Ethical Pitfalls of Social Media
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A. Introduction

The good news is that a judge may participate in electronic social networking. However the judge must comply with relevant provisions of the code of judicial conduct and avoid any conduct that would undermine the judge's independence integrity impartiality or create an appearance of impropriety. See **Appendix-1** hereto for the ABA Formal Opinion 462, Judges' Use of Electronic Social Networking Media, was issued on February 21, 2013 by the ABA Standing Committee on Ethics and Professional Responsibility.

The Nevada Code of Judicial Conduct is virtually identical to the model code of judicial conduct. See **Appendix-2**.

A 2012 study conducted by the Conference of Court Public Information Officers (CCPIO) revealed that 46.1 percent of the 238 judges surveyed use social media sites—a noticeable increase from the 40.2 percent reporting usage in 2010. Of judges who stood for political election, 60.3% use social media sites 2012. CCPIO, *New Media Survey* 5 (July 31, 2012) *available at* http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/.

Members of the legal profession, including judges, continue to embrace social networking in both their personal and professional lives. *See* Nicole Black, *A Look at Lawyers' Use of Technology in 2011*, Sui Generis (Oct. 4, 2011), *see* http://nylawblog.typepad.com/suigeneris/2011/10/a-look-at-lawyers-use-of-technology-in-2011.html.

The *2013 CCPIO New Media Survey* asked judges and court personnel in all 50 states questions about what they are experiencing with new media, what their perceptions are of the changing media environment, and how it affects the administration of justice. Released August 5, 2013 at the CCPIO 22nd Annual Meeting in Salt Lake City and available online at www.ccpio.org.

Among the report's key findings:

- After growing between 2010 and 2012 (6.7 percent in 2010 and 13.2 percent in 2012), courts' reported use of Facebook declined slightly in 2013 (11.3 percent).
- Twitter and Facebook are now the most popular tools among courts; Twitter is used most.
- YouTube use by courts eclipsed Twitter and Facebook in one specific category: explaining court processes to pro se litigants.

- Courts are attempting to control communication from the courtroom by developing formal social media policies. (Forty-five states, as well as the District of Columbia, Guam, and Puerto Rico, reported that they have a courtroom policy regulating at least one social-media tool).

- The 2013 survey did not ask participants simply to indicate whether they use a particular social media tool. Rather, the survey separated such questions by personal and professional uses and whether they read/consume content and post/share content.

  - Judge respondents use Facebook on a personal basis considerably more than they do professionally. For example, 37 percent report using Facebook personally to read and consume content, while 23.1 percent say they post and comment on personal Facebook pages. In contrast, 9.83 percent of judges said they read and consume content on Facebook in their professional roles, while 5.33 percent said they post or share content in a professional capacity.
    - In previous surveys, judge respondents who said they use social media profile sites grew from 40 percent in 2010 to 46 percent in 2012 and a large majority said they use Facebook specifically. These specific questions were not asked in 2013.
  - When examining Twitter use, it was determined that 11.7 percent of judge participants say they use Twitter personally to read or consume content. Likewise, 5 percent said they use Twitter personally to post or share content. Twitter is used by 5 percent of judges in a professional capacity to read or consume content, while 3.1 percent say they use Twitter professionally to post or share content.

- The most popular social medium for personal use is YouTube, with a majority favoring it to read and consume content (Second was Facebook). Another surprise is the use of Pinterest on a personal basis, which was second in popularity to Facebook when respondents post, comment, or share content.

- Similarly, when using social media on a professional basis, LinkedIn was the most popular tool to read and consume content, followed by Google+ and YouTube.

- Reported judicial campaign use of social media appears more conservative than courts themselves, with results showing significantly low use of social media (less than 20 percent).

Please resist temptation

All judicial ethics opinions on the use of social media issued thus far have recognized that the use of social media by judges poses unique and potentially significant problems for the judiciary. Two examples illustrate situations where judicial officers did not fully consider the restrictions imposed by the judicial codes on their use of social media.

In Nevada, a criminal defense attorney who also served as a judge pro tem lost his pro tem position with the North Las Vegas Justice Court due to his postings on his MySpace page. He listed his personal interests as "'[b]reaking [his] foot off in a prosecutor's ass and improving

[his] ability to break [his] foot off in a prosecutor's ass."' See K.C. Howard, MySpace Judgment: Guilty, Las Vegas Rev.-Journal, Aug. 13, 2007, at 2, available at http://www.lvrj.com/news/9121536.html (noting that because of comments made on MySpace, the North Las Vegas Justice Court, "decided not to use [the pro tem judge's] services any longer").

In North Carolina, the Judicial Standards Committee issued a public reprimand for a state district court judge who "friended" the attorney for the defendant, Charles A. Schieck, in a child custody and child support case. During a meeting in Judge Terry's chambers, the judge noted he believed that the defendant had an affair, to which Schieck stated "'I will have to see if I can prove a negative."' That same night, Schieck posted "how do I prove a negative" on his Facebook page. Judge Terry saw that comment and, on his own page, posted that he had "two good parents to choose from" and "Terry feels that he will be back in court." Schieck then posted: "I have a wise Judge." Judge Terry continued to preside over the hearing and made an oral ruling. After the hearing, he finally disclosed to the parties what he had done. Judge Terry disqualified himself only when faced with motions seeking a new trial and his disqualification. He later was publicly reprimanded for his conduct.

See Pub. Reprimand of B. Carlton Terry, Jr., District Court Judge (Judicial District 22), Before the Judicial Standards Comm. of N.C., Inquiry No. 08-234, 2 (2009), available at http:// www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf [hereinafter Pub. Reprimand of B. Carlton Jerry, Jr.] ("Judge Terry and Mr. Schieck designated themselves 'friends' on their 'Facebook' accounts.").

Judge Terry also engaged in ex parte research of the website for plaintiff's photography business. Prior to announcing his finding in the case, he quoted a poem that he found on the website. He later explained to the investigator from the Judicial Standards Commission that "he quoted the poem because it gave him 'hope for the kids and showed that Mrs. Whitley was not as bitter as he first thought."' Id. at pp. 2-3.

B. Ethics Opinions involving Judges and Social media

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 426 (2013). (See Appendix-1)

ABA Formal Opinion 462, Judges' Use of Electronic Social Networking Media, was issued on February 21, 2013 by the ABA Standing Committee on Ethics and Professional Responsibility, and it reminds judges to heed the ABA Model Code of Judicial Conduct when using "electronic social media" ("ESM"). It will likely will be looked at as a guide for states examining this issue in the future. An excellent analysis of this opinion was written by John G. Browning and can be found in an article entitled *Why Can't We Be Friends? Judges and Social Media* at 68 U. Miami L. Rev. 487 (Winter 2014). Mr. Browning notes that:

"The ABA Opinion is pro-social media and acknowledges that "[j]udicious use" of such sites can be a valuable means of reaching out to and remaining accessible to the public. 68 U. Miami L. Rev. 487 at 551. Mr. Browning further notes that Formal Opinion 462 reminds judges that they must "maintain the dignity of the judicial office at all times, and avoid both impropriety

and the appearance of impropriety in their professional and personal lives," particularly with regard to who they connect with and what they share via social media." Id at pp. 511-512 . (Citations omitted).

Additionally Mr. Browning notes that "The opinion also provides valuable guidance on disclosure or disqualification concerns for judges using the same social media sites used by lawyers and others who may appear before a judge. Judges can be Facebook "friends" with lawyers or parties who appear before them, but when it comes to disclosure, "context is significant." The opinion points out that "[b]ecause of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed." Id. at p. 512 (Citations omitted)

Mr. Browning commends the California Judges Association Judicial Ethics Committee Opinion 66, issued in November 2010. Id. at 519. Browning noted that: "While the California Committee gave "a very qualified yes" to the questions of whether a judge may be a member of an "online social networking community" and whether a judge may be Facebook "friends" with lawyers who may appear before him, it was not quite as receptive when it came to judges "friending" lawyers who actually appear before the judge. On that point, the Committee answered in the negative." Id at p. 519. (Citations omitted).

Benjamin P. Cooper in the article *Judges and Socialmedia: Disclosure as Disinfectant* at 17 SMU Sci. & Tech. L. Rev. 521 Winter, 2014 wrote at pages 531-532 that:

The ABA ethics opinion concludes that judges should decide whether to disclose online friendships on a case-by-case basis. The ABA Opinion, for example, said that a "judge should conduct the same analysis [of a socialmedia connection] that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally." It then advised that judgesshould "very carefully consider whether [socialmedai] connections must be disclosed" if the judge and the lawyer engage in "current and frequent communication." But the Opinion went on to say that the judge need not review all socialmedia connections "if a judge does not have specific knowledge of an electronic socialmedia [ESM] connection" that may potentially or actually be problematic." In those circumstances, the judge should consider a number of factors: the number of friends that a judge has, whether the judge has a practice of accepting all friend requests, and other factors . . . ." The ABA Opinion concludes, however, that "because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection."(Citations omitted).

Cooper goes on to say that:

"Finally, the ABA's recent opinion, like the California opinion, did not clearly answer whether it is a violation per se for judges to connect on socialmedia with lawyers and litigants who may appear before them. Instead the ABA mentioned that state committees "have expressed a wide range of views" on the issue and noted that "designation as [a socialmedia] connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person." The opinion concluded that "context is significant." Id. at p. 529. (Citations omitted).

Cooper notes that: The problem is that the ABA's opinion, and most of the state ethics opinions, do not provide judges with clear guidance on what socialmedia connections are permissible. Some of the ambivalence in the opinions undoubtedly reflects uncertainty about what it means to "friend" someone on socialmedia. For example, some users "friend" only friends they know in the nonvirtual world, but other users "friend" anybody, even those they do not know. As the Ohio Committee opinion artfully stated: "A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network 'friend' may or may not be a friend in the traditional sense of the word." Id. at p. 529. *See* Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 210-7 (2010).

With the confusion regarding the meaning of friendship on socialmedia, a "digitally enlightened or realist approach" could provide needed guidance to judges. Id. at p. 529.

Florida, Oklahoma, and Massachusetts have taken steps to preserve the public's confidence in the judiciary and these opinions should serve as a good starting point for placing reasonable restrictions on a judge's use of social media. See generally Fla. Op. 2009-20, supra note 78; Okla. Op. 2011-3, supra note 64; Mass. Op. 2011-6, supra note 70.

These states have announced that a judge may utilize social media in his or her personal and professional life, but may not engage in social networking with anyone who may appear before the judge; and may not allow those individuals to identify the judge as a "friend" on their profile pages.

2. Florida Judicial Ethics Advisory Committee

Opinion Number: 2009-20. Florida Supreme Court, Ethics Advisory Committee (November 2009). This opinion addressed several questions concerning judicial use of social networking sites, including whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend." The Committee concluded that this is not permitted because, "The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge."

Opinion No. 2012-12 (May 9, 2012) Held that a judge may NOT add lawyers who may appear before the judge as "connections" on the professional networking site, Linked In, or permit such lawyers to add the judge as their "connection" on that site.

The Committee's previous Opinion No. 2009-20 concerning Facebook and similar social media sites concluded that it was not permissible for a judge to "friend" a lawyer who *may* appear before the judge, stating that it conveyed the impression that such a lawyer is in a special position to influence the judge. The Committee found no meaningful distinction between Facebook and LinkedIn because the process of selecting persons to be connections on LinkedIn, and the communication by the judge of the list of the judge's connections to others who the judge has approved, violates the same ethical canons.

The Florida Committee found unpersuasive California Judicial Ethics Committee, Opinion No. 66, which concluded that it is permissible for a judge to accept a lawyer as a Facebook "friend" or LinkedIn "contact" if that lawyer may appear before the judge. However, the California committee opined that a judge may not approve the lawyer, or have a lawyer as a "friend," if the lawyer has a case pending before the judge.

The Florida committee found such an approach unfeasible since it would require each judge who had accepted a lawyer as a friend or connection to constantly scan the cases assigned to the judge, and the lawyers appearing in each case, and "defriend" or delist each lawyer upon a friend or connection making an appearance in a case assigned to the judge.

3. Oklahoma Judicial Ethics Advisory Panel Opinion 2011–3 July 6, 2011.

This opinion addresses the questions (1) May a Judge hold an internet social account, such as Facebook, Twitter, or Linkedin without violating the Code of Judicial Conduct? and (2) May a Judge who owns an internet based social media account add court staff, law enforcement officers, social workers, attorneys and others who may appear in his or her court as "friends" on the account? The panel concluded to the first question, yes with restrictions. However, the panel concluded that the answer to question 2 is no.

Code of Judicial Conduct does not prohibit a judge from holding an internet social networking account that includes as "friends" any person who does not regularly appear or is unlikely to appear in the judge's court, as long as he does not use the network in a manner that would otherwise violate the Code *BUT* prohibits a judge from adding lawyers who appear in the judge's court, social workers, law enforcement officers, or others who regularly appear in court in an adversarial role to an internet social networking account as "friends," and prohibits such persons from adding the judge as a "friend," as conveying an impression, or allowing others to convey the impression, that a person is in a special position to influence the judge; whether such posting would mean that the party was actually in a special position is immaterial, as it would or could convey that impression.

4. Massachusetts

Massachusetts Committee on Judicial Ethics, Opinion No. 2011-6 (Dec. 28, 2011). This advisory opinion provides guidance on the parameters of Code-appropriate judicial use of Facebook for a judge who is making the transition from private practice to a judgeship with the Trial Court. The opinion concludes, "The Code does not prohibit judges from joining social networking sites, thus you may continue to be a member of Facebook, taking care to conform your activities with the Code. A judge's "friending" attorneys on social networking sites creates the impression that those attorneys are in a special position to influence the judge. Therefore, the Code does not permit you to "friend" any attorney who may appear before you."

5. Arizona

Use of Social and Electronic Media by Judges and Judicial Employees, Advisory Opinion 14-01. Arizona Supreme Court Judicial Ethics Advisory Committee. (May 5, 2014). See **Appendix 3**

A copy of this opinion is provided because of the fact that it was recently issued and is comprehensive.

The opinion discusses the use of LinkedIn and cites Utah Informal Judicial Ethics Opinion 12–01 (August 31, 2012) for the proposition that a judge may not use LinkedIn to recommend a lawyer who regularly appears before him or her. It is also problematic for a judge to recommend the employment by clients of any professional by using the judge's position or title. Using the press stage of judicial office to advance the personal or economic interests of another violates Rule 1.3.

The use of Facebook is not prohibited even when the site reveals the judge's professional status. Nevertheless, a judge must avoid participating in or being associated with discussions about matters falling within the jurisdiction of his or her court. The question arises whether disqualification is required in cases involving litigants or lawyers or Facebook "friends" of the judge's. Disqualification decisions must be guided by rule 2.11. The test is whether the judge's impartiality in a proceeding might reasonably be questioned.

Rule 2.9 (C) prevents judges from independently investigating the facts of cases except as otherwise provided by law.

There are some restrictions on judges "friending" elected officials or "liking" election related Facebook page. If the judge is simply a friend of an elected state representatives on their official Facebook page, a disqualification issue would likely rise only in connection with a case where the representative is litigant, lawyer, witness or other participant. On the other hand, if the state representative is standing for reelection, the judge may not be a "friend" of the campaign committee's Facebook page or "like" that page. Such associates indicate the judge supports and is endorsing the individual's reelection.

Arizona Judicial Employees

The aforementioned rules for judges apply to judicial employees and have their counterpart in the Arizona Code of Conduct for Judicial Employees and are also discussed in Opinion 14-01.

6. California

California Judges Association Formal Opinion No. 66 - Online Social Networking. (2011). This judicial ethics opinion addresses three questions: 1) May a judge be a member of an online social networking community? 2) May a judge include lawyers who may appear before the judge in the judge's online social networking? and 3) May a judge include lawyers who have a case pending before the judge in the judge's online social networking? The answer to questions 1) and 2) is a very qualified yes. The answer to question 3) is no.

7. Kentucky

Kentucky Judicial Ethics Opinion JE-119, Judges` Membership on Internet-Based Social Networking Sites. Ethics Committee of Kentucky Judiciary (Jan. 20, 2010). This ethics opinion addresses the question, "May a Kentucky Judge or Justice, consistent with the Code of Judicial Conduct, participate in an internet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be "friends" with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials?" The Ethics Committee concluded that the current answer is a "qualified yes." See the full opinion for details.

8. Maryland

Published Opinion #2012-07. Judge Must Consider Limitations on Use of Social Networking Sites. Maryland Judicial Ethics Advisory Opinion (June 12, 2012). This opinion addressed the question of what are the restrictions on the use of social networking by judges?" and whether the "mere fact of a social connection creates a conflict." The answer was "A judge must recognize that the use of social media networking sites may implicate several provisions of the Code of Judicial Conduct and therefore, proceed cautiously."

9. New York

Advisory Opinion 08-176. Advisory Committee on Judicial Ethics (Jan. 29, 2009). This opinion states, "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."

In **Opinion 13-39**, dated May 28, 2013, the Committee held "that the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action."

10. Ohio Judicial Ethics Advisory Opinion 2010-7. Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline (Dec. 3, 2010). This opinion answers the question, "May a judge be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge?" Ohio's Board of Commissioners on Grievances & Discipline finds that a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge, but cautions, "As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Code of Judicial Conduct."

11. South Carolina

Opinion No. 17-2009, Re: Propriety of a magistrate judge being a member of a social networking site such as Facebook. South Carolina Advisory Committee on Standards of Judicial Conduct (October 2009). This advisory opinion addresses the propriety of a magistrate judge being a member of Facebook. The Committee concluded that "Allowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge. Thus, a judge may be a member of a social networking site such as Facebook."

12. Washington

In **Opinion 09-05** the Washington State Ethics Advisory Committee addressed the question of whether a judicial officer can have an internet blog where the judicial officer would post an essay and people would be able to comment and the judicial officer respond to those comments. The Opinion state that the Code of Judicial Conduct does not specifically prohibit a judge from blogging on the internet but "even though a judicial officer may post a blog on the internet, caution should be exercised as to how that blog is used and comments responded to in order to make sure that the judicial officer's impartiality is not called into question or the action does not impair the judicial officer's ability to decide impartiality issues that come before the judicial officer."

C. Cases involving Judicial Contacts with parties through social media

1. *Lacy v. Lacy* 320 Ga.App. 739Court of Appeals of Georgia (March 25, 2013)

Trial judge was not obligated to recuse himself sua sponte in custody proceedings incident to divorce based upon father's claims that judge had personal bias or prejudice toward mother and had personal knowledge of facts pertinent to father's emergency change-in-custody motion, where father's claim was supported only by copy of mother's social media posting claiming that trial judge had met with mother's father prior to hearing and that father had lost children; mother's posting provided no information about circumstances of meeting or what, if anything, was discussed, and neither parent's perspective was dispositive on issue of judge's knowledge. West's Ga.Code Ann. § 15–1–8; Code of Jud. Conduct, Canon 3(E)(1)(a).

2. *Youkers v. State* 400 S.W.3d 200 Court of Appeals of Texas

Communication with and designation of trial judge as a "friend" by assault victim's father on social media website was insufficient to show actual or apparent bias, as required for recusal of judge who ruled on defendant's motion for new trial; judge testified at the motion regarding his limited relationship with father, and stated that he ceased reading father's message once he realized it was an ex parte communication, placed a copy of the communications in court's file, disclosed incident to the lawyers, and contacted judicial conduct commission to determine if further steps were required. Vernon's Ann. Texas Rules Civ. Proc., Rule 18b.

The judge acknowledged he received a Facebook message from the girlfriend's father seeking leniency in sentencing. However, the judge testified that he only casually knew the father and that when he received the message, he replied back online telling the father that the

message violated ex parte communication rules. “A reasonable person in possession of all of the facts in this case likely would conclude the contact between the judge and the father did not cause the judge to abandon his judicial role of impartiality,” the court found. “Besides the evidence that the judge and the father’s acquaintance was limited, any appearance of bias created by the Facebook communications was dismissed quickly by the judge’s handling of the situation.”

The appeal was brought by William Scott Youkers, who pleaded guilty to assaulting his girlfriend and later had a community sentence revoked after testing positive for methamphetamines. The defendant sought a new trial on the basis that the judge in his case did not disclose a Facebook connection with the girlfriend’s father. Prior to the plea agreement, the father sent Becker a message through the social media site, asking that he go easy on Youkers.

Benjamin P. Cooper in the article *Judges and Socialmedia: Disclosure as Disinfectant* at 17 SMU Sci. & Tech. L. Rev. 521 Winter, 2014 wrote that after Pennsylvania District Judge Thomas Placey continued a preliminary hearing for a defendant facing criminal charges arising out of a standoff with the police, some observers were unhappy. They took to the Internet and quickly found Judge Placey’s Facebook page, which showed that defendant Barry Horn, Jr. was among Judge Placey’s hundreds of Facebook “friends.” Judge Placey said that he was only acquainted with Horn because he knew Horn’s father, but he stated that he had never socialized with the defendant and did not consider him a real friend. Judge Placey also told the media that he accepts every “friend” request he receives. After the case received media attention, Judge Placey recused himself though he never explained why.

Cooper mentions another Pennsylvania case where Municipal Judge Charles Hayden declined to recuse himself in a drunken driving case against State Representative Cherelle Parker, who was one of Judge Hayden’s 1,316 Facebook friends. Judge Hayden claimed that he did not know Representative Parker apart from their Facebook accounts; Parker’s attorney, Joseph Kelly, stated that Facebook friendships “do not necessarily present a potential conflict of interest.” After Judge Hayden suppressed evidence in the case, the Attorney General’s Office appealed, arguing that Judge Hayden should have recused himself based on his Facebook connection with the defendant. The Philadelphia Court of Common Pleas reversed the decision and held that Judge Hayden’s Facebook friendship with the defendant required recusal. Id. at 521-522 (Citations omitted) .

D. C**ontact with attorneys**

All of a judge's social contacts, however made, are governed by the requirement that judges must act at all times in manner " that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and must "avoid impropriety and the appearance of impropriety ." Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, “Tweet Justice,” SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to “de-friend” her from their ESM page when they’re trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), article available at *http:// www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_ justice.html*.

Helia Garrido Hull wrote an article for the *Symposium: The Age of Social Media and Its Impact on the Law* entitled *Why Can't We be Friends: Preserving Public Confidence In the Judiciary Through Limited Use of Social Networking* 63 Syracuse L. Rev. 175 (2013). In the article Hull states: All judicial ethics opinions on the use of social media issued thus far have recognized that the use of social media by judges poses unique and potentially significant problems for the judiciary. However, only Florida, Oklahoma, and Massachusetts have taken appropriate steps to preserve the public's confidence in the judiciary and these opinions should serve as a good starting point for placing reasonable restrictions on a judge's use of social media. See generally Fla. Op. 2009-20, supra note 78; Okla. Op. 2011-3, supra note 64; Mass. Op. 2011-6, supra note 70.

These states have announced that a judge may utilize social media in his or her personal and professional life, but may not engage in social networking with anyone who may appear before the judge; and may not allow those individuals to identify the judge as a "friend" on their profile pages. Id. at p. 194.

In an article entitled *Don't Be a Twit: Avoiding The Ethical Pitfalls Facing Lawyers Utilizing Social Media In Three Imnportant Arenas – Discovery, Communications with Jduges and Jurors, and Marketing* 20 Temp. Pol. & Civ. Rts. L. Rev. 297 (Spring 2011) authored by Hope A. Comisky and William M. Taylor it was stated that Model Rule of Professional Conduct 3.5(b), permits an attorney to "friend" a judge through a SNS and converse with him or her so long as the communication does not take place "during the proceeding." And once two people are "friends," they can monitor each other's profiles even though they are not directly communicating with each other. In this way, an attorney who is SNS "friends" with a judge may monitor the judge's postings without initiating any contact with the judge.

Likewise, a judge may see the attorney's postings without initiating any contact with the attorney. Social networking sites then pose the risk that an attorney may, intentionally or not, review any postings that inform the attorney about the judge's mood, temperament, or preferences or, of more concern, postings that a judge inappropriately makes about a case. Id. at 310-311.

To eliminate this risk and comply with Rule 3.5, at the start of any case in which an attorney appears before a judge whom he has "friended" or who belongs to the same network as the judge, the attorney and the judge should "defriend" one another. Id. at 311.

Judges should refrain from contacts with lawyers have cases pending before them

Rule 2.11 of the Code of Judicial Conduct requires that judges disqualify themselves "in any proceeding in which the judge's impartiality might reasonably be questioned."

MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011). The federal judicial recusal statute is modeled on the Code and provides, in relevant part, that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455 (2012). Although I focus on Rule 2.11(A),judges' socialmedia connections also implicate at least two other provisions in the Code of Judicial Conduct: (1) MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2011) ("Judges must "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."); and (2) MODEL CODE OF JUDICIAL CONDUCT R. 2.4(C) (2011) ("A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.").

This standard goes beyond cases of actual bias and also prohibits judges from sitting in cases involving the appearance of impropriety. A comment to the Code provides: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2011).

The words "reasonably" in the Code provision and "reasonable" in the comments indicate that this is an objective standard. Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned"* , 14 GEO. J. LEGAL ETHICS 55, 58 (2000) [hereinafter Abramson, *Appearance*] ("The use of the term 'reasonably' suggest that the viewpoint for assessing the presence of an appearance of impropriety is not from the perspective of the judge whose continued control of the case is at issue.").

California Judges Ass'n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge).

Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle).

Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship" that should be disclosed and/or require recusal).

Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules).

South Carolina Jud. Dep't Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge's judicial position).

See also John Schwartz, "For Judges on Facebook, Friendship Has Limits," N.Y. TIMES, Dec. 11, 2009, at A25. *Cf.* Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge's judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge's office).

The Florida Judicial Ethics Advisory Committee was one of the first to address the issue in 2009 when it prohibited judges from adding lawyers that come before them as "friends" on social media sites. Fla. Judicial Ethics Advisory Op. 2009-20.

The Florida ethics opinion was cited in *Domville v. State*. 103 So. 3d 184, 185 (Fla. 4th Dist. Ct. App. 2012), *cert. denied*, No. SC13-121, 2013 WL 599133, at *1 (Fla. Feb. 14, 2013). The Committee and the *Domville* court relied on Florida Code of Judicial Conduct Canon 2B's rule that "A judge shall not … convey or permit others to convey the impression that they are in a special position to influence the judge." *Id*. In *Domville,* Florida's Fourth District Court of Appeal quashed an order denying disqualification of a trial judge in a criminal proceeding and remanded because the judge and the prosecutor were *Facebook* friends. The online friendship was legally sufficient, according to the court, to conclude that "a reasonably prudent person [would] fear that he could not get a fair and impartial trial." The fear was well founded, especially considering the judge explained on his *Facebook* page that his "'friends' consisted 'only of [his] closest friends and associates, persons whom [he] could not perceive with anything but favor, loyalty, and partiality.' " Lea P. Valdivia in an article entitled *No, We Can't All be Facebook Friends: Ethical Implications of Using Social Media* for the American Association For Justice in their 2013 Annual AAJ-PAPERS 36 (2013).

California took a more accepting position when addressing the ethical implications of contemporary social networking mediums. *See* Md. Judicial Ethics Comm., Op. 2012-07 (citing Cal. Judicial Ethics Comm. Op. 66). The ethics committee applied similar standards to social media as it does to judges' involvement in social and civic organizations. Specifically, it refused to adopt a "per se prohibition of social networking with lawyers who may appear before [them]." Rather, the committee concluded that courts should consider several factors when deciding if an interaction is permissible including: the personal nature of the site; the number of friends on the judge's page; how the judge decides who he or she is friends with on the site; and how regularly the attorney appears before the judge.

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Under Rule 2.9(A) of the ABA Model Code of Judicial Conduct, "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . . ." The purpose of this rule is to ensure that those who have a legal interest in a proceeding, and their counsel, will be heard without procedural or tactical advantage. See Model Code of Judicial Conduct, R. 2.9(A)(1)(a) (allowing a judge to communicate ex parte only when the judge believes such communications will not give one party a "procedural, substantive, or tactical advantage as a result of the ex parte communication").

It is suggested that a broad disclosure rule would solve most of these problems. A broad disclosure regime would serve two primary purposes. First, a broad disclosure rule would best serve the primary policy behind disclosure: maintaining the litigants' and the public's confidence in the judiciary. Second, it would provide much needed clarity to judges who have been seeking guidance regarding the ethical use of social media See the article by Benjamin P. Cooper *Judges and Socialmedia: Disclosure As Disinfectant* SMU Science and Technology Law Review Winter, 2014.

E. Use of electronic social media and election campaigns

Canon 4 of the model code permits a judge or judicial candidate to, with certain exceptions, engage in political or campaign activity the code does not address or restrict the judge or campaign committees method of communication in jurisdictions where judges are

elected the use of social media has become a campaign tool to raise funds and provide information about the candidate.

Several states permit the use of social media in judicial campaigns and retention elections, so long as it comports with ethical guidelines and the law. See Ginny LaRoe, Judges Walk Tightrope with Online Presence, Recorder (May 20, 2011), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202494750458/ ("[Judge Victoria Kolakowski] became the country's first openly transgender trial judge to win election when she defeated a prosecutor in a runoff. She used social networking to do it, and wants to stay connected to supporters.").

To date, none of the states that have issued advisory opinions have imposed limitations on the use of social media in judicial campaigns. See, e.g., Fla. Judicial Ethics Advisory Comm., Op. 2009-20. Even Florida, which adopted a restrictive approach to social media, allows the use of social media sites in judicial campaigns.

The absence of any clear guidelines on the use of social media in judicial campaigns is important because evidence suggests elected judges are more likely to use social media. See Nathanael J. Mitchell article *Judge 2.0: A New Approach To Judicial Ethics In The Age Of Social Media* 2012 Utah L. Rev. 2127.

For example, members of Washington's Supreme Court even use social media to communicate with the public about elections. E.g., Michael Reitz, The Role of Social Media in Judicial Elections, Sup. Ct. Wash. Blog (Mar. 5, 2010), http:// www.wasupremecourtblog.com/2010/03/articles/judicial-elections-1/the-role-of-social-media-in-judicial-elections/. Id. at p. 2147 fn. 148.

Yet, the effect of the rules on candidates or judges who would like to leverage social media in elections but do so in an ethical manner remains unclear. For example, since ethics rules may only apply after the individual formally becomes a candidate, does this mean that there are no restrictions on the use of social media during the campaign, despite the fact that a Facebook group or profile can exist long after the election is over? How should state judiciaries account for features like Facebook's timeline, which permits users to view historical versions of a candidate's Facebook page? If a state decides to limit the social media activities of declared judicial candidates, should the candidate be allowed to simply disassociate herself from her Twitter feed, or is there an affirmative duty to remove a self-created Twitter feed or Facebook group in its entirety? Id. at pp. 2148-2149.

Given the increasingly important role social media plays in elections, state advisory boards will need to determine an effective way of addressing the relationship between social media, ethics, and judicial elections. In fact, as discussed in each of the preceding sections, similar issues or quandaries arise under each of the Canons of the Model Code. Yet, the institutions traditionally responsible for crafting ethical guidelines in response to specific inquiries or problems may be ineffective when it comes to responding to rapidly evolving social media platforms. Instead, a proactive and holistic approach to social media--similar to the one adopted in the state of Utah--may be the preferable alternative. Id. at p. 2148.

In Florida it is been determine by that states judicial ethics committee that a judge or judicial candidate may establish their Candace candidacy by using websites and electronic social media so long as the sites are not starred or maintained by the judge or judicial candidate personally Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).

John G. Browning points out in his article with Don Willett entitled *Rules of Engagement* for the Texas Bar Journal February 2016 at pp. 100-102 that judges and candidates are prohibited from publicly endorsing or posing a candidate for public office. So even though some social media sites allow users to apply "like" labels, judges should be aware that clicking such button on others political campaigns could be perceived as a violation judicial ethics. *See* "Kansas judge causes stir with Facebook 'Like' where the judge "liked" the Facebook page of a candidate for sheriff. The Associated Press, July 29, 2012, http:// www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes stir_with_facebook__like_.html.

It is a long-standing rule in Nevada that a judge or other public official shall exercise reasonable caution and restraint to ensure that his private endorsement is not in fact use the public endorsement *See* Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").

F. Cutting ties on Social Media

It has been stated that "Even when mandated to do so, breaking connections is not a simple undertaking. In addition to ethical considerations, doing so requires tact, sincerity, and a keen sense of timing." See Kelly Lynn Anders paper entitled *Ethical Exits: When Lawyers and Judges Must Sever Ties On Social Media* at 7 Charleston L. Rev. 187 Winter 2012-2013 at page 203.

In a recent newspaper article about the Florida opinion declaring that lawyers and judges may not be connected on Facebook, the issue was raised of severing ties. Colleen Jenkins, Florida Ethics Panel Urges Judges to Unfriend Lawyers From Their Facebook Pages, Tampa Bay Times, Dec. 15, 2009, http:// www.tampabay.com/news/courts/florida-ethics-panel-urges-judges-to-unfriend-lawyers-from-their-facebook/1058812. The lawyer was quoted as asking, "How do you unfriend somebody? Id. at p. 203.

Much like the lack of coverage in the MRPC, the Model Code of Judicial Conduct (MCJC) neither specifically addresses social media nor provides guidance for severing ties with lawyers or other judges. Indirect guidance is contained in Canons 2 and 3, specifically in Rules 2.2 (Impartiality and Fairness), Rule 2.4 (External Influences on Judicial Conduct), and Rule 3.1 (Extra-judicial Activities in General). Additional guidance for performance in this area is found in Rules 1.2 (Promoting Confidence in the Judiciary) and Rule 1.3 (Avoiding Abuse of the Prestige of Judicial Office). Id. at p. 198. (Citations omitted).

Anders goes on to state that "Although neither Facebook, LinkedIn, nor Twitter advises a user of broken connections, a lawyer's or judge's basic under-standing of professionalism in the law should dictate otherwise. Regardless of who is breaking the tie--the judge or the lawyer--one should notify the other of the intention to do so, along with the rationale. For casual

acquaintances, an email would be sufficient. Id at p. 204.

For more personal connections, which, for this purpose, are limited to the small number of one's closest colleagues, a brief telephone call or in-person meeting to discuss the reason for the impending disconnection would be preferable, provided adequate time exists to do so. However, considering the limited amount of free time enjoyed by any legal professional, availability for personal advisories may be limited at best. An email, though not preferred, would at least put close contacts on notice of the need to sever ties so that they would know to expect it, and an invitation to call or meet to discuss the matter could be included in the message Id at p. 204. (Citations omitted).

In January 2009, the New York Advisory Committee on Judicial Ethics issued an opinion on whether a judge could join a social network discretion in determining "whether any such online connections . . . rise to the level of a 'close social relationship' requiring disclosure and/or recusal." Finally, the committee cautioned judges to stay informed of changes on social networks and recommended that judges consult the committee if any questions arose. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), available at http://www.courts.state.ny.us/ip/judicialethics/Opinions/08-176.htm. The opinion was issued in response to a request by a member of the New York state judiciary.

Later that year, South Carolina adopted a similar approach. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (Oct. 2009), available at http:// www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009/ (responding to a specific inquiry and concluding that judges could join Facebook and friend law enforcement officers and employees).

Florida was the first state to impose substantive limitations on the judicial use of social media. In November 2009, the Florida Judicial Ethics Advisory Committee concluded that judges could join and post comments on social networking sites such as Facebook, MySpace, and LinkedIn; however, the committee prohibited judges from accepting or soliciting any friend request from a lawyer who could appear before the judge. Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009). Id. at p. 2131-2132.

Although the Florida committee recognized that "judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities," it reminded the state's judiciary that "some restrictions upon a judge's conduct are inherent in the office."[32] A majority of the committee concluded that an online friendship violated Canon 2B of the Florida Code of Judicial Conduct[33] by conveying "the impression that [the friend] is in a special position to influence the judge."[34] The minority disagreed on the grounds that a Facebook friendship does not convey a special relationship since a reasonable person would distinguish an online friend from a "traditional" friend.[35] The tension between the majority and minority echoes the differences between the New York and Florida approach. And the differences in the New York and Florida opinions are important precisely because the two approaches laid the foundation for ethics opinions across the country. Id. at p. 2132.

Still other states have treated the matter peripherally without issuing formal ethics

opinions. An article written by a member of the Indiana Judicial Qualifications Commission advised the state's judiciary to exercise prudence when using Facebook and LinkedIn. A Massachusetts committee recommended that judicial interns or clerks deferring positions as associates at law firms not disclose their affiliated firm via social networking sites. An Arizona commission concluded that a judge violated the ethics rules by anonymously posting comments critical of a fellow judge on an online discussion board. In Minnesota, a Supreme Court Justice informally drew attention to the issue by calling for guidelines on social media and the courts. Id. at p. 2135. (Citations omitted).

Anecdotal evidence suggests that judges commonly use social media even when their state ethics committee has not yet issued an advisory or formal opinion on the issue. Judges in Texas and Michigan reportedly relied on social media to check on the behavior of juvenile offenders or parolees. A North Carolina judge received a public reprimand after conducting independent online research and engaging in ex parte communications on Facebook. The South Dakota Supreme Court concluded that a trial judge need not recuse himself after a witness wished him a happy birthday via Facebook. In West Virginia, a judge posted his opinion about judicial ethics and social media on his Facebook profile. The judge recognized that West Virginia had not yet adopted the Florida approach, but he advocated an approach whereby he would accept any Facebook friendship request to make his Facebook friendships "non-exclusive." Even in the absence of an advisory opinion, Wisconsin judges rely upon and use social media. An increase in the use of social media , taken together with the number of states that have adopted formal or informal ethics opinions, raises the question of whether there are any common themes emerging in courthouses across the country. . Id. at p. 2135-2136. (Citations omitted).

John G. Browning provides the following examples of judges behaving badly

John G. Browning reminds us that judges are human too, and capable of missteps, both large and small and we need to keep in mind that the use of emerging technologies does not relieve them of traditional ethical conventions and duties. See *Why Can't We Be Friends? Judges and Social Media* at 68 U. Miami L. Rev. 487. Consider the following examples:

A. Angela Dempsey

This Florida circuit judge was formally reprimanded by the Florida Supreme Court for two mistakes that appeared in her 2008 campaign materials. One was a mailing that misrepresented Dempsey's years of legal experience, while the other was a statement asking voters to "re-elect" her on a link to a YouTube campaign video when Judge Dempsey had in fact been appointed, not elected to the bench. According to the Florida Supreme Court, this violated a judicial canon barring misrepresentation about a judge's qualifications. Chief Justice Peggy Quince said, "This case stands as a warning to all judicial candidates . . . . You will be held responsible and accountable for the actions of your campaign consultants including the way they choose to use new technology like the social media. 68 U. Miami L. Rev. 487 at 497. (Citations omitted).

B. Doe v. Sex Offender Registry Board

Although not technically judges, hearing officers serve in quasi-judicial capacities and, consequently, can be held to many of the same standards of conduct as judges. In Doe, the claimant appealed his classification as a sex offender. Among his arguments, Doe claimed that the hearing officer who made this determination later posted "inappropriate" comments about Doe's case on a co-worker's Facebook page. The Massachusetts court described the hearing officer's actions as "most unfortunate" and impugning the "dignity" of the judicial process. Surprisingly, however, the court did not find that the hearing officer should have recused herself. U. Miami L. Rev. 487 at 498. (Citations omitted).

C. Eugenio Mathis

This New Mexico judge resigned in February 2013 amid allegations of improper conduct involving his wife, who also worked at the courthouse. According to charges brought against the jurist, Mathis had violated the court's computer and Internet-use policy by engaging in "excessive and improper" instant messaging with his wife. These included "communications of a sexual nature" during working hours, including "intimations that he had or would be having sexual relations with her during the workday and/or on court premises." According to chat logs filed with the petition, one message actually read, "Don't come knocking if the jury room is rockin."' Other comments that Mathis electronically shared included statements about the veracity of witnesses during trials, vulgar comments about parties in a domestic-violence case, and disparaging comments about other judges. The New Mexico Judicial Standards Commission also alleged that many of these instant messages were sent while the judge was on the bench presiding over trials and hearings and that he permitted his wife to read confidential reports. U. Miami L. Rev. 487, 498-499. (Citations omitted).

D. Lee Johnson

This Ennis, Texas municipal judge ignited a firestorm of controversy by posting on his Facebook page about Heisman Trophy winner and Texas A&M quarterback Johnny Manziel receiving a speeding ticket in his town in January 2013. The post did not identify Manziel by name, instead referring to a "(very) recent Heisman Trophy winner from a certain unnamed 'college' town down south of here . . . [who] was speeding on the 287 bypass yesterday . . . . Time to grow up/slow down young'un." Johnson later added a second, apologetic Facebook post: "I meant to say 'allegedly' speeding, my bad." The judge, who went to the rival school of Baylor, inadvertently brought the subject of legal ethics to national sports news through his actions, which also prompted a reprimand from the Ennis city manager. It is bad enough to pre-judge a party in any case, but sharing that partiality with the world on Facebook? Judge Johnson also faces possible disciplinary action from the state Judicial Conduct Commission. U. Miami L. Rev. 487 at 499. (Citations omitted).

E. Ernest "Bucky" Woods

This jurist retired from his position as Superior Court Chief Justice in 2009 after relatives of a former defendant filed complaints against him for improper involvement with the defendant's ex-girlfriend, Tara Black. He had used Facebook to contact Ms. Black, who also appeared before him on drug charges. Over the course of this relationship, he advised her on how to proceed in court appearances before him, helped her receive deferred prosecution, and signed an order "allowing her to be released on her own recognizance so she wouldn't have to post a

cash bond." Other messages between the judge and the stylist (thirty-three pages of which were turned over as part of the response to a newspaper's open records request) detailed money that he loaned to her, lunch dates with her, and visits he made to Black's apartment. Besides helping Black "behind the scenes" in her own criminal theft by deception case, Woods also used a photo taken off her Facebook page as a basis for issuing a probation revocation against a drug defendant; the defendant's family subsequently complained about Judge Woods' involvement with Ms. Black, leading to the investigation and his retirement. U. Miami L. Rev. 487, 499-500. (Citations omitted).

F. Shirley Strickland Saffold

The Cuyahoga County Common Pleas Court judge was linked to anonymous Internet discussions about cases in her court, leading to her removal from presiding over the high-profile trial of an accused serial killer. More than 80 postings were made by "Lawmiss" on Cleveland.com, website of the Cleveland Plain Dealer. "Lawmiss" was then traced back to Saffold's email account and her court-issued computer. The comments that were posted included calling a defense lawyer a "buffoon" and wishing he would "shut his Amos and Andy style mouth." She also commented about a sentence in a 2008 multiple homicide case: "If a black guy had massacred five people then he would've received the death penalty . . . . A white guy does it and he gets pat on the hand. The jury didn't care about the victims . . . . All of them ought to be ashamed." In removing Saffold from presiding over the trial, the Ohio Supreme Court wrote, "[T]he nature of these comments and their widespread dissemination might well cause a reasonable and objective observer to harbor serious doubts about the judge's impartiality."

Judge Saffold was outed by the Cleveland Plain Dealer, whose public records request included the browser history of her courtroom computer. Although "Lawmiss" was Saffold's screen name, her twenty-three-year-old daughter Sydney came forward and admitted to making "quite a few" of the "Lawmiss" posts. While still denying making posts about her cases online, Judge Saffold brought a $50 million lawsuit against the newspaper for invasion of privacy and breach of contract, claiming that the Plain Dealer violated the terms of use of its website by disclosing the identities of her and her daughter. U. Miami L. Rev. 487 at 501. (Citations omitted).

G. William Adams

A kind of "dishonorable mention" goes out to Judge William Adams, an Aransas County, Texas court-at-law judge. Although Adams did not post the social media activity in question, the attention it attracted led to national outrage as well as a public warning and a suspension from the bench. In November 2011, a YouTube video (made in 2004) depicting Adams beating his then-teenage daughter with a belt and cursing at her went viral. Adams' daughter, who wanted to bring public attention to the abuse, posted the video; ironically, Judge Adams actually presides over family court cases. The disturbing video prompted a police investigation, a temporary suspension by the Texas Supreme Court, and a public warning issued to Adams by the Texas Commission on Judicial Conduct. U. Miami L. Rev. 487 at 501. (Citations omitted).

H. James Oppliger

It is somewhat surprising that, in an age in which judges and lawyers have become sensitized to jurors engaging in online misconduct, we actually encounter a judge who blabs

online about his jury service. Fresno County Judge James Oppliger, excited about actually being picked to serve on a jury, emailed several of his jurist colleagues about the unusual turn of events. Among the comments was a reference to the two lawyers squaring off in the case: "Here I am livin' the dream, jury duty with Mugridge and Jenkins!" While none of the emails discussed the evidence or deliberations in the case, one of the judges on the receiving end of Oppliger's electronic communications was the presiding judge in the case, Judge Arlan Harrell. After the defendant was convicted of second-degree murder, Judge Harrell disclosed the online communications, prompting defense counsel to consider seeking a new trial. U. Miami L. Rev. 487 at 502. (Citations omitted).

I. Judge B. Carlton Terry, Jr.

Perhaps the most infamous, oft-cited case of a "judge behaving badly" on social media is that of North Carolina Judge B. Carlton Terry, Jr. In April 2009, the North Carolina Judicial Standards Commission publicly reprimanded Judge Terry for the activities of a Facebook "friendship" between himself and an attorney appearing before him. Just before a child custody and support proceeding that lasted from September 9 to September 12, 2008, Judge Terry was in chambers with Charles Schieck, counsel for Mr. Whitley, and Jessie Conley, attorney for Mrs. Whitley. When the conversation turned to Facebook, Ms. Conley said she was not familiar with it and, in any event, did not have time for it. However, the judge and Mr. Schiek were Facebook "friends." The next day, during another in-chambers meeting, the judge and attorneys discussed testimony that raised the possibility of Mr. Whitley having had an affair, at which point Schieck commented on having to "prove a negative." That evening, Schieck posted on Facebook, "how do I prove a negative. [sic]" Judge Terry responded with a comment about having "two good parents to choose from," as well as a comment about the case continuing. Schieck, proving that one can "suck up" to a judge in cyberspace as well as in person, posted, "I have a wise Judge." In addition, on September 11, 2008, Terry and Schieck exchanged Facebook comments about whether or not the case was in its last day of trial, with Terry responding, "[Y]ou are in your last day of trial." Judge Terry also went online to view a website that Mrs. Whitley maintained for her photography business, looking at photos and poetry she posted. On September 12, 2008, in announcing his ruling, Judge Terry even quoted from one of her poems. Id. at 502-503. (Citations omitted).

Although Judge Terry disclosed to Ms. Conley the Facebook exchanges between himself and Mr. Schieck the day before he ruled, he waited until after ruling to disclose the independent Internet research he had done. Days after the trial, Ms. Conley filed a motion asking that Judge Terry's order be vacated, that he be disqualified, and that a new trial be granted. On October 14, 2008, Judge Terry disqualified himself; his order was vacated, and a new trial was granted on October 22, 2008. The Judicial Standards Commission determined that he "was influenced by information he independently gathered," as well as his ex parte communications with Mr. Schieck. Furthermore, his behavior demonstrated "a disregard of the principles embodied in the North Carolina Code of Judicial Conduct" and "constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Id. at p. 503.

Judges who actively use social networking platforms often have to decide just how connected they want to be. In January 2012, a judge from Will County, Illinois, Amy Bertani-Tomczak, was urged by prosecutors to view Facebook posts by a reckless homicide defendant,

Tomacz Maciaszek, before sentencing him. The twenty-five-year-old defendant, whose fatal 2008 car crash claimed the life of a seventeen-year-old high school student, professed to being contrite and leading a secluded, haunted life in the wake of the tragedy. Yet, despite the prosecution's attempts to provide the court with printouts from Maciaszek's Facebook profile that supposedly undermined his claims, Judge Bertani-Tomczak refused to consider any of it: "I have not seen anything or looked at anything," she said. U. Miami L. Rev. 487 at 504. (Citations omitted).

Other judges have taken the opposite approach and incorporated social media into their judicial role:

> Michigan Judge A.T. Frank uses social networking sites to monitor offenders on probation under his jurisdiction, occasionally finding photos on Myspace or Facebook pages in which the defendants are engaged in drug use or other prohibited behavior. Galveston juvenile court Judge Kathryn Lanan employs a similar tactic, requiring all juveniles under her jurisdiction to "friend" her on Facebook or MySpace so that she can review their postings for any signs of inappropriate conduct that might warrant a return to her court. Id. at p. 505.

In Cumberland County, Pennsylvania, District Judge Thomas Placey discovered the downside to having too many Facebook "friends."[164] During a 2011 criminal case concerning defendant Barry Horn, Jr.'s standoff with police, it was discovered that Judge Placey and the defendant were Facebook "friends." Placey explained that while he knew Horn's father, a former sheriff's deputy, he did not consider Horn a real friend and pointed out that he accepted every "friend" request he received on Facebook. Judge Placey explained that he doesn't really use Facebook and that "[s]omeone says you want to be my friend, I say yes. You could be a Facebook friend of mine, I wouldn't know it." Id. at p. 508.

Although the prosecutor did not plan to seek Judge Placey's recusal, other observers were more troubled by it. Shira Goodman, deputy director of Pennsylvanians for Modern Courts, stated, "[m]any judges will tell you this: There are certain things you give up when you become a judge. Some of that is social ties. [sic] . . . You have to not put yourself in situations where your impartiality can be challenged." Id. at p. 508

Sometimes it is not even the judge's own Facebook "friend" status that attracts controversy, but the social media connections of family members. In Will County, Illinois in 2011, defendant Kelly Klein--charged with battering a seven-month-old boy left in her day care--sought a new trial over the discovery that the presiding judge in her case, Daniel Rozak, had several children who were Facebook "friends" with members of the victim's family. Klein's lawyer "claim[ed] the relationship between [Rozak's children] and [the family in question was] deeper than a simple social-media connection," and "the Facebook friendships between the Rozaks and the Bashars are only the tip of the iceberg." Judge Rozak declined to recuse himself, pointing out that his children were all adults who moved out of his home years ago and, consequently, "I no longer vet their 'friends' and do not utilize their 'electronic social networking sites."' Id. at pp. 508-509. (Citations omitted).

The only state ethics committee to address whether a judge's Facebook "friendship" with a party or someone related to a party requires recusal is New York. In May 2013, New York's Committee on Judicial Ethics, which responds to written inquiries from the approximately 3,400 full-time and part-time judges in that state, addressed the following question: "[W]hether [a judge] must, [upon request] . . . exercise recusal in a criminal matter because [he is] 'Facebook friends' with the parents or guardians of certain minors who allegedly were affected by the defendant's conduct." Referring to an earlier ethics opinion about lawyers and social media, the Committee held "the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal." As long as the parents of the purported victims were only acquaintances, the Committee wrote, there was no appearance of impropriety. The Committee did, however, "recommend[ ] that [the judge] make a record, such as a memorandum to the [court's] file, of the basis for [his] conclusion," should a challenge to the decision surface. Id. at p. 509. (Citations omitted).

The Committee noted that "[d]espite the Facebook nomenclature," one has to look at the actual relationship itself. Here, the judge had indicated that the victim's parents were only acquaintances of his. It mentioned, "interpersonal relationships are varied, fact-dependent, and unique to the individuals involved." Accordingly, the Committee stated that it could "provide only general guidelines to assist judges who ultimately must determine the nature of their own specific relationships with particular individuals and their ethical obligations resulting from those relationships." Id. at p. 509-510. (Citations omitted).

Another Galveston judge, Susan Criss, "friends" lawyers on Facebook--a handy tool to keep them honest. "On one occasion, a lawyer had asked for and received a continuance because of a supposed death in the family." When Judge Criss happened to check that lawyer's Facebook page, however, she saw photos indicating that the lawyer was "partying that same week." See Gena Slaughter & John G. Browning, *Social Networking Dos and Don'ts for Lawyers and Judges*, 73 Tex. B.J. 192, 194 (2010). (Citations omitted).

Judges do find positive uses for social media. "A recent issue of Case in Point, the National Judicial College's magazine, suggested that participating in social media provides judges with a low-cost means of staying informed while simultaneously enhancing public understanding of the judiciary." The number of judges using social networking sites increases every year, due in part to the increasingly important political role played by social media. In states where judges are elected, social media and other forms of electronic communication can be vital in getting judicial candidates' names out to voters, building awareness among the electorate, campaign organizing, and, of course, fundraising. Id. at 194. (Citations omitted).

E. Discovery Issues

Social Media Evidence: Foundation and Other Admissibility Requirements

1. Social media evidence is increasingly becoming a core focus of the parties in proving or disproving claims. *See, e.g.,*

    a. *United States v. Flores*, 802 F.3d 1028, 1047 (9th Cir. Cal. 2015) (defendant sent Facebook messages about "carrying" or "bringing" marijuana, which the Government used to convince jurors that the Defendant had illegally imported drugs from Mexico.)

    b. *Sublet v. State*, 113 A.3d 695 (Md. 2015) (upholding decisions in lower court cases to admit public Twitter posts ("Tweets") and direct one-to-one Facebook messages that the prosecution sought to introduce to obtain convictions for the crimes of first and second degree assault, use of a handgun in the commission of a crime of violence, and openly carrying a dangerous weapon with the intent to injure).

    c. "Facebook Profile Is Fair Game In Custody Battle: Judge," New York Post, March 16, 2016 (in child custody dispute, father permitted to introduce ex-wife's Facebook posts to establish which parent spent the majority of the time with the child)

2. Like any other evidence, proper foundation must be laid before Facebook evidence can be introduced. *Assuming there is a pending objection*, the five questions to ask:

    a. Authentication: Is the item what it purports to be?

    b. Relevance: Is the item relevant to the claims and defenses in the case?

    c. Best Evidence Rule: The best evidence of an item is the original. Best evidence rule largely superseded by statutes governing copies of documents. This rule can be difficult to apply with emails and other documents that are capable of easy modification. See business record rule.

    d. Parol Evidence Rule:

        i. Integrated written documents: Can't offer evidence to add to or contradict an integrated, unambiguous document.

        ii. Two step process for non-integrated, ambiguous documents:

            1. Step One: Ruling from the Court that it the document is ambiguous.

2. Step Two: Testimony to Clean Up Ambiguity

e. Hearsay: is it hearsay? If so, what's my exception?

3. Sampling of cases that have applied these rules to Facebook and other social media evidence:

a. *Rea v. Wis. Coach Lines, Inc.*, 2015 U.S. Dist. LEXIS 27916 (E.D. La. Mar. 5, 2015) (holding that the authenticity of photographs contained within Facebook posts may be established through the cooperation of a testifying witness, but that "any "comments" below the photo are out of court statements and as such shall be excluded from the exhibits.").

b. *Commonwealth v. Campbell*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 234 (Pa. Cnty. Ct. 2014):

> [D]efense counsel…argued that the best evidence rule required that a representative from Facebook be called to establish whose Facebook account It was and that there had been no alteration or change in the photographs posted on that account. This of course would require the Facebook company to bring in the hardware that actually stored the digital images of appellant and co-defendant. The best evidence therefore would be the actual hardware storage of the images which would then be portrayed onto a screen with a printout to follow as the actual exhibit. The Commonwealth here was not required by the Court to bring the company representative into Court with the computer hardware and there is no record to indicate the size of that hardware or whether or not it can even be transported to Court. A requirement that the Commonwealth prove that there has been no alteration or doctoring without evidence of such is an unreasonable burden to place on a party under the best evidence and authentication rules of evidence, so long as the record contains evidence that the pictures are what they purport to be.
>
> Pennsylvania Rule of Evidence 901 simply requires the proponent of a piece of evidence to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." … Officer Thomas' testimony at trial that all of the photographs of appellant and his co-defendant depicted each of them, since he came to know each of them throughout his investigation, and that Facebook photographs were obtained pursuant to a search warrant much later in the investigation. Hence, his testimony alone establishes the proper identification and authentication of these photographs of what they depict to be, *i.e.* photographs of appellant and co-defendant.

c. *United States v. Muhammad*, 2014 U.S. Dist. LEXIS 164690 (S.D. Miss. Nov. 25, 2014) (where criminal defendant denies authenticity of Facebook posts, his Sixth Amendment right to confront the witnesses against him mandated that the Government produce witnesses at the trial of this matter to testify as to the authenticity of the social media records).

d. *Thomas v. Hill*, 2014 U.S. Dist. LEXIS 123640 (W.D. La. Aug. 29, 2014) (denying admission, in employment litigation, of plaintiff's Facebook post in which he bragged about "suing the crap out of" his former employer and the money he would receive through such lawsuit, the court held that such a post had only marginal relevance to the underlying claims which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and/or misleading the jury).

e. *Targonski v. City of Oak Ridge*, 921 F. Supp. 2d 820, 833-834 (E.D. Tenn. 2013) (plaintiff in Title VII hostile work environment sexual harassment case claimed that a fellow employee humiliated and harassed her by suggesting that she, a devout Christian, was a lesbian who engaged in illicit sexual activities; rejecting arguments that such evidence was improper character evidence, the court allowed the defense to admit Facebook posts in which plaintiff had discussed (1) a game of "naked Twister", (2) her desire for a female friend to join her "naked in the hot tub", and (3) female orgies involving plaintiff; in doing so, the court held that such evidence was relevant to the issue of whether the comments directed at plaintiff by her co-worker were truly offensive).

f. *EEOC v. New Breed Logistics*, 2013 U.S. Dist. LEXIS 189340 (W.D. Tenn. Apr. 29, 2013) (denying admission of Facebook posts in which plaintiff – who claimed that off-color language in the workplace offended her – used off-color language online, the court held that this evidence was irrelevant because "the language [plaintiff] may or may not use in her online profile has no bearing on what language [she] might find subjectively offensive in a workplace environment from a supervisor"; the court also held that defendants' argument that the plaintiff "is predisposed to using sexually-charged language and welcomes sexually-charged language" fell squarely within Fed. R. Evid 412's prohibition on evidence offered to prove sexual predisposition and would unduly prejudice plaintiff at trial).

g. *Ellis v. Commonwealth*, 2016 Va. App. LEXIS 18 (Va. Ct. App. Jan. 26, 2016) (finding harmless error in court's exclusion – on the grounds of hearsay and lack of foundation – of the timestamps attached to photographs posted to Facebook, which the defendant sought to use in order to establish that he owned the allegedly stolen Air Jordan "Concord 11" shoes approximately one year before the alleged robbery)

F. Compelling Production

1. *Fawcett v. Altieri* 38 Misc.3d 1022 Sup. Court, Richmond County, New York Jan. 11, 2013

In the pretrial phase of personal injury lawsuit, the high school and the parents of a student involved in an altercation that resulted in another student sustaining personal injuries

lacked sufficient factual basis to determine whether the records of the injured student's social media accounts on Internet were material and necessary to defense of school and parents, and thus, depositions were required to be taken before determining whether to either compel discovery of records or to issue protective order. McKinney's CPLR 3101(a).

It was further held that social media website materials may be subject to production just as material from a personal diary may be discoverable. Information posted in open on social media accounts are freely discoverable and do not require court orders to disclose such information. McKinney's CPLR 3101(a).

Public social media data often provides a foundation upon which counsel may move to compel the disclosure of other, more private data in a party's social network account.

2. In *Largent v. Reed,* 2011 WL 5632688 (Penn. C.P. Nov. 8, 2011) the plaintiff was injured when the motorcycle on which she was a passenger collided with the defendant's van. As a result of the accident, the plaintiff claimed serious injuries from a motorcycle accident. During her deposition, the plaintiff testified that she had an active Facebook profile and had in fact accessed it as recently as the previous evening. •In a motion to compel production, the defendant argued that the plaintiff's profile was recently public and that certain posted photos exhibiting joy or status updates about going to the gym contradicted the plaintiff's severe injury claims. The court granted the motion and found the information relevant and discoverable.

Under the FRCP, parties may obtain discovery regarding any non-privileged matter relevant to any party's claim or defense, including requesting that another party "produce and permit the [requesting] party…to inspect, copy, test, or sample…any…designated documents or electronically stored information." FRCP §§26(b); 34(a).

3. Although privacy concerns may be germane to the question of whether requested discovery is burdensome or improper, a litigant's expectation and intent that communications be maintained as private is not a legitimate basis for shielding relevant communications from discovery. ***EEOC v. Simply Storage Mgmt., LLC,* 2010 WL 3446105 at *3 (S.D. Ind. May 11, 2010).**

4. See also ***Mackelprang v. Fidelity Nat'l Title Agency of Nevada Inc.,* 2007 WL 119149 (D. Nev. 2007)** (defendants had viewed the plaintiff's public MySpace profile after she had alleged sexual harassment claims against them; court subsequently held that the defendants could discover private messages exchanged with third parties that contained information regarding her sexual harassment allegations or alleged emotional distress.)

5. ***Zimmerman v. Weis Markets, Inc.,* 2011 WL 2065410 (Penn. C.P. May 19, 2011):** The defendant requested access to the plaintiff's social media accounts based upon publicly viewable pages that showed a potential conflict between the plaintiff's current state of health and his claims of impairment of life activities. Citing *Romano v. Steelcase, Inc.;* 907 N.Y.S. 2D 650 (N.Y. Sup. Ct. 2010), the court granted the motion and found that there was a reasonable likelihood of additional relevant information on the non-public portions of the social media sites. The court deemed the plaintiff's privacy-related arguments unavailing, concluding that the plaintiff voluntarily posted the information to share with other users and could not now

claim he possessed any reasonable expectation of privacy to deny the defendant access, particularly given the defendant's threshold showing of relevance.

G. Ethical implications for attorneys attempting to obtain evidence through social media

1. The Association of the Bar of the City of New York, Committee on Professional Ethics, Formal Opinion 2010-2,"Obtaining Evidence From Social Networking Websites"

In this opinion it was stated that a lawyer may not attempt to gain access to a social network under false pretenses, either directly or through an agent. For example, an attorney or hired investigator might try to pose as an old classmate and send a friend request to a potential witness or unrepresented party in order to gather personal information .The committee stated that such deceptive behavior was barred under the New York State Rules of Professional Conduct, namely Rules 4.1 and 8.4(c), which prohibit attorneys from making false statements and engaging in dishonest conduct, respectively citing:

Rule 4.1: In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

Rule 8.4(c): A lawyer or law firm shall not: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The committee also commented that this prohibition also applies to acts by a lawyer's agent or investigator since under Rule 5.3(b)(1), a lawyer is responsible for ethical violations of hired, non-legal personnel, if the lawyer ordered, directed, or ratified the specific conduct.

Rule 5.3(b): A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Instead, the committee advised that a lawyer should rely on discovery procedures sanctioned by the ethical rules and case law, such as the "friending" of unrepresented parties without using deception or by employing formal discovery devices.

The committee recognized that users are easier to deceive in the online world than if approached in person: "Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse."

The NYC Bar opinions echoes opinions from other jurisdictions:

2. Philadelphia Bar Association Professional Guidance Committee, Op. 2009-02

determined that the act of hiring an investigator to mislead a potential witness by becoming

social network "friends" with the witness in order to obtain access to personal pages for future impeachment was a violation of ethical rules.

3. The New York State Bar Association, Committee on Professional Ethics, Op. 843 (Sept. 10, 2010) discussed a lawyer's ethical obligations in gathering public social network information that is not restricted by a user's privacy settings. The committee stated that a lawyer representing a client in pending litigation may access the public pages of another party's social networking website for the purpose of obtaining possible impeachment material. The committee differentiated between those social network pages that are only accessible to a user's "friends" and those pages that are accessible to members of a social network or the entire online community. It stated that New York's Rule 8.4 prohibiting deceptive practices would not be implicated by an attorney searching the public social media information of a party (whether represented by counsel or not).

The committee also noted that searching for such public data is no different than typing a person's name into an Internet search engine, searching print media sources, or conducting research on paid subscription services like Nexis.

H. Jurors use of social media

1. Here is a copy of the "Jury Instruction" with which the Eighth Judicial District Court's ADR Commissioner Chris Beecroft supplies every Pro Tempore Judge prior to their conducting a Short Trial. They are advised that these instructions must be included and incorporated into every trial they conduct.

JURY INSTRUCTION
(must be given at commencement of trial with opening remarks)

Until you have been discharged from service in this case:

- You may not perform any investigation, research or experiment of any kind on your own, either individually or as a group about this case;

- Do not consult any dictionaries for the meaning of words or any encyclopedias for general information on the subjects of this trial;

- Do not look up anything on the Internet concerning this case or any of the people involved, including the defendant, the witnesses, the lawyers, and the judge;

- Do not go to the scene where any of the events that are the subject of this trial are alleged to have taken place or use Internet maps or Google Earth or any other program or device to search for or view any place discussed during the case; and

Until You Are Discharged:

- You must not have any discussions about this case or make any entry on Facebook, MySpace, LinkedIn or other Internet social media site, and that includes all other forms of oral, written and electronic communications, including Twitter, e-mail, blogging, and texting.

Please understand that I am giving these directions as a part of my responsibility to ensure fairness to all parties in this case. That fairness would be compromised and your actions could jeopardize the results of this trial if you violate these instructions.

JURY INSTRUCTION
(must be given at jury deliberation at close of trial)

In the future, the following jury instruction must be included on the Jury Instructions submitted to you as a Pro Tempore Judge for all Short Trial cases:

You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn and YouTube.

2. Florida Supreme Court amended its Standard Jury Instructions in civil and criminal cases:

"In this age of electronic communication, I want to stress that you must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages, including e-mail and text messages, about your jury service. You must not disclose your thoughts about your jury service or ask for advice on how to decide any case."

3. New Jersey state courts have amended their Model Civil Jury Instruction:

"You also should not attempt to communicate with others about the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, Myspace, personal electronic and media devices or other forms of wireless communication."

4. Cases Concerning prohibitions against juror use of social media

a. *Commonwealth v. Werner* 81 Mass.App.Ct. 689 Appeals Court of Massachusetts, Plymouth May 2, 2012.

Instructions to jurors not to talk or chat about the case should expressly extend to electronic communications and social media, and discussions about the use of the Internet should expressly go beyond prohibitions on research.

Jurors' public postings on social networking websites about their jury duty and responses to the postings contained no evidence of extraneous influence in larceny prosecution, and thus trial judge properly concluded that jurors had not been subjected to an extraneous influence and that no further inquiry or discovery was required after judge questioned them, even though website host had not responded to subpoenas; the postings involved the type of attitudinal expositions on jury service, protracted trials, and guilt or innocence that fell far short of the prohibition against extraneous influence, the posts contained no identifying information about defendant or the crimes, and evidence of guilt, including defendant's admissions, was overwhelming. Rules Crim. Proc., Rule 30(c)(4), 47 M.G.L.A.

b. *State v. Smith* Supreme Court of Tennessee, at Nashville No. M2010–01384–SC–R11–CD. Feb. 7, 2013 Session. Sept. 10, 2013.

Contents of expert witness' email to trial court, sent during jury deliberations in murder prosecution, relaying transcript of social media exchange initiated by juror following witness' testimony, were admissible as evidence of juror misconduct, where information in email related to potentially prejudicial external influences, rather than jury's deliberations or juror's thought processes. Rules of Evid., Rule 606(b). The court further held that not every extra-judicial communication between a juror and a third-party requires the court to disqualify the juror, declare a mistrial, or grant a new trial; these remedies are required only when the extra-judicial communication is prejudicial to the defendant and is not harmless error.

c. *McGaha v. Commonwealth* 2013 WL 3123446 No. 2012–SC–000155–MR. June 20, 2013.

Juror being "friends" with victim's wife on social media website did not warrant disqualification and a note sent by jury during deliberations did not establish impermissible consideration of penalty phase issues during guilt phase.

d. *Sluss v. Commonwealth* 381 S.W.3d 215 Supreme Court of Kentucky No. 2011–SC–000318–MR Sept. 20, 2012.

Status of two jurors as "friends" of minor victim's mother on a social-networking website was not, standing alone, a ground for a new murder trial based on juror bias; it was the closeness of the relationship and the information that the jurors knew that framed whether the jurors could reasonably be viewed as biased.

e. *United States v. Ganias*, No. 08-CR-224, 2011 WL 4738684, at *3 (D. Conn. Oct. 5, 2011) (postings such as "Guinness for lunch break. Jury duty ok today;" "Your honor, i[sic] object! This is way too boring.... Somebody get me outta here;" and on the day of the verdict, "Guilty **:)**" did not constitute bias or misconduct).

f. *Juror Number One v. Superior Court of Sacramento County*, 2012 WL 1959466 (Cal. App. May 31, 2012).

Following a criminal trial that ended in conviction, the court learned that one of the jurors (Juror Number One) had made multiple Facebook posts during the trial. The convicted defendants originally sought copies of the postings. The judge conducted an evidentiary hearing and issued an order requiring Juror Number One to execute a consent form authorizing Facebook to release to the court for in camera review all items he posted during the trial. Juror Number One filed an objection. The Court concluded that Juror Number One failed to establish that the court's order exceeded its power to inquire into alleged juror misconduct. The Court found that while it might be a SCA violation to subpoena the records from Facebook directly, the compulsion here was on Juror Number One and under basic discovery principles, where a party to the communication is also a party to the litigation, it is within the power of a court to require his or her consent to disclosure on pain of sanctions. The Court rejected the Juror's argument that disclosure would violate his privacy rights. The court stated that Juror Number One had not shown he had any expectation of privacy in the posts and, in any event, those privacy rights did not trump the convicted defendant's right to a fair trial free from juror misconduct.

g. *Commonwealth v. Werner,* 967 N.E.2d 159 (Mass. App. 2012)

After a conviction, the defense attorney discovered a juror had made Facebook postings during the trial and had friended three fellow jurors. Counsel argued that they may have been exposed to extraneous influences during deliberations.

The posts said among other things that: –"Superior Court in Brockton picks me ... for the trail [*sic*]. The[y] tell us the case could go at least 1 week. OUCH OUCH OUCH." Juror B's wife replied, "Nothing like sticking it to the jury confidentiality clause on Facebook.... Anyway, just send her to Framingham quickly so you can be home for dinner on time."

The Court found that the trial judge did not err in concluding that the postings contained no case-specific information and showed no evidence of extraneous influence –instead involving the type of "attitudinal expositions" on jury service, protracted trials, and guilt or innocence that fall far short of the prohibition against extraneous influence. The Defendant could offer only unsupported speculation that the desired subpoenaed documents might include previously undisclosed communications of extraneous information to the jurors.

h. *Wilgus v. F/V Sirius, Inc.*, 665 F.Supp.2d 23 (D. Me. 2009)

Four days after the jury returned a defense verdict on the plaintiffs' claims for personal injury and wrongful death stemming from a sunken vessel, the plaintiffs' lawyer received an e-mail from one of the jurors about the plaintiff's alleged explicit endorsement of drugs. The juror explained that he had found information about the plaintiffs on Facebook after sending the plaintiffs friend requests, which the plaintiffs apparently accepted. The Court found that the juror did not discover information during trial or deliberations in plaintiffs' action, and thus, did not commit juror misconduct requiring new trial.

i. In *Steiner v. Superior Court*, 220 Cal. App. 4th 1479, 1487, 164 Cal. Rptr. 3d 155 (2d Dist. 2013), as modified on denial of reh'g, (Nov. 26, 2013) and review filed, (Dec. 13, 2013) an attorney's website advertised her success in two cases raising issues similar to those she was about to try in a pending jury-trial case. The trial court admonished the jury not to "Google" the attorneys or to read any articles about the case or anyone involved in it.[2] In addition, the trial judge ordered the attorney to remove, for the duration of trial, two pages from her website discussing similar cases. The attorney challenged the trial court's order, arguing that it violated the First Amendment, and the appellate court agreed. the court held that there were sufficient tools at the trial court's avail short of the extreme measure of issuing a prior restraint taking down material on the attorney's web page, to render the trial court's order void under the First Amendment.

j. In *Marceaux v. Lafayette City-Parish Consol. Government*, 731 F.3d 488, 41 Media L. Rep. (BNA) 2545, 97 Empl. Prac. Dec. (CCH) P 44926 (5th Cir. 2013). the United States Court of Appeals for the Fifth Circuit held that a district court violated the First Amendment in issuing a gag order that required litigants in a civil rights case to take down a website they maintained to inform the media and the public about their case.

k. In *Ex parte Wright*, 2014 WL 5311314 (Ala. 2014)the Supreme Court of Alabama followed the reasoning of the Fifth Circuit in *Marceaux* to hold unconstitutional a protective order issued in an action by homeowners against a pest control service, which prohibited homeowners and their attorneys from making any extrajudicial reference to the circumstances of their case, including posts on a website.

I. Attorney efforts to gain information about jurors through social media

a. New York City Bar Formal Opinion 2012-2

Concluded that if a juror were to…learn of the attorney's viewing or attempted viewing of the juror's pages…that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification.

b. NYCLA Committee on Professional Ethics, Formal Opinion No. 743 (May 18, 2011)

This opinion concerns the propriety of attorneys investigating a juror's social networking postings during a pending trial. The opinion stated that a lawyer may search a prospective juror's and sitting juror's social networking profile, provided there is no contact or communication with the prospective or sitting juror and the lawyer does not seek to "friend" jurors, or subscribe to their Twitter accounts, or otherwise contact them. Importantly, if a lawyer discovers juror misconduct, he or she must promptly bring such misconduct to the attention of the court, under New York State Rules of Professional Conduct, Rule 3.5(d).

c. *NYC Bar, Formal Opinion 2012-2*

Concerned what ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors? Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication.

Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend on the mechanics and privacy settings of each service. Some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction.

The NYC Bar Committee noted that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. The Committee cautioned that if an attorney cannot ascertain the functionality of a website, the attorney must proceed with caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

d. *Carino v. Muenzen*, 2010 WL 3448071 (N.J. Super. A.D. Aug. 30, 2010) (unpublished) (appellate court held that Googling prospective jurors during voir dire is generally permissible; trial judge had cited no authority for his requirement that counsel must notify an adversary and the court in advance of using internet access during jury selection or any other part of a trial).

J. Prosecutorial misconduct stemming from use of social media

1. In 2010, Florida's Assistant State Attorney Brandon White, who apparently became so bored during the trial of alleged gang member Antonio D. Hill, who was accused of assaulting two men with a gun, that he posted to his Facebook account the following ditty he'd written about it, set to the tune of TV classic ***Gilligan's Island***:

"Just sit right back and you'll hear a tale, a tale of a fateful trial that started from this court in St. Lucie County. The lead prosecutor was a good woman, the 2nd chair was totally awesome. Six jurors were ready for trial that day for a four hour trial, a four hour trial.

The trial started easy enough by then became rough. The judge and jury confused, If not for the courage of the fearless prosecutors, the trial would be lost, the trial would be lost. The trial started Tuesday, continued until Wednesday and then Thursday with Robyn and Brandon too, the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie."

Since the State Attorney's Office didn't have a standing policy on Facebook or tweeting, White didn’t immediately face disciplinary action, but the "weasel face," the defendant's attorney, planned to raise the issue with the Florida Bar

2. *State v. Usee*, 800 N.W.2d 192 (Minn. App. 2011)

On appeal from a conviction on attempted first degree murder, the defendant argued that the district court erred by denying his request for a hearing after he presented evidence that the prosecutor had posted comments on her public Facebook page discussing one of the jurors and making other general statements before the case was submitted to the jury.

Court ruled that the defendant did not present evidence that any juror had been exposed to the Facebook comments, and absent evidence of juror exposure, he did not establish a prima facie case of juror misconduct.