



# Advisory Committee on the Code of Judicial Conduct

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## Advisory Opinion Concerning Social Media

### Introduction

{1} Because of the prevalence of the use of social media in current social and business activity, the Advisory Committee on the Code of Judicial Conduct<sup>1</sup> has been asked to express guidelines for judges<sup>2</sup> in their use of social media. As discussed in this advisory opinion, the Code of Judicial Conduct applies to a judge's use of social media in the same manner as it would apply to other activities of the judge. Because of the nature of social media, however, its use by judges may raise ethical issues that may not be as apparent as the traditional issues that judges commonly address. The

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<sup>1</sup>The Code of Judicial Conduct Committee and its staff counsel, Jennifer L. Scott, assisted the Advisory Committee on the Code of Judicial Conduct with this endeavor. Members of the Code of Judicial Conduct Committee were Robert O. Beck, John P. Burton, Hon. Joel Cano, Frank N. Chavez, Hon. Sandra Engel, Harvey Fruman, Michael H. Keedy, Hon. Jim Summers, Hon. James J. Wechsler, and Hon. Briana H. Zamora.

<sup>2</sup>This advisory opinion also applies to judicial candidates when applicable under the Code.

Committee therefore advises that judges be circumspect in their use of social media and be continually vigilant of their compliance with the requirements of the Code.

{2} The following is a list and location of the topics discussed:

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### **Preamble to the Code of Judicial Conduct**

{3} The preamble to the Code of Judicial Conduct stresses the significance of an independent, impartial, and fair judiciary to the public’s confidence in our legal system. Rule 21-001(A) NMRA. It notes that judges “should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives.” Rule 21-001(B). It provides that

“[j]udges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code.” Rule 21-001(C).

### **Other Relevant Provisions of the Code of Judicial Conduct**

{4} The Code does not specifically discuss social media other than in its preamble. Nevertheless, the Code otherwise addresses conduct pertaining to social media use in the context of its broader rules. In particular, the rules concerning independence, integrity, and impartiality; abuse of prestige of office; the impression of being in a position to influence a judge; ex parte communications; statements affecting a pending or impending case; disqualification; promoting public confidence in the judiciary; and extrajudicial activities, have bearing on a judge’s use of social media. Simply put, a judge may not communicate on a social media site in a manner that the judge could not otherwise communicate. But, further clarification and guidance, along with examples, may prove helpful to judges when making decisions regarding social media use.

### **Definition of Social Media**

{5} Social media has been defined in numerous ways, depending on its use and context. For the purposes of this advisory opinion, social media refers to “the wide array of Internet-based tools and platforms that increase and enhance the sharing of

information,” the “common goal [being] to maximize user accessibility and self-publication through a variety of different formats.” *See Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States, Administrative Office of the United States Courts, April 2010, at 9, available at <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct>.

{6} Examples of social media include, but are not limited to, sites for “social and professional networking” (such as Facebook, LinkedIn, and Yelp), sites for photo and video sharing (such as Instagram and YouTube), sites for blogs, sites for micro-blogs (such as Twitter), sites for wikis (such as Wikipedia), online discussion groups and threads, and other web-based applications of this nature.<sup>3</sup> *Id.* at 9-12.

### **Traditional Communication versus Social Media Communication**

{7} Social media formats raise issues different from traditional means of communication because of their ready access and interactive nature. These formats are designed in many respects to foster mass communication and engage large groups of users in open discussions or information sharing. Thus, communications that may seem to be limited in scope to the named participants are available to others, or may be re-transmitted, often without specific knowledge of at least one of the original

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<sup>3</sup>See Norman H. Meyer, Jr., *Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators*, Int’l. J. for Ct. Admin., Vol. 6, No. 1, June 2014, at 3; available at <http://www.iacajournal.org>.

participants. For example, Twitter is a popular free social networking service that enables users to send and read short 140-character messages called “tweets” and permits registered users to read and re-transmit tweets.<sup>4</sup> Although unregistered Twitter users cannot re-transmit tweets, they still have access to Twitter.com and may read registered users’ tweets.<sup>5</sup> Similarly, Facebook is another free popular social networking website that allows registered users to create profiles, upload photos and videos, and send public or private messages to friends, family, and colleagues. Unlike Twitter, only registered users may access facebook.com to view registered users’ profile pages, uploaded photos and videos, and public messages posted on registered users’ profiles. But, if a registered Facebook user fails to implement adequate privacy controls concerning his or her Facebook profile, other registered users may access and re-transmit the content without notifying the registered user.<sup>6</sup> For these reasons, while advisory opinions in other states have allowed judges to participate in Internet social media exchanges, they advise judges to do so cautiously.

While judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will

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<sup>4</sup>See New User FAQs, *available at* <https://support.twitter.com/articles/13920>; FAQs about Retweets (RT), *available at* <https://support.twitter.com/articles/77606>.

<sup>5</sup>See FAQs about Retweets (RT), *available at* <https://support.twitter.com/articles/77606>.

<sup>6</sup>See Basic Privacy Settings & Tools, *available at* <https://www.facebook.com/help/325807937506242>; How to Post & Share, *available at* <https://www.facebook.com/help/333140160100643>.

be scrutinized [for] various reasons by others . . . . [J]udges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.

Cynthia Gray, *Judges and social networks*, Judicial Conduct Reporter, Vol. 34, No. 3, Fall 2012, at 5, *available at* <http://www.ncsc.org> (quoting Tennessee Advisory Opinion 12-1, at 3-4). *See also* Kentucky Advisory Opinion JE-119 (2010), New York Advisory Opinion 08-176, and Maryland Advisory Opinion Request 2012-7 (urging judges to exercise caution in the use of social media). Additionally, the American Bar Association has recently issued an opinion noting the benefits of this technology, concluding that judges may participate in the use of social media if judges take proper care not to violate the Model Code of Judicial Conduct. *See* ABA Comm. on Ethics & Professional Responsibility, Formal Op. 462 (2013). We endorse the same approach.

### **Ex parte Communications and Comments about Pending Cases**

{8} A typical problem that has led to the discipline of judges in other states has stemmed from communications concerning pending cases. *See Letter of Suspension and Removal from Office re Judge Michael A. Maggio*, Arkansas Judicial Discipline and Disability Commission, Case No. 14-136, as adopted by the Arkansas Supreme Court in *Judicial Discipline and Disability Comm'n v. Maggio*, 2014 Ark. 366, 440 S.W.3d 333 (recommending removal of judge from bench for various acts of

misconduct, including the posting of inappropriate comments on a public website regarding a closed adoption matter and pending divorce and public intoxication cases, as well as “gender, race, and sexuality related statements”); *In re Bass*, Public Reprimand (Georgia Judicial Qualifications Commission March 18, 2013) (suspending judge for, among other violations, engaging “in a private Facebook chat with a woman who contacted [the judge] on behalf of her brother about a DUI matter” that ultimately came before the judge); *In the Matter of Allred*, Reprimand and Censure (Alabama Court of the Judiciary March 22, 2013) (reprimanding and censuring judge for making comments on his Facebook page about contempt proceedings against a particular lawyer and for sending an email to all state judges about the proceedings); *In the Matter of Senior Judge Edward W. Bearse*, Public Reprimand (Minnesota Board on Judicial Standards Nov. 20, 2015) (reprimanding a senior judge, a position similar to a judge pro tempore in New Mexico, for posting comments on pending cases on his Facebook page because, among other reasons, the comments undermined the judge’s appearance of lack of impartiality and, in two cases, the posts impaired the fairness of the cases); *In the Matter of Fowler*, Public Admonishment (West Virginia Judicial Investigation Commission March 14, 2014) (admonishing judge for “sexually suggestive” Facebook posts and other improper communications with a woman appearing before him in pending proceedings); Public Reprimand of Terry (North Carolina Judicial Standards Commission April 1, 2009)

(reprimanding judge for “friending” a party’s lawyer in a custody proceeding before the judge and communicating about the proceeding with the lawyer through Facebook posts). *But see In re Hon. Michelle Slaughter*<sup>7</sup> (Special Court of Review of Texas Sept. 30, 2015) (dismissing admonishment of Texas State Commission on Judicial Conduct for posting of comments on a Facebook page about a high-profile case during trial that, although “amount[ing] to an error in judgment,” did not violate the Texas Code in the absence of evidence that the “extrajudicial statements would suggest to a reasonable person the judge’s probable decision on any particular case or that would cause reasonable doubt on the judge’s capacity to act impartially as a judge” as required by the canons pertaining to comments on pending cases and impartiality).

{9} Rule 21-209(A) NMRA states that 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 . . . .” Rule 21-210(A) NMRA prohibits a judge from making “any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.” Social media

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<sup>7</sup>The Committee believes that the outcome of this case is inconsistent with judicial disciplinary commission activity pertaining to social media use in other states.

sites, like Twitter and Facebook, fall squarely within these prohibitions, and they provide an easy means to communicate with not only a single individual but with many others often beyond the scope of the original intent. A Tweet or Facebook post intended for a limited audience may likely be read and re-transmitted by unintended and/or unimagined parties.

{10} The interactive nature of social networking sites presents an additional issue under Rule 21-209. Social networking sites generally enable others with access to the social media webpage to post content (statements, photos, videos, or website links) that are then available for anyone with access to the site to view. If content concerning a pending case is posted on a judge's social media webpage or on a site that a judge accesses, the judge may then receive an ex parte communication that may be prohibited by Rule 21-209. A judge has the obligation under Rules 21-209(A) and 21-210(A) to avoid such communications.<sup>8</sup>

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<sup>8</sup> Twitter and Facebook currently provide security and privacy features that may resolve this issue. At this time, Twitter allows users the ability to limit who can see a user's tweets. *See* About Public and Protected Tweets, *available at* <https://support.twitter.com/articles/14016>. The default setting for Twitter user pages is public (*i.e.* a user's tweets are visible to anyone, regardless whether they have a Twitter account). A user may change this default feature and protect one's tweets (*i.e.* tweets may only be visible to a user's approved Twitter followers), by doing the following: (1) go to the user's security and privacy settings, (2) scroll down to the 'Tweet privacy' section and check the box next to 'Protect my Tweets', and (3) click the blue 'save' button at the bottom of the page, which will prompt the user to enter his or her password to confirm the change. *See* Protecting and unprotecting your Tweets, *available at* <https://support.twitter.com/articles/20169886>.

Facebook offers slightly more privacy features. Judges using Facebook should

{11} If a judge is unable to avoid such an ex parte communication that relates to the substance of a pending case, the judge has the obligation to disclose the communication to the parties and provide them the opportunity to respond. *See* Rule 21-209(B) (“If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”).

{12} An additional aspect of the ex parte communications prohibition of Rule 21-209 concerns a judge’s investigation of facts in a pending case. Rule 21-209(C) provides that a judge “shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” The ease of obtaining factual information from Internet sites has led to discipline of judges in other states. *See e.g.*, Public Reprimand of Terry (North

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become aware of the privacy settings Facebook offers. They may currently do so by the following: (1) click the blue bottom arrow in the upper-right corner of any Facebook page; (2) select ‘Settings’ from the dropdown menu; (3) select ‘Privacy’ on the left; and (4) click a setting (*e.g.* ‘Who can see your future posts?’; ‘Who can send you friend requests?’; or ‘Limit the audience for posts you’ve shared with friends of friends or Public?’). *See* Basic Privacy Settings & Tools, *available at* <https://www.facebook.com/help/325807937506242>. Familiarity with these safety and privacy features may help judges avoid many ex parte communications.

Carolina Judicial Standards Commission April 1, 2009) (reprimanding judge in part for obtaining information about a party from a “Google” site).

{13} Because social media sites provide the ability to communicate broadly, some judges have used these sites to disseminate information to the public concerning the judiciary. When this type of information relates to a pending or impending case, however, a judge is prohibited from making a statement “that might reasonably be expected to affect the outcome or impair the fairness” of the case. Rule 21-210(A).

#### **New Mexico Judicial Standards Commission’s Position on Ex parte Communications and Comments about Pending Cases**

{14} The New Mexico Judicial Standards Commission issued an informal caution to a judge after the judge allegedly made public and ex parte comments on a social networking site about a pending case that included a comment about the jury’s verdict. *See* New Mexico Judicial Standards Commission Annual Report, 2013, p. 41.

#### **Use of Social Media Blogs by Judges**

{15} Rules 21-209(A) and 21-210(A) also pertain to a judge’s maintaining of a blog. A judge may seek to inform the public about court procedures, even in connection with a pending case. Rule 21-210(D). *See also* Rule 21-102 NMRA, Comment 6 (allowing a judge, acting in a manner consistent with the Code, to “initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice”). In providing such

information, however, it would be inappropriate for the judge to express an opinion that may have bearing on the judge’s impartiality or fairness or that may be related to the merits of any pending or impending case. Because of the public nature of most blogs, it is even more critical for judges to remain cognizant of Rules 21-209(A) and 21-210(A). To the extent that a judge may be expressing opinions concerning non-legal matters, the judge must act in conformity with the dignity of judicial office and avoid activity that will lead to frequent disqualification. *See* Rule 21-102 (stating that a judge “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . .”); *see also* Rule 21-301(B) NMRA (prohibiting a judge from engaging in extrajudicial activities “that will lead to frequent disqualification of the judge”). *See* Washington Ethics Advisory Committee Opinion 09-05 (stating that a judge may blog about “the law, the legal system and the administration of justice” within the parameters of the Code of Judicial Conduct).

### **Impression that a Person is in a Position to Influence the Judge**

{16} Rule 21-204(C) NMRA states that 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.” Social media sites, such as Facebook, permit a user to access the information posted by other users and thereby interconnect their posted information. On Facebook, a user may “friend” another user in order to make this interconnection.

Users may also “like” postings of others in order to express approval or support of a posting by another user.

### **Advisory Opinions from other States – Judges “Friending” Attorneys**

{17} The question has arisen in advisory opinions of other states whether judges may be Facebook “friends” with attorneys who appear, or may appear before them in court. The advisory opinions have reached opposite results.

{18} The strict view, as expressed by advisory committees in Florida Advisory Opinions 2009-20 and 2010-6, Massachusetts Advisory Opinion 2011-6, and Oklahoma Advisory Opinion 2011-3, focuses on the impression that can be conveyed when judges and lawyers are “friends” even if the word is not used in its traditional way. *See Gray, supra* at 5. The Oklahoma advisory opinion stresses that the “public trust in the impartiality and fairness of the judicial system is so important that it is imperative to err on the side of caution . . . .” OK Jud. Ethics Op. 2011-3, ¶ 9.

{19} Advisory opinions of other states take a less restrictive position. *See Gray, supra* at 5-6. *See* Arizona Advisory Opinion 14-01; California Advisory Opinion 66 (2010); Kentucky Advisory Opinion JE-119 (2010); Maryland Advisory Opinion 12-1; New York Advisory Opinion 08-176; Ohio Advisory Opinion 2010-07; Utah Informal Advisory Opinion 12-1.

{20} Generally, the less restrictive position recognizes the different, non-traditional meaning of “friend” on a social media site, as well as the fact that even a judge’s

professional or social friends may not be in a position to influence a judge. *See* Gray, *supra* at 5-6. The advisory opinions adopting this view consider the question to depend on the particular facts and circumstances. *Id.* By way of example, the California committee set forth four relevant factors: (1) “[t]he nature of the social networking site,” (2) “[t]he number of “friends” on the page,” (3) “[t]he judge’s practice in determining whom to include,” and (4) “[h]ow regularly the attorney appears before the judge.” CA Judges Assoc. Jud. Ethics Comm. Op. 66, at 8.

{21} This Committee agrees with the less restrictive approach. Given the ubiquitous use of social networking, the mere fact that a judge and an attorney who may appear before the judge are linked in some manner on a social networking site does not in itself give the impression that the attorney has the ability to influence the judge. Other facts are necessary in order to reasonably reach such a conclusion. The factors discussed in the California advisory opinion, as well as others, may be helpful in determining whether there is a reasonable impression, or whether the judge has permitted the impression, that the attorney is in a position to influence the judge.

{22} Professional networking sites, such as LinkedIn, also require a similar analysis. Use of these types of sites carry the same risk of creating an impression that someone is in a special position to influence the judge. As with Facebook, some states have specifically addressed this type of site in ethics opinions. Florida, for example, sees no distinction between LinkedIn and Facebook and has taken a strict approach

prohibiting judges from adding those lawyers who may appear before them as “connections” on the site. *See* FL Sup. Ct. Jud. Ethics Advisory Comm. Op. 2012-12. Utah, on the other hand, takes a more permissive approach and appears to allow judges to maintain a LinkedIn profile and possibly include lawyers who may appear before the judge as “connections” depending on the specific circumstances. *See* Utah Informal Advisory Opinion 2012-1. But, although Utah implicitly appears to permit a judge to “connect” with a lawyer who may appear before the judge, the judge may not “recommend” or endorse the lawyer on LinkedIn if the lawyer regularly appears before the judge. *Id.* Florida’s opinion does not address the difference between “connecting” with a lawyer versus “recommending” or “endorsing” a lawyer.

{23} Again, we take a similar approach as that of Utah and recognize the value of professional networking sites, but urge judges to exercise the same caution as that exercised in the use of all social networking sites. And, although a site may be deemed “professional,” we caution judges that this label does not automatically make the site permissible or advisable.

### **Abuse of the Prestige of Judicial Office**

{24} Rule 21-103 NMRA provides that a judge “shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” Professional and social networking sites, such as LinkedIn, Facebook, Twitter, and Yelp, raise concerns about the potential abuse of the prestige

of judicial power. With LinkedIn, for example, if a judge “recommends” or “endorses” someone, this act may be considered akin to a letter of recommendation, expressing favor toward that individual over others, and requesting that someone act upon that favor. With Facebook, a judge may be inadvertently advancing the views of attorneys and parties by “liking” or commenting on other users’ posts. Similarly, with Twitter, a judge may also be inadvertently affecting the views of attorneys and parties by re-tweeting tweets made by users. With Yelp<sup>9</sup>, a judge may be inadvertently advancing the economic interests of a restaurant upon giving his or her review. Judges must be mindful of these activities and not make any statements or comments that would violate Rule 21-103 or any other provision of the Code.

### **“Friending” and “Liking”**

{25} As previously discussed, the use of the word “friend” on social media is different from the traditional meaning of the word. The same is true for the word “like.” In the social media context, “friending” and “liking” are methods of exchanging, both by sending and receiving, information. For example, on Facebook, a person may “friend” a user to obtain access to the user’s “news feed” and “profile,” which includes the ability to “like” and comment on a user’s posts. A person may “like” a user’s page to access the page’s information and allow it on his or her own

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<sup>9</sup>Yelp is a website connecting users with businesses, allowing for the sharing of opinions and reviews. *See* <http://www.yelp.com/factsheet>.

“news feed.” Merely “friending” a person on Facebook or “liking” a particular page, does not necessarily mean the two are friends in the traditional sense or that anyone actually likes, in the traditional way, the user’s posts. In this manner, “friending,” “liking,” or subscribing to a particular page or posting may not be seen as an endorsement. Of course, judges are cautioned that in some circumstances those activities could be construed as such.

{26} Judges should look to the nature of the social media sites they are using to determine the meaning of the terms used on each particular site and ensure that their participation on the site is in compliance with the Code. A judge should monitor the judge’s social media activity in the same manner as the judge monitors the judge’s other activities and behaviors. Indeed, a judge should engage in the same deliberative analysis process with regard to potential violations of the Code when deciding whether to engage in social media use as the judge would engage with regard to the judge’s other activities and behaviors.

**Ownership of Social Media Activity, including the Use of Aliases, Pseudonyms, or Surrogates**

{27} If a judge decides to participate in social media use, the judge must take ownership of his or her use. Typically, a social media user will adopt a user name for the social media site. There is no requirement that a user provide the user’s correct identity. Thus, a judge using social media may do so without disclosing the judge’s true name by using an alias or a pseudonym. When doing so, however, the judge’s

actions are nonetheless subject to the requirements of the Code. The judge must not act in a manner that undermines the dignity of judicial office or would conflict with the Code, even if the judge’s identity may not be readily apparent. That is to say, the judge may not hide behind an alias or pseudonym. *See Judicial Discipline and Disability Comm’n v. Maggio*, 2014 Ark. 366, 440 S.W.3d 333 (removing judge from bench for improper comments and misconduct on a public website under a pseudonym). In addition, a judge must not ask others, such as family members, friends, or staff, to post or share information for them that they otherwise would not be allowed to post.

### **Supervisory Responsibility for Court Staff**

{28} Rule 21-212(A) NMRA instructs a judge to “require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations” under the Code of Judicial Conduct. As a result of Rule 21-212(A), a judge’s supervisory duties include ensuring that court staff do not participate in social networking that would undermine the judge’s responsibilities. Examples of such activity include engaging in social media exchanges that either involve *ex parte* communications or statements concerning pending or impending cases.

## **Promoting Confidence in the Judiciary**

{29} Rule 21-102 provides that a judge “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” As a result, a judge who uses social media must be mindful of the dignity of judicial office and the impact the judge’s personal activities may have on the public’s view of the judiciary. When assuming the position of judge, an individual accepts restrictions upon his or her behavior in order to comply with the ethical requirements of the office. *See* Rule 21-102, Comment 2 (stating that a judge “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code and should do so freely and willingly”). In a judge’s use of social media, it would therefore be improper for the judge to include or allow material (such as pictures, videos, or linked material) that could call into question the dignity of the judge and the judicial office. *See Letter of Suspension and Removal from Office re Judge Michael A. Maggio*, Arkansas Judicial Discipline and Disability Commission, Case No. 14-136, as adopted by the Arkansas Supreme Court in *Judicial Discipline and Disability Comm’n v. Maggio*, 2014 Ark. 366, 440 S.W.3d 333 (recommending removal of judge from bench for various acts of misconduct that undermined public confidence in the judiciary, including the posting of inappropriate “gender, race, and sexuality related statements”

on a public website). In general, a judge may identify himself or herself as a judge when using social media unless doing so would impair the judge's obligations under any provision of the Code of Judicial Conduct.

### **Extrajudicial Activity**

{30} Judges are encouraged to participate in community activities, provided that their involvement does not undermine the judge's independence, integrity, or impartiality; does not create an appearance of impropriety; and does not improperly lend the prestige of judicial office. *See* Rule 21-001(A),(B); Rule 21-103; Rule 21-301. To the extent that a judge's extrajudicial activities involve social networking, the restraints of the Code of Judicial Conduct apply.

{31} Extrajudicial activities frequently involve a judge's serving as an officer, director, or member of a charitable, educational, or non-profit organization. *See* Rule 21-307(A) NMRA (allowing a judge to participate in activities sponsored by certain charitable, educational, and non-profit organizations). Such organizations, or individuals associated with them, may participate on social networking sites in connection with the purposes or operations of the organizations. Judges associated with such organizations must scrutinize this social media usage to avoid situations in which the judge's independence, integrity, and impartiality or the judge's official position may be compromised. By way of example, an organization in which a judge is a director, may be using social media to raise funds. Although the judge may be

identified as a director of the organization, it would be improper for it to appear that the judge was soliciting funds for the organization. *See* Rule 21-307(A)(2) (limiting the manner in which a judge may solicit funds for a charitable, educational, or non-profit organization); Rule 21-307, Comment 4 (stating that it is permissible for a judge's name to appear on an organization's letterhead for solicitation of funds as long as the judge is not personally soliciting funds, but that the judge's title may not appear on the letterhead for any purpose). *See* Private Reprimand of a Justice of the Peace (Texas State Commission on Judicial Conduct April 23, 2013) (reprimanding judge for soliciting funds for a non-profit corporation by allowing the non-profit to send out a letter that included the judge's name and position encouraging supporters to buy raffle tickets, contacting a state senator to secure grant funding, and soliciting public participation through the use of Facebook and the non-profit's website); Private Warning and Order of Additional Education of a Municipal Court Judge (Texas State Commission on Judicial Conduct Aug. 23, 2012) (issuing a private warning to judge for organizing a charitable fundraiser under circumstances in which judge was aware his name and position were being used to promote, sell tickets, and solicit funds for the organization, and his involvement was apparent from numerous Facebook posts). In addition, an organization's social networking site could draw postings that could bear upon subject matter or pending or impending cases that could infringe upon the judge's impartiality.

## **Disqualification after a Judge's Use of Social Media**

{32} Rule 21-211 NMRA requires a judge's disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Depending upon the specific circumstances, a judge's social media participation could lead to a judge's disqualification. *See Domville v. State*, 103 So.3d 184 (Fla. Dist. Ct. App. Sept. 5, 2012) (affirming grant of criminal defendant's motion to disqualify judge who was a Facebook "friend" with prosecutor in case); *Chace v. Loisel*, 170 So.3d 802 (Fla. Dist. Ct. App. Jan. 24, 2014) (holding that judge's initiating ex parte communications with a party by sending a Facebook "friend" request that the party did not accept, were sufficient grounds for disqualification by creating a well-founded fear in the party's mind that the party would not receive a fair trial). *But see In re Hon. Michelle Slaughter* (Special Court of Review of Texas Sept. 30, 2015) (dismissing admonishment of judge who was disqualified from high-profile criminal case after Facebook postings).

{33} There are circumstances, however, in which Facebook "friendships" have not resulted in a judge's disqualification. *See State v. Forgyson*, 2014 WL 631246 (Tenn. Crim. App. Feb. 18, 2014) (holding that there was not a sufficient showing of proof that trial judge could not be impartial as "thirteenth juror" when trial judge was Facebook "friend" of confidential informant and the record did not show the length of the Facebook relationship or the extent or nature of the interactions); *State v.*

*Madden*, 2014 WL 931031 (Tenn. Crim. App. March 11, 2014) (holding that criminal defendant failed to establish bias of trial court judge although judge had numerous community ties and a Facebook connection with one of the State’s witnesses). *Youkers v. State* is an example of the steps a judge should take to avoid disqualification when faced with ex parte communications on a social media site (400 S.W.3d 200 (Tex. Ct. App. May 15, 2013)). In that case, the trial judge was a Facebook “friend” with the father of a criminal defendant’s girlfriend. According to the judge, the extent of the relationship between the judge and the father was the fact that they ran for office at the same time, nothing more. The father sent the judge a Facebook message requesting leniency for the defendant. The following describes the actions taken by the judge in response to the father’s message:

The judge responded online formally advising the father the communication was in violation of rules precluding ex parte communications, stating the judge ceased reading the message once he realized the message was improper, and cautioning that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge’s Facebook “friends.” The judge’s online response also advised that the judge was placing a copy of the communications in the court’s file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required.

*Id.* at 204. The Texas Court of Appeals concluded that there was no evidence that the judge and the father had a relationship that would “influence the judge and lead to bias or partiality” and that the judge had fully complied with the procedures for

handling *ex parte* communications as recommended by the Texas Committee on Judicial Ethics. *Id.* at 206-207.

### **Political Campaigns and Activities**

{34} The Code of Judicial Conduct permits judges to engage in certain campaign and political activity, particularly when a judge is a candidate for judicial office. Non-judge judicial candidates are also subject to the rules of the Code with respect to campaigns for judicial office. *See* Rule 21-003(O) NMRA (defining a “judicial candidate” to include “any person” seeking selection for or election to judicial office).

{35} Rule 21-400 NMRA precludes a judge from engaging in political or campaign activity “that is inconsistent with the independence, integrity, or impartiality of the judiciary.” Rule 21-402(A)(1)(a) NMRA requires a judicial candidate to “act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary.”

{36} An election campaign will frequently include a website or social media page regarding the campaign and the candidate that also includes a fundraising effort. Such sites are typically interactive and enable the public to access the sites and post comments. They also enable the public to make campaign contributions. Because of the interactive nature of such sites, there is potential for non-parties to post comments on pending cases. Such postings may lead to the appearance that the judge is participating in *ex parte* communications or statements concerning pending or

impending cases contrary to Rules 21-209(A) and 21-210(A). A judge must guard against such an appearance. If an incident of this nature does occur, the judge must take appropriate remedial action as required under the Code.

{37} A judge accepting or expending funds in excess of \$1000 in a political campaign must form a campaign committee for the campaign. Rule 21-402(A)(1)(e) NMRA; Rule 21-404(A) NMRA. A campaign social media site maintained by a campaign committee may present a buffer for the judge as opposed to a site maintained by the judge. Nevertheless, a judicial candidate retains responsibility to “review and approve the content of all non-financial campaign statements and materials produced by the candidate or his or her campaign committee.” Rule 21-402(A)(1)(c). A committee maintaining a social media site must vigilantly scrutinize the site to avoid any appearance that the judge is receiving ex parte communications and/or participating in improper communications.<sup>10</sup>

{38} The question remains as to the degree in which a campaign committee that maintains a social media site may act to fully insulate the judge. Specifically, the question is whether a committee must inform the judge of an improper communication that has been made on the site. If the judge has no knowledge of a communication and the communication can be removed without comment, the

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<sup>10</sup>A judge may also delegate responsibility to a third person other than a campaign committee to maintain a social media site, in which event, the judge would continue to have full responsibility for all aspects of the site.

committee can arguably remove the communication in its maintaining of the site. On the other hand, if the communication necessitates a response, Rule 21-402(A)(1)(c) requires a judge to approve the content of statements from the judge's campaign committee, which would include those made on a social media site. The judge, in turn, may be required to notify the parties of such a communication from a third-party as an inadvertent *ex parte* communication under Rule 21-209(B).

{39} The content of a social media site maintained by a campaign committee, and any social media communications on behalf of a campaign committee or the judge, must maintain the dignity demanded of judicial office. Furthermore, communications may not involve any activity not permitted by the judge. *See* Rule 21-402(A)(1)(d) (requiring a judicial candidate to “take reasonable measures to ensure that other persons do not undertake” actions on behalf of the candidate that the candidate or a campaign committee may not take under the Code). By way of example, a site may not endorse or solicit funds for another candidate for public office because a judge may not take such action under Rule 21-401(C)(2)(a), (4). Similarly, a judge, or anyone acting on behalf of the judge, may not use a social media site to express public support for another candidate for public office, even if the judge is also currently a candidate. *See* Rule 21-401(C)(2)(a) (prohibiting a judge from publicly endorsing a candidate for public office); Rule 21-402(A)(2)(b), (c), and (C) (prohibiting a candidate from engaging in behaviors or activities that are prohibited

by judges under Rule 21-401(C)(2) and prohibiting a candidate from soliciting funds for another candidate or a political organization, or making a contribution to another candidate subject to certain exceptions). *But see* Rule 21-402(C) (providing that “judicial candidates may, however, run for election as part of a slate of judicial candidates and may participate in joint fundraising events with other judicial candidates”). Some social media sites provide the opportunity for users to indicate their approval or support for the site of another. A judge’s communication of approval or support for another candidate’s social media site has the effect of publicly communicating the judge’s support for the candidate, an action generally impermissible under the Code.

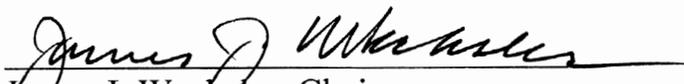
{40} A judicial campaign social media site will commonly include a fundraising component. Fundraising for a judicial campaign has strict restrictions. “Candidates shall not personally solicit or personally accept contributions for their own campaigns. Nor shall candidates solicit personally, or through campaign committees, contributions for the campaigns of other candidates or offices.” Rule 21-404(A) NMRA. A judicial candidate may not personally receive any contributions and must refrain from seeking to discover who has contributed to the candidate’s campaign. Rule 21-404(A); Rule 21-402(A)(2)(a). A campaign committee “may solicit and accept reasonable campaign contributions” on behalf of a judicial candidate subject to certain restrictions. Rule 21-404(A). In particular, a campaign committee may not

knowingly solicit a contribution from a litigant with a case pending before the judicial candidate. Rule 21-402(E). A committee may not disclose identifying information concerning contributions to the judicial candidate. *Id.*

{41} As a result of these restrictions, a judicial candidate who maintains a social media site may not engage in fundraising on the site. Any financial contributions must be donated directly to the candidate's campaign committee. A campaign committee may use a social media site to raise funds, but it must seek to avoid soliciting contributions from litigants in pending cases and must scrutinize contributions to avoid accepting such contributions. The judicial candidate must ensure that his or her campaign committee is complying with these restrictions. Rule 21-404(A). The committee, however, must avoid sharing fundraising results with the judicial candidate, and the candidate must avoid accessing fundraising information on the site.

## Conclusion

{42} With the popularity of social media, judges may wish to use it for personal, campaign, or professional purposes. But, judges should be mindful that many provisions of the Code of Judicial Conduct could be compromised. Because of the potential pitfalls and its evolving nature, judges should be cautious in using social media and constantly monitor their use for compliance with the Code.

  
James J. Wechsler, Chair