. V, § 1-a(6).

249. Texas State Commission on Judicial Conduct Amended Public Reprimand and Order of Additional Education, Honorable James Oakley, County Judge, Burnet County CJC NOS.17-0320-

Facebook comment. The San Antonio Police Department posted on its Facebook page a mug shot of Otis Tyrone McKane, an African American man arrested for the capital murder of a San Antonio police detective. Judge Oakley posted the "[t]ime for a tree and a rope" comment on the San Antonio Police Department page and on his own Facebook page.[250] The Commission received eighteen written complaints, expressing concern about "the call for vigilante justice"; "disregard for due process"; "racial insensitivity" and "doubts about the judges suitability for judicial office" and "impartiality."[251] Even though Judge Oakley promptly removed the posts, the Commission condemned the conduct because "by posting the Facebook Post, Judge Oakley cast reasonable doubt on his capacity to act impartially in the performance of his duties"[252] and "engag[ed] in willful conduct . . . [that] cast public discredit on the judiciary and the administration of justice."[253]

Furthermore, judicial canons nationwide and Texas Code of Judicial Conduct Canon 3(B)(10) forbid a judge from commenting on a pending proceeding.[254] In January 2013, *Texas Monthly* wrote a "Bum Steer" article about former Municipal Court Judge W. Lee Johnson for his post on Facebook regarding a speeding ticket received by Texas A&M football player Johnny Manziel.[255] Not only did Judge Johnson post a comment about the speeding stop (clearly a pending proceeding), the judge also added "[t]ime to grow up/slow down young 'un. You got your whole/life career ahead of you. Gig'em indeed."[256] Though never reprimanded by Texas's State Commission on Judicial Conduct, Judge Johnson received a negative review by Jason Cohen in the *Texas Monthly* article.[257] In addition, one blogger questioned the judiciary's use of ESM by noting: "It's not clear

CO,17-0325-CO,17-0326-CO,17-0327-CO,17-0328-CO,17-0329-CO,17-0337-CO,17-0346-CO,17-0347-CO.17-0348-CO,17-0364-CO,17-0382-CO,17-0390-CO,17-0400-CO,17-0413-CO,17-0425-CO,17-0440-CO &17-0590-CO

May 8, 2017 http://scjc.state.tx.us/media/46571/oakleyamendedfinalpubrepoaewebsite.pdf

250. *Id.*

251. *Id.*

252. TEX. CODE JUD. CONDUCT, Canon 4(A)(1).

253. TEX. CONST. ART. V, § 1-a(6).

254. TEX. CODE JUD. CONDUCT, Canon 3(B)(10) (stating "[a] judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case").

255. Jason Cohen, *Bum Steer: The Judge Who Facebooked Johnny Football's Speeding Ticket*, TEX. MONTHLY (Jan. 23, 2013), http://www.texasmonthly.com/its-always-football-season/bum-steer-the-judge-who-facebooked-johnny-footballs-speeding-ticket/.

256. *Id.*

257. *Id.* ("Really, if you're a judge . . . you probably shouldn't even be on social media.").

why a municipal judge has a Facebook page in the first place . . . ."[258] Notably, Judge Johnson received a letter of reprimand from the City of Ennis Commission, after issuing an apology to the commission, the mayor, the defendant, and the Texas A&M Athletic Department for the Facebook post.[259]

Alabama Judge Henry P. Allred was sanctioned for publicly discussing the facts in a then pending contempt case against a lawyer.[260] The violations occurred when the judge posted on a closed-group Facebook page.[261] However, he prefaced his comment with the following: "Here's the whole story. Please spread it far and wide."[262] The post did indeed circulate far and wide and resulted in Judge Allred being sanctioned for commenting on a pending case.[263]

Former Arkansas Judge Michael Maggio was removed from the bench for constantly commenting under a username ("geauxjudge") on his profile on the ESM page TigerDroppings.com, which he maintained from 2005 until his removal in 2014.[264] Maggio made frequent comments about cases and litigants—many of which were inappropriately racial, sexual, and biased.[265] Arkansas's Judicial Discipline and Disability Commission found that Maggio had committed twenty-three violations of its Code of Judicial Conduct, twelve of which involved posting comments about pending cases, including details about Charlize Theron's closed adoption.[266]

During a criminal trial, a New Mexico judge posted on his campaign Facebook page: "I am on the third day of presiding over my 'first' first-degree murder trial as a judge."[267] Following the trial, but before sentencing, he posted, again: "In the trial I presided over, the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch.

258. Andrew Lu, *Johnny Manziel's Speeding-Ticket Judge Fumbles on Facebook*, FINDLAW: TARNISHED TWENTY (Jan. 22, 2013, 1:31 PM), http://blogs.findlaw.com/tarnished_twenty/2013/01/johnny-manziels-speeding-ticket-judge-fumbles-on-facebook.html.

259. Mike Sackett, *Ennis Judge Reprimanded*, Daily Light Correspondent (Jan. 23, 2013), http://www.waxahachietx.com/article/20130123/News/301239984.

260. *In re* Henry P. Allred, No. 42, Complaint at 1 (Ala. Judicial Inquiry Comm'n Feb. 28, 2013), http://judicial.alabama.gov/judiciary/COJ42COMPLAINT.pdf.

261. *Id.*

262. *Id.* at 4.

263. *In re* Henry P. Allred, No. 42, Final Judgment at 10 (Ala. Judicial Inquiry Comm'n Mar. 22, 2013), http://judicial.alabama.gov/judiciary/COJ42FINALJUDG.pdf.

264. Letter of Suspension & Removal from Office, No. 14-136, at 2 (Ark. Judicial Discipline & Disability Comm'n Aug. 6, 2014), http://www.arkansas.gov/jddc/pdf/pr080614.pdf.

265. *Id.* at 2–10.

266. *Id.* at 2–3, 13–14.

267. State v. Thomas, 2016-NMSC-024, ¶ 8, 2016 N.M. LEXIS 149, 376 P.3d 184.

Justice was served. Thank you for your prayers."[268] The case went up to the New Mexico Supreme Court to review the denial of a motion for new trial, which was sought on many grounds, including judicial bias, and ultimately granted on forensic-science-related issue. Although the New Mexico Supreme Court did not reach the issue of judicial bias, the court warned "a judge who is a candidate should post no personal messages on the pages of these campaign sites other than a statement regarding qualifications[,]" and a judge should not allow public comments to be posted on their page, and should not engage in any "dialogue, especially regarding any pending matters that could either be interpreted as ex parte communications or give the appearance of impropriety."[269]

Furthermore, comments on pending cases where the judge is a litigant have also resulted in sanctions. Former Indiana judge, Dianna L. Bennington, posted an injudicious comment about her children's father's compliance with child support obligations on his Facebook account.[270] Indiana's Commission on Judicial Qualifications found the post was a violation of the Indiana Canons.[271] Bennington was removed from the bench for this, as well as additional violations, and is banned for life from serving in a judicial office.[272]

Similarly, in *Ex parte Dupuy*,[273] Galveston County Court at Law Judge Dupuy was found in contempt of court for violating a gag order.[274] Judge Dupuy received a forty-five-day sentence "in the Galveston County Jail for using his Facebook page to make personal attacks" against the prosecutor in his criminal case.[275] Judge Dupuy was also ordered "to cease using the Internet, any social media platforms[,] or any electronic media to

268. *Id.*

269. *Id.*

270. *In re* Bennington, 24 N.E.3d 958, 964 (Ind. 2015) (per curiam). The judge's post was "a comment in response to a photo of [the father] and his girlfriend" in which the judge wrote: "Must be nice to take such an expensive trip but not pay your bills. Just sayin[g]." *Id.* The post was visible to the father's Facebook friends for over an hour until the judge deleted it. *Id.*

271. IND. CODE JUD. CONDUCT 1.2. Specifically, it concluded the judge's Facebook comment and public arguments with the father violated Judicial Conduct Rule 1.2, which requires judges to always act "in a manner that promotes public confidence in the . . . integrity . . . of the judiciary . . . [and to] avoid impropriety." *In re* Bennington, 24 N.E3d at 964–65.

272. *In re* Bennington, 24 N.E3d at 965.

273. *Ex* Parte Dupuy, 498 S.W.3d 220 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

274. Harvey Rice, *Galveston Judge Arrested for Contempt,* HOUS. CHRON. (Aug. 28, 2013, 8:15 PM), http://www.chron.com/news/houston-texas/houston/article/Galveston-judge-arrested-for-contempt-4769760.php.

275. *In re* Slaughter, 480 S.W.3d 842, 845–48 (Tex. Spec. Ct. Rev. 2015) (per curiam).

communicate about his case."[276]

The Texas State Commission on Judicial Conduct initially issued a public admonishment to Judge Michelle Slaughter for posting updates on the "Boy in a Box" case she was presiding over and violating her own instructions to the jury to refrain from using ESM.[277] However, after a de novo review by a Special Court of Review, the public admonition was dismissed because the Texas State Commission "failed to meet its burden of pro[of that] the [judge] violated the Canons of Judicial Conduct."[278] In doing so, the court noted "no rule, canon of ethics, or judicial ethics opinion in Texas prohibits Texas judges from using social media outlets like Facebook."[279]

The non-exclusive list provided shows many examples of unacceptable ESM behavior by judges. As a whole, these judges publicly discredit the judiciary and cast a negative image on the impartiality of judges while performing their duty.

D. *Avoiding Impropriety or the Appearance of Impropriety*

The Texas Code of Judicial Conduct Canon 2[280] is one of the greatest trouble areas for judges using ESM. Unfortunately, the "appearance of impropriety" is not amenable to an easy definition. Thus, in many situations, judges must decide for themselves when their conduct on ESM might give the appearance of impropriety.[281]

276. *Id.*

277. *Id.* at 845–46, 847–48.

278. *Id.* at 855.

279. *Id.* at 848.

280. Texas Code of Judicial Conduct Canon 2 states:

> A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
> B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.
> C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

TEX. CODE JUD. CONDUCT, Canon 2, *reprinted in* TEX. GOV. CODE ANN., tit. 2, subtit. G, app. B (West 2013).

281. *See* MODEL CODE OF JUD. CONDUCT Canon 1 cmt. 3 (AM. BAR ASS'N 2011) ("Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.").

The problem of appearance is compounded by the virality facet of social media. The immediate ability to post and repost expands the audience immeasurably and what might have been buried in the small local newspaper will now be available globally on an electronic social network.[282]

Judge William Adams made national and global news because of a video that was posted on the visual ESM, YouTube.[283] The eight minute video showed Judge Adams using a belt and hitting his then sixteen-year-old daughter.[284] The Texas Commission on Judicial Conduct acknowledged that Judge Adams was not aware that he had been secretly videotaped, and that he was not the person who released the videotape on the Internet; however, because Judge Adams regularly presided over and decided child custody, child abuse, and family violence cases, his private conduct did cast public discredit upon the judiciary and the administration of justice.[285] Though the filming and the posting of the video were done without his knowledge, it is a prime example of the virality and massive reach of ESM.[286]

In addition to judges who may be the victim of virality unbeknownst to themselves, inappropriate political activity on Facebook has also become an ongoing problem. The Missouri Supreme Court publically reprimanded Judge Philip E. Prewitt for Facebook posts that were unfairly critical of the integrity of other judges in the circuit.[287]

Other judges have gotten into trouble using Facebook for more intimate purposes and therefore a higher impropriety. For example, the West Virginia Judicial Investigation Commission admonished a former magistrate for exchanging sexually explicit Facebook messages with a woman who appeared before him in court.[288] New York Judge Matthew

282. *See supra* notes 33–39.

283. Public Warning of Judge William Adams, No. 12-0217-CC, at 2 (State Comm'n on Judicial Conduct Sept. 4, 2012), http://www.scjc.texas.gov/media/8102/adams-william-12-0217-cc-public-warning-ocr-3.pdf.

284. *Id.*

285. *Id.*

286. *See id.* ("The Internet release of the videotape prompted an international media storm of controversy."); *see also Texas Judge Beating Video Causing Outrage*, ASSOCIATED PRESS (Nov. 3, 2011 10:03 AM), http://www.cbsnews.com/news/texas-judge-beating-video-causing-outrage/ (describing how the video spread rapidly and "resulted in a deluge of phone calls, emails and visits" to Judge Adams's courthouse).

287. *In re* Prewitt, Order (Mo. Nov. 24, 2015), http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Prewitt%20MO.ashx.

288. Public Admonishment of Former Magistrate Richard D. Fowler, No. 125-2013, 5–6 (W. Va. Judicial Investigation Comm'n Mar. 14, 2014), http://www.ncsc.org/~/media/Files/PDF/

Sciarrino provides another example: Judge Sciarrino had a Facebook page which he "updated his 'status' while on the bench" and even "took a photograph of his crowded courtroom and posted it to his account."[289] He also had a public MySpace page which was shown to be updated at a time he was on the bench and his mood was listed as "amorous."[290] Another prime example involves North Las Vegas Judge pro tem Jonathan MacArthur who was fired over a MySpace page that was reportedly hostile to prosecutors and used graphic language.[291] On his MySpace page, MacArthur boasted his skills in the courtroom and listed his interests as: "[B]reaking 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."[292] Lastly, in September 2016, County Judge Joel Baker resigned based on allegations that he had exchanged sexually graphic messages, photos, and videos with a woman that he "friended" on Facebook.[293] Some of these communications were done during a Texas State Commission on Judicial Conduct meeting, while serving as vice chair and at an education conference in his official capacity.[294] These examples incase the use of ESM in ways that give an appearance of impropriety when done by judicial officers of the court.

E. *The Not So Smart Use of Smart Phones*

According to the 2014 CCPIO report, smart phones are used between 60% and 71% of the time to access ESM.[295] Facebook estimates that about 90% of users access ESM through mobile devices. This type of electronic communication or "texting" is a mere "click away" from entry into an electronic social network. The ethical issues, the virality potential, and the medium used in texting and ESM are the same.[296] Both texting

Topics/Center%20for%20Judicial%20Ethics/Fowler.ashx.

289. Daniel Leddy, *MySpace, the Judge and Judicial Propriety*, SILIVE (Oct. 20, 2009, 7:19 AM), http://www.silive.com/opinion/danielleddy/index.ssf/2009/10/myspace_the_judge_and_judicial.html.

290. *Id.*

291. Martha Neil, *Temp Judge Fired Over MySpace Post*, A.B.A. J. (Aug. 14, 2007, 4:39 PM), http://www.abajournal.com/news/article/temp_judge_fired_over_myspace_post.

292. Damon Hodge, *Invading His (My)Space*, LAS VEGAS SUN (Apr. 23, 2008, 12:27 PM), https://lasvegassun.com/news/2008/apr/23/invading-his-myspace/.

293. *In re* Baker, Nos. 16-0626-CO & 16-0910-CO, at 2 (State Comm'n on Judicial Conduct, Sept. 20, 2016), http://www.scjc.texas.gov/media/46406/BakerResignation.pdf.

294. *Id.*

295. *See supra* 2014 CCPIO SURVEY note 60, at 5.

296. *See supra* Part III. The use of smart phones is analogous to any use of ESM. The only difference is that the use of smart phones makes the accessibility even greater with the ability to log

and the use of social media present similar ethical issues for judges, which are exacerbated by the virality potential of both mediums of communication.

Recently, a Texas texting case made national news,[297] when Polk County District Judge Elizabeth Coker presided over a criminal jury trial, involving an injury to a child.[298] While the defendant was testifying, Judge Coker sent ex parte text messages to an assistant district attorney, instructing her to tell the lead prosecutor to ask the defendant very specific questions.[299] On October 21, 2013, following a nine-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 for the electronic ex parte communications.[300] Judge Coker formally resigned her office.[301]

The Michigan Commission on Judicial Tenure sanctioned Judge Wade McCree for "sexting"[302] from the bench with a complaining witness in a child support case involving the father of the child who was before McCree.[303] In addition, Judge McCree was also accused of carrying on a sexual relationship with the same litigant witness.[304] 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."[305] According to Judge McCree, "The text message was sent in an effort to flatter [the litigant] and was not intended to demean any person who had appeared in his courtroom."[306] McCree told a reporter, "There is no shame in my

on to Facebook, Instagram, Twitter, etc. anywhere in the world.

297. Cindy Horswell, *District Judge Resigns in Texting Case*, HOUS. CHRON. (Oct. 21, 2013 3:09 PM), http://www.chron.com/news/houston-texas/houston/article/District-judge-resigns-in-texting-case-4913627.php.

298. *In re* Coker, Nos. 13-0376-DI, 13-0448-DI, 1309712-DI, 13-0815-DI, 13-0101-DI (Tex. State Comm'n on Judicial Conduct Oct. 21, 2013), http://www.scjc.texas.gov/disciplinary-actions.aspx?t=Resignations&ptype=1336.

299. *Id.*

300. *Id.*

301. *Id.*

302. *See* Todd A. DeMitchell & Martha Parker-Magagna, *Student Victims or Student Criminals? The Bookends of Sexting in a Cyber World*, 10 CARDOZO PUB. LAW, POLICY & ETHICS J. 3, 4 (2011) ("Sexting, a blend of the words *sex and texting,* is the sending or posting of sexually suggestive text messages and images, including nude or semi-nude photographs, via cell phones or over the Internet." (footnote omitted)).

303. *In re* McCree, 845 N.W.2d 458, 459, 459, 461 (Mich. 2013).

304. *Id* at 459–60.

305. *Id.* at 459, 461.

306. David Edwards, *Michigan Judge: 'Gap Tooth Skank Hoes' was a Compliment*, RAW STORY

game."[307] Interestingly, a portion of the McCree's misconduct investigation was prompted because of a Facebook post.[308] McCree's affair was documented through the texts messages with the litigant.[309] As a result of this misconduct, the judge was removed from office and conditionally suspended without pay for six years.[310] Additionally, he was ordered to pay $11,645.17 to the Judicial Tenure Commission.[311]

In South Carolina, Magistrate James Oren Hughes, while attending a Horry County Bar reception, made an inappropriate remark to a law student.[312] Hughes went on to show the law student and others an inappropriate image of an explicit sexual nature that he had saved on his cell phone.[313] After being placed on suspension, Judge Hughes resigned from the bench and received public reprimand for the conduct.[314]

Arizona Judge Theodore Abrams left an assistant public defender at least twenty-eight voicemails and sent her at least eighty-five text messages containing personal and often sexual content.[315] After the assistant public defender refused his sexual advances, Judge Abrams began a retributory series of acts against her from the bench, including verbally berating her, denying her motion to dismiss for lack of jurisdiction, and declaring a mistrial while he was presiding over her first jury trial.[316] 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.[317] In addition, the Arizona Supreme Court suspended Judge Abrams's law license for two years.[318] The City of Tucson subsequently had to defend a lawsuit filed against the city for Judge Abrams's sexual harassment of the assistant public defender.[319]

(Mar. 29, 2013, 11:09), http://www.rawstory.com/2013/03/michigan-judge-gap-tooth-skank-hoes-was-a-compliment/.

307. *In re* McCree, 845 N.W.2d at 459, 460.

308. Master's Report at 6, *In re* McCree, 845 N.W.2d 458 (Mich. 2013), https://cbsdetroit.files.wordpress.com/2013/06/masters-report-06-23-2013.pdf.

309. *In re* McCree, 845 N.W.2d at 459, 464–66.

310. *Id.*

311. *Id.* at 476–77.

312. *In re* Hughes, 710 S.E.2d 75, 75 (S.C. 2011) (per curiam).

313. *Id.*

314. *Id.* at 76.

315. *In re* Abrams, 257 P.3d 167, 168 (Ariz. 2011) (en banc).

316. *Id.* at 169.

317. *Id.* at 174–75.

318. *Id.*

319. Kim Smith, *Tucson Lawyer Sues City Alleging Sex Harassment by Former Judge*, ARIZ. DAILY

These examples help judges discern unacceptable behavior, yet advisory opinions with more clarity would help judges to have a better idea of what ESM encompasses and what behavior should be avoided.

F. *Judicial Use of ESM in Election Campaigns*

Thirty-nine states elect certain members of their judiciary,[320] but only ten states, in addition to the ABA, have issued ethical advisory opinions regarding judicial campaigns and ESM.[321] ESM was effectively used in the 2016 presidential election.[322] Indeed, President Donald Trump credited his use of ESM for winning the White House race.[323] Trump, with over twenty-eight million social media followers, said, "I think it helped me win all of these races where they[] [a]re spending much more money than I spent."[324] Presidential candidates are not subject to a code of judicial conduct,[325] but this recent campaign emphasizes the cost

STAR (June 7, 2012), http://tucson.com/news/local/govt-and-politics/tucson-lawyer-sues-city-alleging-sex-harassment-by-former-judge/article_a56c232a-b0e4-11e1-af2d-0019bb2963f4.html.

320. *Fact Sheet on Judicial Selection Methods in the States*, A.B.A., http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited July 27, 2017).

321. Ariz. Supreme Court Judicial Ethics Advisory Comm., Advisory Op. 14-01 (2014); Cal. Judges Ass'n Judicial Ethics Comm., Advisory Op. 66 (2010); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2016-13 (2016); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2013-14 (2013); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2012-15 (2012); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-28 (2010); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-21 (2010); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009); La. Supreme Court Comm. on Judicial Ethics, Op. 271 (2016); Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016); Mo. Comm'n on Ret., Removal, and Discipline, Op. 186 (2015); N.M. Advisory Comm. on the Code of Jud. Conduct, Advisory Op. Concerning Social Media (2016), http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf; N.Y. Advisory Comm. on Judicial Ethics, Op. 15-178 (2015); N.Y. Advisory Comm. on Judicial Ethics, Op. 15-121 (2015); N.Y. Advisory Comm. on Judicial Ethics, Op. 13-126 (2013); N.Y. Advisory Comm. on Judicial Ethics, Joint Op. 12-84/12-95(B)-(G) (2012); N.Y. Advisory Comm. on Judicial Ethics, Op. 07-135 (2007); N.D. Judicial Ethics Advisory Comm., Op. 2016-2 (2016); Utah Ethics Advisory Comm., Informal Op. 12-01 (2012); W. Va. Judicial Investigation Comm'n, Advisory Op. 2016-01 (2016); ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 462 (2013); U.S. Comm. on Codes of Conduct, Advisory Op. 112 (2015).

322. *See* Farhad Manjoo, *Social Media's Globe-Shaking Power*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/technology/social-medias-globe-shaking-power.html (discussing how online "social networks are helping to fundamentally rewire human society" and how "social media played a determining role in the" 2016 U.S. presidential race).

323. Rich McCormick, *Donald Trump Says Facebook and Twitter 'Helped Him Win*,*'* VERGE (NOV. 13, 2016), http://www.theverge.com/2016/11/13/13619148/trump-facebook-twitter-helped-win.

324. *Id.*

325. *Id.*

effectiveness of using ESM in campaigns.[326] As previously mentioned, Texas Supreme Court Justice Don Willett began using ESM in his campaign and has continued to maintain a Twitter account since.[327] Last year Willett told *The Weekly Standard* he "diligently self-censor[s] and aim[s] for carefulness" on Twitter because "judges must always be judicious."[328]

The online presence in judicial elections will certainly increase in the coming years.[329] The New Mexico Supreme Court has even acknowledged "the utility of an online presence in judicial election campaigns."[330]

1. Advisory Opinions and Judicial Canons Relevant to ESM Use in Campaigns

A judicial election campaign may use ESM to promote the candidate.[331] The Model Code of Judicial Conduct "does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance."[332]

Even Florida, the leader of the restrictive opinions,[333] allows a judicial campaign page on ESM.[334] The opinions allow visitors to friend or "like" the campaign pages.[335] The distinction, the committee explained, is that,

326. *Id.*

327. Jesse Wegman, *Some Judicial Opinions Require Only 140 Characters*, N.Y. TIMES (Sept. 29, 2014), https://www.nytimes.com/2014/09/30/opinion/justice-don-willett-of-the-texas-supreme-court-lights-up-twitter.html?_r=0; *see also supra* notes 74–82.

328. Shoshana Weissmann, *Online and On the Bench the 'Tweeter Laureate of Texas' Is All About Judicial Engagement*, WEEKLY STANDARD (Sept. 17, 2015, 11:09 AM), http://www.weeklystandard.com/online-and-on-the-bench-the-tweeter-laureate-of-texas-is-all-about-judicial-engagement/article/1032288; *see also* Wegman, *supra* note 328 ("Justice Willett also noted that the American Bar Association's ethical guidelines approve of the 'judicious' use of social media in judicial elections as 'a valuable tool for public outreach.'").

329. Wegman, *supra* note 328 (reiterating the "use of social media in judicial elections" is a valuable and beneficial "tool for public outreach.").

330. State v. Thomas, 2016-NMSC-024, ¶ 50, 2016 N.M. LEXIS 149, 376 P.3d 184.

331. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

332. *Id*; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (addressing the use of ESM in judicial elections).

333. *See* N.M. Advisory Comm. on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media, at 13 (2016), http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf (noting how Florida, Massachusetts, and Oklahoma have adopted a stricter view than other states).

334. *See* Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (permitting the use of social media in judicial campaigns so long as "the publication of [comments and other material] does not otherwise violate the Code of Judicial Conduct").

335. *See id.* ("Political campaigns may also establish pages on social networking sites which allow users to list themselves as 'fans' or supporters of the candidate.").

unlike a friend request on a personal page, on a campaign's social networking site, "the judge or the campaign cannot accept or reject the listing of the fan," and, therefore, "the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge."[336] Likewise, ABA Formal Opinion 462 explains:

> [I]t is unlikely to raise an ethics issue for a judge if someone "likes" or becomes a "fan" of the judge through the judge's [ESM] political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.[337]

The Florida Ethics Opinion distinguishes between friends and fans on campaign pages, where fans can like the page or list the person as a supporter.[338] It goes on to state campaign pages should accept anyone who requests to be a friend.[339] Therefore, a campaign page does not present an ethical issue because fans are not accepted or rejected by the candidate or the social media director, unlike personal Facebook profiles that raise ethical dilemmas because friend requests must be accepted or rejected.

A Missouri Ethics Advisory Opinion suggests the campaign page be separate from the judge's personal page and information "should be limited to the judge's identity, qualifications, present position[,] or other facts that are relevant to allowing the voters to make an informed decision."[340] The critical requirement is that of monitoring to ensure that the ESM campaign site complies with the applicable code of judicial conduct in all regards.[341]

336. *Id.*

337. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013).

338. Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

339. *Id.* (declaring campaign pages may not control or reject fans).

340. Mo. Comm'n on Retirement, Removal and Discipline, Formal Op. 186 (2015).

341. Ariz. Supreme Court Judicial Ethics Advisory Comm., Advisory Op. 14-01 (2014); Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (2010); Fla. Judicial Ethics Advisory Comm., Op. 2016-13 (2016); Fla. Judicial Ethics Advisory Comm., Op. 2013-14 (2013); Fla. Judicial Ethics Advisory Comm., Op. 2012-15 (2012); Fla. Judicial Ethics Advisory Comm., Op. 2010-28 (2010); Fla. Judicial Ethics Advisory Comm., Op. 2010-21 (2010); Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009); La. Supreme Court Comm. on Judicial Ethics, Advisory Op. 271 (2016); Mass. Comm. on Judicial Ethics, Op. 2016-01 (2016); Mo. Comm'n on Retirement, Removal and Discipline, Op. 186 (2015); N.M. Advisory Comm. on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media (2016), http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf; N.Y. Advisory Comm. on Judicial Ethics, Op. 15-178 (2015); N.Y. Advisory Comm. on Judicial Ethics, Op. 15-121 (2015); N.Y. Advisory Comm. on Judicial Ethics, Op. 13-126 (2013); N.Y. Advisory Comm. on Judicial Ethics, Joint Op. 12-84/12-95(B)-(G) (2012); N.Y. Advisory Comm. on Judicial Ethics, Op. 07-135 (2007); N.D. Judicial Ethics

Even if the candidate delegates the creation and monitoring of the ESM campaign page to a committee or a third party, the judge is ultimately responsible for the content.[342] The New Mexico Supreme Court restricted the content on a judicial candidate's ESM page solely to qualifications.[343]

2. Political Campaigns—Refraining from Endorsing or Liking

One of the features of ESM is the ability to "like" or endorse a post.[344] Regardless of the type of media, judges are prohibited from "publicly endorsing or opposing any candidate for non-judicial office . . . [and] from engaging in 'any political activity other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.'"[345] Some states ethical advisory opinions have viewed a like as an inappropriate comment or inappropriate endorsement of a position or candidate.[346] "The act of 'liking' a campaign on Facebook, becoming a fan or 'friending,' or the equivalent indication of support or approval of a candidate on any social media also constitutes an endorsement and, therefore, is prohibited."[347]

In one of the first reported cases, in August 2009, New York State Judge Matthew A. Sciarrino, Jr. was involuntarily transferred because of his

Advisory Comm., Op. 2016-2 (2016); Utah Ethics Advisory Comm., Informal Op. 12-01 (2012); W. Va. Judicial Investigation Comm'n, Advisory Op. 2016-01 (2016); U.S. Courts Comm. on Codes of Conduct, Advisory Op. 112 (2015); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013).

342. N.M. Advisory Comm. on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media, at 25 (2016), http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf.

343. State v. Thomas, 2016-NMSC-024, ¶ 50, 2016 N.M. LEXIS 149, 376 P.3d 184.

344. *See supra* note 6, 12.

345. Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (2010).

346. N.M. Advisory Comm. on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media, at 26–27 (2016), http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf.

347. Cynthia Gray, *Social Media Endorsements,* JUDICIAL ETHICS & DISCIPLINE BLOG (June 21, 2016), https://ncscjudicialethicsblog.org/2016/06/21/social-media-endorsements/. Some states allow for a campaign page to like another page. Mass. Comm. on Judicial Ethics, Op. 2016-01 (2016); N.M. Advisory Comm. on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media, at 27 (2016), http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf; *see also* N.Y. Advisory Comm. on Judicial Ethics, Op. 15-121 (2015); U.S. Courts Comm. on Codes of Conduct, Advisory Op. 112 (2015) (informing judicial candidates and judges that "'liking' or becoming a 'fan' of a political candidate or movement" or otherwise affiliating with a political activity may constitute an ethical violation).

ESM activity.[348] Judge Sciarrino maintained a Facebook page, viewable by the public, through which he friended several lawyers; posted "blow-by-blow details of his location and schedule; updated his [Facebook] 'status' while on the bench; and once took a photograph of his crowded courtroom and posted it."[349] Sciarrino also maintained a MySpace page that listed twenty-four friends including an attorney who was running for a New York Assembly seat.[350] Sciarrino's MySpace page had an image of the New York Assembly candidate's "campaign poster which, when clicked, connect[ed] the user to [the candidate's] 'MySpace page,'" which had "multiple entries promoting [his] campaign for the [a]ssembly."[351] The New York code prohibits judges from "publicly endorsing or opposing . . . another candidate for public office."[352] Therefore, it has been alleged that at least one reason for Judge Sciarrino's transfer was due to his behavior on the ESM pages he maintained.[353]

There are other examples of judges being reprimanded for using social media to endorse political candidates. The Mississippi Supreme Court recently reprimanded a judge for endorsing a political candidate on social media, as well as other misconduct.[354] The judge had posted: "Cast your vote in the Senate District 16 Special Election. I will be voting for Angela Turner Lairy! . . . Let's not lose this seat!"[355] In a similar case, a New Mexico judge was ordered to retire for endorsing candidate for office and posting campaign materials.[356] A Kansas judge received a private sanction and a cease and desist order because the judge "liked" a comment on a candidate's Facebook page.[357]

In 2014, the Kentucky Judicial Conduct Commission issued two sanctions for inappropriate endorsements.[358] The first was a private

348. Daniel Leddy, *MySpace, the Judge and Judicial Propriety*, STATEN ISLAND ADVANCE, http://www.silive.com/opinion/danielleddy/index.ssf/2009/10/myspace_the_judge_and_judicial.html (last updated Oct. 20, 2009, 7:20 AM).

349. *Id.*

350. *Id.*

351. *Id.*

352. N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(1)(e) (2007).

353. Leddy, *see supra* note 349.

354. Miss. Comm'n on Judicial Performance v. Clinkscales, No. 2015–JP–01281–SCT (¶ 25) (Miss. 2016).

355. *Id.*

356. *In re* Romero, No. 30,316 (N.M. Feb. 13, 2015).

357. *See* KAN. COMM'N ON JUDICIAL QUALIFICATIONS, 2012 ANN. REPORT (reporting the judge was privately ordered to refrain from "publicly endorsing a candidate for any public office").

358. Order of Private Reprimand (Ky. Judicial Conduct Comm'n, Dec. 5, 2014),

reprimand of a judge who liked the Facebook pages of lawyers, law firms, and judicial candidates.[359] The second was a public reprimand to judicial candidate Dana M. Cohen,[360] thus, extending the endorsement prohibition to judicial candidates, in addition to sitting judges.[361]

For clarification purposes, in 2016, the Supreme Court of New Mexico accepted a stipulation to Permanent Retirement from Judicial Office in Lieu of Further Disciplinary Proceedings from Judge Philip J. Romero and barred him any future judicial office for repeatedly endorsing on Facebook a candidate for judicial office.[362] It is likely more states will follow suit by clarifying their stance on ESM endorsements of judicial candidates which have been molded by the various opinions and sanctions reviewed.

3. Political Campaigns—Refraining from Inappropriate Political Activity

Canon 5 of the Texas Code of Judicial Conduct addresses political activity and the restrictions on judicial candidates and campaigns apply on-line as well as in-person.[363] A candidate must always ensure their statements and conduct on social media comply with the Texas Code of Judicial Conduct, but—more importantly—they must maintain the dignity of the office.[364]

http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand120514.pdf; *In re* Cohen (Ky. Judicial Conduct Comm'n July 21, 2014), http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PublicReprimandCohen.pdf.

359. Order of Private Reprimand (Ky. Judicial Conduct Comm'n, Dec. 5, 2014), http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand120514.pdf.

360. *In re* Cohen (Ky. Judicial Conduct Comm'n July 21, 2014), http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PublicReprimandCohen.pdf. In addition to liking the Facebook post, Mrs. Cohen also made a contribution to another candidate's campaign, thus, violating the Kentucky Code of Judicial Conduct Canon 5A(1)(d). *Id.*

361. *See In re* Cohen (Ky. Judicial Conduct Comm'n July 21, 2014), http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PublicReprimandCohen.pdf (including candidates for judicial positions in the prohibition).

362. Supreme Court of New Mexico N0. 30,316 In the Matter of Hon. Philip J. Romero, *Pro Tempore Judge*, Inquiry nos. 2014-063 and 2014-075 http://www.nmjsc.org/wp-content/uploads/2016/07/Philip-Romero-SCT-Petition-2-2-15.pdf

363. TEX. CODE JUD. CONDUCT, Canon 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013).

364. *See* TEX. CODE JUD. CONDUCT, preamble, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013) ("Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."); MODEL CODE OF

In the following examples, judges were sanctioned due to misconduct that attacked the integrity of the office.

The Texas State Commission on Judicial Conduct publicly warned a judge for a Facebook post directing an offensive term to her political opponent, in addition to other misconduct.[365]

The Arizona Supreme Court suspended a judge for ninety days for, in addition to other misconduct, posting pictures of himself in his robe in front of the judicial bench on his campaign Facebook page.[366]

The Florida Supreme Court issued a thirty-day suspension without pay to a judge who used social media to ask her friends to help her judicial-candidate husband and correct perceived misstatements by his opponent.[367]

Based upon another judge's agreement, the Kentucky Judicial Conduct Commission suspended a judge for ninety days without pay for, in addition to making other comments: (1) making several comments on Facebook about a victim's impact statement and on his decision to grant probation; (2) publishing comments on Facebook that criticized the county commonwealth's attorney and accused him of advocating for all-white jury panels; (3) discussing a motion to certify the law filed by the Kentucky Attorney General on behalf of the county commonwealth's attorney while the case was pending before the Kentucky Supreme Court; and (4) taking to social media to criticize the public defender and other attorneys for not publicly supporting him in his dispute with the county commonwealth's attorney.[368]

The Minnesota Board on Judicial Standards publicly reprimanded a senior judge for comments he publicly posted on his Facebook page about cases dealing with political activity to which he was assigned as a senior

JUDICIAL CONDUCT Preamble ¶ 2 ("Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.") (AM. BAR ASS'N 2010).

365. Public Warning of Wright and Order of Additional Education, CJC No. 14-0651-JP (Tex. State Comm'n on Judicial Conduct Sept. 22, 2015), http://www.scjc.state.tx.us/pdf/actions/FY2016-PUBSANC.pdf.

366. *In re* Grodman, Nos. JC-15-0002, 14-216, at 10 (Ariz. Sept. 23, 2015), http://www.azcourts.gov/portals/137/reports/2014/14-216.pdf.

367. *In re* Krause, 166 So. 3d 176, 177 (Fla. 2015) (per curiam). The court viewed this as impermissibly participating in her husband's judicial campaign. *Id.*

368. *In re* Stevens, Agreed Order of Suspension (Ky. Judicial Conduct Comm'n Aug. 8, 2016), http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/AgreedOrderStevens.pdf.

judge.[369]

It must be noted the fine line between political activity associated with a political campaign and statements that may be attacking the integrity of the judiciary. Hopefully these examples from various states of judicial misconduct will help judges maintain ethical behavior on ESM behavior in all contexts.

V. CONCLUSION

ESM use will continue rise worldwide.[370] The use of ESM by judges will also continue to increase in jurisdictions where such use is permitted. ESM is a tremendous tool that can be used to educate the public about the third branch of government, and its members as well as promote transparency.[371] Also, ESM can be used effectively and is necessary to reach the voters in judicial campaigns in states where judges run for office.[372]

But as ESM use increases, so will the ethical challenges for judges. There is very limited guidance for judges as delineated in this Article. Only three states—West Virginia, New Mexico and Idaho—have amended their respective codes of judicial conduct to address ESM.[373] Only a third of the states have issued ethics advisory opinions regarding the use of ESM by judges.[374] All but three of these ethics advisory opinions are

369. *In re* Bearse, Amended Public Reprimand (Minn. Bd. on Judicial Standards Nov. 20, 2015), http://www.bjs.state.mn.us/file/public-discipline/1517-news-release-and-reprimand.pdf.

370. *See* Perrin, *supra* note 40 (reporting the number of American adults utilizing social media websites has risen from 7% in 2005 to nearly 65% in 2015).

371. *See* 2014 CCPIO SURVEY, *supra* note 60 (acknowledging courts' increasing use of social media and awareness of how social media can facilitate their connection with the public and the satisfaction of their duties "to be open, transparent, and understandable institutions").

372. *See* Wilson, *supra* note 75, at 32, 33 (advocating for judges to use ESM to reach the voters more efficiently).

373. *See* W. VA. CODE JUD. CONDUCT r. 3.1 cmt. 6 (2015) (explaining the rules governing a judge'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"); N.M. RULES ANN. r. 21-001 pmbl. (2015) (amending the preamble of the Code of Judicial Conduct, and encouraging judges "to pay extra attention" to their participation in social media so as to avoid ethical implications), IDAHO CODE JUD. CONDUCT r. 3.1 cmt. 5 (2016) ("While judges are not prohibited from participating in online social networks . . . they should exercise restraint and caution in doing so. A judge should not identify himself as such, either by words or images, when engaging in commentary or interaction that is not in keeping with the limitations of this Code.").

374. For the various opinions, *see* Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Advisory Op. 14-01 (2014); Cal. Judges Ass'n Judicial Ethics Comm., Advisory Op. 66 (2010); Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010); Fla.

permissive,[375] and the Massachusetts advisory opinion hints that it may relax its restrictive approach and join the other thirteen permissive jurisdictions.[376] These permissive opinions all charge judges to employ *extreme caution* when using ESM.[377] Subsequently, judges are left to their own discretion to avoid the appearance of impropriety, a subjective standard that lies in the eye of the beholder. Therefore judges should strive to be appropriate in every comment, photograph, and status update.[378] Judges must be vigilant and constantly review the posts, comments and content of their pages. Judges should be technologically proficient to stay current with and understand the policies, control, and privacy settings of the ESM site.[379] Lastly, judges should always be cognizant of the virality of ESM and of the immense outreach potential, always assuming that every post will be viewable by the public.[380]

Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Mass. Comm. on Judicial Ethics, Op. 2016-8 (2016); Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016); Mass. Comm. on Judicial Ethics, Op. 2011-6 (2011); Md. Judicial Ethics Comm., Op. 2012-07 (2012); Mo. Comm. on Ret., Removal, and Discipline, Op. 186 (2015); N.M. Advisory Comm. on the Code of Jud. Conduct, Advisory Op. Concerning Social Media (2016); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009); N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013); N.Y. Advisory Comm. on Judicial Ethics, Op. 14-05 (2014); Ethics Comm. of the N.C. State Bar, 2014 Formal Ethics Op. 8 (2014); Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7 (2010); Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. No. 17-2009 (2009); Tenn. Jud. Ethics Comm., Advisory Op. 12-01 (2012); Utah Courts, Informal Advisory Op. 2012-1 (2012); Wash. Ethics Advisory Comm., Op.09-05 (2009); ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 462 (2013); U.S. Comm. on Codes of Conduct, Advisory Op. 112 (2015).

375. Conn. Comm. on Judicial Ethics, Informal Op. 2013-06 (2013); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2010-06 (2010); Fla. Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Mass. Comm. on Judicial Ethics, Op. 2016-8 (2016); Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016); Mass. Comm. on Judicial Ethics, Op. 2011-6 (2011); and Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

376. Mass. Comm. on Judicial Ethics, Op. 2016-1 (2016).

377. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (quoting MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2011).

378. *See* Rabe, *supra* note 176 (reiterating the warnings to judges pertaining to content on ESM).

379. *See* N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009) (suggesting judges "stay abreast of new features of, and changes to, any social networks they use").

380. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (quoting MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2011). Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to compromise the independence, integrity and impartiality of the judge, as well as to

The use and impact of Facebook, Twitter, and other ESM networks will continue to increase, and as the use by judges' increases, so does the possibility of misuse. The responsibility to self-monitor remains with each judge and the challenge will be to correctly employ the appropriate level of decorum when using ESM.

Hopefully, the examples in this Article will provide judges who sit in permissive jurisdictions some guidance for the ethical use of ESM. Otherwise, it would be helpful to urge the ethics advisory committees of the many states who have no guidance to issue opinions to aid the judges in their determination of what is acceptable or unacceptable in the world of social media.

The best advice to judges who use ESM can be summarized in the words of the "Tweeter Laureate of Texas," Justice Don Willett of the Texas Supreme Court: "Judges must always be judicious."[381]

undermine public confidence in the judiciary

381. John Council, *The Social Media Justice: Texas Supreme Court Justice Don Willett Gets Attention with His Tweets, and His Opinions*, TEX. LAW. (Oct. 3, 2016), http://www.texaslawyer.com/id=1202767845029/The-Social-Media-Justice-Texas-Supreme-Court-Justice-Don-Willett-Gets-Attention-With-His-Tweets-and-His-Opinions?slreturn=20170108193721.